

Discretionary claims

This article looks at the types of discretionary claims and the process for members applying for their claim to be approved by the board.



James Bean
Managing Director,
Standard Europe
T +44 20 3320 8811
E james.bean@ctplc.com

What are discretionary claims? Introduction

A discretionary claim or claim for consideration is one that the managers have no power to agree to pay and only the board may approve.

There are three types of discretionary claims:

- (a) Those triggered by provisos to cover under specific rules. For example, exclusions 1-13 to rule 3.13 relating to cargo liabilities.
- (b) Those arising under specific rules. For example, discretionary fines arising under rule 3.16.4 and omnibus claims under rule 3.21.
- (c) Those arising where there has been a breach of the rules. For example, breaches of rule 7 relating to notification and submission for reimbursement in respect of claims.

The three most common types of discretionary claims arise in respect of fines, sue and labour, and claims presented under the omnibus rule. This article looks at each in more detail.

Discretionary fines

Typically, discretionary fines arise from the following incidents: failure to follow local navigation rules, MARPOL violations or a failed port state control inspection.

In most circumstances, the incidents giving rise to a fine are due to the failure of on-board procedures, inadequate training of crew, lack of due diligence ashore and, in some occasions, a deliberate act either due to commercial pressure or a crew member embarking on a folly of their own. In such situations, for example, MARPOL violations in the US, there can be criminal consequences for the crew.

Rule 3.16.4 provides for a two-stage test. The first stage is whether there is to be any recovery at all. The burden is upon the member to satisfy the board that they took all such steps as appear to the board to be reasonable to avoid the event giving rise to the fine. The board is made up of individuals with considerable experience in the shipping field and it is their opinion which is material. In reaching a conclusion on this first issue, the directors of the board act fairly and reasonably.



The rules of The Standard Club are available on our [website](#). Members requiring hard copies should request these from their usual club contact.



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If the directors are satisfied that the member took all steps to avoid the event giving rise to a claim, the second stage concerns the amount of the recovery from the club. In this respect, the directors have a wide discretion to determine the extent of the recovery.

Sue and labour

The scope of a member's entitlement to seek recovery of sue and labour expenses is circumscribed by rule 3.20. Members are entitled to sue and labour expenses as of right if such expenses have been incurred with the managers' approval. Alternatively, they are recoverable at the discretion of the board.

The costs and expenses that can be characterised and recovered as sue and labour will depend on the circumstances of the individual case, and they can be tested against the following criteria:

1. The costs and expenses incurred are extraordinary and not, therefore, the ordinary operational costs incurred during a normal voyage to earn freight. Included will be the costs and expenses incurred by the members directly.
2. The costs and expenses must be incurred voluntarily to avert or minimise a liability against which the members are insured by the club. It is often a matter of controversy how likely either the peril will occur or, once there is a peril, that there will be a loss. In every case, it is a matter of degree. However, there is a distinction between expenses incurred, for example, to protect cargo from imminent risk of damage on the one hand and the incurring of additional expenses in order to perform a voyage and earn freight on the other.
3. The costs and expenses must be directed to avoiding or minimising a risk which is covered.
4. The costs and expenses recoverable are those incurred solely to avoid or minimise the risk of a peril or loss.
5. The costs and expenses must be reasonably incurred and not disproportionate, compared with the risk of the peril or the loss.



Omnibus

P&I cover is intended to dovetail with hull insurance so that there is no gap. However, the liabilities and risks for which a member requires insurance cover are dynamic and the club's rules may not specifically identify all the risks that need to be covered. The cover offered by clubs therefore has to be flexible enough to grow and develop, and so be in a position to respond to the changing needs of the members. The ultimate expression of this flexibility is the omnibus rule.

As the club's board is largely composed of shipowners, a member putting forward a claim under the omnibus rule is likely to receive a generally sympathetic hearing, albeit there will usually be more sympathy for claims arising from bad luck than those arising from bad management.

The deciding factor is usually whether the new 'risk' or liability is of a P&I nature. The test is sometimes put this way: 'had the claim/risk been known to the club at the time its rules were drafted, would the club have included it within the cover? And was it a claim the member could have avoided had he exercised the standard of care accepted as the norm within the industry?'

Role of the board and the exercise of its discretion

The Pooling Agreement sets out in Appendix XI the minimum procedural requirements for the treatment of the discretionary claims. These requirements, with some enhancements, have been included in the club's directors' manual, which deals with the procedures and treatment of discretionary claims, namely:

- The board should act fairly, reasonably and without misdirecting itself in law.
- The member concerned shall, prior to the meeting of the board, have been given the opportunity to review the agenda note and other materials which may be placed before the board in order for that member to comment. Any such comments shall be brought to the attention of the board.

- If the member concerned is represented on the board, that representative shall absent himself from the meeting whilst the board considers the exercise of its discretion.
- In considering the exercise of its discretion, the board shall act in good faith and in the best interests of the members of the club as a whole and in accordance with the wording of the relevant rules. It should also take into account any legal advice obtained on its behalf by the managers on issues of cover.
- The board should not normally be asked to exercise its discretion until the litigation between the member and the claimant is over, save in exceptional cases where there is a compelling reason to make the decision earlier.
- The board, having exercised its discretion, may or may not give reasons. Generally, reasons should not be given for the exercise of its discretion other than where the board believes that the evidence put before it reveals facts which the member should be given the opportunity to refute.

Rights of redress

If a member considers that his discretionary claim has either been improperly declined or that he has been unfairly penalised, he has the right to take the claim to arbitration.

Conclusion

Discretionary claims may still be reimbursed, but members should be aware that this is at the discretion of the board, subject to the type of claims, and the adherence to the due process for application and consideration.

The Standard Club prides itself on having a pragmatic approach to paying claims. In this respect, the cover offered to member is broad and inclusive, and the board takes a sympathetic view to discretionary claims, always aiming to be fair and consistent.

How are discretionary claims dealt with?

1

Notification

When the club is notified of a discretionary claim, the discretionary nature of cover is explained in full to the member.



2

Security

If security is required in respect of a discretionary claim, security may only be issued once appropriate counter-security has been received from the member either by way of cash deposit or a first-class bank guarantee. In any event, provision of security by the club on behalf of the member remains wholly discretionary at all times: see rule 9.1.



3

Reimbursement

Once a member's liability in respect of a discretionary claim has crystallised and all fees and expenses have been paid, a request for reimbursement should be submitted to the club. On receipt of a member's request, a report will be prepared for submission to the board at its next meeting. The member will have the opportunity to review the report prior to submission.