



Steamship
Mutual

Discretionary Cover



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Mutual Vision



Discretionary Cover



Crew Claims

Mutuality

Unlike commercial insurers, Clubs are owned by their Members who are therefore both insurers and insured. To assist members, the scope of cover available can be extended to cover risks at the Director's discretion where appropriate.

Liability Insurer

The Club insures liabilities which can arise in novel and unforeseeable ways. Therefore the need for an omnibus rule to enable cover to be provided for claims which, had they been able to be foreseen, would have been regarded as falling within the scope of P&I cover.

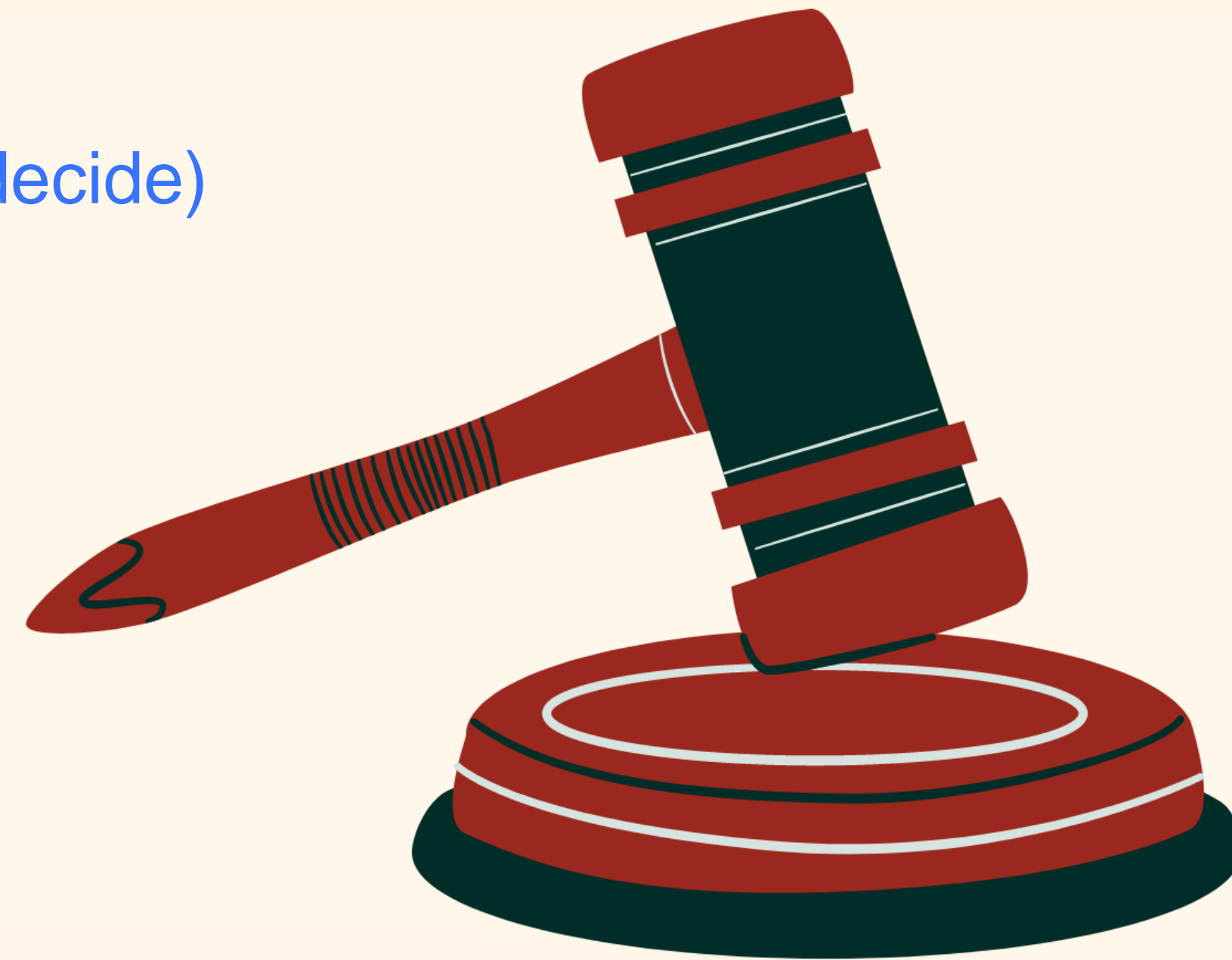
Special Consideration



The “Special Consideration” procedure (the Board’s Discretion)

💡 Where cover under a Rule is discretionary
(or there is no cover unless the directors otherwise decide)

💡 The Omnibus Rule



Where cover under a Rule is discretionary

Examples

Discretionary Claims in the Cargo Rule – Rule 25 xii, such as **failure to incorporate the Hague or Hague-Visby Rules**

“Unless and to the extent that the Directors in their discretion otherwise determine.... there shall be no recovery from the Club in respect of liabilities..... which would not have been incurred .. if the cargo had been carried under a bill of lading or other contract of carriage incorporating terms no less favourable to the carrier than the Hague or Hague-Visby Rules.”

Where cover under a Rule is discretionary

Examples (cont.)

Claims handling provisions – Rule 28. This sets out a number of requirements, such as prompt notice of claims, but then states:

“Compliance with the provisions of this Rule shall be a condition precedent to a Member’s right of recovery from the Club, **provided that the Directors shall have power in their absolute discretion to admit in whole or in part a claim**, notwithstanding a breach of such condition. The exercise of their discretion by the Directors shall be final and conclusive for all purposes.”



Where cover under a Rule is discretionary

