UKP&I

An Overview of P&I Clubs and Claims (Americas)

A collection of questions asked by online attendees during a webinar hosted by our New Jersey office on 25th June 2020

UK P&I CLUB
IS MANAGED
BY **THOMAS MILLER**

People

Q: "How are Clubs assisting the owners during these Covid-19 times, as ships and crew encounter unforeseen roadblocks?

A: The Club has seen a huge number of enquiries from owners in connection with both actual ongoing problems and hypothetical scenarios. Those enquiries range from the more obvious health and safety issues, illness and death cover, quarantine, diversion and repatriation, expiry of crew contracts and ship's certificates, how to social distance and minimise risks on board ships, how to deal with shore personnel coming on board – pilots, surveyors and port officials, to the less obvious cargo related issues, delivery issues, survey issues, c/p contractual issues, force majeure, tankers being used as floating storage and ship layup questions. What is covered and what is not covered? I'm sure we will see more. I believe that the important thing though is that the Club is here as a focal point of knowledge, information and advice for such enquiries and we are here, across our worldwide network of offices, to assist as much as we can. It is a fast-changing situation in some areas so it is important to check the latest advice. Also, the Club, through the International Group, can also work with other international bodies such as the ICS to assist and lobby the IMO to issue and update the various Covid-19 Guidelines that are being put out.

In any event, I would encourage everybody to look at the dedicated Coronavirus section of our website and to review the FAQs that are there and which are being circulated as part of this webinar.

Q: What costs are covered for Covid-19 by P&I Clubs?

A: As Jeff mentioned, I would definitely refer to our FAQs on the website. There is a ton of useful information and real-life scenarios as to how Club cover would be applied to certain situations. But, in short, in addition to covering liabilities for illness or death of crewmembers and passengers, the Club will cover quarantine expenses, vessel deviation expenses, crew repatriation and substitution costs.

I'll get a bit more into each of those categories:

- As most of you know, the Club covers costs incurred by the Member for any illness or death of a crewmember. It also covers costs incurred by a Member for death or illness of a passenger where that death or illness is caused by the Member's negligence.

- In addition, the Club will cover quarantine expenses. Quarantine expenses have become especially relevant in the Covid era: Specifically, the Club will cover additional costs incurred as a direct consequence of an outbreak of Covid-19 on an entered ship. In addition to those costs already discussed, this includes quarantine and disinfection expenses as well as the cost of fuel, insurance, wages, stores, provisions and port charges that are over and above the expenses that would have been ordinarily incurred by the member but for the outbreak. It is important to note that there must be an outbreak of Covid-19 on that ship for these quarantine costs to be covered.

  - The Club will also cover the costs of quarantine when a ship is required to comply with a quarantine order by a local or national authority – so long as there is an outbreak on the ship. So say, a ship is ordered to quarantine for 30 days as opposed to the 14 days that the company was planning, the Club will cover the above costs for those extra days required by the order.

  - As mentioned above, unearned wages through the term of the contract will also be covered for both ill and healthy crewmembers so long as there is an outbreak.

  - If there is no outbreak on the ship, then the quarantine rule is not triggered and unearned wages for healthy crewmembers would not be covered.

- Another important one for the Covid era is deviation costs. If a ship needs to deviate from her intended voyage in order to get medical care for a sick person on board, the Club will cover the additional costs for fuel, insurance, wages, stores, provisions and port charges caused by that deviation. So basically costs over and above what the operational costs would have been had the ship continued on its intended route.

- Lastly, crew repatriation and substitute costs: the Club will cover the necessary repatriation and substitute expenses (basically the costs of bringing in a replacement) incurred by an owner to deal with an ill or deceased seafarer.

Q: Cover for superintendents / riding crew on the vessel?

A: These guys don't fall within the definition of a crew member as they are not employed as part of the ship's complement under the terms of a contract of service to serve on board the ship. The Club cover for personal injury, illness or death is restricted to being in respect of claims for negligence or breach of duty on the part of the ship and it follows that they would then be covered for damages/compensation for injury/loss of life; medical/funeral expenses; repatriation.

With riding crew, wherever possible, we do recommend that an indemnity be obtained from them holding the owner and/or operator harmless from any claims and require them to obtain their own medical, injury and life insurance. Owners should ask their Clubs for assistance with the text of an appropriate Letter Of Indemnity (LOI) for the riding crew to sign. (Note that it may not be enforceable in certain jurisdictions.) The Member should also ensure that the employer of the individual who will go on board has adequate insurance in place to meet its potential liabilities under the terms of the letter of indemnity.

