

Agreement (and the General Excess Loss Contract where appropriate) even where a court subsequently finds that there has been a deviation and consequently denies defences or limits;

- (iii) an individual Association may, if it wishes, arrange fall-back protection for the Association (and/or its excess loss reinsurance) to cover the possibility that a situation accepted by it leads to a larger claim than anticipated because of such a finding by a court, but there shall not be any obligation upon any individual Association to arrange such fall-back protection.

There follow by way of Guidelines a number of examples of potential deviation situations to illustrate the way in which Associations would, *prima facie*, exercise the discretion under proviso (i) above.

This list has to be treated with caution. It is intended to be a list of example situations to test how such situations should, *prima facie*, be treated. Some of the examples are situations which are justified departures as a matter of law. Others may rely for justification upon there being a relevant and appropriately drafted liberty clause or where there is a clearly established custom of the trade, both of which will be highly relevant considerations.

Where the justification for a deviation or departure is less clear, a further and paramount consideration should be the commercial advantage or convenience to the carrier relative to the commercial disadvantage or risk to other interests i.e. the greater the commercial advantage or convenience to the carrier relative to the commercial disadvantage/inconvenience to the venture as a whole, the less a Club should exercise discretion in favour of the member. This should be taken as a KEY GUIDING PRINCIPLE whenever there is doubt about whether a particular situation falls comfortably within one of the examples below, or where the example specifically requires the key guiding principle to be taken into consideration.

Managers faced with a potential deviation will take into account the existence of laws in various countries which are particularly unfavourable to shipowners. Bearing in mind, however, that the decisions have to be taken quickly and on information which may not be as full as we should like, it is common ground that it will be reasonable for the Managers of an Association to test particular situations in accordance with their knowledge of the law prevailing in their own countries unless it is immediately obvious to them, on the facts then known, that it is likely that another law will apply, which other law is already known by them to impose a heavier burden on the shipowner in such a situation.

*Prima facie*, the following types of situation could be expected to be treated as falling within Association cover.

- (a) A Member operating in a liner service between Europe and the USA with advertised ports of call being New York, Philadelphia and New Orleans, where the bills of lading contain a typical liberty clause found in liner services, discharges cargo to be contractually delivered at Philadelphia at another customary port or place and forwards it to Philadelphia by any other customary means.
- (b) Minor departures from the geographical route of the vessel's contracted voyage(s) relating to bunkering in whole or in part for the voyage being performed.
- (c) Minor departures from the geographical route of the vessel's contracted voyage(s) such as those relating to crew changes, taking on spares, stores or supplies, minor repairs, minor surveys, bunkering, taking on or disembarking supernumeraries or other personnel for operational reasons, landing of stowaways, ballast water exchange or slowing down for any of the reasons provided that approval in any such case will not be inconsistent with the key guiding principle described above.
- (d) A vessel calls at the nearest available port or place or other customary port or place on the vessel's contracted voyage to carry out repairs necessary for the safe completion of a cargo voyage whether or not the repairs arise in respect of a general average event.
- (e) The vessel calls at any place or port off the customary route or departs from the customary route to save life or property or to protect the environment or to land persons saved at sea or to embark or disembark security personnel or otherwise avoid or reduce the risk of piracy on the contracted voyage.
- (f) A vessel slow / economically steams if the contract of carriage incorporates an appropriate liberty clause or it is customary to do so at the time the voyage is undertaken and in the particular trade or on the particular voyage route or if there is congestion at the contracted destination provided that approval in any such case will not be inconsistent with the key guiding principle described above.
- (g) The situation appears to be covered by an appropriately drafted liberty clause in or incorporated in the bill of lading or applicable contract of carriage.

- (h) The situation appears to be within a custom of the trade.

On the other hand the following situations should probably fall outside Association cover and be subject to separate insurance.

- (i) A vessel calls at a port or place for the purposes of major repairs, dry docking, or major surveys which are not necessary for the contracted voyage.
- (j) A vessel slow / economically steams or stops short of the contracted place of discharge in order to exercise a lien on cargo and the contract of carriage does not contain an express liberty clause permitting it to do so.
- (k) Subject to (f) above, a vessel slow / economically steams in order to conserve fuel and the contract of carriage does not contain an express liberty clause permitting it to do so.
- (l) A vessel departs either geographically or otherwise from the contracted voyage or through or combined transport such that approval in any such case would be inconsistent with the key guiding principle described above.
- (m) At the time the decision is made to depart geographically or otherwise from the contractual voyage there exists an unreasonable increase in the risk of loss or damage to the cargo as a result of such departure. For instance the cargo is perishable.
- (n) A liner owner has a direct service from Hong Kong to Europe: he gives a bill of lading for cargo from Korea intending to tranship onto his own liner at Hong Kong but gives no indication on the face of the bill, which names his Hong Kong liner as the carrying ship, that in fact the cargo will be carried from Korea to Hong Kong by feeder service.
- (o) A liner owner loads cargo despite a prior decision that after loading he will enter dry-dock to carry out repairs or survey work.

