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Høringsvar – NOU 2008:20 om skadeforsikringselskapenes virksomhet

Vi takker for anledningen til å komme med innspill til Banklovkommisjonens utredning NOU 2008:20, og gjør innledningsvis oppmerksom på at *Sjøassurandørernes Centralforbund (CEFØR)* har endret navn til *The Nordic Association of Marine Insurers (Cefor)*. Det bes om at dette korrigeres i departementets høringslister.

Generelt

Cefor har merket seg at utredningen er av generell karakter, og i liten grad omhandler eller tar sitt utgangspunkt i de særskilte forhold som gjelder innen internasjonal sjøforsikring:

"Banklovkommisjonen har gjennom sitt arbeid med skadeforsikring ikke avdekket forhold som tilsier at det er behov for en særlig gjennomgang av virksomhetsreglene for skadeforsikring med tanke på de særlige forholdene som kjennetegner sjø- og energiforsikringer sammenlignet med den landbaserte forsikringsvirksomheten. Det forutsettes da at de dispensasjoner disse bransjene er gitt i medhold av gjeldende virksomhetslovgivning fortsatt vil gjelde. På denne bakgrunn vil ikke Banklovkommisjonen gå nærmere inn på en særlig vurdering av disse bransjene i denne utredningen."

Da lovutkastet ikke eksplisitt klargjør hvorvidt sjøforsikring på grunn av sin internasjonale karakter vil være unntatt fra enkelte av de nye bestemmelsene, kommenterer vi nedenfor to av disse spesielt.

Skadeforsikringselskapenes virksomhet - § 2-1 tredje ledd, ny bokstav d) og § 12-1 fjerde ledd

Det foreslås i lovutkastet at "...virksomheten i skadeforsikringselskap ikke kan omfatte forsikringer som er i strid med ærbarhet eller rettsorden for øvrig." Dette inkluderer i følge utredningen forsikringer mot bøter og andre former for straffeansvar. Selv om forslaget har sitt utgangspunkt i et brev fra Finansdepartementet til Banklovkommisjonen der det særlig pekes

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på erstatningsordninger i tilknytning til smugling, fartsovertredelser og ulovlig nedlasting på internett, fremgår det ingen avgrensning i selve lovteksten eller merknadene til denne.

Cefor vil i den forbindelse påpeke at det innen internasjonal sjøforsikring er lang og allmenn tradisjon for å forsikre mot visse typer bøter. Dette omfatter blant annet bøter i tilknytning til oljesøl, som kan komme opp i betydelige beløp, samt bøter knyttet til brudd på toll- og immigrasjonslovgivning. Forsikringen forutsetter at forsikringstageren gjør det som med rimelighet kan ventes for å avverge en situasjon som kan føre til bøter gjennom etablering av rutiner/sikkerhetsstyringssystemer som sikrer korrekt opptreden fra mannskapets side. Hensikten med disse klausulene er å sikre rederiet mot utgifter pådratt på grunn av feil som likevel blir begått av mannskapet og som resulterer i bøter mot rederiet. Rederiet kan også bli bøtelagt for feil og ulovligheter begått av passasjerer eller andre som er om bord i skipet. Vi anser det derfor som klart at denne internasjonale praksisen ikke er "i strid med ærbarhet og rettsorden for øvrig" ut fra de hensyn som i følge motivene begrunner bestemmelsen.

Som eksempel på slike forsikringer vedlegges Gard Rules for Ships, Rule 47 med kommentarer som inntatt i Gards Guidance to the Statutes and Rules. Dette er forsikringer som i dag tilbys av samtlige aktører i det internasjonale Protection & Indemnity (P&I) markedet. Tilsvarende klausul finnes i ansvarsforsikringen i Norsk Sjøforsikringsplan av 1996, Versjon 2007, se vedlagte klausul 17-42 med motiver. Denne forsikringen tilbys rederier med kyst- og fiskefartøy.

Norge er et av verdens ledende sjøforsikringsmarkeder, som beskrevet i utredningens avsnitt 4.2.2. For norske P&I assurandører vil det føre til en uakseptabel konkurransesituasjon dersom bestemmelsen tolkes slik at den innebærer et forbud mot å tilby disse forsikringsproduktene på linje med sine internasjonale konkurrenter. Det bes derfor klargjort i motivene eller også i selve bestemmelsen at den ovennevnte internasjonale praksis innen sjøforsikring ikke vil falle inn under denne bestemmelsen i en ny forsikringslov.

Premietariffering - § 12-6 første ledd

Det fremgår av lovutkastet at skadeforsikringsselskaper skal ha premietariffer i tilfeller der selskaper selger standardiserte produkter eller produktkombinasjoner. *Standardisering* er nærmere definert der hvor det foreligger massesalg av et produkt uten at det i særlig grad foretas individuelle tilpasninger i forhold til den enkelte kunde.

