



Getting to grips with the rules: the directive requires that cover is evidenced by a certificate of insurance when ships enter an EU port, or fly the flag of a member state.

Guy Ropes



Davos to focus on barriers to energy investments

THE world's business leaders will head for Davos next week for the annual World Economic Forum and, as is now tradition, it has issued its yearly report of the world's major business threats, writes Jon Guy.

High on the threat list for this year and with long-term ramifications is the continued lack of investment in energy infrastructure and the industry in general, according to the WEF.

The figures for the past year are stark, with energy infrastructure spending down 19% in the oil and gas sectors, with a slump of 20% on renewable energy projects. However, that figure would become a 30% reduction had it not been for government incentives.

The global recession is to blame, states the report, which is now in its 10th edition.

John Drzik, chief executive of Oliver Wyman, part of the Marsh & McLennan broking and risk group, said at the report's launch: "The recent drop in oil prices has been good for consumers, but has also contributed to a significant cut in much-needed investment in energy infrastructure and renewable energy projects. This comes at a time when governments — as well as business and consumers — are looking for long-term security of an energy supply that is both sustainably sourced and reasonably priced. The fragile global economy will make itself more susceptible to oil price-related shocks if this underinvestment continues."

What is quite clear from the report and its launch is that the exposure the risks highlighted is significant and may reach a level that would simply exhaust the world's insurance and reinsurance capacity.

The biggest threat is the interdependency of the risks themselves, according to the report. At its heart was a matrix that showed just how each of the risks will cascade in a domino effect as global business risk become ever more interdependent.

The report makes grim reading and the warning was made that there is a real danger that the continuing impact of the recession has inhibited the ability of business and government to address the risks.

It is clear that one of the topics for discussion at Davos will be how governments and the global risk industry will look to mitigate the risks. It is equally clear neither will be able to do so in isolation.

Third EU safety package poses protection question

Directive's failure to allow a claimant direct recourse against an insurer sparks concern

Haco van der Houven van Oordt

THE Insurance Directive 2009/20/EC that forms part of the eight regulations and directives which make up the Third European Union Maritime Safety Package is intended to increase the level of protection available to claimants as a result of loss or damage caused by incidents involving ships.

Among other things, it seeks to ensure that all ships above a specified tonnage entering EU ports have proper insurance in place, and are able to produce proof of cover in the form of an authentic certificate of insurance. However, it remains to be seen whether the final wording of the insurance directive provides much comfort to the victims of maritime incidents.

The legislative dossiers which constitute the Third EU Maritime Safety Package entered force on June 17, 2009, although they will not take effect in EU member states until they have been implemented into the domestic law of individual states.

Directive EU 2009/20/EC of the European Parliament and the Council is that part of the safety package that relates to the insurance of shipowners for maritime claims. It requires owners of ships of more than 300 gt to maintain insurance cover subject to limitation under the 1996 Limitation of Liability for Maritime Claims Protocol, and up to the maximum amounts specified in that protocol.

Under the terms of the directive, member states are required to enact laws, regulations and administrative procedures necessary to comply with the directive before January 1, 2012, although the International Group of P&I Clubs has said that it understands that some member states may give effect to the directive towards the end of the 2010-2011 policy year, which concludes on February 20, 2011.

The directive requires that cover is evidenced by a certificate of insurance when ships enter an EU port, or fly the flag of a member state. Initial indications are that the directive will be enforced through port state control, and that a standard certificate of entry with a P&I club, for example, will be acceptable evidence to show that the necessary insurance cover is in place. This is good news for owners and their clubs, even though the nature of the information required to be shown will necessitate some changes to be made to the tradi-

tional certificates of entry issued by the clubs, for example by including the address of the registered office of the registered owner of the vessel. But there is also some not-so-good news for those claimants who may need to seek compensation for damages and losses caused by incidents involving ships.

The directive has been some years in the making. In 2005, the European Commission published a proposal for a Directive on the Civil Liability and Financial Guarantees of Shipowners. This draft included an article (Article 10) relating to direct action against the provider of the financial guarantee for civil liability, which stipulated: "Any requests for compensation for damage caused by the ship may be addressed directly to the provider of the financial guarantee for civil liability covering the owner's civil liability. The provider of the financial guarantee may rely on the means of defence which the owner himself would be entitled to invoke, with the exception of those based on the owner declaring bankruptcy or going into liquidation. The provider of the financial guarantee may also rely on the fact that the damage was the result of intentional fault on the part of the owner. However, it may not rely on any of the means of defence that it could have invoked in an action brought against it by

the owner. The provider of the financial guarantee may, in all cases, require the owner to be joined in the proceedings."

