

### **Tidstab – Eksklusionsklausul for Smitsom Sygdom (kapitel 18, MOU's, afsnit 4)**

*For forsikringsdækninger som henviser til Nordiske Søforsikringsplan af 2013, herefter benævnt "Planen".*

Smitsom Sygdom er en ekskluderet fare under forsikringen. Forsikringen dækker ikke tab hvor den dominerende årsag til havariet var en Smitsom Sygdom, undtagen når den dominerende årsag til havariet var en handling eller undladelse af en person, der var smittet eller angiveligt smittet af en sådan sygdom. Såfremt Smitsom Sygdom ikke er den dominerende årsag, finder klausul 2-13 anvendelse.

Såfremt forsikrede har været ude af indtægtsgivende virksomhed på grund af et havari som ikke er ekskluderet under første led ovenfor og som er dækket i henhold til klausul 18-43, skal alt ekstra tidstab som forårsages af Smitsom Sygdom være begrænset til det antal dage, der er nævnt i policen, eller 30 dage hvis intet er nævnt i policen.

Denne begrænsning skal gælde for tidstab som ellers kan tilskrives havariet.

Denne klausul skal under ingen omstændigheder udvide dækningen under Planens standardbetingelser.

"Smitsom Sygdom" betyder enhver sygdom, kendt eller ukendt, som kan overføres ved hjælp af en substans eller agens fra en organisme til en anden, hvor:

- a) Substansen eller agensen inkluderer, men er ikke begrænset til, en virus, bakterie, parasit eller anden organisme eller enhver variation eller mutation af noget af det foregående, uanset om det anses for at være levende eller ej, og
- b) Overføringsmetoden, hvad enten den er direkte eller indirekte, inkluderer, men er ikke begrænset til, menneskelig berøring eller kontakt, luftbåren overførsel, overførsel via kropsvæske, overførsel til eller fra eller via enhver genstand eller overflade eller væske eller gas, og
- c) Sygdommen, substansen eller agensen kan, alene eller i forbindelse med andre samtidige sygdomme, tilstande, genetiske modtageligheder eller med det menneskelige immunforsvar, forårsage død, sygdom eller legemsbeskadigelse eller midlertidigt eller permanent påvirke menneskers fysiske eller psykiske sundhed eller negativt påvirke værdien af eller sikker brug af ejendom af enhver art.

*Dette er en Cefor-oversættelse fra original engelsk tekst. Hvis der er en konflikt mellem den engelske original og den danske oversættelse, har den originale engelske tekst forrang.*

## **Commentary**

The Clause is drafted to be used in combination with a loss of hire insurance based on the Plan.

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.

This 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 have happened if A had not first 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 by a theory of sufficiently close proximity between the cause and the loss. However, the Plan has a different approach by applying a rule of apportionment, cf. Cl. 2-13.

A Communicable Disease might cause a casualty, or alternatively it might increase the loss where the dominant cause of the casualty was another peril. The first situation is regulated by sub-clause 1 and the second situation is regulated by sub-clause 2.

As a starting point, sub-clause 1, first sentence, excludes Communicable Disease as a peril. Sub-clause 1, second sentence, contains two exceptions; first a deviation from the rule of apportionment in Cl. 2-13, and secondly an exception from the main rule in the first sentence. The exception from the rule of apportionment is limited. It is only where the dominant cause of a casualty was a Communicable Disease that all loss arising out of the casualty is excluded. For guidance on the assessment of the 'dominant cause' see the Commentary to Cl. 2-14. This exclusion of all loss in this situation means that no apportionment as per Cl. 2-13 shall take place if a Communicable Disease is the dominant cause. In all other cases Cl. 2-13 shall still apply. As an example, if damage repairs after a casualty takes 100 days, but it is concluded that Communicable Disease has had an influence on the occurrence of the casualty of 20%, the number of recoverable days under the loss of hire insurance will be 80 days that will be subject to adjustment as per Chapter 18, Section 4.

The last part of the second sentence makes an exception for situations where the dominant cause of the casualty was an act or omission by a person infected or allegedly infected by the disease. Normally this will be a crew member, but it could also be another person. The exception is meant to preserve the assured's insurance cover for damage caused by specific acts or omissions of an identifiable person who is infected or allegedly infected. Thus, the effect of this exception is that an act or omission of a person infected or allegedly infected by a Communicable Disease becomes a covered peril. However, the exception is not applicable for measures taken to prevent the spread of infection, for example evacuation of some or all of the crew due to the presence of a person onboard who is infected, or due to fear of risk of an infection.

Sub-clause 2 limits the insurer's liability for any prolongation of the loss of time caused by a Communicable Disease. The 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 Communicable Disease 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 Communicable Disease, 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 Communicable Disease. 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 Communicable Disease. For the Communicable Disease Exclusion 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 Communicable Disease is over, 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 Communicable Disease.

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 normally have taken 80 days. In addition, an extended delay of 70 days in effecting repairs is caused by Communicable Disease. The limitation stated in the clause is 30 days. If these 70 days are split 50/50 according to Cl. 2-13, and 35 days of delay caused by the Communicable Disease is attributed to the initial casualty, then due to the limitation the allowance of delay caused by Communicable Disease will be limited to 30 days. In this example, 110 days (80 days of ordinary repairs + 30 days caused by Communicable Disease) will be covered by the LoH insurance, less the agreed deductible period.

The limitation caused by a Communicable Disease applies to '*all*' loss of time. This *inter alia* means that loss of time caused by Communicable Disease 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 Communicable Disease 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 Communicable Disease), less the agreed deductible of 30 days.

**8 December 2020**