#### 14. Cargo Claims

Liabilities, costs and expenses in respect of the carriage of cargo arising out of any of the following save insofar as and to the extent only that the Insured Owner satisfies the Directors of an Association that it took such steps as appear to those Directors reasonable to avoid the event or circumstances giving rise to such liabilities, costs and expenses:

- (a) Discharge of cargo at a port or place other than the port or place provided in the contract of carriage.
- (b)
  - (i) Delivery of cargo carried under a negotiable bill of lading or similar document of title (including an electronic bill of lading<sup>16</sup>) without production (or the equivalent thereof in the case of an electronic bill of lading) of that bill of lading or document by the person to whom delivery is made except where cargo has been carried on an Insured Owner's vessel
    - under the terms of a non-negotiable bill of lading, waybill or other non-negotiable document, and has been properly delivered as required by that document, notwithstanding that that Insured Owner may be liable under the terms of a negotiable bill of lading or other similar document of title issued by or on behalf of a party other than that Insured Owner

<sup>16</sup> Proper delivery is required in the case of an electronic bill of lading as with a conventional bill of lading. See also Appendix V paragraph 28 which excludes certain liabilities arising under an electronic trading system that has not been approved.

providing for carriage in part upon that Insured Owner's vessel and in part by another mode of transport<sup>17</sup>.

- under the terms of an approved electronic trading system and has been properly delivered to the person so entitled in accordance therewith<sup>18</sup>.
- (ii) Delivery of cargo carried under a non-negotiable bill of lading, waybill or similar document without production of such document by the person to whom delivery is made, where such production is required by the express terms of that document or the law to which that document, or the contract of carriage contained in or evidenced by it, is subject, except where the Insured Owner is required by any other law to which the Insured Owner is subject to deliver, or relinquish custody or control of, the cargo, without production of such document.
- (c) The issue of an ante dated or post dated bill of lading, waybill or other document containing or evidencing the contract of carriage, that is to say a bill of lading, waybill or other document recording the loading or shipment or receipt for shipment on a date prior or subsequent to the date on which the cargo was in fact loaded, shipped or received as the case may be.
- (d) A bill of lading, waybill or other document containing or evidencing the contract of carriage issued with the knowledge of the Insured Owner or his master with an incorrect description of the cargo or its quantity or its condition.
- (e) The failure to arrive or late arrival of the Insured Vessel at a port of loading, or the failure to load or delay in loading any particular cargo or cargoes in the Insured Vessel, other than any such liabilities, costs and expenses arising under a Bill of Lading already issued.
- (f) Carriage under an ad valorem bill of lading or other document of title, waybill or other contract of carriage in which a value of more than two thousand five hundred Dollars (\$2,500) (or the equivalent in any other currency) is declared and/or inserted by reference to a unit, piece, package or otherwise, where the effect of such a declaration/ insertion is to deprive the carrier of any right or rights of limitation to which he would otherwise have been entitled and cause him to incur a greater liability than he would have done but for such declaration/insertion, to the extent that such liability thereby exceeds two thousand five hundred Dollars (\$2,500) (or the equivalent in any other currency) in respect of any such unit, piece or package.

<sup>17</sup> This exception is intended to give cover to an Insured Owner who issues a non-negotiable bill of lading etc. in respect of cargo carried on a feeder vessel and who is found liable under a negotiable ocean bill of lading issued by the ocean carrier who had subcontracted part of the carriage to the feeder vessel.

<sup>18</sup> The exception is intended to give cover to an Insured Owner in respect of mis-delivery claims which arise even though delivery has been made to the person entitled to take delivery under the rules of the approved electronic trading system.

