

Insight Article

Brief overview of the Nordic Plan and Institute Time Clauses (Hulls) (ITCH)

Organisational framework and structure

Published 16 August 2012

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Introduction

The Nordic Marine Insurance Plan of 2013 is an important step in the development of the Norwegian Marine Insurance Plan of 1996 which in turn has its roots back to the first Plan of 1867.

The Nordic Plan is unique because:

- It is supported by a formal institutional framework as laid down in the Plan Agreement entered into in November 2010 between shipowners, represented by the four Nordic Ship Owner Associations, and Insurers, represented by Cefor, the Nordic Association of Marine Insurers.
- A Standing Revision Committee reviews the Nordic Plan every three years. In addition to representatives from the four shipowner associations and Cefor, the committee also benefit from the inclusion of independent experts represented by a Nordic Adjuster, and the Chair and Secretary of the Standing Revision Committee, professor Trine-Lise Wilhelmsen and Kaja de Vibe Malling of the Scandinavian Institute of Maritime Law.
- The Nordic Plan review process is open and transparent and anyone can make comments and suggestions to the participating parties.
- The Nordic Plan is comprehensive. It contains rules for all standard non-P&I insurances used by shipowners.
- It is co-ordinated. The various products are co-ordinated with a set of common provisions and with each other.

The Plan and its Commentary is available at <http://www.nordicplan.org/> . Further information and material, including the text of the Plan Agreement, is available on Cefor's website www.Cefor.no .

The purpose of this article is to provide a limited overview of the most important differences between the Nordic Plan and the Institute Time Clauses Hulls 1983 (ITCH), which are subject to English law and jurisdiction and therefore to the provisions of the United Kingdom Marine Insurance Act of 1906 (MIA). The terms of the Hull & Machinery cover are at the centre of non-P&I insurance because they also affect, and must be co-ordinated with, the terms of cover for Loss of Hire (LOH), Total Loss only insurances (Hull Interest and Freight Interest in Plan terms) and War insurance.

1. Insured perils

Nordic Plan: covers all risks except:

- perils covered by war insurance as per Clause 2-9 which includes piracy,
- standard exclusions such as Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons exclusion Clause (RACE), and
- wear and tear etc., in connection with Hull & Machinery. See Clauses 12-3 and 12-4, and Clause 12-5 for excluded losses.

Damage to defective parts which have been approved by Class is covered under the Hull & Machinery insurance and, therefore, also under the Loss of Hire insurance even if there is no consequential damage to other parts of the insured vessel. See Clause 12-4.

The burden of proof is on the insurer to prove that the loss has been caused by an excluded peril.

ITCH: Named perils as defined in Clauses 6 and 7 are subject to normal exclusions, Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons exclusion Clause (RACE), wear and tear etc. See ITCH Clauses 23 – 26 and MIA Section 55.

Piracy is included in Clause 6 as a marine peril, but is today normally transferred to the war risk policy.

The Additional Perils Clause covering any accident and negligence of any person etc., is normally included in Hull & Machinery policies. To a certain extent this Clause also provides cover for the cost of repairing a latent defect, but is limited by the rather intricate wording of Clauses 1.1.2 and 2.

Cover under the Additional Perils Clause is subject to a due diligence proviso.

Burden of proof is on the assured to prove that loss has been caused by an insured peril.

Good Practice: Under the Nordic Plan the main rule when there is doubt as to whether a loss has been caused by marine or war perils is that one should look for the dominant cause of the loss. However, if the matter is evenly balanced the loss may be apportioned 50/50 to each policy. Under ITCH and English law the loss must be placed 100 per cent on one or the other policy. For this reason, Nordic Plan cover against marine perils should not be combined with a war cover based on another system such as ITCH.

Standard insurance against *war perils* under Chapter 15 of the Nordic Plan includes cover for Hull & Machinery, collision/striking, Hull and Freight interest, Loss of Hire and P&I. See Clause 15-2. It is of course necessary to specify the sums insured for each interest in order to activate cover, see Clause 15-3. It is also common practice in other systems to write war risks as a package of interests, usually including P&I, up to the same amount as the insured value under the Hull & Machinery component of the package.

