Gard Guidance to the Rules
Richard Williams
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Preface

I am delighted to offer to our Members, clients, brokers and other business partners our Gard Guidance to the Rules which aims to give navigational aid in the sometimes complex waters of P&I and Defence insurance. The first edition of the book was published in 2008 and proved to be in demand externally as well as being a very useful reference for our own staff dealing with underwriting, claims or legal issues.

Since 2008, we have periodically updated the electronic edition of the Guidance, which is available on www.gard.no. However, we felt the time was ripe to do an end-to-end review to ensure that the book was fully updated in respect of Rule changes and to address typical cover issues arising in the day-to-day underwriting or claims handling.

I am very pleased that Mr. Richard Williams again accepted the role as the main author for the book. Richard is a former partner in the London law firm of Ince & Co, and now a visiting professor and teacher of maritime law at the University of Wales, Swansea. His expertise in shipping law, writing and editorial skills as well as teamwork capabilities have again proved invaluable and deserve our greatest appreciation.

As in previous publications, Richard has worked closely with a Gard team of experienced P&I professionals, who again have reached out to their colleagues in the organisation for comments and contributions. I am very grateful and proud that Gard has so many inspired and engaged employees who, aside from their daily duties and tasks, have managed to dedicate the time needed for this project.

The Gard Guidance to the Rules is our way of sharing key P&I knowledge with our Members, clients, brokers and other business partners. I hope you will all find it helpful in your work and that you do not hesitate to contact Gard if you have questions or comments.

Arendal, August 2015

Rolf Thore Roppestad
Chief Executive Officer
Gard AS
Acknowledgments

The first edition of this book was written in 2008 and was itself a development of the foundations that were laid in earlier editions of the *Gard Handbook on P&I Insurance*, the first edition of which was published in 1972 and the 5th in 2002. However, since 2008, the corporate structure of the Gard group has seen many changes and the scope of cover that is now provided by the group is much broader. Consequently, staff members are required to provide guidance on a much broader range of questions and issues. Nevertheless, the one thing that has not changed in any way throughout these years is the ability and readiness of those staff members to provide their Members and Assureds with the maximum assistance and support. Consequently, the commentary that is provided in this new edition is the culmination of many hours of in-house analysis and consideration based on real issues, events and developments that the group has been required to consider and resolve. The deliberate usage of the word ‘Guidance’ continues to emphasise the purpose and intention of the publication and the desire of Gard to provide assistance to its Members and Assureds and also to those who work for Gard either in-house or on a delegated basis.

The first edition of this Guidance purported to explain not only the extent of P&I cover but also the reasons why such cover might not be available in particular circumstances. However, since that time, Gard has sought to assist its Members by developing additional insurances that may provide cover for Members on payment of an additional fixed premium in those circumstances where mutual P&I insurance cannot provide cover. Therefore, the new edition also seeks to provide a detailed commentary on such additional insurances and to continue to do so in a readable and clear manner whilst at the same time treating all issues with the weight and importance which the subject matter requires, and which is expected by a sophisticated and knowledgeable readership. This is, after all, only what Gard personnel strive to do on a day-to-day basis.

This work is the culmination of the collective and extensive experience and wisdom of all of the Gard workforce. My task was simply to edit all their contributions and I have again learned much whilst doing so. I cannot say that my task has been an easy one since all contributors have been ready to spend time to review drafts (often repeatedly) to ensure that the commentary is both accurate and as clear as circumstances (often complex circumstances) allow. This is as it should be and demonstrates the pride that those staff members have in their work and their desire to provide their Members and Assureds with the maximum assistance and comfort.

I have once again been exceedingly fortunate to have had the assistance, support and encouragement of those whose expertise and experience I respect and value. Since this has been a truly collective project it is not possible for me to mention and thank individually all of those that have devoted their time and energy to it. However, you know who you are and I extend my profound thanks to each and every one of you.
However, particular thanks must be extended firstly to Bart Mertens and Lars Lislegard-Bækken who cheerfully assumed responsibility for coordinating and vetting the contributions that were made by individual staff members. Their assistance made the subsequent drafting process so much easier. Profound thanks must also be given to Nick Platt and Christen Guddal. Nick was the leader of the core project team and had the unenviable task of firstly collating all materials and then the even more unenviable task of reviewing my first drafts and pointing out their deficiencies and omissions in his customary courteous fashion. Nick is not only one of the most diligent and hard-working of persons that I have ever met but is also someone who has a very extensive experience across the whole breadth of maritime claims and who is able to draw on that experience to good and sensible effect when assisting Members and Assureds. Nick and I also profited enormously from the customary guidance, stewardship and overview that was provided on behalf of the Steering Committee by Christen Guddal who has the happy ability to stand back and spot issues that have been missed or wrongly or insufficiently described and which require clarification. Christen is the most professional of people and lives by the rule that if something needs to be done, it will be done.

This project would not have been possible without the managerial support and commitment that has been provided unswervingly by the Steering Committee consisting of Kjetil Eivindstad and Svein Andresen as well as Christen Guddal and who not only provided the vision and drive that was necessary to make the project a reality but who also took time out of their ridiculously busy schedules to read and comment on all materials both meaningfully and constructively. In my experience, such dedication is certainly beyond the call of duty and is a clear illustration of the Gard traditional ethos as stated in the Gard Centenary Book: “to take all the steps that are required to help our clients navigate the often troubled waters of commercial life.”

Finally, I also thank Randi Gaughan at Gard UK who once again not only eliminated most of my inexcusable typographical and formatting errors but also co-ordinated arrangements with the publishers with her usual patience and efficiency and made it possible to produce yet another stylish and polished finished product.

I thank Gard once again for the opportunity to be involved with this worthwhile project. I repeat that I have learned much in the process and have had both the good fortune and the pleasure of learning from those whose knowledge and understanding is impressive and who clearly have a real concern for the wellbeing of Gard and its Members and Assureds.

