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# LEGAL REGIME OF MARINE INSURANCE IN ARCTIC SHIPPING: SAFETY AND ENVIRONMENTAL IMPLICATIONS

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# Contents

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- 1. Introduction**
- 2. Arctic Shipping and Marine Insurance Risks**
- 3. Institute Clauses in H&M Policies**
- 4. Seaworthiness in English Marine Insurance Law**
- 5. Seaworthiness in NMIP and Polar Code Implications**
- 6. Nordic Marine Insurance Regime: NMIP Clauses**
- 7. Indemnification of Pollution Liability: P&I Insurance**
- 8. Environmental Salvage in the Arctic and its Marine Insurance Implications**
- 9. Conclusion**



# 1. Introduction

## **Purpose**

- Legal implications regarding insurability and indemnifiability under marine insurance norms and practices relating to risks in Arctic shipping.
- Comparative analysis between Institute Clauses under English marine insurance law and practice and Nordic Marine Insurance Plan (NMIP).

## **Issues**

- H&M and P&I insurance comparison
- Arctic marine risks for shipping: safety and environmental protection.
- Institute Clauses versus NMIP
- Environmental salvage



## 2. Arctic Shipping and Marine Insurance Risks

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- Shipowners are able to assume risks of trading on Arctic routes if suitable marine insurance can be obtained.
- Normally marine insurance contracts exclude or limit coverage of Arctic marine perils by imposing navigating limits because of extraordinarily high risks. These are reflected in -
  - Institute Warranties 1976.
  - International Navigating Limits (INL) in International Hull Clauses 2003 - alternative to the Institute Warranties 1976.
  - Navigating Limits under NMIP 2013



## 2. Arctic Shipping and Marine Insurance Risks

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- Risk factors
  - Presence of concealed or visible ice.
  - Inadequacy of SAR and salvage facilities.
  - Inadequacy of hydrographic, bathymetric and seabed mapping data.
  - Unreliable communication networks in higher latitudes.
  - Inadequate crew competence: lack of knowledge and experience relating to the Arctic and language difficulties



## 2. Arctic Shipping and Marine Insurance Risks

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- Class requirements must be met; if safety measures are reduced, insurers view it as increasing risk factors.
- Vagaries of Arctic environment makes premium calculation difficult.
  - Separate policy for each passage may be needed for the high Arctic.
  - Costs of infrastructure and related investment are uncertain causing anxiety for the marine insurance industry; premiums must be compatible with international and national law and policy relating to the Arctic.



### 3. Institute Clauses in H&M Policies

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- Institute Clauses and Warranties operate in conjunction with H&M policies which are subject to limitations on navigation; cover is denied if the insured vessel enters certain waters. These limitations are known as promissory warranties.
- These clauses and warranties were developed by Institute of London Underwriters (ILU); originally designed to be used with Lloyd's SG and MAR 91 policies primarily as cargo, voyage and time clauses in respect of hulls and freight and war and strikes clauses. ILU eventually became International Underwriting Association (IUA).



### 3. Institute Clauses in H&M Policies

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- Breach of warranty automatically discharges insurer from liability under s.32 of the MIA.
- By contrast, under s.10 of the new Insurance Act 2015 breach of warranty only suspends the insurer's liability from time of breach to time the breach is rectified.





### 3. Institute Clauses in H&M Policies

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- Shipowner must have in his favour "held covered" clauses to cover Arctic risks and avoid consequences of breaching the warranty of navigating limits
  - "Held covered" provisions require prompt notification by assured to insurer and make premium arrangements.
  - In essence, this is a special agreement which gives the assured the right to retain cover when operating in a prohibited area such as the Arctic.
  - Post-contract obligation of good faith is applicable. This attracts duty of disclosure manifested by requirement of prior notification; but failure does not vitiate the contract.



## 4. Seaworthiness in English Marine Insurance Law

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- Seaworthiness of ships operating in the Arctic has significant ramifications for marine insurance. Under English law, it consists of public and private law components.
- A violation of statutory seaworthiness, which is public law leads to detention of the vessel as a sanction until it is made seaworthy.
- Seaworthiness operates as commercial private law in carriage of goods and marine insurance contracts in which it essentially means the state of fitness of a ship for the purpose of prosecuting its intended voyage.



## 4. Seaworthiness in English Marine Insurance Law

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- In respect of voyage policies, seaworthiness is an implied warranty under s.39 (1) of MIA.
- Under sub-section (5) there is no implied warranty in a time policy but where the ship is sent to sea in an unseaworthy state, insurer is not liable for any loss.
- Sub-section (4) contains a definition - "a ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured".