Innen sjøforsikring skilles det gjerne mellom fartøy over og under 15 meter. Antallet næringsfartøy under 15 meter dekket i det norske markedet er ca 6500, hvorav fiskefartøy utgjør ca 2800. Fartøy under 15 meter består av et relativt stort antall forskjellige båttyper som er produsert i begrensede serier. I tillegg kommer det momentet at to identiske fartøy kan ha vidt forskjellig anvendelsesområde. Et annet viktig moment i risikovurderingen innen forsikring av kyst- og fiskefartøy er assurandørens vurdering av fartøyeieren og dennes evne til å drive fartøyet, jfr. utredningens avsnitt 2.2.2 pkt 2. Det kreves således i utgangspunktet spesialkompetanse innen det enkelte selskap for å selge dette produktet, selv om det også finnes eksempler på standardisering.

For fartøy over 15 meter vil det uansett ikke være mulig å operere med premietariffer. Selv om det tegnes forsikringer blant annet innen tidstap, kasko og ansvar (P&I) basert på standardiserte vilkår som eksempelvis Norsk Sjøforsikringsplan, London-markedets vilkår og selskapenes P&I Rules, vil det bestandig måtte foretas individuelle justeringer og risikovurderinger. Risikovurdering innen sjøforsikring vil ikke bare omfatte skipet, men også rederiorganisasjonen. Det er også vanlig at standardvilkårene modifiseres med egne klausuler for å tilpasses rederiets behov. Vi antar derfor at forsikring av fartøy over 15 meter klar vil falle utenfor denne bestemmelsen. Dette bør tydelig fremgå av motivene.

Når det gjelder transportforsikring, dvs forsikring av varer under transport, refererer ca 80% av det samlede norske non-captive premievolum til såkalte omsetningsforsikringer der forsikringsavtalen omfatter alle eller nærmere spesifiserte transporter som kunden har i løpet av et år. Premien vil her måtte settes på grunnlag av en individuell vurdering av kundens virksomhet, produktenes karakter, transportmiddel og destinasjon, for å nevne de viktigste. Det inngås dessuten enkeltavtaler om store og kompliserte transporter som må være gjenstand for individuell vurdering og premiesetting. Tilbake står da de mindre enkeltransportene av forskjellige typer varer som kan falle inn under lovutkastets § 12-6 som standardiserte produkter. Det er i denne sammenheng viktig å understreke at transportforsikring er et høyt spesialisert produkt. Så snart det er tale om en mindre individuell tilpasning for en enkeltransport, vil som regel en vareassurandør i selskapet måtte vurdere forespørselen.

Omtalen av de ovennevnte dekningene viser etter vårt skjønn at det kan være behov for en utbygging av motivene til § 12-6 når det gjelder omtalen av når et forsikringsprodukt anses for å være standardisert.

Vi står selvsagt til disposisjon dersom det skulle være ytterligere spørsmål knyttet til dette i den videre oppfølging av utredningen.

Med hilsen



Helle Hammer
Adm. Direktør

Vedlegg: 1) Gard Rules for Ships, Rule 247 m/ kommentarer
2) Utdrag av Norsk Sjøforsikringsplan av 1996, Versjon 2007 m/ motiver

VEDLEGG 1): Gard Rules for Ships, Rule 47 m/ kommentarer

Rule 47 Fines

1 The Association shall cover fines or other penalties imposed upon a Member (or, imposed upon a third party whom the Member is legally obliged to reimburse or whom the Member reimburses with the Agreement of the Association) in respect of the Ship by any court, tribunal or other authority of competent jurisdiction for or in respect of any of the following:

a short- or over-delivery of cargo, or failure to comply with regulations concerning the declaration of goods, or documentation of cargo, provided that the Member is insured by the Association for cargo liability under Rule 34;

b breach of any immigration law or regulations;

c the accidental escape or discharge of oil or any other substance or threat thereof, provided that the Member is insured for pollution liability by the Association under Rule 38, and subject to the applicable limit of liability under the P&I entry in respect of oil pollution risk;

d smuggling or any infringement of any custom law or regulation other than in relation to cargo carried on the S

2 The Association may, in its sole discretion, cover in whole or in part a fine or penalty other than those listed in Rule 47.1 above imposed upon the Member (or imposed upon a third party whom the Member is legally obliged to reimburse), provided the Member has satisfied the Association that he took such steps as appear to the Association to be reasonable to avoid the event giving rise to the fine or penalty.