Examples (cont.)

The Fines Rule – Rule 25 xvi d

“..... There shall be no recovery in respect of fines other than those specified in paragraphs a-c of this Rule 25 xvi unless the Member has satisfied the Directors that it took such steps as appear to the Directors to be reasonable to avoid the event giving rise to the fine;

Provided always that:

Any amount claimed under paragraph d of this Rule 25 xvi in respect of any such fine **shall be recoverable to such extent only as the Directors in their absolute discretion may determine without having to give any reason for the decision;**”

The “Omnibus Rule”



Expenses incidental to ship owning (the Omnibus Rule) – Rule 25 xix

“Liabilities, costs and expenses incidental to the business of owning, operating or managing ships which the Directors may decide to be within the scope of the cover of the Club.

Claims under this paragraph shall recoverable to such extent only as the Directors in their absolute discretion may determine without having to give reasons for their decision.”

Requirements:

- Must be incidental to the business of owning, operating or managing ship;
- The directors must decide to be within the scope of the cover of the Club; and
- Recoverable to such extent as the Directors in their absolute discretion may determine

Principles governing the exercise of the Directors' discretion



The Directors must act in accordance with the Rules of natural justice:

- Fairly and not capriciously
- In good faith and without bias
- Reasonably and consistently i.e. similar claims should be approached in the same way unless there are valid grounds for distinguishing them; but prior decisions are not binding precedents in the strict sense

They must also:

- Not act ultra vires or outside the authority given to them
 - Use the powers given by the Rules for the purposes for which they were conferred and not for some ancillary purpose
 - Not misdirect themselves as to the applicable law
- (see “The Vainqueur José” I LLR [1979] p.557)

What considerations may the Board take into account?