Pollution

Q: What type of assistance does the Club provide for large oil spills? From Club, from local correspondent, type of on-scene expert services and overall management of incident and clean-up?

A: Just to recap, the Club covers the liabilities, losses, damages, costs and expenses caused by a ship source spill (bunkers or

cargo), i.e. damage caused by the pollution, clean-up and pollution prevention costs. As you will appreciate, these can be amongst the largest claims that a Club will face and the Club has a number of factors to consider including controlling and managing the spill response, controlling the financial risk exposure and in turn minimising the loss and damage to those directly affected and also the shipowner's and IG Clubs' reputation.

The key is Strategy, Co-operation and Visibility. This is achieved through the effective management of and assistance from local correspondents, oil spill responders, salvors and experts such as ITOPF and OPA'90 emergency response spill managers. In this way, a strategy and plan will be established, developed and communicated. We will also engage media response experts to monitor the media / social media interest and who will compile and provide information on the steps being taken to manage and control the spill and clean-up and take the pressure off the shipowner.

The Club's managers are also likely to regularly attend the scene and engage with authorities and officials to address local concerns. The Club will also be engaging external experts to assist in managing and settling the claims as they arise. In a recent major oil spill in the Mediterranean, the Club set up a temporary local office to assist with this and to act as a conduit for the claims.

US perspective

The Club certainly appreciates that the most expensive oil spills occur in the US (just look at the Exxon Valdez in late 80s / early 90s costing $7bn and the Deepwater Horizon costing over $60bn just a few years ago).

We are particularly attuned to the complexities and sensitivities that a pollution incident in US waters brings.
Our claims handlers are specifically trained for responding to US oil spills and each US office has a pollution specialist. In addition we maintain a 24/7 emergency line for our Members where they can always reach a US claims executive who will assist Members in activating their oil spill response plan, appointing local correspondents (with pollution response expertise), retaining experts and ensuring all necessary governmental entities are properly and timely notified. Every Member's first call should be to their QI and their second to the Club's emergency line.

Now that's what to do when disaster strikes, but we also want to help make sure our Members are prepared for such a situation in advance. So, we provide member-specific training and publications on US casualty response and environmental issues. We also often attend Member spill drills so we can assist with preparation and highlight any issues we see before such an event happens.

Charterers

Q: How does the P&I cover help charterers?

A: UKP&I Club has a very significant charterers entry. Our charterer members, be they time or voyage, slot or space, charterers, have around 100m gt entered with the club.

Charterers can find themselves with a liability for many P&I risks with cargo claims being the most common area of exposure. So, there is a mirror P&I cover for charterers, responding to the core P&I exposures that are also faced by owners. We also provide some additional charterer-specific covers including:

- cargo owners/traders extension
- extended cargo
- charterers bunkers and others.

One charterer-specific cover which does differ from owner's P&I is damage to hull (dth) cover. This is best explained by two examples:

1. The charterer provides bunkers to the ship as obliged under the time c/p. The ship breaks down and the owner alleges that the engine breakdown is due to off specification bunkers. Charterers P&I cover steps in to defend such claim under dth and will cover claims relating to, e.g. engine damage, removal and disposal of bunkers.

2. The chartered ship runs aground and the owner alleges that the port was unsafe, e.g. the channel had not been dredged and there was less water depth than advised to owners. Again, the claim is defended under dth and charterers have cover in respect of, e.g. the physical loss of or damage to the chartered ship.

Cargo

Q: There is an increasing trend that charterers are asking the vessels to wait as floating storage tanker. Is there a deviation or breach of contract of carriage for owners as the discharge port mentioned is different from the waiting location?

A: Quite possibly. This raises both c/p and B/L issues. First, check the c/p. Charterers are generally free to employ the vessel to carry cargo how they see fit and that may include orders to wait. Some tanker time c/p's expressly permit the charterers to use the vessel as floating storage, e.g. BPTime3.

Let's assume that it is a time c/p and there is no express clause. Are the orders lawful orders because owners can normally refuse orders that would place them in breach of the B/L, which will include a duty to prosecute the voyage with utmost despatch and not to deviate. Ordering the vessel to wait for months at a floating storage location which is not the named discharge portis arguably inconsistent with the charterer's rights under the c/p and owners can argue that such orders are not legitimate and can be refused. There should be an implied indemnity in owner's favour for the consequences of complying with charterer's orders.

