



Insurance cover for legal costs – the Gard approach

In a casualty situation legal costs can run to many thousands of dollars but which insurance policy covers what? This Insight looks at legal costs coverage across a range of standard Gard policies.

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Introduction

Hull & Machinery and P&I policies generally contain specific provisions regarding the recoverability of legal costs (including, lawyers, experts, arbitrators etc.). In the wake of a major maritime casualty these costs can run into hundreds of thousands of dollars and may constitute a significant proportion of the total expenditure on a claim. However, it may not be immediately clear exactly which insurance covers what. This Insight aims to clarify where such costs are likely to fall and includes some concrete examples.

Appointment of lawyers

Casualties that generally warrant the early appointment of a lawyer will include:

- collisions
- major fires
- potential unsafe berth or port claims
- incidents involving the release of pollutants
- incidents involving significant personal injury
- any incident likely to give rise to claims for salvage.

In anticipation of future litigation, a lawyer will often be sent on board to obtain evidence. We have standing agreements with a number of law firms for this purpose. Incidents involving both H&M and P&I aspects will often involve establishing an early fee sharing or funding arrangement, to be re-apportioned at a later stage once the claims have crystallised. This helps minimise the number of involved parties. Usually the appointment will be made by insurers on behalf of the assured to protect their joint interests against third parties. In the rare case where interests are not aligned, separate legal representatives may be appointed.

Types of legal costs

Legal costs incurred can generally be divided into four categories; casualty investigation, defence, attack and coverage dispute costs.

1. Casualty investigation costs

These are straightforward and include the collection of evidence and on board interviews of the crew and are usually shared on a provisional basis.

**2. * Costs of defence*

Not to be confused with costs covered under a standard FD&D cover, these are costs incurred in defending the assured and its liability insurer from claims made against them by third parties. Recourse actions benefit both the insurer and the assured, in terms of the deductible, uninsured losses and the claims record.

Nordic Plan 2013

Costs of defending liability claims are covered in full to the extent the underlying liability is covered, subject to the measures being justifiable or pre-agreed.

German ADS/DTV Hull Clauses

Costs are recoverable in full.

English ITCH clauses

The basic rule is that 3/4 of the legal costs that arise in defending collision liability claims are covered by H&M insurers, with the vessel's P&I Club picking up the remaining 1/4, reflecting the liability coverage.

2015 Gard Rules

There is general cover for legal costs, including the costs of defending claims, provided the measures taken are *pre-agreed* with the Club. Invariably it will be the insurer itself which appoints a law firm, so the question of pre-agreement is rarely a practical problem.

Example

A product tanker assured for H&M under Nordic Plan conditions (including collision and FFO liability) and for P&I with Gard, loses main engine propulsion during berthing at a refinery terminal. The terminal infrastructure is heavily damaged and the vessel's aft bunker tank ruptures, causing a significant quantity of bunkers to escape into the sea.

Gard's crisis management team is mobilised and an agreement is reached in collaboration with the client/Member to appoint a Gard approved law firm to advise on both the liability for the damaged property (H&M risk) and the pollution liability (P&I risk). A fixed casualty investigation fee applies to the initial on board investigation and collection of evidence. The legal costs are dealt with by Gard, to be later re-apportioned on the H&M and P&I claims as they crystallise. Alternatively, the parties could agree to apply a fixed level of apportionment throughout, regardless of the outcome, or even ask the lawyers to allocate their time specifically to each head of claim. The client/Member receives the full benefit of expert legal assistance without having to worry about who will cover the costs.

*3. * *Costs of attack*

Whilst defending claims is usually in the insurer's financial interest alone, the costs involved in pursuing claims against third parties will often involve several heads of damage, some assured and some uninsured. The insurer will usually seek to recover what they have paid out to the assured under the terms of the applicable policy, whilst the assured may seek to recover their uninsured losses in a joint action with the insurer. The costs associated with pursuing such claims are treated slightly differently depending on whether they are incurred on behalf of H&M interests or P&I interests. Pre-agreement in respect of such costs is generally a necessity, but as with costs of defence, the insurer will usually be in the driving seat and may be funding the costs upfront, as it will often have the largest overall interest in the outcome of the case.

Nordic Plan 2013

There is general coverage for the costs of pursuing claims against third parties for losses covered by the insurance. However, if the costs are incurred in connection with measures relating to several interests (e.g. the deductible and loss of earnings), they are to be apportioned *pro-rata* over those interests.

German ADS/DTV clauses

Same as for Nordic Plan.

