

# **MARITIME NEWSLETTER VOLUME ONE**

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### **LIABILITIES ARISING FROM “CO-INSURANCE CLAUSE” IN MARINE INSURANCE CONTRACTS**

#### **Introduction**

Very often the risk involved in a marine adventure may be enormous such that it may not be reasonable for a prudent insurer to cover such a risk alone. The need arises to share the risk with other underwriters. The underwriters, like joint venture partners, will normally agree on the terms and conditions of the joint underwriting and their interests are expressed in the marine insurance contract under a “co-insurance clause.”

In practice the co-insurance insurers agree on one insurance company to represent the others. Very often the lead underwriter will represent the other underwriters and will enter into the marine insurance contract in its name but on behalf of the co-insurers. The identity of the other underwriters is disclosed in the co-insurance clause. The clause will also contain the proportion of liability undertaken by each co-underwriter and the sum insured by each. The clause will also contain a declaration that reference to the lead underwriter in the marine insurance contract shall be interpreted as reference to the co-insurer.

Very often the co-insurers will not have a separate contract providing for their rights and liabilities rather reference will be made to the co-insurance clause to determine the rights of the co-insurers as between themselves and between themselves and the assured. This creates certain legal difficulties and raises questions on the extent of liabilities arising from the co-insurance clause. Before venturing into some of the legal problems that may arise from a co-insurance clause a conceptual clarification of the expression “co-insurance” is necessary.

#### **Understanding the Concept of Co-insurance.**

In insurance contracts, the expression co-insurance has different meanings and application. Robert H. Brown dealt with the different applications of the expression in his book *Marine Insurance – Principles & Basic Practice* at pages 79 – 80. The first instance of co-insurance is where two or more insurers each cover part of an insurance risk. They are said to be co-insurers of the risk but each insurer enters into a separate contract with

the assured and no one insurer is responsible for the liabilities of any of the other co-insurers.

Another instance is where the assured insures only part of the total amount of the risk. In law he is deemed to carry part of the risk himself and thus becomes a co-insurer of that part of the risk he carries. While the assured in this case is liable to indemnify a third party up to the proportion of his "co-insurance" he will not be entitled to share in any recoveries made from third parties which would normally be shared by co-insurers according to the proportion of loss borne by each.

The third aspect of co-insurance is the practice of reinsurance. The re-insurer reinsures an underwriter and to that extent is regarded as a co-insurer of the risk but his liability is not directly to the assured but the re-insured underwriter. If the reinsured does not pay the assured for a loss, the re-insurer is not liable and the unsatisfied assured cannot his claim against the re-insurer.

The fourth type of co-insurance occurs when a lead insurer takes a large portion of a marine risk for himself and offers the balance of the risk to other underwriters under the same terms and conditions of the marine insurance contract. The co-insurers are deemed to be in the same position as the original or lead insurer and each or all of the co-insurer can be sued directly by the assured since his contract of insurance is between the co-insurers and the assured. It must be said that the contract of marine insurance is not a contract between the lead underwriter and the co-insurers and *vice versa* or between one of the co-insurers and another.

### **Issue of liability**

What the above clarifications throws up is the fact that the provision of the co-insurance clause determines the extent of liability of the co-insurers to the assured but the co-insurers have to look to another contract outside the marine insurance contract to determine any liability that may exist between themselves. In other words where the liability of the co-insurers to the assured is to be determined, the co-insurance clause will be read in conjunction with the other clauses of the contract of marine insurance relating to liability. This also means that the co-insurers will be entitled to rely on any clause in the marine insurance contract excluding or limiting liability of the insurer.

Where however the liability of the co-insurers among themselves is to be determined the marine insurance contract may not be very helpful. This is because the agreement between the co-insurers is a collateral contract. A separate contract is necessary to incorporate the terms and conditions of the joint underwriting including the rights and liabilities of the co-insurers. It is submitted that where no such contract was made the co-insurers would be deemed to have nothing more than the right of contribution.

This right arises under the principle of joint obligations discussed by the learned author of Chitty on Contracts (25<sup>th</sup> Ed.) Vol. 1 pages 651 and 658. According to the author joint liability arises where two or more persons jointly promise to do the same thing. There is only one obligation and consequently, performance by one discharge the others but this give rise to a quasi-contractual right of contribution among themselves. That is to say if one party has paid more than his share of the debt he can recover the excess from the others in equal shares.

Thus where co-insurers do not have a separate agreement from the marine insurance contract they would be deemed to be a quasi contractual right of contribution among them and this will only enable a party who has paid more than his share of the debt to recover the excess from the others.

## **Conclusion**

It is imperative that co-insurers are vigilant enough to agree on the terms and conditions of their involvement in co-insurance and such agreement should be expressed in writing. The law of contract does not lend itself to speculations. Except for terms that are implied by law any other term not agreed by the parties and reduced into writing may not be binding or enforceable against the other co-insurers.