Standard Club

June 2018

Discretionary claims

Discretionary fines, sue and labour and omnibus

What are discretionary claims?

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

There are three types of discretionary claims arising under the rules:

- Provisos to cover under specific rules, e.g. provisos (1) to (13) to rule 3.13 – relating to cargo liabilities.
- Claims under specific rules, e.g. discretionary fines, sue and labour, and omnibus.
- Breaches under rule 7 and 8 relating to notification, settlement and reimbursement of claims.

In this article, we look at the second type in more detail.

Discretionary fines

Rule 3.16.4 provides:

"Fines imposed on the member or upon any other person whom he reasonably reimburses or is legally liable to indemnify:

...for any other matter to the extent that the member has satisfied the board that he took all such steps as appear to the board to be reasonable to avoid the event giving rise to the fine; in addition, any amounts claimed in respect of such fine are recoverable only to the extent the board may determine."

Typically, discretionary fines fall into three categories:

- failure to follow local navigation rules;
- MARPOL violations; and
- failed port state control inspections, giving rise to a fine.

These can arise 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.

As is apparent from the above, rule 3.16.4 provides for a two-stage test:

- Whether there is to be any recovery at all. There is only recovery *"to the extent that the member has satisfied the board that he took all such steps as appear to the board to be reasonable to avoid the event giving rise to the fine"*. The burden is upon the member to demonstrate this.
- The amount of any recovery. The amount of such recovery is at the discretion of the board.

Given the well-known enforcement practices of the US authorities, especially the huge penalties and the absolute requirement to have effective shore-side and on-board management systems, members should not expect the board to approve reimbursements of such liabilities, save in the most exceptional circumstances.

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

Discover more
For details of our range of industry expertise visit www.standard-club.com
@StandardPandI
The Standard P&I Club

Standard Club

Sue and labour

Rule 3.20 provides:

"Extraordinary costs and expenses reasonably incurred on or after the occurrence of any event liable to give rise to a claim upon the club and incurred solely for the purpose of avoiding or minimising any liability against which the member is insured by the club, but only to the extent that those costs and expenses have been incurred with the prior agreement of the managers, or to the extent that the board determines."

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

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

- The costs and expenses incurred are indeed extraordinary and not, therefore, the ordinary operational costs incurred during a normal voyage so as to earn freight.
- The costs and expenses must be incurred to avert or minimise a liability against which the members are insured by the club. In every case, it is a matter of degree. There is a distinction between expenses incurred, for example, to protect cargo from imminent risk of damage and the incurring of additional expenses in order to perform a voyage and earn freight. A formulation sometimes used to describe the same concept is that the expense is 'voluntary', i.e. not incurred in accordance with a contractual obligation under, for example, a contract of carriage.
- The costs and expenses must be directed to avoiding or minimising a risk which is covered.
- The costs and expenses recoverable are those incurred solely to avoid or minimise the risk of a peril or loss.
- The costs and expenses must be reasonably incurred and not disproportionate, compared with the risk of the peril or the loss.

Omnibus

Rule 3.21 provides:

"Any liabilities which the board may determine to be within the scope of club cover, but only to the extent that it decides that the member shall recover from the club."

P&I cover is intended to dovetail with hull insurance so that there are no gaps. 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 members. The ultimate expression of this flexibility is the omnibus rule.

The deciding factor when considering omnibus claims 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 their cover? Or was it simply a claim the member could have avoided had he exercised the standard of care accepted as the norm within the industry?'

The club has more than 50 qualified lawyers and barristers working in house, spread across London, Piraeus, New York, Singapore and Hong Kong. All of our claims handers have experience in handling discretionary claims.

The Standard Club is always on hand to assist. If in any doubt, the reader should contact the authors of this article or their usual club contact.

This information is published on behalf of The Standard Club Ltd by the managers' London agents:

Charles Taylor & Co. Limited
The Minster Building, 21 Mincing Lane, London EC3R 7AG
Registered in England No. 02561548

Telephone: +44 20 3320 8888
Emergency mobile: +44 7932 113573
Email: pandi.london@ctplc.com
Website: www.standard-club.com

Authorised and regulated by the Financial Conduct Authority
FRN 785106

Charles Taylor