Richard Williams

London, August 2015
Introduction

The first edition of the Gard Guidance to the Statutes and Rules was written and published in 2008 with the intention of helping readers to gain a better understanding of Assuranceforeningen Gard’s Statutes and Rules by adding context to content, offering comments and interpretation and showing relevant inter-relationships between provisions. Since that time, the electronic version of the Guidance has been regularly updated as and when a change in circumstances required revisions to be made. However, some significant changes have been made to the corporate structure and asset allocation within the Gard group since 2008 and it is believed that the time has now come to have a thorough review of the Guidance.

Gard P. & I. (Bermuda) Ltd., the parent of the Gard group, is now the entity that holds the most assets and, as from 20 February 2010, the majority of ships and other units that are insured for P&I and Defence risks have been entered directly with Gard P. & I. (Bermuda) Ltd. and the balance with Assuranceforeningen Gard -gjensidig-.1 Gard AS acts as the agent for both Assuranceforeningen Gard -gjensidig- and Gard P. & I. (Bermuda) Ltd. and has prepared, and the Board of Directors of each association has approved, a joint set of standard terms of cover for P&I risks (the Rules). Since both Associations are involved in direct P&I insurance and are parties to the Pooling Agreement of the International Group of P&I Clubs, the Rules mirror to a large extent the scope of cover that is laid down in the Pooling Agreement which is the legal framework by which the P&I clubs that are members of the International Group of P&I Clubs share claims and the collective purchase of market reinsurance for P&I risks.

This Guidance comments on the Rules of the Association and the Additional Covers that are provided by the Association on a fixed premium basis. A distinction needs to be drawn between the Rules and the Articles of Association since the function of the Articles of Association is very different from that of the Rules. The Articles of Association comprise provisions that govern the Association as a mutual P&I association that is owned and controlled by its Members.2 They encompass the purpose of the Association, membership eligibility, voting rights, the governing bodies, the authority vested in, and the functions carried out by, those bodies,

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1 For further detail see Member Circular 6/2009.
2 Assuranceforeningen Gard -gjensidig- is governed by its Statutes of Association whereas Gard P. & I. (Bermuda) Ltd. is governed by Bye-Laws which are in many respects similar to, albeit not identical to, the Statutes of Assuranceforeningen Gard -gjensidig-. Therefore, the term ‘Articles of Association’ is intended, in the case of Assuranceforeningen Gard -gjensidig-, to be a reference to the Articles of Association of that Association, and in the case of Gard P. & I. (Bermuda) Ltd., to be a reference to the Bye-Laws of Gard P. & I. (Bermuda) Ltd. The Statutes of Assuranceforeningen Gard -gjensidig- and the Bye-Laws of Gard P. & I. (Bermuda) Ltd. are available on request and are published on the Gard website.
as well as provisions relating to amalgamation and dissolution. Some provisions are necessitated by external legal requirements whereas others are purely self-regulatory. In brief, the Articles of Association regulate the rights and obligations of the Members of the Association as owners of that Association. In contrast, the Rules govern the rights and obligations of Members as assureds, i.e. policy holders. They contain provisions relating to the creation of the contract of insurance, the rights and obligations of the Association and the Members inter se under the contract of insurance, including, in particular, the extent to which cover is available in relation to particular risks, as well as provisions that govern the cesser and termination of entry. Therefore, since the day-to-day needs of most Members relate to the Rules rather than the Articles of Association it was decided that the commentary in this edition should concentrate on the Rules rather than on the Articles of Association.

As from 20 February 2010 Ships that have been entered in Assuranceforeningen Gard -gjensidig- have been insured by Assuranceforeningen Gard -gjensidig- whereas the Ships that have been entered in Gard P. & I. (Bermuda) Ltd. have been insured by Gard P. & I. (Bermuda) Ltd. However, since the two insurers provide cover on the same terms, this Guidance is intended to comment on the Rules that are applicable to all entries that are insured in either Association and the reference in this Introduction and the remainder of the Guidance to the terms ‘Association’ and ‘Gard’ are intended to refer to whichever insurer is the relevant insurer for the purposes of the Rules.

The fundamental principle that underscores the Rules is that of mutuality. By agreeing to be a Member of the Association each Member agrees to share on a mutual basis the cost of liabilities, losses, costs and expenses that are incurred by each Member in direct connection with the operation of the Ships that are entered by them. It is important in this regard to emphasise that the Rules that apply for any Policy Year are agreed by the Members prior to the inception of that Policy Year. Therefore, the Members themselves decide the extent of the cover that is to be provided to them by the Association and the terms upon which such cover is available or not available!

It is important to note that the objective of the Association is not the generation of profit for external shareholders, but the creation of value for its Members by the provision of broad and cost-effective insurance cover as protection against financial loss, as well as the provision of a professional and expert claims handling service. With these objectives in mind, the Rules are designed to ensure that the principle of mutuality is properly preserved.

For example, all entered Ships must comply with relevant flag state regulations and remain in class at all times, since they are otherwise considered to represent an unacceptable risk to the rest of the membership in terms of claims and losses. Similarly, the risks that arise as a result of certain types of specialised operations
that are carried out at sea are so different in nature from those that arise in relation to traditional shipping operations that cover is not afforded for such risks since they are not the type of risks that the majority of the membership has agreed to share. Furthermore, if the particular liability, loss, cost or expense is not one that is encountered by the bulk of the membership on a regular basis, but is more the result of the manner in which the particular Member has conducted his business on a particular occasion, cover is not available under the Rules since such liabilities etc., represent a greater risk than that which has been taken into account when assessing the premium that is payable by that Member. Consequently, the funds that are contributed by the wider membership should not be used to compensate the Member for such loss. For these reasons, liabilities etc., that would not have been incurred but for the contractual terms that have been accepted by a Member are covered only to the extent that such terms have received the prior approval of the Association.