15. Specie etc.

Liabilities, costs or expense arising out of the carriage of specie, bullion, precious or rare metals or stone, plate or other objects of a rare or precious nature, bank notes or other forms of currency, bonds or other negotiable instruments, whether carried as cargo or as passengers' baggage or as crew's effects and whether the value is declared or not, unless in any such case the Managers of the Association have been notified prior to any such carriage, and any directions made by the Managers have been complied with.

16. Towage by an Insured Vessel

Liability for loss of or damage to or wreck removal of a vessel or other floating structure towed by an Insured Vessel or the cargo or other property on such tow (together with costs and expenses associated therewith), save insofar as either

(a) the towage or attempt thereat is made for the purpose of saving or attempting to save life or property at sea, or

(b) the Insured Vessel is towing under a contract approved by the Association in the exercise of a discretion under its Rules, provided that in the exercise of any such discretion the Association shall take account of the following Guidelines<sup>19</sup>:

## (A) Market Forms of Towage Contracts

The following contracts are acceptable:

- (a) United Kingdom, Netherlands and Scandinavian standard towage conditions.
- (b) Towcon and Towhire.
- (c) The current Lloyd's standard form of salvage agreement (1980, 1990, 1995, 2000 or 2011, whether or not incorporating SCOPIC) - no cure, no pay.

## (B) Other Acceptable Towage Contracts

- (a) Contracts containing similar exclusions of liability clauses to those in the contracts specified in Guideline (A).
- (b) Contracts incorporating a term as between the Insured Owner of the Insured Vessel on the one part, and the owner of the tow and the owners of any cargo or other property on board the tow on the other part, that each shall be responsible for any loss or damage to his own ship, cargo or property and for loss of life or personal injury on his own ship, without any recourse whatsoever against the other.
- (c) Other contracts where
  - (i) a term or terms of the contract complying with Guideline (B)(b) is or is likely to be unlawful or unenforceable in whole or in part, and

<sup>19</sup> Note also that certain towage operations may constitute specialist operations excluded by Appendix V paragraph 18.

- (ii) the contract does not impose on the Insured Owner any liability to any person arising out of any act, neglect or default of the owner of the tow or any other person; and
- (iii) the contract limits the liability of the Insured Owner under the contract or otherwise to the maximum extent possible by law.

(C) Supply Boat Charters

If the Insured Vessel is working under a time charter and there is no contract between the Insured Owner and the owner of the tow, then liability for loss of or damage to or wreck removal of a towed object and/or property on board shall only be covered provided the Association concerned has approved in writing the charter which in their opinion contains:

- (a) a clause in terms set out in Guideline (B)(b) above covering the property of sub-contractors of the charterers as well as the property of the charterers themselves, or
- (b) a separate clause requiring that all towage be carried out on terms no worse than as provided in Guideline (B)(b); or
- (c) it otherwise complies with the requirements of Guideline B(c).

(D) As a general rule, an Association should ensure that, so far as possible, the Insured Owner:

- (a) includes in the towage contract, charterparty or other agreement under which the Insured Vessel is employed, a "Himalaya Clause"; or
- (b) that the towage contract, charterparty or other agreement under which the Insured Vessel is employed includes a clause specifying that any other contract entered into by the charterer or other contracting party with any other third party shall contain a "Himalaya Clause".

A Himalaya Clause is a clause stipulating that the servant, agent, or independent contractor employed by the contracting party shall be entitled to the protection and benefit of every right, exemption, limitation, immunity or defence available to that contracting party and that the contracting party is contracting not only on his own behalf but as agent or trustee for such persons.

17. Towage of an Insured Vessel

Liabilities, costs and expenses incurred under or pursuant to the terms of a contract for the towage of an Insured Vessel other than

- (a) a contract entered into for the purpose of entering or leaving port, or manoeuvring within the port, during the ordinary course of trading; and
- (b) a contract entered into in the ordinary course of trading of the Insured Vessel, being a vessel which is habitually towed from port to port or from place to place provided always that
  - (i) such liabilities, costs and expenses shall only be capable of giving rise to Pool Claims to the extent that the Insured Owner is not insured against such liabilities, costs and expenses under the hull policies on the Insured Vessel, and

- (ii) such Insured Vessel has been so declared to the Association with which it is entered; and
- (c) towage under Lloyd's Open Form of Salvage Agreement (1980, 1990, 1995, 2000 or 2011, whether or not incorporating SCOPIC ) or any other form of salvage contract approved by the Association with which the Insured Vessel is entered; and
- (d) a contract incorporating a term to the effect that each of the Insured Owner of the Insured Vessel and the owner of the towing vessel shall be responsible for any loss or damage to his own vessel, and for loss of life or personal injury on his own vessel, without any recourse whatsoever against the other