3 The Association shall be under no obligation to give reason for its decision pursuant to Rule 47.2 above.

Guidance

Every Member of the Association is expected to operate his Ships in compliance with the laws and regulations that apply where his Ships are trading. He is expected to have, or to obtain knowledge about, all such laws and regulations, and to ensure to the best of his ability that he complies with them.

A distinction is drawn between, on the one hand, serious offences or violations of regulations committed with the knowledge or connivance of the Member, and, on the other hand, less serious offences or violations of regulations which are caused without the connivance of the Member, by the acts or omissions of the master or Crew in the course of their duties and employment. If the Member consents to, or knows that the Ship is being used for the furtherance of illegal purposes, cover for that Ship will cease automatically upon such occurrence.¹ Furthermore, cover is not available for liabilities, losses, costs and expenses incurred by the Member as a result of the use of the Ship for the carriage of contraband, for blockade running or for unlawful trades or voyages, even if the Member was unaware that the Ship was being employed in this manner.²

However, cover is available under Rule 47 in certain limited circumstances where fines or penalties are imposed on the Member as a result of acts or omissions committed by the master or Crew during the course of their employment. Rule 47.1 itemises certain categories of fines and penalties for which cover is available, whereas Rule 47.2 gives the Association the discretionary right to cover fines and penalties in circumstances other than those itemised in Rule 47.1. However, it is important to note that cover is available only in respect of fines and penalties that have been incurred in direct connection with the operation of the Ship, and in respect of the Member's interest in the Ship, and as a result of events that occurred during the period of entry of the Ship in the Association.³

(A) ...fines or other penalties... (Rule 47.1)

The cover available for fines or other penalties pursuant to Rule 47.1 is specifically restricted to the categories of fines or other penalties described in sub-paragraphs a, b, c and d of that Rule and is based on a 'model Rule' which was agreed by the clubs which are parties to the Pooling Agreement to take effect from the 2000 Policy Year. The 'model Rule' was designed to strike a balance between, on the one hand, accidental or non-deliberate law infringements which are considered difficult to avoid given the trading environment in which ships normally operate,

and which are considered to be mutual risks which should be shared by the membership and, on the other hand, those infringements which a Member should have taken steps to avoid and which are not considered to be mutual risks but risks which should be for the Member's own account.

Rule 47.1 does not define the terms 'fines' or 'other penalties'. However, for the purposes of Rule 47.1, a fine is considered to be a monetary punishment which is imposed by a public authority, which is empowered under the applicable law to impose such a punishment for a violation or infringement of any applicable laws or regulations, and which has the legal means to enforce it in the country, port or place in question.

Similarly, for the purposes of Rule 47.1, the term 'other penalties' is considered to be any other form of monetary punishment that is not considered to be a fine by the imposing authorities, e.g. an order to pay monetary contributions after an accidental oil spill for wildlife restoration or development projects in an area other than that affected by the pollution.

Therefore, when read together, the phrase 'fines or other penalties' encompasses most types of monetary punishment, but does not extend to the confiscation of the Ship⁴ or other assets by authorities.

(B) ...imposed upon a Member... (Rule 47.1)

Cover is available under Rule 47.1 for the fines or other penalties itemised in sub-paragraphs a – d of the Rule when they are imposed upon the Member by a court, tribunal or other authority of competent jurisdiction. In this context, the Member also means any Joint Member or Co-assured, as well as any Affiliate to whom the Association may exercise its discretion to extend cover.⁵

Whilst the laws of some countries permit enforcement action to be taken against the Ship in rem, with the consequent risk that the Ship may be arrested, attached, detained and, ultimately, auctioned, cover is not available under Rule 47.1 in such circumstances unless the fines or other penalties in respect of which action has been taken against the Ship, have also been imposed on the Member. Therefore, cover is not available for fines or other penalties which are imposed on the Ship, but which relate to violations or infringements which occurred when the Ship was owned by someone other than the Member.

(C) ...imposed upon a third party whom the Member is legally obliged to reimburse or whom the Member reimburses with the Agreement of the Association... (Rule 47.1)

Whilst cover is not directly available for fines or other penalties that are imposed, not on the Member, but on other individuals who may be employed, engaged or appointed by the Member, cover is available if the Member is legally obliged to indemnify that person against such fines or other penalties. Such individuals include the master of the Ship or any Crew member, whom the Member has a legal obligation pursuant to the terms of their employment to indemnify for, or to hold harmless against, any fines or other penalties imposed upon them personally as a result of acts or omissions committed by them within the scope of their duties and employment on board.