It is also very important to appreciate that the Association is a member of the International Group of P&I Clubs and, as such, is a party to the Pooling Agreement that binds all the International Group clubs. The Pooling Agreement forms the basis on which such clubs purchase excess loss reinsurances from the commercial market. Consequently, it is vital that the Rules should comply at all times with the provisions of the Pooling Agreement in order to ensure that the Association continues to enjoy full and comprehensive reinsurance protection. It follows that, whilst the Rules are governed by Norwegian law, the Association strives, insofar as possible, to interpret the Rules in the same way (and spirit) that similar provisions are interpreted in the Pooling Agreement.

The Association, like all the other P&I clubs that are members of the International Group, regularly monitors and amends the Rules in order to try to meet the evolving needs of its Members, and to ensure compliance with the Pooling Agreement. Therefore, the wording and interpretation of the Rules will evolve from time to time. Despite the, perhaps welcome, lack of case law relating to the interpretation of P&I club rules, the clubs that are members of the International Group try to achieve a common understanding in relation to their application.

Notwithstanding the fact that the Association is a mutual insurer, it has in recent years, in response to the demands that have been made by its Members, endeavoured to provide additional insurances that extend cover for risks that are not fully and completely covered by the Standard P&I Cover that is provided by the Association under the Rules. Such additional insurances are separate from the Standard P&I Cover and are offered on payment of an additional fixed premium. However, such additional insurances are normally offered to Members that already have Ships that are entered in the Association for the Standard P&I Cover and are intended to ‘bolt on’ to such Cover in order to provide cover where it is not available under the Standard P&I Cover. In some instances, such additional insurances are
provided by the Association itself whereas, in other instances, the Association will arrange additional insurance for the Member with other insurers. Therefore, this Guidance also comments on the additional insurances that are provided by the Association.

To sum up, this Guidance is intended to assist and clarify issues that arise generally in relation to:
- the Rules; and
- the Additional Insurances that are provided by the Association.

However, as has been the case since 2008, the commentary may periodically be reviewed and readers are reminded of the necessity to periodically scrutinise the version that appears on the Gard website. Furthermore, it is not intended to provide definitive answers in all situations and readers should seek specific guidance in specific situations. Similarly, the comments that are made in this Guidance are given in good faith and to the best of the knowledge and understanding of the contributors to it, but should not to be treated as legally binding or conclusive in relation to any particular case or matter.

With these comments in mind you are encouraged to increase your understanding of the Rules, and, most definitely, to provide comments or ask questions by contacting the Association.
Protection and Indemnity (P&I) cover

A. Early Development
The use of marine insurance as a means of providing protection against loss by maritime perils can be traced back to at least 215 B.C.E. but the origins of marine insurance, as it is practiced today, can be traced back to the 13th century to the merchants of the cities of Lombardy, especially Florence, and of the Hanseatic towns of northern Germany. These merchants travelled far and wide across Europe and influenced the establishment of the London insurance market in the form of the Lloyd's Coffee House in the 17th century, the first Danish marine insurance company in 1726 and the first Norwegian marine insurance company in 1809.

In the 17th century, London had many coffee houses and one of the most famous was owned by Edward Lloyd and was located on Tower Street near the River Thames. Lloyd's Coffee House attracted the patronage of people that were interested in, and had connections with, the sea since it proved to be a convenient, congenial place for merchants that had common interests to meet to conduct commercial transactions. As time went by, Lloyd's Coffee House became known as the place where marine underwriters could be found, and in 1696 Edward Lloyd began to publish a news-sheet called Lloyd's News which was the forerunner of Lloyd's List which first appeared in 1734. Marine insurance was provided by individuals, who came to be known as underwriters, since they wrote their names and signatures beneath the wording of the insurance policy, and thereby provided a personal guarantee for a commercial venture.

The first major marine insurance companies were established in the early 1700's following the bursting of the infamous South Seas Bubble. However, these companies underwrote only the safest risks on very restricted cover and charged extremely high brokerage fees. Consequently, the scope for private individuals to continue to practice marine insurance was not restricted to any great extent.

However, at about the same time, a number of the shipowners that carried on business in ports other than London banded together in order to establish hull clubs that provided insurance cover for physical damage to the ships of their members on a mutual basis, i.e. each member of the club agreed to bear a share of the total risk.

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1 The South Sea Company was a British joint-stock company founded in 1711 which was granted a monopoly by the government for trade with South America. The expectation of huge wealth encouraged many investors to buy shares which caused the share value to increase enormously. However, in reality, there was no hope of profit since Britain was then at war with Spain which controlled South America. The founders of the scheme had, in effect, engaged in insider trading as it is called today and made large fortunes whilst most ordinary investors were ruined. As a result of these events, the British government introduced the Bubble Act which sought to prevent the establishment of fraudulent joint-stock companies.
that was run by all of the ships that were entered in the club. However, this mutual system tended to work to the disadvantage of good shipowners in that it required them to subsidise other less careful shipowners. By comparison, Lloyd’s underwriters were generally able to quote better insurance terms and rates for individual ships and owners and to provide better claims administration, facilities and organisation. Consequently, the more responsible shipowners tended to insure their vessels with Lloyd’s whilst the hull clubs were left to insure those ships that individual underwriters were not prepared to accept. Consequently, hull clubs declined in importance.

Before the second half of the nineteenth century, the scope of marine insurance was largely restricted to the protection of property risks in hull and cargo since ship ownership and operation did not at that time attract the degree of liability that is now commonplace. Therefore, liability for damage caused to another vessel as a result of a collision was not recoverable under the standard policy of marine insurance that was then in use in the London market. However, the decision of the English court in the case of de Vaux v Salvador in 1836 demonstrated that a large claim of this nature could easily bankrupt a shipowner. Consequently, policy terms were extended to cover not only physical loss or damage but also the liability of the shipowner. Insurance cover was made available for three-quarters of a shipowner’s liability for collision damage leaving the shipowner exposed for the remaining quarter, presumably in order to encourage those shipowners to exercise due diligence to avoid collisions.