The position under the B/L is important and cargo owners need to agree to floating storage as does the Club. Do charterers have cargo owners' agreement?

Under a voyage charter there is a bigger problem as the c/p usually defines the load and discharge ports and requires utmost despatch on customary route, i.e. no deviation. Again,

look for any express provision in the c/p but without it there may be a breach of the B/L here. It might be possible to argue for an implied indemnity but it is harder under a voyage c/p. Therefore, owners would likely want to refuse such orders.

Finally, will the Club cover any deviation? It will depend upon all the facts but we may propose additional cover at an additional premium but only after reviewing and advising upon the full situation.

Q: Cargo: What is the problem in accepting P&I Club approved LOI from charterers?

A: First, very briefly, what is an LOI and why is it used? An LOI is an agreement whereby the issuer (charterer) requests the recipient (shipowner) to do or refrain from doing something in exchange for an indemnity for any losses that may result from complying with that request.

The common situations covered by Club approved (and we are talking about a form of wording approved by the IG Clubs) are 1) in return for delivering cargo without production of the original B/L; 2) delivering cargo at a port other than that stated in the B/L; 3) delivering cargo at a port other than that stated in the B/L and without production of the original B/L.

It is fundamentally important to note that Club approved LOI wording does not mean that the Club will cover the request being made. The LOI is to replace Club cover. It plugs the hole in P&I cover that is created when an owner feels commercially compelled to, e.g. deliver the cargo without presentation of B/Ls.

It is necessary to bear in mind the following problems and issues: Does the charterer giving the LOI have the financial backing to come good on the LOI if you have to call upon it? Can it be enforced? A Court may refuse to enforce the LOI on the ground of illegality or public policy.

In any event, consult the Club for assistance and guidance. For the more academically minded and for those with particular concern or interest in this area, there have been some English law cases in recent years that highlight the pitfalls. See:

The Bremen Max (2009) – relating to the wording of the standard LOI and questioning the identity of the party able to take delivery of the cargo in accordance with the LOI.

The Zagora (2017) – if actual delivery to Party A is not satisfied will the LOI be engaged if the owner believed the party to whom delivery was made was or was representing party A – even if the owner in the end was wrong? (Answer = yes)

The Songa Winds (2018) – emphasising that owners must take all necessary steps to ensure that they have a sound basis for delivering cargo to a particular party, backed up by relevant contemporaneous correspondence.

Q: At the load port, if there is a large ship/shore difference but terminal refuses to accept ship's figure, what can owners do?

A: The terminal is likely to insist that their figure is used as it will be under an obligation to load a certain amount of cargo as per the underlying sales contract and there may be issues with the letter of credit in connection with which figure is used. However, the master may refuse to sign a bill which he reasonably suspects contains inaccurate information.

What to do? Alert the Club. It may be appropriate to appoint a surveyor to assist the master and check the figures. If the terminal's figure exceeds the ship's figure by more than the customary allowance (generally 0.5% on bulk and 0.3% on liquid) the master should insist that the ship's figures be inserted on the B/L or the B/L is claused to say what the ship's figures are as determined by draft survey or ullage. If the master fails to do so then Club cover may be discretionary. If the master accepts the shore figures in return for an LOI which may not be enforceable there may also be issues for Club cover in the event that a claim is brought at the discharge port.

It may also be necessary to engage a local lawyer to advise on whether there are any remedies through the local court. The big concern here is delay to the ship and the owners will not want to incur potential losses due to delays in awaiting a local court decision or to negotiate an agreed outcome. There is often no easy fix here and it is important to involve the Club at every stage.

For the more academic amongst you or if you have a particular interest in this area there is an interesting English law case called the "Boukadoura" (1989) that sets out the problems and issues.

Fines and operations

Q: How does the Club decide which fine is covered and which is not?

A: Certain fines are generally covered by the Club as of right. They are:

- Fines for short or overlanding of cargo or failure to comply with regulations relating to the declaration of goods or documentation of cargo.
- Fines for smuggling or any infringement of any custom law or regulation other than in relation to cargo.
- Fines for contravention of any law or regulation relating to immigration.
- Fines for the accidental escape or discharge of oil, although this does not extend to fines relating to Marpol violations.

So, those are generally covered as of right and this is based on a model rule that was agreed between the P&I Clubs that are party to the Pooling Agreement many years ago with the aim being to strike a balance between, on the one hand, accidental or non-deliberate infringements that are considered difficult to avoid given the trading environment and on the other hand, those infringements which an owner should have taken steps to avoid and which are not considered to be mutual risks but risks that should be for the owner's own account.

