

# Environmental liabilities: a question of reasonableness



**Helen Belgrano Operto**  
Average Adjuster

+44 20 7398 5301  
helen.belgrano-operto@rhl-ct.com



**Benjamin Gibbs**  
Average Adjuster

+44 20 7015 2031  
benjamin.gibbs@rhl-ct.com

## General and particular average defined

Section 66 of the Marine Insurance Act 1906 provides that a general average loss is a loss caused by or directly consequential on a general average act. There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure. In contrast, section 64 defines a particular average loss as a partial loss of the subject matter insured, caused by a peril insured against, and which is not a general average loss, a salvage charge or sue and labour.

Situations in which pollution-related costs can be recovered in general average (GA) have been discussed in our previous article in Standard bulletin, March 2015, *Environmental liabilities: a question of motive*. We will now consider when the costs of cleaning up pollution in dry dock may be covered by particular average (PA).

## Case study

A vessel, sailing in ballast, suffers a serious grounding. A diver's inspection reveals extensive bottom damage; however, the water pressure is holding the bunkers in the breached bottom tanks and there is no actual leakage. The vessel is towed to a local shipyard for repairs and enters dry dock. Considerable expenditure is incurred to:

- carry out tank cleaning in all areas adjacent to planned hot work;
- remove bunker residues from undamaged areas of the exterior shell plating; and
- clean the dry dock and its pumping facilities.

We will consider each cost in turn.

## Tank cleaning

There is a long-standing practice stating that it is necessary to clean cargo or bunker tanks in order to do repairs, and it is now largely uncontroversial that these costs form part of the cost of repairs. The Association of Average Adjusters Rule of Practice D6 provides guidance on how these costs should be divided when both damage repairs and owners' work are being carried out. If bunkers have escaped and have formed a coating over parts of a hull, and this needs to be cleaned before

hot works can be carried out, the cost of doing so would likely be recoverable as part of the cost of repairs.

## Bunker residues

If undamaged areas of plating are covered with bunker residues, can the cost of removing those bunker residues be recovered? This question arose in the *Orjula*,<sup>1</sup> where several drums of acid began leaking because they had been badly stowed. The shipowners sought to recover from the charterers the cost of cleaning the deck of acid, whilst the charterers argued that there had been no physical damage to the vessel because the acid did not penetrate the deck material and so the cost should fall on the shipowners. The judge decided that the ship had been damaged 'by reason of her contamination'.

It follows that the cost of cleaning bunker residues from undamaged areas of exterior shell plating is likely to constitute physical damage to the ship and may be recoverable in PA on that basis.

<sup>1</sup> The *Orjula* [1995] 2 Lloyd's Rep. 395

2 The *Medina Princess* [1962] 2 Lloyd's Rep. 17

### A question of reasonableness

The final scenario involves the cleaning of a dry dock and its pumping facilities. Unlike the other examples, the damage happened to something other than the ship itself; therefore, the recovery cannot be based on damage to the ship and we must consider what the reasonable cost of repairs is. A very significant case which assists is the *Medina Princess*.<sup>2</sup> The plaintiff owners were looking to prove a constructive total loss and much of the several-hundred page judgment concerns which costs could be brought in as part of the reasonable cost of repairs. Mr Justice Roskill stated that the correct approach to adopt when calculating the reasonable cost of repairs is to consider 'what would have to be expended to put the ship right'. On the facts, a cost which must be incurred to put a ship right is to put it into dry dock. Part of

the expense of putting the ship into dry dock would be the cost of tugs and mooring, which would form part of the cost of repairs. Additionally, we know that the vessel has damaged tanks and that they will leak oil into the dry dock – this is foreseeable. The oil will need to be cleaned from the dry dock's walls and pumping equipment.

In this example, it is quite clear that the cost of cleaning the dry dock is as much a part of the cost of entering a dry dock as the cost of tugs and mooring, and therefore forms part of the cost of repairs.

Whilst the above are all examples where pollution costs may be recovered in PA, the position is by no means straightforward and each case will need to be reviewed on its own merits.