Furthermore, the increased liability exposure that resulted from the implementation of the British Fatal Accidents Act 1846 and subsequent statutes caused considerable concern to shipowners and resulted in the founding in 1855 of the first mutual protection club, the Shipowners’ Mutual Protection Society (now the Britannia Steam Ship Insurance Association Limited) which was the offspring of one of the early hull clubs. However, the rules of the Society provided cover only for limited risks, namely, for the shipowner’s liability for death and personal injury claims, for the one-quarter collision liability that was not covered by the hull insurers and for excess collision liability, i.e. collision liability that was in excess of the sums insured under the hull policy.

Shipowners did not at that time need insurance cover for cargo liability since they were able to rely on wide-ranging exemption clauses in their contracts of carriage to escape liability. However, in 1870, the sinking of the WESTENHOPE caused them to reconsider since her owners were not allowed to rely on the protection

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2 This Act came into being due to the rapid increase in the number of fatalities that resulted from the introduction of railways in the United Kingdom. The Act gave the personal representatives of the deceased the right to bring an action against the wrongdoer for the benefit of the deceased’s family and dependants.
of such exemption clauses following a deviation during the course of the voyage, and her owners were held to be liable in full for the loss of the cargo. As a result, the first indemnity club was established in 1874 in order to provide insurance cover for liability for loss of, or damage to, cargo, then known as an indemnity risk. The protecting societies subsequently amended their rules to enable them to provide such indemnity cover, and consequently, became known as protection and indemnity (P&I) clubs.

Thereafter, the scope of cover that is provided by P&I clubs has steadily expanded exponentially in response to the increasing need that shipowners have had to obtain insurance cover for liabilities to third parties and for expenses that are not insured under standard Hull & Machinery and other marine policies. Therefore, during the early part of the twentieth century, the various P&I clubs also began to offer Defence cover in response to their members’ need for insurance cover for legal costs incurred by them in pursuing or defending claims that were not otherwise covered by the rules. The clubs also started to provide sophisticated advice and claims administration services to their members for P&I and many non-P&I matters, something that other profit-making insurers did not do.

Consequently, by the beginning of the 20th century, P&I clubs provided cover for a wide range of legal liability that the assured might have to third parties, and for expenditure arising as a result of, inter alia:
- Loss of or damage to cargo;
- Pollution from the ship, or its cargo;
- Loss of life and injury to crew members, or passengers;
- Removal of wreck;
- Damage to fixed or floating objects;
- Collisions with other ships.

However, it is important to remember that P&I cover is ‘itemised risk’ cover, i.e. cover is available only for the specific risks that are itemised in the club’s rules. Such cover is provided by P&I clubs on a mutual, non-profit making basis. This means that each member of the club agrees to share the risks that affect the other members of the club and agrees to contribute the funds that are required to meet the claims that may be made against any member of the club during the policy year. Consequently, cover is made available only for those risks that are regularly and commonly encountered by the majority of the membership since these are the risks that each member has agreed to share. Such losses and liabilities may be onerous, as proved by the various pollution cases referred to in footnote 4 below, but, nevertheless, since they are the result of risks to which members are routinely subjected as an integral incident of their everyday shipping activities, members agree to share such risks between themselves. Liability for the majority of such risks is normally unavoidable under the provisions of international or national compulsory laws or may be commercial risks that most members are unable to avoid. However,
the concept of mutuality and the readiness of members to underwrite the losses and liabilities of other members does not stretch to cover losses and liabilities that are the result of activities that attract greater risk than that which is routinely run by the majority of members particularly if such risks are the result of contractual terms or practices which the majority of members consider to be unwise. For example, if a member incurs a liability that arises solely as a result of contractual terms that are not commonly and regularly used by the majority of the membership, such risks would normally be excluded from cover unless they have first been approved by the club.

Similarly, members are expected and required to make full use of whatever rights they may have to exclude or limit their liability in order to protect the common funds of the club and its membership. Finally, clubs will also normally exclude risks that are preventable and which can give rise to very costly claims such as the liability that shipowners may face if they have delivered cargo without surrender of the original bills of lading to the wrong party and the liability of cruise operators for personal injury to passengers incurred whilst travelling on an aircraft to join a cruise.

B. Mutuality
Traditionally, P&I clubs have provided insurance cover on the mutual, i.e. non-profit making, basis described above. Each member agrees to share the risks and claims that are borne by other members and agrees to contribute the funds that are necessary to finance compensation of such claims. Consequently, if the funds that are initially contributed by each member do not prove to be sufficient to cover claims, each member is contractually obliged to contribute further funds as and when required.

The mutual nature of P&I insurance enables clubs to be more flexible than profit-making market insurers in the manner in which they can provide cover. One important example is the ‘Omnibus Rule’ which gives the club the discretion to cover risks that do not fall expressly within the expressly itemised cover but which, in the opinion of the club, are incidental to the operation of an insured ship and which fall broadly within the scope of club cover. Such discretion is exercised by the board of directors of the club who are themselves members of the club and who, therefore, have the knowledge and experience to evaluate and decide on behalf of their fellow members whether cover should be afforded in the particular circumstances.

However, mutuality also has the consequence that if claims during any particular policy year prove to be higher than originally anticipated, the members must contribute whatever additional funds that may be necessary to cover such increased
liability. Therefore, despite the fact that P&I club managers are very experienced in assessing likely trends and in responding to them before they occur by assessing in advance the funds that are likely to be required during a policy year, members need to be aware that unexpected events or unexpectedly high losses may occur and that the club may require additional funds. Since the ability of P&I clubs to borrow funds is limited and they do not have third party owners who can inject additional equity capital, the only way in which such additional funds can be obtained is by calling on members to comply with their obligations to contribute such additional funds, known as additional calls. However, since the claims records of clubs may differ, the level of any additional calls that may be required from the members of clubs may also differ.

