



November 2015

## To the Members

Dear Sirs,

### The UK Insurance Act 2015

The UK Insurance Act 2015 (the “new Act”) will come into force on 12 August 2016 (during the 2016/17 Policy Year).

The new Act seeks to provide further protection to both consumer and non-consumer buyers of insurance. As such it will change English insurance contract law currently codified in the Marine Insurance Act 1906 (“MIA 1906”). When being drafted it was recognised that the new Act might not be required in sophisticated markets, with the marine insurance sector named as one such market. Rather, it was anticipated that some insurers would contract out of (i.e. not apply) many of the new Act’s provisions.

P&I is a sophisticated insurance market, with well established practices that benefit both Members (“the insured”) and the P&I Club (“the insurer”). Eight of the Clubs in the International Group (“the IG”) are affected by the new Act because their Rules are subject to English law, including the MIA 1906. Accordingly and in the interest of continuity across the wider IG, the consensus amongst the eight IG Clubs is to contract out of certain aspects of the new Act. Nevertheless, those eight IG Clubs recognise that some provisions of the new Act should be adopted as they clarify certain aspects of the law which are presently uncertain.

### Implementation date

The new Act will apply to contracts of insurance entered into from 12 August 2016 (half way through the coming 2016/17 policy year). In anticipation, the eight affected IG Clubs will be making changes to their Rules with effect from 20 February 2016. Members will be notified of these Rule changes by their Clubs in the normal manner. The Clubs will also revise their internal quotation procedures in respect of (a) new Members or tonnage entered with the Club from 12 August 2016 onwards and (b) all renewing Members from that date. The Rule changes and revisions to internal procedures will reflect the following changes in statutory and/or contractual rights and duties.

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#### STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION LIMITED

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(Registered in England and Wales – Registration number 105461. PRA and FCA registration number 202548)

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### **Duty of “fair presentation”**

The obligation of disclosure set out in the MIA 1906, requiring the insured to disclose every material circumstance known to him, will be replaced by a duty to make a “fair presentation” of the risk. The new duty shares many of the features of the current duty of disclosure. However, greater emphasis is given to the insurers’ role in the process of disclosure, with a Member potentially fulfilling its duty of “fair presentation” by disclosing sufficient information to put the Club on notice that it needs to make further enquiries. The view is that a “fair presentation” and a professional assessment of the risk are of mutual benefit to Members and to Clubs and that, consequently, the new duty of “fair presentation” should and will be adopted by the affected Clubs.

### **Remedies for breach of the duty of “fair presentation”**

Under the new Act, an insurer will remain entitled to avoid the policy if an insured deliberately or recklessly fails to make a “fair presentation”. The insurer will also be entitled to avoid the policy where an insured’s failure to make a “fair presentation” was innocent or negligent if that insurer would not have entered into the policy had a “fair presentation” been made. It is only in circumstances where an insurer would have entered into the policy notwithstanding the relevant information that the policy will continue and the remedy will depend on the terms on which the risk would have been written or the premium the insurer would have charged to write the risk. The remedy of avoidance may therefore remain the usual remedy under the new Act where an insured fails to make a “fair presentation” of risk.

However, in a P&I context and recognising the importance in a mutual club of proper disclosure, the eight affected IG Clubs intend to contract out of the new Act’s provisions on remedies for breach of the duty of making a “fair presentation”. The eight IG Clubs will therefore maintain the remedy of avoidance in respect of any breach of the duty under the new Act to make a “fair presentation” of the risk.

### **Warranties and other terms**

Compliance with certain warranties, e.g. maintaining a vessel’s Class, is a condition precedent to cover by a Club irrespective of the type of loss suffered. Current practice and law may give Clubs a wider right to reject claims than would be possible under the new Act’s remedies for breach of warranty: at present a Members’ breach of a warranty will discharge the Club’s liability under the insurance from the date of the breach, unless and to the extent the relevant Club’s Board determines otherwise. Under the new Act, breach of warranty would suspend, rather than discharge, an insurer’s liability. There would be no liability for losses which arise whilst an insured is in breach, but once that breach is remedied, cover would be reinstated.

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When considering the new Act, importance was given to the mutual nature of the risks insured, the availability of the relevant Club's Board's or Managers' discretion in appropriate cases and also uncertainty on how the new Act's provisions on warranties and other terms may be applied by the courts. Accordingly, it was felt best to preserve the current position. The affected IG Clubs will, insofar as permitted, therefore maintain existing practices by contracting out of the new Act's provisions on warranties.

### **Basis clauses**

The new Act prohibits any term in an insurance contract by which the insured warrants the truth of all pre-contractual representations. This prohibition would negate the effect of the current Club Rules which declare such information to be the "basis" of the contract of insurance. This provision is mandatory and, consequently, any such basis of contract wording will be removed from the Rules of the eight affected Group Clubs. Any inaccuracies in material representations will instead be treated as relevant to the question of whether or not there has been a "fair presentation" of risk.

### **Fraudulent claims**

The new Act's provisions on fraud provide clarity to this area of the law. The insurer would not be liable for a fraudulent claim and sums already paid in respect of such a claim will be recoverable. The insurer may treat the contract as having been terminated with effect from the time of the fraudulent act, after which the contractual position will be as follows:

- The insurer will remain liable in respect of relevant events arising before the fraudulent act;
- All subsequent claims will be invalid; and
- The insurer will be entitled to retain any premium paid to it before the fraud.

The affected IG Clubs will adopt the new statutory provisions as to the treatment of fraudulent claims. However, the Clubs will exclude the operation of the new Act's provisions on the continuing validity of policies following a fraudulent claim made by a beneficiary who is not specifically named in the terms of entry, such as an entity associated with or affiliated to a Member against whom a covered claim is enforced. Where a fraudulent claim is made in this context, for consistency, the IG takes the view that the fraud should have the same impact on the Member as if it had made the fraudulent claim. The affected IG Clubs will therefore contract out of these aspects of the new Act.

### **Payment of claims**

The Enterprise Bill 2015 (which is currently being considered by the UK Parliament) proposes to amend the new Act by implying into all contracts of insurance a term requiring the reimbursement of claims within a reasonable time.

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The Bill proposes certain remedies for breach of that implied term, including the possibility for the insured to claim interest in addition to damages. Bearing in mind the mutual nature of the risks insured and the manner in which claims are handled in the IG and under the Pooling Agreement, these provisions do not appear to be appropriate for IG Clubs. The eight affected IG Clubs therefore intend to contract out of this provision and will maintain the longstanding exclusion of the payment of interest on Members' claims. To clarify, the Club will, subject to individual terms of entry, continue to cover claims against Members by third parties which may include an element for interest including any interest payable to that third party, but not any additional amount claimed by the Member in respect of any alleged delay in reimbursement. The new Act does not permit an insurer to contract out of the implied term in circumstances if the insurer deliberately or recklessly fails to reimburse an insured's claim within a reasonable time. Members will therefore be protected to that extent.

### **Duty of good faith**

The new Act will abolish the right of a party to an insurance contract to avoid this on the ground of failure to observe utmost good faith. In the context of mutual insurance it is felt that the obligation of utmost good faith should be continued both to be required and entitle avoidance if not observed.

The eight affected IG Clubs in the International Group of P&I Clubs whose Rules are governed by English law have issued similar Circulars.

Yours faithfully,

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