2. Incidence of loss

Nordic Plan: The issue of which of a series of time policies should pay is dealt with in the Nordic Plan, Clause 2-11 and its Commentary. The burden of proof in relation to these issues is discussed in the Commentary to Clause 2-12. The main rule in Clause 2-11, sub-clause 1 is the 'peril struck' rule, but Clause 2-11, sub-clauses 2-3 contains specific rules applicable when a loss arises from an unknown defect or unknown casualty damage. In these cases a 'damage commenced' rule is applied. The Commentary to Clause 2-12 – Burden of Proof, makes it clear that where it is difficult to establish the time at which damage commenced there is a strong presumption in favour of the most recent policy years. Under the Nordic Plan the entire loss will be ascribed to a particular point in time and will not, except in exceptional circumstances, be apportioned over more than one policy period.

ITCH: This issue is not regulated by the ITCH or the MIA. The application of case law and adjusting practice will give the same result as under the Nordic Plan in most cases. The most significant potential difference arises where an unknown defect or damage causes new damage over more than one policy period. Here, English practice tends to apportion over all relevant policies whereas the Nordic Plan will normally allocate the entire loss to a single policy.

Good practice : Because of the last point mentioned above, it is good practice to include the Cefor Change of Conditions Clause when changing from any other set of conditions to Nordic Plan conditions.

3. Collision liabilities

Nordic Plan: Chapter 13 provides for 4/4ths liability for collisions with ships (RDC) as well as liability for striking of fixed and floating objects (FFO) cover as standard, subject to a separate sum insured.

Cross liabilities: Clause 4-14 provides that the cross liabilities principle is to be applied in all cases even when one or both vessels in a both-to-blame collision are able to limit their liability.

See also article in Gard News 179, August October 2005: [Adjustment of claim for collision liability and division of recovery – single or cross liabilities?](#)

ITCH: Clause 7 provides for 3/4ths collision liability, vessels only (3/4ths RDC, and no FFO) subject to a separate sum insured.

Cross liabilities: Under Clause 8 the cross liabilities rule is applied in the case of a both-to-blame collision, but only if neither vessel is able to limit their liability. This is a disadvantage to the assured as recoveries in respect of uninsured losses are not separated out in a single liability settlement and cannot therefore be allocated to the assured. The rule in Clause 7 is based on the view that it is not possible to carry out a cross liability settlement if one or both vessels is able to limit its liability, but as demonstrated by Clause 4-14 in the Nordic Plan, this view is incorrect.

Good Practice: It is difficult to see any good reasons for maintaining a 3/4ths 1/4th split between Hull & Machinery and P&I. It is more logical to place the 4/4ths RDC and FFO with one insurer. The most important practical considerations for the assured are price and the ability of the insurer to provide adequate security at all times. The solution in the Nordic Plan whereby 4/4ths RDC/FFO is placed under the Hull & Machinery insurance is motivated by two considerations. Most collisions and contacts cause damage both to the insured vessel as well as the other vessel or object, but it is only in the larger cases that losses covered by P&I, such as personal injuries or pollution, occur. Since the Hull & Machinery insurer must be involved and attend the casualty in any event, it is more efficient for him to also handle the claims against the vessel as well. Secondly, the Hull & Machinery insurer, unlike the P&I insurer, will be interested in any recovery against the other party involved.

4. Duties of the assured

The rules applicable to trading areas are dealt with separately in the section five. The assured also has certain duties during the claims process, but these do not create any issues of substance.

Nordic Plan: Chapter 3 deals with: the duties of the assured in relation to disclosure both before and after the risk has attached, the vessel's status (ownership, flag, class) and the employment and operation of the vessel during the policy period. Generally, Nordic Plan rules are more flexible and favourable to the assured than the rules that apply under other systems.

Disclosure: a breach of the duty of disclosure does not necessarily deprive the assured of cover. In the case of an innocent breach the insurers only remedy is to cancel the insurance by giving 14 days' notice of their intention to do so.

Alteration of risk: status and employment of the vessel: the warranty construction is not used in the Nordic Plan and the only two cases where the insurance contract automatically terminates are in the event of loss of or suspension of class and change of ownership of the vessel. In the case of change of class, flag or management cover continues, but the insurer may cancel the insurance by giving 14 days' notice of their intention to do so. In order to apply the ultimate sanction of rejecting cover, the insurer must prove that he would not have accepted the risk had he known that the alteration of risk would take place or, if he would have accepted the risk but on other conditions, that the loss has been caused by the matter that was not disclosed.

The general principle is that the vessel may engage in all activities that are normal for the type of vessel involved and its particular trade and the same applies to contractual provisions with third parties. It is the insurer who has the burden of proving that any particular activity or contract is so unusual that it amounts to an alteration of risk. For this reason, it is not necessary to include specific clauses such as e.g. a helicopter clause stating that various activities are held covered.