Similarly, cover is available for the Member's legal liability to indemnify independent contractors such as a firm of engineers contracted by the Member to conduct main engine repair works while the Ship is in port, or for the legal liability of a Member who is a charterer to indemnify the owner of the Ship as a result of the charterer's failure to provide the relevant authorities with the cargo manifest information which is required pursuant to port security regulations. However, in both cases, cover is available only if the Association has previously approved the terms of the contract or indemnity which imposes the duty to indemnify on the Member.⁶

The Member may wish to reimburse a third party in respect of a fine or other penalty imposed upon that party even though the Member does not have a legal obligation to do so. For example, the Member may wish to indemnify a master where such a fine has been imposed personally on the master, even if there is no obligation to indemnify him under the contract of employment. Whilst the Association has no obligation to make cover available in such circumstances, cover may be extended if the Member obtains the agreement of the Association to indemnify the master. However, the Member should always endeavour to obtain such agreement prior to making any commitment to indemnify the third party in question.

(D) ...in respect of the Ship... (Rule 47.1)

The fine or penalty which is imposed on the Member must have been incurred by him in his capacity as the operator of the Ship. For example, if the Member is an owner of an oil tanker which is entered in the Association, but is also the operator of an oil terminal, cover would not be available for fines or other penalties that the Member incurs in his capacity as operator of the terminal.⁷ Similarly, cover is not available for fines and penalties that a Member who is also the owner of the cargo carried on the Ship, e.g. a Member who is a charterer, incurs in his capacity as owner of the cargo.

(E) ...by any court, tribunal or other authority of competent jurisdiction... (Rule 47.1)

Cover is available under Rule 47.1 only if the Member can demonstrate that the fine or penalty has been imposed by a court, tribunal or another authority of 'competent jurisdiction', i.e. an authority that is empowered under the applicable law to impose such punishment, e.g. the customs authorities, the coast guard or an environmental protection agency. The Member is required to investigate and verify the applicability of the law or regulation based on which the fine or penalty is being imposed, and the legal competence of the authority which purports to impose the fine or penalty. This is usually done by taking advice from local legal counsel.

Most countries have a system of law which allows a person upon whom a fine or penalty has been imposed by administrative public authorities to appeal to a court or a higher authority. Whilst it is not a pre-requisite of cover that the Member must have requested appellate review of any fine that has been imposed upon him, the Member is obliged to take, and to continue to take, such steps as may be reasonably necessary to minimise the liability of the Association, and to consult the Association in this regard.⁸ The question of whether the Member should simply pay the fine when first imposed, or seek appeal to a court or higher authority is an issue that must be determined on a case by case basis in the light of the particular facts, the applicable law or regulations and the likelihood of obtaining a fair hearing in the country concerned.

Comment is made in (F) – (L) on the specific types of fines or other penalties for which cover is available whereas comment is made in (M) and (N) on other circumstances in which the Association has a discretion to extend cover.

(F) ...short or over-delivery of cargo, or failure to comply with regulations concerning the declaration of goods, or documentation of cargo... (Rule 47.1.a)

The customs laws and regulations of many countries empower the local customs authorities to impose a fine or some other penalty on a carrier of cargo in the event that there is a discrepancy between, on the one hand, the marks, number, quantity or weight of cargo described in the Bill of Lading, waybill or some other transport document such as cargo manifest and, on the other hand, the actual marks, number, quantity or weight of cargo ascertained by those authorities after discharge of the cargo from the Ship. The customs authorities of some countries are particularly strict in carrying out their duties in this regard and may impose fines or other penalties even when the discrepancies are either very small or unavoidable given the nature of the cargo, e.g. where a dry bulk cargo loses weight during the course of transit as a result of evaporation caused by the inherent moisture content of the cargo on loading.

Cover is available under Rule 47.1.a if the Member has failed to comply with regulations governing cargo documentation and the declaration of 'goods'⁹ and for the purposes of Rule 47.1.a, the terms 'cargo' and 'goods' are intended to be interchangeable. Fines and penalties are often imposed as a result of the failure of the carrier to present a cargo manifest on time and/or to make accurate cargo declarations in the manifest, and/or for short-delivery of cargo, i.e. when less cargo has (allegedly) been delivered than that which is recorded in the Bill of Lading etc., and/or for over-delivery of cargo, i.e. when more cargo has (allegedly) been delivered than that which is recorded in the Bill of Lading etc. Cover is available in all these circumstances.

Whilst cover is not restricted to fines and penalties which have been imposed by customs authorities, cover is called upon most usually in such circumstances. However, cover is also available for fines and penalties which have been imposed as a result of the failure to provide an accurate cargo manifest by authorities who have responsibility for port security. In such circumstances, the Member has failed to comply with regulations that apply to 'documentation of cargo', notwithstanding the fact that the regulations are designed primarily to protect the port against terrorist attacks.¹⁰

(G) ...provided that the Member is insured by the Association for cargo liability under Rule 34... (Rule 47.1.a)

This proviso is intended to align the cover which is available under Rule 47.1.a for fines and penalties which are incurred in relation to cargo, with the cover that is available for cargo liability under Rule 34. Therefore, cover is not available under Rule 47.1.a for fines etc., imposed in relation to cargo where the Member, as a result of special terms of entry, does not have cover for cargo liability under Rule 34.