18. Specialist operations

Liabilities, costs and expenses incurred by an Insured Owner during the course of performing specialist operations including but not limited to dredging, blasting, pile-driving, well-stimulation, cable or pipelaying, construction, installation or maintenance work, core sampling, depositing of spoil, professional oil spill response or professional oil spill response training and tank cleaning (otherwise than on the Insured Vessel) (but excluding fire-fighting) to the extent that such liabilities, costs and expenses arise as a consequence of:

- (a) claims brought by any party for whose benefit the work has been performed, or by any third party (whether connected with any party for whose benefit the work has been performed or not), in respect of the specialist nature of the operations; or
- (b) the failure to perform such specialist operations by the Insured Owner or the fitness for purpose or quality of the Insured Owner's work, products or services; or
- (c) any loss of or damage to the contract work.

Provided always that this exclusion shall not apply to liabilities, costs and expenses incurred by an Insured Owner in respect of:

- (i) loss of life, injury or illness of crew and other personnel on board the Insured Vessel; or
- (ii) the wreck removal of the Insured Vessel; or
- (iii) oil pollution emanating from the Insured Vessel or the threat thereof,

but only to the extent that such liabilities, costs and expenses are covered by the relevant Association in accordance with its rules.

19. Drilling and production operations

- (a) Liabilities, costs and expenses incurred in respect of an insured Vessel carrying out drilling or production operations in connection with oil or gas exploration or production, including any accommodation unit moored or positioned on site as an integral part of any such operations, to the extent that such liabilities, costs or expenses arise out of or during drilling or production operations.
- (b) For the purposes of paragraph 19(a) above:
  - (i) an insured Vessel shall be deemed to be carrying out production operations if (inter alia) it is a storage tanker or other vessel engaged in the storage of oil, and either:
    - (ia) the oil is transferred directly from a producing well to the storage vessel; or
    - (ib) the storage vessel has oil and gas separation equipment on board and gas is being separated from oil whilst on board the storage vessel other than by natural venting; and
  - (ii) in respect of any Insured Vessel employed to carry out production operations in connection with oil or gas production, the exclusion shall apply from the time that a connection, whether directly or indirectly, has been established between the Insured Vessel and the well pursuant to a contract under which the Insured Vessel is employed, until such time that the Insured Vessel is finally disconnected from the well in accordance with that contract.

20. Waste disposal and sub-sea activities

Liabilities, costs and expenses incurred by an Insured Owner in connection with any claim brought against it arising out of

- (a) waste incineration or disposal operations carried out by the Insured Vessel (other than any such operations carried out as an incidental part of other commercial activities, not being specialist operations); or
- (b) the operation by the Insured Owner of submarines, mini-submarines or diving bells; or
- (c) the activities of professional or commercial divers where the Insured Owner is responsible for such activities, other than
  - (i) activities arising out of salvage operations being conducted by an Insured Vessel where the divers form part of the crew of that Insured Vessel (or of diving bells or other similar equipment or craft operating from the Insured Vessel) and where the Insured Owner of that Insured



Vessel (being an Insured Owner within category 1 of Appendix I) is responsible for the activities of such divers; and

- (ii) incidental diving operations carried out in relation to the inspection, repair or maintenance of the Insured Vessel or in relation to damage caused by the Insured Vessel; and
- (iii) recreational diving activities.

21. Refugees

Consequential loss of profit or depreciation arising from the rescue of refugees.

22. Passengers

Liabilities, costs and expenses incurred by an Insured Owner of an Insured Vessel,

- (a) in respect of a passenger of the Insured Vessel, other than liability to pay damages or compensation for personal injury, illness or death of that passenger (including any resulting deviation and repatriation expenses) or for loss of or damage to his property, save to the extent that such liabilities, costs and expenses relate to a passenger on board the Insured Vessel and result from an incident or condition onboard involving either:
  - (i) collision, stranding, explosion, fire or any other cause affecting the physical condition of the Insured Vessel so as to render it incapable of safe navigation to its intended destination; or
  - (ii) a threat to the life, health or safety of passengers; or
- (b) under contract in respect of passengers on the relevant Insured Vessel whilst on an excursion from the Insured Vessel in circumstances where either:
  - (i) a separate contract has been entered into by the passenger for the excursion whether or not with the Insured Owner; or
  - (ii) the Insured Owner has waived any or all of his rights of recourse against any sub-contractor or other third party in respect of the excursion; or
- (c) in respect of any passenger of the Insured Vessel by reason of carriage of that passenger by air except where such liabilities, costs and expenses occur either:
  - (i) during the repatriation by air of an injured or sick passenger or of a passenger following an incident involving the Insured Vessel as provided in paragraph (a) above; or
  - (ii) subject to paragraph (b) above, during excursions from the Insured Vessel.