Safe operation of the vessel: the assured's duty of care in relation to the safe operation of the vessel is a duty to comply with the requirements of class, public authorities, and any specific requirements contained in the policy or imposed by the insurer in accordance with the insurance contract. The concept of seaworthiness is no longer used in the Nordic Plan.

MIA and ITCH: *Disclosure:* a failure to disclose, or misrepresentation of, a material fact will in all cases allow the insurer to void the policy, MIA Section 18.

Alteration of risk: status/employment of the vessel: ITCH Clause 4 provides for automatic termination of the insurance contract in the event of loss or suspension or change of class, change of ownership, flag, management, requisition, or charter on a bareboat basis. The warranty construction as defined by the MIA applies to all policies governed by English law. Any requirement stated in the insurance contract that is stated to be a warranty or where the term "warranted that ..." is used will activate the very strict rules in MIA Section 33. For this reason ITCH Clause 3 contains a held covered provision in relation to breaches of certain warranties, and Clause 1 specifies activities that are permitted.

Safe operation of the vessel: the duty of care in relation to the safe operation of the vessel is defined by the terms of MIA Section 39.5 as to seaworthiness and by the due diligence proviso in ITCH Clauses 6 and 7 and in the Additional Perils Clause.

Good practice: because of the danger that the term 'warranty' may be interpreted in accordance with MIA Section 33, even in policies not subject to English law or jurisdiction, this term or the phrase "warranted that ..." should never be used in modern marine insurance policies. Automatic termination is a better mechanism for achieving essentially the same result where the insurer wishes to make it clear to the assured that some activities fall completely outside what he is prepared to cover. For standard policies there are very few cases where automatic termination is necessary. In some cases the real issue is that an insurer does not wish to cover a particular risk even if it is only a remote cause of loss. Here, causation rules, as exemplified by those used in relation to nuclear risks, are appropriate.

5. Trading areas

All systems distinguish between normal trading areas and areas which are restricted in the sense that cover is either not available at all or is subject to an additional premium and/or special conditions. However, there are variations in the definition of such areas and related administrative matters. A related but separate matter that is not dealt with in this article is the way in which cover under war insurance is regulated according to the level of war risk present in different parts of the world at any given time.

Nordic Plan: the Nordic Plan Clause 3-15 differentiates between the ordinary trading area, conditional trading areas and excluded trading areas. The ordinary trading area comprises all waters apart from conditional and excluded areas, as defined in the Appendix to the Nordic Plan. The assured is free to trade in these waters without any further restrictions or notice requirements. Sailing in conditional areas, some of which are conditional on a seasonal basis, is covered subject to the assured giving notice thereof and agreeing to additional premium or conditions if any. The sanction for failure to give notice is that any claim for damage arising while sailing in the conditional area will be subject to a deduction of one fourth, maximum USD 200,000.

Cover is suspended as long as a vessel is in an excluded area without the prior agreement of the insurer. However, if a vessel proceeds into an excluded area for the purpose of saving life, or otherwise proceeds into such waters without the intention of the master or crew, the cover remains intact.

ITCH: the ITCH do not differentiate between conditional areas and excluded areas. In practice these matters are dealt with by the inclusion of a separate set of rules such as Institute Trading Warranties (ITW) of 1/7/76. As a starting point, MIA Section 33 will apply with the consequence that in case of a breach of a trading warranty, the insurer is discharged from liability from the date of the breach. However, ITCH Clause 3 states that the assured is 'held covered' in case of any breach of trade warranty provided the assured has notified underwriters 'immediately after receipt of advices'. The assured may also have to pay an additional premium or accept amended terms in order to be held covered for the breach. The assumption underlying the clause is that the assured was unaware of the breach at the time it occurred and therefore unable to give prior notice. This severely limits the scope of the protection provided to the assured. The practical differences between the two systems are:

1. Under the Nordic Plan the sanction for failure to give notice that the vessel will sail with the consent of the assured into a conditional trading area is an additional deductible in respect of damage (not sue and labour or total loss) of 25 per cent, max USD 200.000. Under ITCH the assured may avoid any sanction, but only if he gives notice immediately after receipt of advices. If this is not done there is no cover at all.
2. The ordinary trading areas under both systems are very similar, but slightly more extensive under the Nordic Plan.