## 5. Seaworthiness in NMIP and Polar Code Implications

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- There is no longer any notion of seaworthiness under the NMIP; rather there is the parallel concept of "safety regulation".
- Whether a Polar Code violation will constitute a breach of the seaworthiness warranty under English law to attract the insurer's right to vitiate the contract is in the realm of speculation and will remain so until case law is developed.
- Under the NMIP regime, relevant provisions of the Polar Code may constitute safety regulations if they are for the prevention of loss in relation to a marine insurance contract. Violations may give the insurer the right to refuse indemnification.

## 5. Seaworthiness in NMIP and Polar Code Implications

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- It must be noted that ships must comply with national regulatory safety standards of Arctic states when traversing their waters. These will eventually include Polar Code provisions.
- Harmonization of national safety standards is of utmost importance and virtually indispensable from a marine insurance viewpoint.
- The Polar Code may be instrumental in achieving this harmonization which will have a positive impact on indemnification of losses or damage suffered by ships in the Arctic.



## 6. Nordic Marine Insurance Regime: NMIP Clauses

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- Unlike Institute clauses, NMIP 2013 does not contain warranties and "held covered" clauses but there are similar stipulations.
- Under NMIP 2013, there are three types of trading areas, namely, ordinary, conditional and excluded.
- Assured must notify insurer before the ship proceeds beyond the ordinary trading limits which is relevant to the Arctic.
- The ship may continue to sail in the conditional trading area subject to payment of additional premium.
- If the ship proceeds to an excluded area, the insurance ceases to have effect unless the insurer has given permission in advance.



## 6. Nordic Marine Insurance Regime: NMIP Clauses

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- Under NMIP , assured must notify insurer and enter into a special agreement as in the case of Institute Clauses, if he wishes to embark on Arctic shipping.
- There may be a potential lapse in coverage for vessels trading in ice without ice class or for ice class ships encountering ice in excess of class notation.
  - Normally, obtaining ice class notation has been a voluntary matter apart from the NMIP requirements.
  - Under NMIP, class Society prescriptions regarding ice class constitute a "safety regulation “, non-compliance with which results in loss of coverage.
  - Therefore the assured must obtain and maintain ice class prescribed by the Class Society.



## 6. Nordic Marine Insurance Regime: NMIP Clauses

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- Regardless of whether there is compulsory ice class requirement under national legislation, non-compliance with such Class Society prescriptions with regard to ice class notation will amount to a violation of a safety regulation resulting in loss of coverage.
- An amendment will be introduced in the 2016 revision of the Plan and will alleviate the current complexity of the existing NMIP in relation to the ice class issues. The change was introduced by the Central Union of Marine Insurers (Cefor) .
- After the Polar Code enters into force on 1 January 2017, ice class requirement will be considered a "safety regulation" under NMIP.





## 7. Indemnification of Pollution Liability: P&I Insurance

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- Ship-source pollution liability is governed by strict liability under convention law which applies in all waters including the Arctic. These are the CLC and the FUND, HNS and BUNKERS Conventions.
- It is indemnified through P&I insurance of shipowners of polluting ships.
- “Evidence of financial responsibility” is required meaning compulsory insurance cover for third party liability in respect of pollution damage.
- Right of direct action against the P&I club is available to a pollution victim whether or not the pollution incident is in Arctic waters.



## 8. Environmental Salvage in the Arctic and its Marine Insurance Implications

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- Salvage impacts on safety and environmental implications for Arctic shipping being more difficult and costly.
- Polar Code violations can result in casualties requiring indemnification which makes salvage indispensable for marine insurance.
- The emerging concept of environmental salvage has numerous legal implications which are addressed in the paper.
- As background, discontent in the salvage industry following the *Nagasaki Spirit* decision despite the introduction of SCOPIC has continued.
- This has given rise to environmental salvage as the basis for a separate award to salvors for preventing or mitigating pollution damage.



## 8. Environmental Salvage in the Arctic and its Marine Insurance Implications

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- With respect to the Arctic, such a proposal would be viewed positively by the salvage industry but possibly not by shipowners and their P&I clubs.
- It is submitted that serious research and discourse will contribute substantially towards current efforts being expended under the aegis of CMI to arrive at a balanced and satisfactory resolution to the subject of environmental salvage.
- Undoubtedly environmental salvage has serious implications for indemnifiability of salvage charges in Arctic waters and due attention should be paid to it.



## 9. Conclusion

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- This presentation has addressed the correlation between safety and environmental concerns for Arctic shipping infused with issues of indemnifiability of loss or damage under marine insurance law.
- It is hoped that the exposè will evoke further interest regarding marine insurance implications in the minds of those involved in safety and sustainability in Arctic shipping.