In short, this draft article provides claimants with a right to direct action against insurers for damage caused by an insured vessel. But nowhere in the final wording of Directive 2009/20/EC does this provision, or anything approximating to it, appear. The direct action by the claimant against the insurer is no longer an option under the Third EU Maritime Safety Package.

P&I Clubs traditionally grant cover on the basis of the 'Pay to be Paid' principle, whereby they are, in many jurisdictions, not obliged to make any payment to anyone until owners have first settled the losses with the claimant. Many ships are owned by single-ship companies and, in the event of a serious incident, that can make it unlikely that the owner is willing or able to settle a loss with the claimant first. So the fact that no direct recourse against the insurer is available under the Third EU Maritime Safety Package raises serious questions about whether the EU is achieving its stated objective of increasing the level of protection available to claimants as a result of loss or damage caused by incidents involving ships.

Haco van der Houven van Oordt, a partner with the shipping team at Dutch law firm AKD

Courts left to decide if policy wordings hold water

Ling Ong

IN 2009 there were a number of decisions from the English courts dealing with coverage issues.

Rather than review all of them, this article looks at a handful of cases, which give guidance as to the court's current approach to such disputes.

First is *Qayyum Ansari v New India Assurance Ltd* (February 18, 2009), which looked at material changes in cover and changes in use. There, the premises were described in the proposal form as protected by an automatic sprinkler system. There was a fire and it was discovered that in fact the sprinkler system had not worked for some time.

The policy provided that "the insurance shall cease to be in force if there is any material alteration to the premises or business or any material change in the facts stated in the proposal form".

The Court of Appeal found in favour of the insurer. Where an automatic sprinkler system is installed in a building, it is intended to function permanently in that it should be constantly ready to operate in the event of a fire without the need for human intervention. The sprinkler system had been made inoperative for an indefinite period. This amounted to a change in the facts stated in the proposal.

In terms of materiality, the alteration must be a real alteration of the risk. The essence of the principle is that insurers' liability is circumscribed by the contract the parties entered into. If circumstances altered so as to take the risk outside that which was within the contemplation of the parties when the contract was made, insurers cease to be liable.

'Material' refers to alterations, changes or risks outside the parties' reasonable



Does it work? If you state that your premises has a sprinkler system installed, it must be in full working order.

contemplation at the time the policy was issued.

The next decision of relevance is *Direct Line Insurance plc v Kenneth Ronald Fox* (March 10, 2009), which considered fraud in the context of a claims settlement.

The insured had submitted a claim under a buildings and contents insurance following a fire. The policy contained a standard fraud provision in terms: "If any claim or part of a claim is made fraudulently or falsely, the policy shall become void and all benefit under this policy will

be forfeited" (Condition 6). The parties reached agreement as to the settlement of the claim, which was recorded in a settlement agreement.

Various interim payments were made by insurers before it was discovered that the insured had submitted a false invoice to satisfy a condition precedent set out in the settlement agreement relating to part of the claim. Insurers sought to recover the interim payments on the basis that the insured had acted fraudulently and the policy became void under Condition 6.

The court accepted that the insured acted dishonestly. However, it considered that the settlement agreement was a separate contract from the insurance contract and the principle of utmost good faith did not apply to the settlement agreement.

The fraudulent act was not to establish an element of claim under the insurance contract but to assert the condition precedent in the settlement agreement had been satisfied. As such, although the remaining balance under the settlement agreement did not become due, the

insured was not required to repay insurers the previous interim payments.

Next is a case where the court found against insurers in construing a question on the proposal form: *R&R Developments Ltd v AXA Insurance UK Plc* (September 28, 2009). Here, the dispute centred on a question in the proposal form which asked: "Have you or any partners or directors either personally or in connection with any business in which they have been involved... ever been declared bankrupt or are the subject of any bankruptcy proceedings or any voluntary or mandatory insolvency?" The insured answered "no".

It transpired that a director of the insured was a director of a company in administrative receivership. The issue was whether this made the above answer a misrepresentation. The insured argued that it did not on the basis that the question in the proposal did not extend to the insolvency of any business in which they had been involved i.e. that it only applied to the insolvency of the insured or any partners or directors.

The court applied a restrictive interpretation on the question and found that on a proper construction of the question, the answer given by the insured was correct.

On the ordinary meaning of the words, the question related to the insured, its partners and its directors, not the previous business of other companies, as this would give too broad a meaning to the question. The court found that even if the question was ambiguous, then applying the principle of contra proferentem, it would have held that the meaning contended for by the insured would be a fair and reasonable meaning which could be attributed to the question.

Ling Ong is a partner in the London Market Team of Weightmans LLP