(H) ...breach of any immigration law or regulations... (Rule 47.1.b)

Immigration laws and regulations regulate the extent to which any person who is not a citizen of that country may enter and reside in that country. Such laws and regulations will usually require persons who are not citizens of that country, to show on arrival at that country's border, such evidence of permission to enter that country, that is required from citizens of the country in which the persons seeking entry are domiciled, e.g. passport, visa or other similar documentation. A person who violates the relevant immigration laws or regulations may not only be arrested, held in custody or deported, but may also be made liable to pay fines or other penalties, including costs incurred by the relevant authorities in this regard. Common examples of violations occur when Crew members cross a border without permission, or stay in the country for longer than is permitted by the conditions of the relevant visa.

Cover is available where a fine is imposed on the Member as a result of a breach by him, or by a person whom the Member is legally obliged to reimburse, of any such immigration law or regulations. For example, cover is available if the Member is held responsible by the authorities as a result of the desertion of Crew members from the Ship, or if stowaways which are held in custody on board the Ship escape ashore while the Ship is in port and are subsequently apprehended by the local authorities. Cover is also available if an operator of a passenger Ship or ferry is held responsible by the local authorities when passengers enter the country at the Ship's port of call without a proper visa.

Immigration laws or regulations may also require the repatriation of Crew members or passengers if the Ship is detained or arrested in port in circumstances where there is no prospect that the Ship will be able to resume trading in the immediate future. Cover for costs and expenses incurred by a Member in relation to such repatriation is not available under Rule 47.1.b, but may be recoverable under Rule 27.¹¹

(I) ...accidental escape or discharge of oil or any other substance... (Rule 47.1.c)

Cover is available for fines or penalties which are imposed on the Member as a result of the accidental discharge or escape of oil or any other substance from the Ship, or as a result of a threat thereof. However, cover is available only if the discharge or escape is 'accidental.'

For example, an escape or discharge would be considered to be accidental when caused by:

- a casualty involving the Ship, such as a collision, grounding or foundering; or
- the discharge or other release from the Ship of a polluting substance where the master or Crew had no intention to discharge or release that substance, e.g. when caused by a leak, tank overflow or any other inadvertent act or omission; or
- any inadvertent act or omission which has resulted in the contamination on board of a clean substance by another polluting substance, and where such contaminated substance is subsequently intentionally discharged or released from the ship, but without knowledge on the part of the master or Crew that contamination has occurred.

However, an escape or discharge would not be considered to be accidental when:

- oil or any other pollutant has been intentionally discharged or allowed to escape from the Ship even if this was thought to be justifiable in the circumstances, e.g. the jettison of crude oil for safety purposes after a casualty; or
- a substance that the master or Crew knew was (or contained) a pollutant is intentionally discharged from the Ship; or
- a substance which the master or Crew believed to be a non-pollutant, but which was considered to be a pollutant according to local regulations, is intentionally discharged from the Ship.

(J) ...provided that the Member is insured for pollution liability by the Association under Rule 38... (Rule 47.1.c)

Rule 38 outlines the scope of cover that is available in respect of liabilities, costs and expenses which arise in consequence of the discharge or escape from the Ship of oil or any other substance, or as a result of the threat of such discharge or escape.¹² Cover for pollution-related fines is expressly excluded under Rule 38, since cover for such fines is available under Rule 47. However, if a Member is not insured by the Association for pollution liability pursuant to Rule 38, the cover that would otherwise have been available for fines and penalties under Rule 47.1.c is not available. Furthermore, it is unlikely that the Association would exercise its discretion to extend cover to the Member pursuant to Rule 47.2 in such circumstances, in view of the fact that the Member has chosen to exclude pollution liability cover under his terms of entry for the Ship.

(K) ...and subject to the applicable limit of liability under the P&I entry in respect of pollution risk... (Rule 47.1.c)

The liability of the Association for claims for oil pollution is subject to special limits depending on whether the Ship is entered on behalf of an owner or a charterer, and on whether the Ship is a tanker engaged on a voyage which involves the loading or discharging of oil as cargo at any port or place in the USA.¹³ Furthermore, the Member and the Association may have agreed special terms of entry for the Ship, as a result of which, a special limit may apply for pollution liability. Rule 47.1.c stipulates that any such limit, whichever is applicable in the particular circumstances, shall apply to the sum total of the cover that is available for the liabilities etc., covered under Rule 38 and for fines and penalties under Rule 47.1.c.