English ITCH conditions

They do not regulate costs of attack. However, in general they are recoverable in full to the extent incurred in respect of a loss covered by the insurance, therefore leading to substantially the same result. Recovery under the ITCH is based on the *top-down* principle, with insurers being credited first, whereas any recovery under the Nordic Plan is apportioned *pro-rata* over the heads of damage.

2015 Gard Rules

Cover for legal costs is available where the Association has a proprietary interest in the underlying claim. This necessarily implies that if Gard and the assured pursue a joint action against a third party for e.g. claims paid and an uninsured loss of earnings, the legal costs will be apportioned thereafter. However, legal costs will *not* be apportioned over the applicable deductible - in contrast to the Nordic Plan.

The mechanism of apportionment applied in these cases can lead to the assured having to bear a significant proportion of the legal costs itself, especially where its loss of earnings or deductible are particularly high. However, standard FD&D cover may provide coverage for these types of costs where they fall on the assured. If an assured has FD&D cover, the insurer must be notified at the outset of any recovery action to avoid any coverage issues at the end of a lengthy legal process. An unsuccessful recovery action can leave both the insurer and the assured exposed to payment not only of their own appointed lawyers' costs, but also those of the opponent.

Example

A cement carrier assured for H&M under Nordic Plan conditions and for P&I with Gard, grounds in port due to the presence of an unmarked wreck, resulting in significant bottom damage and water ingress into one of the cargo holds containing cement.

A joint claim by the assured, the H&M insurers and P&I Club is pursued against charterers for the following heads of damage:

- a) the repair costs covered by H&M insurers
- b) the costs of removing damaged cargo covered by the P&I Club
- c) uninsured loss of earnings during the repair period
- d) the assured's deductibles.

The H&M insurers and P&I Club agree a 50:50 split of legal costs upfront, to be re-apportioned once the claims have crystallised. After extensive pre-trial formalities and negotiations, the charterers agree to settle 75 per cent of all claims, with each party bearing its own legal costs, amounting to USD 500,000. These costs of attack are apportioned pro-rata over the heads of damage. Given total insured losses of USD 1.8 million and total uninsured losses of USD 1.2 million the assured is asked to cover 40 per cent of the total costs, being USD 200,000. Provided the assured has notified his FD&D insurer (if any) in advance and kept them up to date with respect to the proceedings, there is a good chance that the majority of these costs may be recovered.

4. Costs relating to coverage disputes

These are self-explanatory - if the insurer seeks to deny coverage, perhaps because of a breach of a safety regulation or gross negligence on the part of the assured, both parties to the insurance contract will likely appoint lawyers to represent them.

Finally, legal advice given solely to the assured on general commercial issues that may arise during the course of a casualty, including charterparty issues, will likely be recoverable under a FD&D policy if the assured has one in place.

Legal cost complications in collision claims

Collisions often give rise to complex recovery adjustments involving several insurers, different categories of legal costs and many different heads of damage. The parties involved in collision cases will often be trying to defend their position and reduce liability while at the same time attacking opponent parties with a view to obtaining a recovery for losses suffered. Courts and arbitration tribunals do not normally distinguish between different types of legal costs, but can do if asked. Often it will be up to the adjuster to apportion the costs as seen fit. A collision that results in totally opposed views of liability and deep rooted positions may result in a 50:50 split of defence and attack costs, though it is equally plausible that a situation arises where the adjuster deems it fair to allocate all costs as attack costs, e.g. where a moored vessel has been hit by a berthing vessel.

Disputes concerning legal proceedings

Occasionally there may be disagreement between the insurer and the assured as to whether a legal action should be commenced, a settlement offer accepted or a decision appealed. This problem is neatly regulated in the Nordic Plan, which specifies that an umpire appointed jointly by the Nordic average adjusters shall finally decide the matter, based on the solution that is likely to result in the *least overall loss*. If, e.g. the assured decides not to follow the umpire's decision, any further legal costs will be for its own account. If the assured succeeds in its action, the insurer will cover a proportionate share of the costs up to the amount that has been saved. The matter is not regulated by the ITCH conditions or the ADS/DTV Hull Clauses, but in practice the issue rarely arises.

The 2015 Gard Rules specify that all disputes are to be decided in arbitration in Oslo. Very few cases get this far - Gard has a discretionary right in any event to control and direct the conduct of legal proceedings therefore leaving little room for any dispute to arise.

Concluding comments

The key to the successful resolution of challenging and complex maritime casualties is always founded on good and timely communication - this is no less relevant for the costs incurred, whether legal or otherwise. Gard always strives to work together with our clients and Members to keep costs to defendable levels and to avoid any unnecessary or unbudgeted surprises.

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