Good practice: the insurer is obviously exposed to the risk that he will not be informed when additional premium becomes payable for navigating outside the normal trading area. Clearly good practice in these cases is for the assured and his insurance advisors to establish procedures that ensure that timely notice is given to the insurer. Under ITCH the assured is exposed to the catastrophic risk of losing cover entirely if he fails to give notice 'immediately after receipt of advices'. Various modifications are sometimes introduced to reduce this risk. One form that is not acceptable to insurers is the phrase "held covered with or without notice". The effect of this phrase is to give the assured an unfettered discretion as to whether he will give notice at all and deprives the insurer of any sanction even in those cases where an assured deliberately does not give notice in order to avoid paying any additional premium. One of the reasons for the requirement to give notice "immediately after receipt of advices" is that there is no other provision in ITCH nor in the MIA that imposes a duty to give notice when the vessel sails outside the ordinary navigating areas. On the other hand it seems unreasonable that an assured who has acted in good faith should be exposed to the huge risk of losing cover entirely because of some inadvertent failure in established procedures. The provision in the Nordic Plan avoids this extreme sanction when sailing into conditional trading areas. In the case of policies subject to ITCH a better balance can be achieved by a clause that, e.g. requires the assured to give notice as soon as reasonably possible.

6. Position of mortgagees

Nordic Plan: mortgagees are automatically co-assured as per Clause 7-1 so that a mortgagee can rely on the protection provided by Clauses 7-2 to 7-4 once the insurer has received notice of the existence of the mortgage. Notice is not subject to any formal requirements. This provides a safety net in the event of a failure in respect of the documentation usually used to protect the position of the mortgagee. Clause 7-2 requires the insurer to give 14 days' notice to the mortgagee in the event of amendment or cancellation of the policy. Clauses 7-3, sub-clause 2 and 7-4, sub-clause 1 protect the position of the mortgagee in the event of a total loss.

ITCH: no equivalent provisions, but MIA Sections 50 and 51 deal with the assignment of marine insurance policies; a mechanism that is usually used in the rather cumbersome procedures that protect the position of the mortgagees in contracts governed by English law.

7. Constructive total loss (CTL)

Nordic Plan : according to Clause 11-3, the vessel is a CTL when the cost of repairing the casualty damage will exceed 80 per cent of the insured value or the market value of the vessel after repair, whichever is the higher. Relevant costs do not include salvage, and in practice the evaluation is made after the vessel is in a position of safety and capable of being surveyed. The relevant costs are all those necessary to complete repairs. This includes the costs of repairing all damage reported in the previous three years.

The assured is not required to give notice of abandonment, but may claim for a total loss whenever he is of the opinion that circumstances justify such a claim. In any event, the assured must send a 'request for condemnation' to the insurer without undue delay after the vessel has been salvaged. The insurer may, at his own expense, attempt to salvage the vessel, but salvage must be completed within six months from the time the insurer first received notice of the casualty. Cost of repairs or total loss are payable in addition to the salvage costs. Alternatively, the insurer may avoid all future costs of salvage by paying the sum insured. In this case the insurer is not entitled to take over the vessel.

ITCH: constructive total loss may be claimed if the costs of recovery and/or repair would exceed the insured value, see MIA Section 60 and ITCH Clause 19.

The assured is required to give notice of abandonment in accordance with MIA Section 61. If the insurer does not accept such notice, normal practice is for the insurer to agree to put the assured in the same position as if suit had been served on the day notice was given. In practice, this means that the insurer requires more time to establish whether the notice is justified by the facts existing at the time notice was given.

Good practice : major casualties often give rise to complex situations where experienced experts can easily disagree as to whether it is worthwhile to continue the salvage efforts. Once the vessel has been brought to a position of safety the evaluation becomes a more straightforward cost/benefit analysis and the crucial issue becomes the threshold which costs must exceed in order to justify a claim for a CTL.

It is good practice while the vessel is still in the midst of the crisis to establish close communication between the assured and the insurer. The advantage of the Nordic Plan is that it allows both parties to make rational decisions based on their best evaluation of the situation without prejudicing the position of the other party. The English system lacks the same clarity, but provided there is good communication and co-operation between the parties the end result will usually be the same.

Good practice when it comes to the policy trigger for claiming a CTL can be simply stated. Irrespective of system, the trigger for a CTL should never be less than 2/3 of the total amount payable under all policies in respect of a total loss.