Furthermore, the boards of directors of individual P&I clubs have traditionally had some flexibility in the manner in which they can assess the level of original and any additional contributions that may be required from members. Therefore, in any particular policy year, the additional contribution that may be required from the members of one club may be more or less than the additional contribution that is required from the members of another club. This is particularly so since different clubs, albeit all members of the International Group of P&I Clubs (IG), apply different solvency and risk-acceptance management strategies. The members of some clubs have accepted a lower solvency margin and, consequently, a correspondingly higher risk of additional calls, whereas the members of other clubs prefer to operate with contingency reserve levels that result in a much lower probability for additional calls. Therefore, it is not just the claims records of the clubs that differ, but also their capitalisation relative to their underlying risk exposures.

However, as from 2016, the degree of flexibility that club managers have in this respect may be curtailed by the introduction of the Solvency II Regulations for insurance companies in Europe, and the introduction of similar regimes in other jurisdictions such as Bermuda. Such new regulations will mean that most of the P&I clubs that are members of the International Group (see C. below) will become subject to new laws that regulate risk-based solvency and capital requirements. They will be obliged to comply with Minimum Capital and Solvency Capital requirements that establish the minimum capital that each P&I club will have to hold on its balance sheet in order to ensure that it has a sufficiently large capital buffer to enable it to withstand claims or other financial shocks. Accordingly, the freedom that each P&I club has traditionally had to decide for itself the strength of its balance sheet and to rely on supplementary calls to recapitalise if and when needed, will thereafter be far more restricted.

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3 P&I clubs normally try to manage their finances in such a way that any surplus funds in any policy year can, if necessary, be allocated to contingency reserves that can, consequently, be called upon in future years in order to avoid the need to make additional calls on members. However, clubs need to be careful and responsible when considering whether to use reserves in this way since they have a responsibility to members to ensure that the club's finances remain healthy over more than one policy year.
C. The development of the Pooling Agreement

The Pooling Agreement has its origins in the 19th century. Traditionally, P&I cover had been unlimited and the clubs had been able to compensate their members in full (subject to any deductible) for insured claims. However, members became fearful at the end of the 19th century that this source of comfort was becoming unsustainable. Consequently, the so-called ‘London Group of P&I Clubs’, which at that time consisted of six clubs, entered into their first claims sharing agreement in 1899. The principal purpose of that agreement was then the same as is today the purpose of the Pooling Agreement: It constituted the legal framework for sharing on a mutual basis the financial burden of large claims between the participating clubs so as to reduce earnings volatility arising as a result of their respective exposures to such claims. It also included mechanisms that were designed to determine how much each participating club should contribute to claims that were brought by the other clubs. In so doing, it reduced the probability that the participating clubs would suffer a financial loss in any given policy year that would necessitate the levying of calls on their members in excess of the estimated total call for the year.

From 1951 the Pooling Agreement also became the framework that enabled the participating clubs to purchase excess reinsurance cover from the commercial reinsurance market on a collective basis. The cost-effective ‘bulk buying’ of high levels of reinsurance cover, combined with the (then) unlimited obligation of the members of individual clubs to pay contributions toward truly catastrophic, but highly unlikely, claims in excess of the market reinsurance cover, made it possible for the shipowner-controlled, mutual clubs to provide unlimited cover for liabilities arising out the operation of their members’ ships.

However, the second half of the 20th century saw a quantum leap in the importance of the role that P&I clubs had to play in order to meet the challenges of the increasingly more complex nature of shipping operations. Perhaps the most startling and innovative development has been the ‘container revolution’ which has enabled carriers to collect and deliver cargoes at inland locations far removed from the coast. Such carriers often assume responsibility not only for the sea leg of the carriage but also for that part of the carriage that has been performed by road, rail or river carriers to or from the loading or discharge ports. Consequently, such members incur liability that has been caused by risks and factors that are very alien to traditional seaborne risks and factors.

The world community has also begun to appreciate that the environment in which we live is fragile and that whilst it is important to ensure that ships continue to transport the food, energy and other products on which we all rely daily, it is also important that the environment is not harmed in the process. The damage that has
been caused by a number of high-profile pollution cases\textsuperscript{4} has attracted the attention of national, regional and international regulators and has resulted in the imposition of stringent laws that require ships to be operated to the highest standards. Such laws have also required polluters to provide very high levels of compensation to individuals and governmental bodies that have suffered as a result of any breaches.

Similarly, the courts of many countries have imposed very high levels of compensation liability for personal injury and death, particularly in the case of fare-paying passengers. This has resulted in the imposition of similar international laws that are designed to ensure that ships provide a safe and satisfactory leisure and working environment for passengers and crew members respectively and require transgressors to provide very high levels of compensation to individuals that have suffered as a result of any breaches.

Because of such varied developments, the owners and operators of ships have been obliged to demand a greater scope of cover from P&I clubs and the clubs have wished to try to accede to such requests. However, as a result of the very high pollution claims that arose in the 1970’s and 1980’s, it became clear that the International Group clubs did not have the financial strength to compensate their members in full should a number of such incidents arise during a policy year. Therefore, it became necessary to place a cap on the cover for oil pollution liabilities. Initially, the cap was fixed at the sum of USD 15 million per incident which was just above the amount to which shipowners could limit their liability under the CLC. However, it subsequently became necessary to review and increase such a cap substantially due to the fact that shipowners’ right to limit their liability was increasingly being eroded so that, in an increasing number of cases, shipowners were either not able to limit their liability at all, or were made subject to much higher limits. Furthermore, countries began to require the owners of ships that traded to their countries to produce evidence that they had sufficient insurance cover for their potential liability for such claims.