In acting fairly, consistently and reasonably, the Directors should consider all relevant factors, and in particular are entitled to take into account:

- Nature of the risk – was it unusual, unforeseeable and therefore more difficult to guard against
- Degree of due diligence exercised – what steps did the Member take to protect itself
- Claims record – if similar prior claims, what steps were taken in consequence to avoid a repetition in the future
- Amount of the claim
- The Club's financial position
- The Directors are entitled to consider the interests of the Membership as a whole (and in effect balance the needs of the individual Member and of the Club)







Special Consideration (1): MARPOL, Fines Rule



MARPOL Scenario



-  Vessel is owned by a substantial tanker owner / operator
-  Vessel is detained by the USCG against “whistleblower” evidence that vessel has been discharging oily waste through a “magic pipe”
-  6 Members of Crew detained for questioning and security for US\$4 million demanded
-  Owners put up security for US\$4 million to release vessel; in addition, the owners had to pay for (i) accommodation for the crew whilst under detention (ii) the cost of replacing those crewmembers and (iii) legal representation for themselves and for the crew

MARPOL Scenario (cont.)



MARPOL:

- Requires all ships to be fitted with oil discharge monitoring equipment (ODME) and an oily water separator (OWS)
- Limits oil content which may be legitimately discharges into the sea
- Requires Oil Record Book to be maintained detailing oil loading / discharge / transfers / disposal
- US authorities have long been concerned over illegal oil discharges into sea and falsification of Oil Record Book...

Shortcuts typically taken because of:

- Time / manpower / sea condition constraints
- Equipment malfunctions
- Cost / availability of shore disposal facilities



Covered?

- The fines rule provides cover for fines in respect of the accidental escape or discharge of oil or any other substance or the threat thereof
- Where a Marpol offence is alleged, clearly it cannot fall within this (since it would not have been accidental). It can only therefore be dealt with as a matter of Board discretion under sub paragraph d of the fines rule, or under the omnibus rule (both of which are set out above). The situation was highlighted in an International Group circular in June 2005
- Accordingly, the Members were advised that the matter must be treated as uncovered in the first instance, and all costs would be for the Member's account and security could not be provided by the Club
- In order for cover to be considered in respect of fines for non-accidental oil pollution under discretionary Club rule 25.xvi.e, Members must have "... ***satisfied the Directors that it took such steps as appear to the Directors to be reasonable to avoid the event giving rise to the fine***"

- During questioning, engine room crewmembers say practice prevalent across fleet
- In this case, oil illegally discharged into sea because of problems with incinerator
- Owners plead guilty to one charge of falsifying oil record book
- Vessel fined US\$4 million and incurred crew costs of US\$280,000 and legal costs of a further US\$1.6 million

The Owners seek reimbursement from Club and request the Board to consider matter as a special consideration claim

Enquiries by the Club ascertained that:












- The Owner is no longer a Member, having left the Club shortly after the incident
- They have good written policies and procedures
- Management of fleet, including compliance with environmental regulations, outsourced to third party managers
- Regular crew training and general audits + superintendents' visits
- Vessel frequently inspected by Class, Port State Control and oil majors
- Continuing problems with incinerator meant that it was unable to cope with the quantity of oily waste being produced by the vessel. Several guarantee claims had been submitted to manufacturers
- No record of requests for transfer/shoreside disposal of unburnt waste

What, if any, contribution do you think should be awarded by the Board?

As above, however:

- The USCG did not impose a fine, but instead, sent a letter to the Owners simply stating that it would not be pursuing the matter further
- The security was returned
- Whilst the crew were under detention and the Owners under investigation the Owners incurred crew costs of US\$280,000 and legal costs of a further US\$1.6 million
- The Owners request the Board to exercise its discretion under the omnibus rule to reimburse these sums

Points to consider

-  Did Owners know? Blind eye knowledge?
-  Active or Passive approach to environmental compliance audit?
-  Would oil major vetting / PSC / Class visits detect malpractice?
-  Would a superintendent's inspection differ?
-  Relevance of incinerator malfunction?
-  Should Owners have questioned how oily waste was being disposed of on this vessel?
-  Evidence of a fleet-wide practice?
-  Should Owners recover the legal costs, at all or in full?
-  Can the Directors attach weight to the fact that is an ex-Member?
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-  Can the Directors attach weight to the fact that is an ex-Member?