8. Damage - excluded losses

Nordic Plan: Clause 12-5 identifies losses that are not covered in a claim for repair costs. There are equivalent exclusions in ITCH and general market practice for the items listed in Clause 12-5.a.- e., *but not* to the exclusion for damage caused by contaminated lubricating oil, cooling water and feed water (for boilers). This provision effectively imposes a duty of care in respect of these matters so that the assured, the master and the chief engineer have a duty to take action once they become aware of any contamination.

ITCH: No equivalent to Clause 12-5.f of the Nordic Plan.

9. Damage - The 20 per cent rule

Nordic Plan: in recognition of the fact that a vessel is a freight earning machine and that an uninsured owner would take the vessel's current earnings into account when considering available repair options, the Nordic Plan establishes a notional daily earning sum for the purposes of evaluating the hull insurer's liability to cover costs of various options to speed up repairs. The vessel's notional earnings are calculated as 20 per cent per annum of the vessel's agreed hull value and the assumed daily earnings are therefore 20 per cent of the hull value, divided by 365. The hull insurer is liable up to this amount for each day saved, e.g. in carrying out temporary repairs, see Clause 12-7, for measures to speed up repairs, see 12-8 and by incurring extra costs by selecting a quicker repair yard. Clause 16-9 co-ordinates the loss of hire insurance with the rule in Clause 12-12.

ITCH: No equivalent.

10. Damage -time lost in waiting for tenders

Nordic Plan: Clause 12-11 covers time lost whilst waiting for tenders in excess of 10 days at 20 per cent per annum of the agreed hull value. This applies irrespective of whether the tender has been requested by the Assured or the Insurer.

ITCH: Clause 10.3 covers time lost whilst waiting for tenders *required by underwriters* at 30 per cent per annum of the insured value, but subject to a reduction for amounts covered in respect of wages and maintenance etc.

11. Interest on claims

Nordic Plan: LIBOR +2 per cent.

- One month from the date of notice of casualty in the case of a total loss.
- From the date of the assured's payment in cases of reimbursement of the assured's disbursements.
- One month after expiry of the period for which the insurer is liable in the case of the insurer's liability for loss of time. See Clause 5-4, sub-clause 1.

ITCH: No equivalent.

12. General average, salvage, and sue and labour

Nordic Plan: general average (GA) and salvage are payable in full even if the contributory value (market value) exceeds the agreed value, see Clause 4- 8, sub-clause 1.

General average, salvage, and sue and labour are not subject to a deductible, see Clause 12-18.

General average contributions payable by freight interests are covered by the Hull & Machinery policy if they fall upon the assured shipowner. This will be the case where freight is payable upon delivery of the cargo, so called 'destination freight', see Clause 4-8, sub-clause 1.

General average absorption: standard clause in Clause 4-8, sub-clause 3 - amount to be filled in. Clause 4-8, sub-clause 3 states as follows:

"If the assured chooses not to claim contributions from the other interests in the general average, the insurer is, at the assured's option, liable either:

for any loss, damage, liability or costs which would have been recoverable in the general average up to the amount stipulated in the policy, or,

for the ship's general average contributions."

If the assured chooses the first option, the maximum amount for which the insurer will be liable must be stipulated in the policy.

ITCH: General average and salvage, Clause 11, and sue and labour, Clause 13.4 are payable subject to a reduction for any 'underinsurance', i.e. if the insured value is less than the sound value of the vessel. Any such shortfall is recoverable under the terms of most Increased Value (IV) policies. Current market practice tends to reverse the standard solution under ITCH and adopt the Nordic Plan solution of full cover under the Hull & Machinery policy.

General average, salvage, and sue and labour are subject to the agreed deductible as per Clause 12.

No equivalent to the rule in the Nordic Plan in respect of freight's contribution in general average being payable by the assured.

No standard general average absorption

13. Recoveries from third parties

Nordic Plan: Assured shall participate in all recoveries in proportion to the amount of the relevant loss he has carried , Clause 5-13, sub-clause 2.

ITCH: recoveries, excluding interest, shall first be credited to the insurer, see Clause 12.3.

14. Contract administration - underwriting matters

Nordic Plan: the Nordic Plan does not contain any rules regulating the role of the leading underwriter in respect of underwriting matters, such as adjustment of values, additions or deletions of insured vessels, premium adjustments etc. Chapter 9 – Relations between the claims leader and co-insurers only applies to claims matters including approval of lay-up arrangements, 3-26, which can be seen as on the borderline between underwriters.