THE IMPORTANCE OF KEEPING INSURERS INFORMED OF ANY TOWAGE OPERATION

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Two recent English cases illustrate the importance of keeping insurers informed of towage by or of the ship, including the terms of such towage. Both cases involve disputes under the hull and machinery (H&M) policies and the risk of losing cover as a result of breaches of insurance warranties.

In *The Buana Dua*, which was heard by Mr. Justice Teare, the owners of the tug *Buana Dua* had H&M insurance incorporating the Institute Time Clauses – Hulls. These terms included a warranty that the ship shall not undertake towage or salvage services under a contract previously arranged by the assured. Mr. Justice Teare concluded that the ship may still assist/tow ships in distress and perform customary towage in connection with loading and discharging.

The assured's fleet of tugs, barges and cranes were primarily employed in the domestic carriage of coal from coal terminals to power stations in Indonesia. A tanker in associated ownership ran aground, while approaching the Pertamina Oil Terminal at Cilacap in September 2005. It was decided to use the *Buana Dua* and another tug to tow the tanker to Tanjung Priok for tank cleaning prior to undergoing repairs. The tanker had by then already been refloated by harbour tugs and secured to a discharge berth, so was no longer in distress.

Under clause 3 of the Institute Time Clauses – Hulls, the assured is held covered in the event of any breach of the towage warranty, provided immediate notice is given to the underwriters and any amended terms of cover and any additional premium are agreed. However, no such notice had been given prior to the *Buana Dua* proceeding to Cilacap for the towage. The tug ran aground, off the coast of Tanjung Gede and was subsequently declared a constructive total loss.

One of the hull underwriters on the hull policy agreed that it was not bound to follow the leading underwriter's acceptance of the claim. They argued that there had been a breach of warranty and that the claim did not fall within the policy. The judge found that the insurer was bound to follow the decisions of the other hull underwriters, but decided that allegations of fraudulent misrepresentation by the assured needed to be determined at trial, based on full evidence. He also considered the breach of warranty issue and held that there was a real prospect of showing a breach of the towage warranty – although some issues would again have to be considered in more depth at trial. He concluded that the warranty was to ensure that the risks associated with towage/salvage services were not to be borne by the underwriters. Those risks did not commence simply on agreeing to perform such services or merely by setting off to the disabled ship with the intention of towing her on arrival. However, manoeuvring to approach the ship and to hook her up may involve risks so closely associated with such towage risks that the tug should then be deemed to be undertaking towage services.

This dispute with hull underwriters may have been avoided if the assured had immediately notified its H&M insurers of its intention to use the *Buana Dua* for the towage.

In *The Copa*, the assured bought a floating casino for scrap and took out a hull voyage policy for its towage from the US Gulf to India. However, the policy included a warranty that "no release, waivers or 'hold harmless' given to Tug and Towers". The towage was arranged on TOWCON terms, including the standard knock-for-knock indemnities by which each party agrees to bear its own losses regardless of negligence.

Whilst en route, under tow, the *Copa Casino* developed a list and sank in the Caribbean Sea in March 2003. In the High Court, the Judge found the assured to be in breach of the 'hold harmless' warranty. However, he also held that the H&M underwriters had waived their right to rely on the breach by their delay in raising the point. The decision was appealed to the Court of Appeal, which held that a breach of warranty automatically discharges the insurer from further liability under the insurance policy. As such, no further positive action such as no 'election' by the insurer is needed for the insurer to avoid its liability under the policy. The Court of Appeal held that the H&M underwriters did not waive their rights. Therefore, the assured's claim under the H&M policy would fail.

Members should carefully consider any towage, including the terms on which such towage is provided and promptly and accurately notify all relevant insurers and other parties. The above cases concerned the cover under the H&M policies. Members' P&I cover contains specific provisions relating to towage by a ship. If a towage contract does not fall within the automatic approvals under the club's rules, it should be submitted to the managers for consideration. The managers will then advise whether it can approve the contract under the ordinary poolable cover, or whether, say, the contractual extension may be advisable. Please see the *Standard Bulletin* Special Edition dated 16 May 2007 (http://www.standard-club.com/docs/SB_16_May_07_disclaimer.pdf) for more details on towage by an entered ship.