

### Cefor - Loss of hire - Pandemic Delay Clause (Chapter 18 MOUs, Section 4)

*For insurance covers subject to the Nordic Marine Insurance Plan of 2013, hereinafter called “the Plan”.*

If the assured is deprived of income as a result of a casualty covered by Cl. 18-43, all loss of time caused by the COVID – 19 virus or any other infectious diseases declared by the World Health Organization as a pandemic, shall be limited to [...] days.

This limitation shall apply to loss of time otherwise attributed to the casualty.

This Clause shall in no circumstances extend the cover under the standard conditions of the Plan.

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### **Commentary**

A loss of hire insurance covers loss due to the MOU being deprived of income as a consequence of a recoverable casualty, cf. Cl. 18-43. In principle, a pandemic might cause a casualty covered by Cl. 18-43. It is, however, more likely that another recoverable peril has struck the MOU and caused a casualty, and that the pandemic causes a prolongation of the loss of time. This Clause is aimed to limit the insurers liability in the latter situation. The Clause does not make any amendments to any provisions in the Plan relevant for the assessment of whether a cause or loss is covered.

The Pandemic Delay Clause initially raises a question of causation. The starting point is a theory of logical causation: A is the cause of B if B would not happen if A had not occurred. A is thus a necessary condition for B. Such logical causation is a minimum requirement for any legally relevant causation, cf. Handbook on Hull Insurance, 2nd edition, page 115 and onwards. However, logical causation must be supplemented by some form of legal qualifications. Insurance law in the Nordic countries is based on the “dominant-cause doctrine” aiming to establish the dominant-cause factor or the dominant-peril. This doctrine is also supplemented with a theory of adequate proximity between the cause and the loss.

The Nordic Plan has a different approach by applying a rule of apportionment. The Pandemic Delay Clause’s wording “*caused by*” and the application of the limitation to loss “*otherwise allowed under the casualty*” connects this Clause to the causation rule/apportionment rule in Cl. 2-13, sub-clause 1, which reads:

*“If the loss has been caused by a combination of different perils, and one or more of these perils are not covered by the insurance, the loss shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss, and the insurer shall only be liable for that part of the loss which is attributable to the perils covered by the insurance”.*

According to the Commentary to Cl. 2-13 the apportionment process shall be conducted in two steps:

The first step consists of an assessment of relevant and non-relevant causes based on the effect each peril has had on the loss. The Commentary states that the lower limit required for an effect of a peril having a bearing on the apportionment may on a discretionary basis be set at 10-15%. The approach to this assessment will differ depending on whether we have a situation with;

- two or more independent causal factors leading up to and resulting in a casualty, or
- a combination of causes where a casualty is combined with another event that results in extended loss or further damage.

The first situation will have similarities with considerations associated with the dominant-cause doctrine and adequate proximity. In the second situation, and particularly in loss of hire insurance, the effect of a peril will normally be a matter of fact. Establishing the factual circumstances might be difficult, not least where the effect of the pandemic is part of a causative chain and is considered more remote or derived compared to other effects. For example, where closure of yards or repair facilities affects the available capacity in the surrounding area. As a starting point, these difficulties must be solved by the rules concerning burden of proof in Cl. 2-12. In this situation the insurer will have the burden of proving that the loss has been caused by a pandemic, cf. Cl. 2-12, sub-clause 2.

The second step, if the peril is considered relevant, is the “*apportionment over the individual perils according to the influence each of them must be assumed to have had on ... the extent of the loss*”. The Commentary to Cl. 2-13 gives guidelines to this process. For apportionment on loss of hire insurance there are also important guidelines in the Commentary to Cl. 16-1 (referred to in Commentary to Cl. 18-43) regarding the criterion of foreseeability which would be relevant for an extended loss of time caused by a pandemic. Furthermore, practice and comments to Cl. 4-18 might also be relevant.

If a cause is relevant but the effect is considered too remote or derived, cf. above, it is logical that this will have an effect on the apportionment by way of allocating less or no weight to the pandemic. For the Pandemic Delay Clause to be consistent with this approach its wording “*caused by*” has to be supplemented by the adequacy doctrine. Say as an example that the pandemic is over, still several months thereafter certain spare parts, normally in stock, are still subject to considerable waiting time. This loss of time will not be subject to any limitation as it is considered too remote or derived from the pandemic.

The limitation in the Clause shall be applied to loss of time “*otherwise attributed to the casualty*”. This means that the limitation is applied after any apportioning of the loss as per Cl. 2-13 or per other apportionment rules in Chapter 18, Section 4 (For example Cl. 18-52, Cl. 18-54 and Cl. 18-55). As an example: Casualty repairs of a recoverable damage would have taken 60 days. In addition, an extended delay of 70 days is caused by COVID-19, which delay would not have occurred but for the casualty. Limitation stated in the clause is 30 days. As an example; if these 70 days are split 50/50 according to Cl. 2-13, and 35 days of delay caused by the pandemic is attributed to the initial casualty, then due to the limitation in this Clause, these 35 days of delay caused by the pandemic, will be limited to 30 days. In this example, 90 days (60 days of ordinary repairs + 30 days caused by pandemic) will be covered by the LoH insurance, less the agreed deductible period.

The limitation caused by a pandemic applies to “all” loss of time. This inter alia means that loss of time caused by pandemic falling within the deductible period shall be subject to apportionment as per Cl. 2-13 (contrary to for example the system in Cl. 18-54 where the apportionment applies in excess of the deductible period). As an example, say the deductible is 30 days. Casualty repairs would take 20 days. Additional delay caused by a pandemic is 70 days. Then these 70 days are subject to apportionment as per Cl. 2-13, not 60 days which would have been the time if only time in excess of the deductible period should be considered. If, as in the example above, 35 days is apportioned on the initial casualty and thereafter limited to 30 days, this will give a total recoverable loss of time of 50 days (20 days of repair + 30 days of delay caused by pandemic), less the agreed deductible of 30 days.

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