23. Non-marine personnel

Liabilities, costs and expenses incurred by an Insured Owner of an Insured Vessel in respect of any of the following:-

- (a) personnel (other than marine crew) on board the Insured Vessel (being an accommodation vessel) employed otherwise than by the Insured Owner where there has not been a contractual allocation of risks as between the Insured Owner and the employer of the personnel which has been approved by the Association with which the Insured Vessel is entered;
- (b) hotel and restaurant guests and other visitors and catering crew of the Insured Vessel when the Insured Vessel is moored (otherwise than on a temporary basis) and is open to the public as a hotel, restaurant, bar or other place of entertainment.

24. Salvage operations

Liabilities, costs and expenses arising out of salvage operations (including for the purpose of this paragraph, wreck removal) conducted by an Insured Vessel or provided by an Insured Owner, other than

- (a) liabilities, costs and expenses arising out of salvage operations conducted by an Insured Vessel for the purpose of saving or attempting to save life at sea; and
- (b) liabilities, costs and expenses incurred by an Insured Owner (being a professional salvor) which are covered by a special agreement between that Insured Owner and its Association or Reinsured Entity, and which arise out of the operation of, and in respect of that Insured Owner's interest in an Insured Vessel<sup>20</sup>.

25. Cover for cargo etc.

Losses incurred by an Insured Owner in a capacity other than the capacity ("the insured capacity") in which it has effected an Entry with the relevant Association or Reinsured Entity, including (without limitation) any losses incurred by an Insured Owner in its capacity as an owner of cargo, save to the extent that, had those losses been incurred by another person, that person would have been entitled to claim against the Insured Owner in its insured capacity.

26. Pollution charges and general average

Liabilities, losses, costs and expenses arising out of or in respect of the escape or discharge or threatened escape or discharge of any substance from the Insured Vessel where:

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<sup>20</sup> Separate cover has been arranged on behalf of International Group Associations for oil pollution liabilities arising out of salvage operations carried out in the absence of an Insured Vessel by a professional salvor which has a special agreement with the Association (or Reinsured Entity) by which it is insured. The cover is subject to an excess of US\$375,000 and a limit of US\$100,000,000

- (a) the claim in respect thereof by the Insured Owner on the Association is made as a claim otherwise than in respect of general average, and
- (b) either
  - (i) the liability, loss, cost or expense is recoverable in general average under the terms of the contract of carriage, or
  - (ii) the liability, loss, cost or expense is not allowable in general average under the terms of the contract of carriage but would be so allowable if the contract of carriage had incorporated the unamended York Antwerp Rules.

27. Heavy lift

Loss of or damage to or wreck removal of cargo carried on a semi-submersible heavy lift vessel or any other vessel designed exclusively for the carriage of heavy lift cargo, save to the extent that such cargo is being carried under the terms of a contract on Heavycon terms or any other terms approved by the Association.

28. Paperless trading

Liabilities, losses, costs and expenses arising from the use of any electronic trading system, other than an approved<sup>21</sup> electronic trading system, to the extent that such liabilities, losses, costs and expenses would not (save insofar as an Association in its sole discretion otherwise determines) have arisen under a paper trading system.

For the purposes of this paragraph,

- (a) an electronic trading system is any system which replaces or is intended to replace paper documents used for the sale of goods and/or their carriage by sea or partly by sea and other means of transport and which:
  - (i) are documents of title, or
  - (ii) entitle the holder to delivery or possession of the goods referred to in such documents, or
  - (iii) evidence a contract of carriage under which the rights and obligations of either of the contracting parties may be transferred to a third party.
- (b) a “document” shall mean anything in which information of any description is recorded including, but not limited to, computer or other electronically generated information.

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<sup>21</sup> A list of approved electronic trading systems is available at the Secretariat and cargo liabilities arising from the use of such approved systems are poolable, subject to the other provisions of the Pooling Agreement – see, for example, Appendix V, paragraph 14.