Notwithstanding the protective measures that were taken by P&I clubs to limit their exposure to such large claims, the potential liabilities were, nevertheless, so great that no one P&I club felt able by itself to provide the necessary cover for its members. Consequently, most of the clubs agreed to impose a general limit of cover in order to ensure that they could withstand the shock of a single, catastrophic claim\textsuperscript{5} and to cooperate with each other in order to provide their individual members with very high levels of cover and to share (pool) liabilities, losses, costs and expenses.

\textsuperscript{4} Such as the TORREY CANYON in 1967, the AMOCO CADIZ in 1978, the EXXON VALDEZ in 1989, the SEA EMPRESS in 1996, the ERIKA in 1999 and the PRESTIGE in 2002.

\textsuperscript{5} Currently USD 2 billion in excess of USD 50 million per incident.
The Pooling Agreement establishes the legal framework upon which claims are shared between the clubs that are parties to the Agreement, and is the vehicle for the collective purchase of market reinsurance cover. Apart from the quantum of the cover, the terms of the cover that is available under the Pooling Agreement mirror to a large extent those of the cover that is provided by the individual clubs to their members and is provided on a tier basis. Each club agrees to bear claims brought against it by its own members up to an agreed total (its retention) and the other clubs that are parties to the Pooling Agreement agree to contribute proportionately the additional funds that are necessary to cover the balance of the claim. However, if a claim, i.e. an overspill claim, exceeds the upper limit of the cover that is available under such reinsurance, the balance is then payable by the members of each club, which club may require its members to pay one or more additional Overspill Calls up to a stated maximum amount. If the claim still exceeds that maximum amount the balance must be borne by the particular member that has suffered the claim.

The Pooling Agreement is an annual agreement that is renewed each policy year. This means that no IG club is bound to be a party beyond the policy year for which the Agreement is in force and may in principle elect to withdraw upon renewal of the Agreement. Furthermore, amendments to the Agreement are effective only from the beginning of the next policy year but special mechanisms make it possible to amend the Agreement during a policy year if needs be.

D. The development of the International Group and the International Group Agreement

The ability of P&I clubs to co-operate to share the burden of claims has been facilitated by the fact that whilst the rules of individual P&I clubs differ to some extent, the scope of cover that is provided by each club is broadly similar. Although such co-operation had originally been restricted to the UK based P&I clubs that had formed the London Group, that group was subsequently renamed the International Group when non-UK-based P&I clubs such as the Scandinavian clubs and the Japan Club became indirect members through reinsurance arrangements. Consequently, the IG was established in 1981 and obtained observer status at the International Maritime Organization (IMO) at the same time. It also quickly became clear that if individual clubs were to co-operate in this manner, it would be necessary to do so on the basis of a formal agreement called the International Group Agreement (IGA) that set out the terms upon which such co-operation would be done.

---

6 The collection of Overspill Calls are subject to special rules. See the Guidance to Rule 18.
7 Further information is available on the IG website: http://www.igpandi.org
Currently, 13 P&I clubs are members of the IG and collectively provide liability insurance for more than 90 per cent of the world’s ocean-going tonnage and more than 95 per cent of the world’s ocean-going tankers. The current members of the IG are:

- The American Steamship Owners Mutual Protection and Indemnity Association Inc
- Assuranceforeningen Skuld
- Gard P. & I. (Bermuda) Ltd.
- The Britannia Steam Ship Insurance Association Ltd.
- The Japan Ship Owners’ Mutual Protection and Indemnity Association
- The London Steam-Ship Owners’ Mutual Insurance Association Ltd.
- The North of England Protecting and Indemnity Association Ltd.
- The Shipowners’ Mutual Protection and Indemnity Association (Luxembourg)
- The Standard Steamship Owners’ Protection and Indemnity Association (Bermuda) Ltd.
- The Steamship Mutual Underwriting Association (Bermuda) Ltd.
- Sveriges Ångfartygs Assurans Forening (The Swedish Club) (Sweden)
- The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd
- The West of England Ship Owners Mutual Insurance Association (Luxembourg)

The rights and obligations inter se of the clubs that are members of the IG are regulated by the Constitution of the IG but the daily work of the IG is administered by a Secretariat based in London which gives support to the many club representatives that serve on the various IG sub-committees and working groups. However, it is important to remember that IG policy is not determined independently by the IG but by the shipowner members of the individual clubs acting through the medium of their boards.

The main functions of the IG are as follows:

- the management and development of the Pooling Agreement that regulates the sharing of large claims by the clubs;
- the purchase of excess of loss reinsurance for liabilities that exceed the Pool limit;
- the administration of the rules and procedures that are laid down in the International Group Agreement to regulate quotations for the movement of fleets between clubs; and
- the representation of shipowners in relation to legislation and policies that affect their liabilities to third parties and insurance.

A key aim of the IGA is to establish quotation procedures that are designed to safeguard the inter-club discipline that is necessary to ensure the proper operation of the Pooling Agreement. It contains self-imposed competitive restraints which aim to avoid the undercutting of rates that may lead to the under-pricing of risks that affect the financial viability of individual clubs and the wider Pool. Therefore, the Pooling Agreement places restrictions on the ability of individual clubs to compete
in terms of premium price, or the premium rating as it is called, when a ship is transferred from one club to another. Furthermore, the quotation procedures are supplemented by provisions that are designed to increase transparency by requiring the disclosure of the level of administration costs of each club.

If a club that is a party to the IGA fails to comply with the provisions of the IGA it may lose the ability to claim contributions under the Pooling Agreement in relation to the ships that were the subject of the non-compliance. The offending club may lose the right to claim contributions from the other clubs that are members of the Pooling Agreement and the ability to claim under the Group’s Loss Reinsurance Cover up to a total of USD 150 million for a period of two years should a committee consisting of representatives of the other clubs so decide.