(L) ...smuggling or any infringement of any custom law or regulation other than in relation to cargo carried on board the Ship... (Rule 47.1.d)

'Smuggling' occurs when goods are brought into a country in a manner which is designed to avoid detection by the local authorities in order to avoid embargos which are imposed by the criminal laws of that country, e.g. laws prohibiting the importation of drugs, or in order to avoid or circumvent the import laws and regulations of that country, e.g. import taxes, customs dues etc.

If the Ship is used for smuggling with the consent or knowledge of the Member, cover for the Ship will cease automatically, and without notice to the Member, as from the time that the Ship is used in such manner.¹⁴ Furthermore, cover is not available for any liabilities, losses, costs or expenses that arise out of or consequent upon the Ship being employed in an unlawful trade¹⁵ or as a result of the wilful misconduct of the Member.¹⁶

However, the Member may be held responsible for smuggling activities involving the Ship, even though the Member has not consented to, or had any knowledge of, such activities. For example, the Ship may have been used to carry illicit drugs without the consent or knowledge of anyone on board the Ship, since the drugs were attached to the hull under water whilst the Ship was in port, or since the drugs were brought on board the Ship in a sealed container in the guise of lawful merchandise. Cover is available under Rule 47.1.d if a fine or other penalty is imposed on the Member in such circumstances.

Cover is also available under Rule 47.1.d if a fine or other penalty is imposed upon the Member because the master or Crew were involved in, or had knowledge about, the smuggling activities, in circumstances where the Member was unaware of such activities.

Cover is also available where there has been 'an infringement of any custom law or regulation other than in relation to cargo carried on the Ship.' This provision does not apply to the infringement of regulations which relate to cargo since such infringements are regulated by Rule 47.1.a.¹⁷ It applies to infringements of regulations relating to other items which are on board the Ship and which the Member is obliged to declare under the applicable laws and regulations, e.g. stores or other provisions such as medical supplies, wine, tobacco or even food.

If a fine or other penalty has been imposed upon the master or Crew personally as a result of their smuggling activities, cover will be available only if the Member is legally obliged to reimburse the master or Crew, or if he pays such reimbursement with the agreement of the Association.¹⁸ In normal circumstances, the obligation to indemnify the master or Crew will arise only when the master or Crew are acting within the scope of their employment, and the Association considers smuggling not to be an activity that is within the scope of their employment. Accordingly, it would be contrary to the interests of the membership as a whole to make cover available in such circumstances. However, if the Association is satisfied that the Member has reimbursed the master or Crew on the basis that the fine or penalty was wrongfully imposed, i.e. on the basis that the master or Crew had not in fact been involved in the smuggling activities, then cover might be made available. In such circumstances, the Association will require strong evidence of the fact that the fine was wrongly imposed.

(M) The Association may, its sole discretion, cover in whole or in part a fine or penalty other than those listed in Rule 47.1... (Rule 47.2)

The reason why cover is restricted in the case of the fines and penalties which are itemised in Rule 47.1 has been explained in (A) above. However, Rule 47.2 recognises the fact that restricting cover in this way may, in exceptional cases, cause hardship to the Member. Consequently, subject to the conditions imposed by Rule 47.2, the Association is given the discretion to cover in whole or in part a fine or penalty which has been imposed upon the Member, or on a third party whom the Member is legally obliged to reimburse, in circumstances other than those described in Rule 47.1.

Discretion is exercised by the Board of Directors of the Association who will consider any application which the Member wishes to make under Rule 47.2 after the Member has paid the fine or penalty, and after clarification of all relevant circumstances that resulted in the fine or penalty being imposed upon the Member. The Board of Directors is under no obligation to give reasons for any decision reached by them in relation to such application for cover.¹⁹

(N) ...provided the Member has satisfied the Association that he took such steps as appear to the Association to be reasonable to avoid the event giving rise to the fine or penalty... (Rule 47.2)

Discretion cannot be exercised in favour of the Member under Rule 47.2 unless and until the Member has demonstrated that he took steps which are considered reasonable by the Association, to avoid the event that gave rise to the fine or penalty. The onus is on the Member to convince the Association in this regard, as well as to provide all relevant information and documentation, and to give all the assistance that the Association may require in order to enable it to properly investigate the claim.²⁰

However, even if the Member satisfies all such requirements, the Association is under no obligation to exercise its discretion in favour of the Member. The Association must consider the interests of the membership as a whole, and

may conclude that the event that gave rise to the fine or penalty was of such a nature, or had such characteristics, that it would be contrary to the interests of the membership as a whole to make cover available for the claim even if the Member had taken all reasonable steps to avoid it.