The Club has the discretion to cover other fines which are not covered as of right, where the owner has satisfied the Club's Directors that he took reasonable steps to avoid the event giving rise to the fine. The Directors can exercise their discretion to award all or part of the fine, without having to provide reasons for their decision. The Club's managers do have some delegated authority to consider such fines up to a certain value.

When presented with a claim seeking discretionary cover, there are no hard and fast rules but there will need to be full investigation of the circumstances giving rise to the fine before any decision on cover can be taken. A decision may be quite straightforward in some cases such as a breach of port or health authority regulations or contravention of a traffic separation zone. It is more difficult where it relates to the condition of the ship, e.g. a PSC detention, fines relating to criminal actions of the crew, OWS (oily water separator) violations – often apparent from discrepancies found in the oil record book. It is important that the facts are carefully investigated to review what procedures the owner had in place to avoid the fine and what steps they have taken to prevent such issues taking place before any decision to cover is reached.

In addition, while we may not cover criminal fines or costs incidental to a criminal investigation, our US offices maintain a database of local resources that may be helpful to the member, such as criminal counsel and experts.

Q: Some claims are raised due to indirect results of a vessel not paying a bribe. How does the Club handle this?

A: We hold a "zero tolerance" stance towards bribery. Bribery is illegal and consequently the Club can have no part in countenancing such a payment. We are of course well aware of the high risk countries and we continue to see instances where an initial refusal to pay a bribe then turns into a claim being brought against the vessel – usually in the form of a fine. We then get a bribe masquerading as a fine.

Clearly, we still want to assist the member in such circumstances. We see fines imposed that are totally disproportionate to any offence. They are often combined with threats of detention of the vessel and crew. We will work with the owners, assisted by local correspondent and lawyer as necessary to challenge the fines as presented and obtain a satisfactory settlement but I would emphasise that the Club cannot reimburse an outright bribe.

Q: How has the Club dealt with IMO 2020 Sulphur cap so far, in terms of claims and effectiveness in complying with emission requirements where scrubbers were installed?

A: This was of course to be the key issue for shipowners for 2020. It started off that way but was obviously quickly overtaken by Coronavirus issues. However, the Sulphur cap has not gone away.

Whilst it has not gone away, I think it is correct to say that due to the significant reduction in shipboard inspections we have perhaps not been seeing the test for exceeding sulphur limits or contravening the carriage ban that we might have expected. I can also say that the fines seen by the Club for breach of the Sulphur cap regulations have been few.

As regards scrubbers, this Club has not heard of scrubber issues resulting in accidental pollution claims and fines yet. How the Club has dealt with this is in more as a conduit for information and guidance – both technical and contractual with our sister organisation, the UK Defence Club dealing charterparty issues. The usual technical issues with scrubbers are sensor or control system failures, at times material or weld defects due to excessive corrosion and poorly supported pipelines leading to vibrations and failures.

Currently, most port state inspection regimes are in some sort of slowdown mode resulting in fewer inspections. PSC officers are also still learning about scrubbers and there can be many different types. But there are possibilities of issues, generally there will be additional built in systems and methods to verify compliance in case of single emission or wash water sensor failure. Sensors can give wrong or higher readings during plant start up or due to change in load. Crew will need to log fluctuations in the EGS record book, details of scenarios for logging will be available in the Scrubber technical manual. Trained crew will be able to understand the abnormalities, they will also have the option to correct the situation with first one hours, if not report to flag/PSC and change over to compliant fuel. Most scrubbers also have a tamper proof data logger, recording every alarm/trip, timings. Sensors will have calibration requirements.

Similar to other Marpol equipment like OWS, accidental discharge will not be so easy. Crew will have to act with negligence (or intentionally) for things to go wrong and get arrested/fined. There can be scenarios where crew will operate the scrubber where wash water discharge is not allowed, this can be due to negligence or intentional. Also whistle blowing can happen. Some scrubbers are not approved for operating in US waters due to stricter wash water discharge criteria, but crew might still operate and get fined.

Collision and FFO

Q: How does collision cover work with P&I and H&M? Relations between P&I/H&M?

A: The standard position is that with collision liability the Club covers ¼ and H&M ¾ of liabilities but it is not uncommon for the Club to agree terms on 4/4 or indeed for the owners to have full collision cover under H&M.