Ever since the 1980’s the IG and its agreements have been subject to regulatory scrutiny by the EU competition authorities. In 1985, the EU authorities confirmed that the International Group Agreement was exempt from the otherwise prohibitive EU competition provisions since the Agreement was recognised to be indispensable for the operation of the Pooling Agreement, which, together with the clubs’ claims handling practices, was considered to be of great benefit to consumers by ensuring the availability of effective compensation mechanisms. A renewed exemption was granted for ten years running from 20 February 1999 and the current position is that, following regulatory changes, the IG is allowed to operate without applying for exemptions, but is under a duty to self-assess and report vital aspects of the business to the EU competition authorities on an annual basis.

E. The development of compulsory insurance requirements

Over the last half century or so there has been a rapid increase in the number of circumstances in which national and international regulatory authorities have imposed strict liability on ship operators subject to a maximum limit and have obliged ship operators to prove that they have adequate insurance to cover such liabilities before they are allowed to trade freely. Such regulations also normally oblige the liability insurer that provides such cover to submit to direct liability to the third party claimant. This ‘package’ was originally conceived in relation to the liability of shipowners for pollution damage under the Civil Liability Convention (CLC) 1969 but has been extended thereafter to other pollution conventions such as the CLC 92, the Hazardous and Noxious Substances Convention 1996 (HNSC) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunkers Convention). Consequently, P&I clubs, who are the predominant pollution liability insurers, are now required to provide certificates of compliance confirming that the relevant ship has the required insurance cover and that the liability insurer is directly liable to the claimant.
The requirement that there be compulsory insurance has subsequently been extended to other areas of shipping activity. Article 4bis of the Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) now has similar requirements as do section 2 of US Public Law 89-777 and the EU Passenger Liability Regulation (EC) No 392/2009 which have provisions to the same effect for the purposes of US and EU law respectively. Furthermore, the Nairobi Convention of 2007 (The Wreck Removal Convention) requires ships to maintain insurance or some other acceptable form of financial security to cover liability under the Convention for wreck removal.

The P&I insurance that is provided collectively by the IG clubs has very high limits of cover for such liabilities and is considered to be an extremely reliable form of security. Consequently, the so-called ‘blue cards’ that are issued by the IG clubs as evidence that the “insurance or other financial security” that is required by the compulsory insurance requirements of such international conventions are accepted as sufficient evidence of compliance by the countries that are contracting parties to such conventions. Therefore, in reliance upon these ‘blue cards’, such contracting states are then prepared to provide shipowners with the certificates that are acknowledged to be the formal evidence of the “insurance or other financial security” that is required by such conventions. However, the P&I clubs that are members of the IG have been less ready to provide similar ‘blue cards’ for liabilities that arise under purely national or regional regulations since it is believed that liabilities should be determined and regulated by international conventions that have been developed under the aegis of the IMO. Consequently, such clubs have not been prepared to provide ‘blue cards’ for liabilities that arise under the Oil Pollution Act 1990 of the USA (OPA 90), but have been prepared to do so for liabilities that arise under the EU Passenger Liability Regulation (EC) No 392/2009 since such regulation mirrors many of the requirements of the 2002 Protocol to the Athens Convention.

The current compensatory framework that is based on the ability of the IG clubs to guarantee payment of claims is very advantageous to claimants in that it facilitates the rapid settlement of high level claims. This is one of the reasons why the European Union has been prepared to exempt the IG from a strict compliance with the otherwise prohibitive EU competition provisions. However, the readiness of the clubs to provide such comfort is based on the premise that the shipowner is able to rely on a virtually unbreakable limit of liability and that the required insurance and the liability of the insurer is capped at the same figure, i.e. on a delicate balance. However, in recent years, attempts have been made by the European Union to undermine the concept of limited liability and thereby expose liability underwriters to the risk of unlimited liability. Should such attempts be successful the IG clubs may have to reconsider their ability to continue to provide such comfort.
F. The development of the ‘one-stop shop’

Traditionally, P&I cover has been subject to a number of exclusions based on the rationale that, since P&I insurance is mutual insurance, the membership as a whole should not contribute to risks that are not borne by the membership as a whole but only by some members who choose to run additional or non-standard risks such as delivering cargoes without surrender of the original bills of lading. However, such exclusions have caused difficulty since more and more shipowners have found that they are obliged for commercial reasons to run risks for which they can either find no cover at all, or only cover at high premium cost. Therefore, Gard has over decades developed insurance solutions for risks that cannot be covered by the Standard P&I Cover, and offers several additional covers tailored to the provision of protection against such risks. Such cover is provided on an additional fixed premium basis. Initially spurred on by the desire to innovate coupled with the increasing complexity of shipping activity and the increasing demands that are made on insurance providers to provide a fast, efficient and competent service, Gard became increasingly keen to explore whether it could develop an insurance service that could transcend the difficulties that can often arise as a result of the historical divergence between different insurers such as hull and machinery, P&I, war risks etc. Therefore, when in the late 1990’s, a ‘once in a lifetime opportunity’ arose due to structural changes in the Nordic insurance market, Gard was ready to grasp the opportunity. The marine, energy and property insurance portfolios of various Nordic insurance companies were acquired by a new property and casualty insurer called If P&C Insurance Ltd (IF) which had been jointly established by such companies. However, IF’s total insurance portfolio was weighted in favour of land-based risks and the marine and energy business was considered to be a rather specialised non-core business with a low frequency/high severity risk. Gard saw an opportunity to significantly expand its marine and energy market presence by offering to manage this business for and on behalf of IF. Consequently, IF and Gard established the jointly owned insurance services company Gard Services AS with effect from July 2000.

This development benefitted Gard since it increased the volume of business over which costs could be spread and it enabled the management to develop new insurance products and services that would meet the changing requirements of the shipping industry. The new company created cross-functional teams that blended P&I and marine experience in relation to both underwriting and claims handling and consequently, offered a service that could address an increasingly wide range of client needs that covered damage to assets, loss of income and third party liability. The success of the venture, achieved by operational synergies and prudent risk management, resulted in increased financial strength to the benefit of all members of the Association.

