Rogers & Co.
R&C
Abogados
Lawyers

C/ Francisco Silvela nº 7, Esc. 1ª, Bajo B
28028 Madrid
Teléfono +34 91 401 60 91
Fax +34 91 401 70 62
24 horas +34 629 554 119
rogers@rogersco.es
www.rogersco.es

Spain: Jurisdiction clauses in marine insurance policies. Marine insurers beware!

On the 20th January 2014, the Appeal Court of Lugo issued an Order (9/2014) which appears to confirm the current trend of the Appellate Courts to kick out foreign jurisdiction clauses in marine insurance contracts, where it cannot be shown that the assured expressly accepted the foreign jurisdiction. Marine insurers beware!

Spain has a large fishing vessel fleet, and for many years foreign marine insurers have come to Spain and sold their policies in this sector, in the belief that their choice of jurisdiction and law clauses would be respected and that they could determine where and how a dispute with the Assured would be resolved. This is not an unreasonable commercial expectation on the part of insurers, since marine insurers were clearly not dealing with consumers and there is no EU or national legislation that seeks to offer specific protection to fishing vessel owners who engage in commercial fishing operations.

However, the Spanish Appeal Courts seem inclined to ignore the equality of the contracting parties, and where they feel they can, they will oust the jurisdiction clause and with it wash away all marine insurers´ carefully calculated risk assessments and commercial realities.

This time round, the Appeal Court of Lugo held that where the marine insurance policy had not been signed by the owner of the fishing vessel, that even if the custom of international Pand I clubs to submit all disputes to the High Court of London and English law could be proven (and the Appeal Court judges were not satisfied that it had been proven) it was nonetheless not to be assumed that this particular fishing vessel owner would know what custom exists in the marine insurance world, let alone be bound by such rules. In this case, the Spanish Appeal Court seemed to be persuaded that this was a "small" fishing operation – though the owner in fact employed 10 crew and had H&M cover in the region of €800,000.

So the questions to be answered for future cases must be: what does it take to prove that the majority of PandI Clubs provide similar jurisdiction clauses? And how small is small for a fishing vessel owner? Both difficult burdens to overcome – since whatever evidence may

satisfy the judge at 1st Instance, may well displease all three judges on appeal!

And why should foreign insurers fear Spanish jurisdiction – the answer is simple: not only is it the devil that foreign marine insurers do not know, and a notoriously unpredictable jurisdiction, but by kicking out their chosen jurisdiction and then applying similar logic to oust the choice of a foreign law, the Spanish Assured is immediately placed in a more advantageous position *vis à vis* the foreign marine underwriter and can now attempt, *inter alia,* to rely on the Spanish Law of Insurance Contracts 50/1980, Article 20 – penalty interest provision which allows a claim for a rate of 20% interest to be applied where insurers delay in payment – given how long insurers may need to investigate a particular claim and then add on how long litigation can run in Spain, the maths can be quite startling – and may encourage marine insurers to settle where, in any other jurisdiction, they would have likely continued to fight – or at least had the option.

So, PandI clubs and foreign marine insurers beware! – **when dealing with Spanish Assureds, the golden rule is to get the Assured to sign the policy** – because anything short of a signature will likely see you fighting any claim with your Assured in Spain, irrespective of your perfect and elegantly drafted foreign jurisdiction and law clause.

This note is for reference only and is not intended to substitute formal legal advice.

For further details please contact:

Marie Rogers: marie@rogersco.es

David Diez Ramos: ddr@rogersco.es

Luis Alberto García: lag@rogersco.es