Even where the Club may be carrying only 25% of the risk it may well be that the Club takes the claims lead. One reason for the Club taking the lead is that, taking into account other aspects of the claims, the Club is often taking the largest share of the loss. The Club keeps H&M underwriters (usually through the broker or lead underwriter) advised of all developments and are involved in any decisions relevant to hull cover.

As for securing the claims, again the Club will work closely with H&M. The Club will often post security for the full ship's liability even though only liable for ¼. This is worked out by the Club taking counter security from the H&M interests for their ¾ proportion.

There needs to be close interaction between the Club and H&M not least because the laws of most countries provide that each vessel's claims arising from a collision will be set off to produce a single net balance payable by one ship to the other. This is known as the single liability principle. However, that can lead to difficulties in relation to settlements between the shipowner and different underwriters. So, we need to work with H&M to establish a cross liability settlement rather than a single net payment to ensure that the actual ship liabilities are properly paid by the relevant insurers, i.e. on the 1/4, 3/4 basis.

Q: Terminal alleges that the vessel damaged fender and bollard but it was very old and looked damaged already. How can owners fight the claim?

A: First call us. Then we will help you get a local surveyor involved right away. Careful investigation by the surveyor can often reveal pre-existing damage or deterioration. In most situations, it will be best to get a joint survey with the terminal owner's surveyor in order to try to get agreement on the extent of the damage and what is old and new damage.

If it is a significant claim then we are likely to get a structural engineer involved at the outset. Also, in the US, we would often recommend getting an experienced attorney involved if the damage is significant. In most situations, terminals have little recourse against a ship once it sails away so the threat of arrest is very real and we want to be primed and ready to deal with that situation should it come to that.

As a practical matter, the vessel should be vigilant about the condition and suitability of the port facilities before berthing. When a pilot comes on board, he should be asked whether he is aware of any existing damage to the fenders at the berth and his response should be recorded. If it is suspected that claims may be made for pre-existing damage, the master is recommended to draw the port authority's attention to the damage and record details in the log book with photos / videos that may prove useful in challenging any unjustified claim. On the other hand, in certain jurisdiction, this could potentially invite the port authority to bring a claim. So you should always refer the matter to the Club and local correspondent for advice.

General Average

Q: Do Clubs cover GA? Discuss the scope of GA cover.

A: Yes, this is best shown by way of an example. Cargo is loaded on a ship. The ship grounds while exiting the port. Tugs are engaged and the ship is refloated and towed back to port for temporary repairs to continue the voyage. The owners declare GA. The owner puts his GA claim together and the GA Adjuster produces the Adjustment which he then sends to the cargo owner together with an invoice for their contribution to GA.

The cargo owner says, hang on a minute, we can't understand how the ship came to ground there. We believe the vessel was unseaworthy – lack of proper passage plan and/or the master was incompetent. We are not paying anything.

It follows that where the cargo interests can show that the casualty which gave rise to the GA act was caused by the owner's actionable fault; i.e. failure to make the vessel seaworthy then owners are in breach of the contract of carriage and on that basis the cargo owner does not need to contribute to GA.

However, that is not the end of it as the owner is entitled to claim from the Club the unrecoverable general average contributions, i.e. the proportion of GA which an owner may be entitled to claim from cargo or from some other party to the marine adventure and which is not legally recoverable solely by reason of a breach of the contract of carriage. However, I would emphasise the words "solely by reason of a breach of the contract of carriage". That is a prerequisite for any recovery from the Club.

US Litigation

Q: Does the Club's assistance in and management of incident investigations and matters in litigation pose any privilege issues for the Member?

A: While every state has its own privilege laws, in general, a claims handler's communications with a Member, a surveyor appointed on behalf of a Member or outside counsel are typically protected by the attorney-client privilege so long as they involve discussions about a matter that will most likely end up in litigation. In addition, insurance claims files are often protected from discovery by work-product doctrine as "material prepared in anticipation of litigation."

In most states, this same privilege is not afforded to insurance brokers or Member's employees who are not at the management level so we really have kind of a unique ability to act as a sounding board for our Member's in-house legal team and/or in-house claims handlers. Perhaps to some outside counsel's annoyance, we really do think of ourselves as part of the team and want to help in developing legal strategy and handling of various matters for our Members.

The Thomas Miller Americas team are available to discuss all your P&I Club and Cover questions or comments in greater detail. Please don't hesitate to contact us any time.

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