The Association might decide to exercise its discretion in favour of the Member in the case of a fine or penalty which has been imposed on the Member for the discharge or escape of oil from the Ship, if the Member convinces the Association that there has in fact been no such discharge or escape of oil, and that the fine or penalty has been wrongfully imposed on him as a result of an unjustifiable act by the relevant authorities.

Similarly, the Association might decide to exercise its discretion in favour of the Member where a fine or penalty is imposed on the Member in respect of a breach of a regulation which was impossible to avoid, since no information had been made available to him about the circumstances that would result in the breach, e.g. where the relevant authorities have prohibited the anchoring of ships in certain coastal areas, but have not released the relevant information in the public domain and the available charts for the areas do not indicate any such restriction.

(O) The Association shall be under no obligation to give reasons for its decision pursuant to Rule 47.2 above. (Rule 47.3)

Rule 47.2, like the 'Omnibus Rules' of other clubs, empowers the designated decision-making body of the Association, i.e. the Board of Directors, to consider and determine whether, in the context of mutual insurance, and with due regard to the interests of the membership as a whole, a claim which is outside the scope of cover should, nonetheless, be compensated by the membership.

The decision of the Board of Directors is to be final in this regard and it need not give any reasons for its decision. By agreeing to the Association's Statutes and Rules, Members have agreed and confirmed that claims made pursuant to Rule 47.2 are to be decided by the Board of Directors of the Association as the sole and highest decision-making authority of the Association. The decision of the Board is subject to judicial review only when it is alleged that the Directors have exceeded their authority or have failed to apply the rules of natural justice.²¹ A court will normally assume that the Directors have acted in good faith, and the onus of proving otherwise, which is not easily discharged, is on the party making the allegation.²²

1 See the Guidance to Rule 25.2.j.

2 See the Guidance to Rule 74.

3 See the Guidance to Rule 2.4.

4 The cover is available for the confiscation of the Ship is subject to the special provisions set out in Rule 49.

5 See Rule 1.1 for a definition of Member and the Guidance to Rules 78.1 and 78.7 which describes the basis on which cover can be extended to an Affiliate.

6 See the Guidance to Rule 55.

7 See also the Guidance to Rule 2.4.a and b. Rule 47 Fines

8 See the Guidance to Rule 82.1.

9 Cover is available under Rule 47.1.d for fines or other penalties imposed on the Member for infringements of customs laws or regulations in relation to other issues than cargo. See (L) below.

10 See the Guidance to Rule 58.

11 See the Guidance to Rule 27.2.

12 See the Guidance to Rule 38 in this regard.

13 See the Guidance to Rules 53.1 and 53.2 and Appendix III.

14 See the Guidance to Rule 25.2.j.

15 See the Guidance to Rule 74.

16 See the Guidance to Rule 72.

17 See (F) above.

18 See (C) above.

19 See the Guidance to Rule 47.3.

20 See the Guidance to Rules 82.2.d and e.

21 See *Vainqueur Jose* (1979) 1 Lloyds Rep 557. This is a decision of the English court, but other courts and tribunals are likely to follow the same approach.

22 See Hazlewood, Steven J P&I Clubs law and Practise, 3rd Edition, London, Lloyds Press 2000 pp. 25-32.

VEDLEGG 2): Utdrag av Norsk Sjøforsikringsplan av 1996, Versjon 2007 m/ motiver

§ 17-42. Ansvar for mulkter m.v.

Assurandøren dekker sikredes ansvar for:

- (a) immigrasjons og tollmulkter,
- (b) mulkter som følge av besetningens forhold,
- (c) utgifter ved pålegg om deportasjon av besetningen, passasjerer eller andre personer som medfølger fartøyet uten å tilhøre besetningen.

Selv om sikrede ikke blir personlig ansvarlig, dekker assurandøren slike mulkter og utgifter når betaling kan fremtvinges ved tilbakeholdelse av eller dekning i fartøyet.

Assurandøren dekker likevel ikke sikredes ansvar for mulkter som er en følge av:

- (a) overlasting av fartøyet,
- (b) at fartøyet har flere passasjerer enn tillatt,
- (c) ulovlig fiskerivirksomhet,
- (d) utilstrekkelig vedlikehold av fartøyets rednings- eller navigasjonsutstyr,
- (e) at fartøyet ikke har de påbudte sertifikater ombord.

Motiver:

§ 17-42. Ansvar for mulkter m.v.

Paragrafen tilsvarende Pl. 1964 § 232.

Assurandørens ansvar for mulkter er begrenset noe i forhold til 1964-Planen, jfr annet ledd. Første ledd litra (c) er dessuten endret for å få samsvar med bestemmelsen i § 17-34.