Special Consideration (2): cargo claim, delay



Special Consideration Case No. 2



- Whilst on a voyage carrying a cargo of wheat, the vessel encountered heavy weather, with water ingress to some holds
- Some cargo total loss, some damaged
- Owner's (Master issues) bill of lading
- Consignees present bill of lading for delivery at discharge port
- On arrival at discharge berth they obtain an order for arrest of vessel, seeking security for loss/damage claims
- Members are a very substantial and important Member, represented on the Board, who pays considerable premium, always on time



- The vessel completes discharging, but negotiations over wording and amount of security are protracted, and take a further 6 days before security is finally agreed and provided by a Club letter of undertaking (“LOU”), and a further 4 days to obtain a Court order lifting the arrest
- But port authorities then refuse permission and withhold clearance to leave the port unless a “facilitation fee” of US\$10,000 is paid to the official in charge
- Club advises against payment of any such fee and a further five days of delay is incurred before the vessel is cleared, no fee having been paid
- The Member is reimbursed by the Club in respect of the cargo claim in the normal way
- The Member then requests the Board to exercise its discretion to reimburse their loss of time for the 15 days securing the ultimate release of the vessel, which they calculate by reference to the earnings which would have been available under a voyage charter covering that period

Bear in mind the following:



Rule 22 i Equipment and Freight and Other Risks

- The Club shall not under any circumstances, save only those provided for in the specific Rules enumerated hereunder, pay for loss of freight or hire or for demurrage on or detention of an entered ship

The specific Rules referred to are as follows:

- Rule 25 xiii proviso (ix) – relating to loss of freight or hire, or claims for demurrage, detention and delay where such loss or claim forms part of a claim for liabilities in respect of cargo;
- Rule 25 xx b – relating to sue and labour;
- Rule 25 xx c – relating to expenses incurred by direction of the Club



Bear in mind the following:



Rule 43 Provision of Bail

- I. The Club is under no obligation to provide bail or other security, including any guarantee, undertaking or certificate evidencing financial or other responsibility, on behalf of any Member. When the Club does provide bail or such other security the Managers may at the time when such bail or other security is provided or at any time subsequently until the security is returned for cancellation:
- II. The provision of bail or other security is at the absolute discretion of the Managers and the Club shall not be liable for any delay or detention to a ship to which such security relates and any other ship owned by the Member or any other assets, or for any other losses whatsoever and howsoever arising, resulting from non-provision or delay in providing bail or other security;



Rule 24 Imprudent or Unlawful Trading

II. Bribes and other Corrupt Activity

There shall be no recovery from the Club in respect of sums, or the monetary equivalent of any other improper inducement or advantage, which are determined by the Directors in their absolute discretion to have been offered or paid by way of bribe or by any other corrupt or illicit activity

The Member says:



- The first 6 days were lost whilst the Club negotiated wording of the security (LOU)
- The next 4 days – obtaining the Court order to lift arrest – were outside the control of the Member
- Final five days resulted from following Club's advice
- The Member could and would have paid the “facilitation fee” but for the Club's advice

What, if any, contribution do you think should be awarded by the Board?



- Loss of time would not normally be paid by the Club – the Club is not a loss of hire insurer. This applies to all members
- Club guarantees are provided on a discretionary basis – although in most cases they are provided when cover is not in issue (it was not in issue here)
- Did the Club unnecessarily prolong the security discussion?
- Did the Member need to follow the Club advice regarding the facilitation payment?
- Can the Directors attach weight to the fact that (i) this Member has a representative on the Club Board (NO ! – and the representative must recuse themselves whilst the Board is considering the claim, and should not discuss this with other Board members) and (ii) they pay substantial premium on time?
- Reasonableness of the amounts claimed
- How has the Board dealt with similar cases previously?
- Perhaps - did the Owners do anything to cause their own misfortune?



Any Questions?