I henhold til første ledd litra (a) dekkes sikredes ansvar for immigrasjons- og tollmulkter uten hensyn til hvem som har begått forseelsen. Det er tilstrekkelig at sikrede blir ansvarlig, og at ansvaret er oppstått i direkte forbindelse med driften av fartøyet. Dette siste kravet vil som regel være oppfylt hvis sikrede blir ansvarlig for besetningens eller passasjerenes forhold, selv om forseelsen ikke har noen tilknytning til tjenesten eller fartøyet. At sikrede blir ansvarlig i slike tilfelle, er en risiko i forbindelse med driften av fartøyet.

Forutsetningen for dekningen er at det dreier seg om "mulkter", dvs. en uttalt strafferettslig reaksjon. Avgifter i form av toll eller skatt dekkes ikke, selv om de måtte ha en viss pønalt karakter.

Litra (b) omfatter mulkter som følge av besetningens forhold. Slike mulkter dekkes uten hensyn til mulktens art, men dekningen gjelder bare for mulkter som skyldes skipsføreren eller mannskapet. Mulkt som skyldes forseelser av passasjerer eller sikredes folk i land dekkes ikke.

I henhold til litra (c) dekkes utgifter ved pålegg om deportasjon av besetningen, passasjerer eller andre personer som medfølger fartøyet uten å tilhøre besetningen. Slike utgifter har for sikrede samme karakter som mulkter når sikrede hefter for dem. Bestemmelsen gjelder alle personer som har medfulgt skipet, dvs. også personer som verken er passasjerer eller tilhører besetningen, f.eks. en reiseoperatør. Deportasjon av blindpassasjerer er imidlertid dekket under § 17-41. Dekningen omfatter også en

deportasjon som er påregnelig, f.eks. hvor passasjerer går i land eller mannskap avmønstres i en havn hvor de ikke har oppholdstillatelse, og hjemreise ikke er ordnet for dem.

Dekningen etter første ledd forutsetter at sikrede har "ansvar" for mulkten eller utgiftene, dvs. et personlig ansvar. Annet ledd utvider imidlertid dekningen til også å gjelde tilfelle hvor betaling kan fremtvinges ved tilbakeholdelse av skipet, f.eks. ved formell arrest eller ved at utklarering nektes, eller ved dekning i skipet, f.eks. fordi det er sjøpant eller annet legalpant for fordringen. En mulkt som sikrede ikke er ansvarlig for, og hvor betaling heller ikke kan fremtvinges, er ansvarsassurandøren derimot ikke ansvarlig for.

Tredje ledd gjør unntak fra assurandørens ansvar i henhold til første og annet ledd for en del nærmere spesifiserte mulkter. Litra (a) unntar mulkter som følge av overlasting av fartøyet. Med "overlasting" menes at skipet flyter lavere enn tillatt merke, som regel på grunn av for meget last, bunkers, ordinært vann eller ballastvann. Begrunnelsen for unntaket er at overlasting medfører en betydelig økning i risikoen for skade på skip, last og passasjerer. Et tilsvarende unntak finnes i litra (b) for såvidt angår at fartøyet har flere passasjerer enn tillatt.

Unntaket i litra (c) om ulovlig fiskerivirksomhet har sammenheng med at økt konkurranse kombinert med reduserte fiskeressurser har ført til økt risiko for overfiske. Mange kyststater har strenge regler for tillatte fiskesoner, bruk av og størrelse på utstyret og forbud mot å fiske enkelte fiskeslag. Mulkt som følge av brudd på disse reglene bør ikke være dekket av ansvarsforsikringen.

Litra (d) unntar mulkt som følge av utilstrekkelig vedlikehold av rednings- eller navigasjonsutstyr, og har sin bakgrunn i den økte fokuseringen på sikkerhet. Redningsutstyr omfatter ikke bare livbåter og livbøyer, men også utstyr som f.eks. livvester, redningsraketter og vanntett lys. Vedlikeholdet av dette utstyret omfatter rutinemessige reparasjoner og utskiftninger. Med navigasjonsutstyr menes f.eks. radar, ekkolodd og kart. De fleste kyststater har minimumskrav for det redningsutstyret som skal finnes ombord. Brudd på slike forskrifter vil normalt føre til en bot, som altså ikke dekkes under ansvarsforsikringen.

Unntaket i litra (e) er knyttet til flaggstatens krav om at fartøyet til enhver tid skal ha de påbudte sertifikater ombord. For Norges vedkommende er det her tale om sertifikat påbudt av Sjøfartsdirektoratet. I henhold til § 17-4 faller forsikringsdekningen bort dersom gyldig sertifikat bortfaller. I så fall er unntaket i litra (e) overflødig. Bestemmelsen har derfor kun betydning hvor fartøyet nok har gyldig sertifikat, men dette ikke finnes ombord.