8 Details of the extended covers that are provided by Gard can be found on the Gard website at: http://www.gard.no/ikbViewer/web/products
However, although Gard now managed this new portfolio, it did not own it, and this hampered the desire for expansion and growth. Consequently, when plans were made for IF to have stock market listing and it became apparent that it wished to dispose of the marine and energy portfolio, Gard took the opportunity to acquire it. Ultimately, Gard did so and established a new company: Gard Marine & Energy Ltd in Bermuda in early 2004, part owned by Gard P. & I. (Bermuda) Ltd., with IF holding a minority share. Less than 18 months thereafter, Gard acquired all the shares in the company from IF and for the first time, a mutual P&I association had full ownership control of a commercial marine insurance company. This represented something new in the world of mutual P&I clubs and several other clubs have since expanded and diversified their business in similar ways, but not perhaps to the same extent.

Consequently, it can truly be said that P&I clubs are complex and evolving organisms that provide much of the lubrication that enables shipowners and operators to provide the transportation service that the modern world requires whilst at the same time protecting such owners and operators against losses, additional expenses and liabilities that could make it impossible or difficult for them to do so. Therefore, the role that P&I clubs play has universal importance not just to those that operate ships but also to the ordinary man and woman in the street.
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Rules

Part I - Availability of cover
Chapter 1

Introductory provisions
Rule 1 Interpretation

1. In these Rules the following words or expressions shall have the following meanings:

**Advance Call**
the initial premium payable for a Policy Year in respect of an entry (other than a fixed premium entry) and calculated in accordance with Rule 12.

**Affiliate**
any person who is insured pursuant to Rule 78.1.a.

**Articles of Association**

**Association**

**Bill of Lading**
bill of lading or similar document of title.

**Certificate of Entry**
document issued by the Association pursuant to Rule 5.1, including (where the context permits) any endorsement note in respect of the relevant entry issued pursuant to Rule 5.3, which evidences the terms and conditions of the contract of insurance in respect of the Ship.

**Charterer’s Entry**
an entry effected by a charterer and which does not insure any other person except as a Co-assured or an Affiliate.

**Consortium Agreement**
shall have the meaning given to it in Appendix II.

**Consortium Claim**
shall have the meaning given to it in Appendix II.

**Consortium Vessel**
shall have the meaning given to it in Appendix II.

**Co-assured**
any person who is insured pursuant to Rule 78.1.b.

**Crew**
officers, including the master, and seamen contractually obliged to serve on board the Ship, including substitutes and including such persons while proceeding to or from the Ship.

**Defence cover and Defence entry**
insurance by the Association for risks specified in Part IV of these Rules, and the entry of a Ship for such cover.
Deferred Call
the proportion of the Premium Rating for a Policy Year in respect of an entry
(other than a fixed premium entry) which shall be deferred for payment in later
years in accordance with Rule 12.

Group Excess Loss Policies
the excess of loss reinsurance policy or policies effected by parties to the
Pooling Agreement.

Group Reinsurance Limit
shall have the meaning given to it in Appendix VI.

Hull Policies
the insurance policies effected on the hull and machinery of the Ship, including
any excess liability policy.

Insurance Premium Tax
any taxes or other dues payable in respect of an entry of a Ship in the
Association in the country where the Ship is registered, the country where the
Member is resident, the country where the Member has a permanent place of
business or in the country where the risk is located.

Joint Members
where the Ship is entered in the names of more than one Member, the
named Members.

Member
an owner, operator or charterer (including a bareboat or demise charterer) of a
ship entered in the Association who according to the Statutes and these Rules
is entitled to membership of the Association, provided that, where the context
allows, the term ‘Member’ shall, in these Rules, include a Co-assured and
an Affiliate.

Overspill Call
shall have the meaning given to it in Appendix VI.

Overspill Claim
shall have the meaning given to it in Appendix VI.

Owner’s Entry
an entry effected by an owner, bareboat or demise charterer or operator of the
Ship and which does not insure a charterer of the Ship (other than a charterer
insured as a Co-assured or an Affiliate).

P&I cover and P&I entry
insurance by the Association for risks specified in Part II of these Rules, and the
entry of a Ship for such cover.

Policy Year
a year from noon GMT on 20 February in any year to immediately prior to
noon GMT on the next following 20 February.
**Pooling Agreement**

an Agreement, to which the Association is a party, between certain protection and indemnity associations dated 20 February 1998 and any addendum to, or variation or replacement of such Agreement.

**Premium Rating**

the agreed rating on which the Advance Call is payable to the Association, or the fixed premium payable to the Association on a fixed premium entry, according to the terms of the Ship’s entry.

**Release Call**

any premium which may be payable on termination or cesser of an entry (other than a fixed premium entry) in accordance with Rule 15.1.

**Ship**

a ship or other floating structure entered in the Association (other than a mobile offshore unit entered in accordance with Part III of these Rules).

**Supplementary Call**

further premium payable for a Policy Year in respect of an entry (other than a fixed premium entry), in addition to the Advance Call and Deferred Call, but excluding any Overspill Call.

2 Headings and notes are for reference only, and shall not affect the construction of these Rules.

3 Any reference to a Charterer shall be deemed (unless otherwise expressly indicated) to be a reference to a charterer other than a bareboat or demise charterer.

4 Any reference to a person shall be deemed to include a reference to an individual or a body corporate or unincorporate, as the context requires.

5 A person shall be deemed to be the manager or the operator of a Ship for the purposes of these Rules if the Association in its discretion shall so determine.

6 Where any matter requires the agreement, approval or consent of the Association, agreement, approval or consent shall only be deemed given if in writing.
Guidance

It may be necessary when commenting on the Rules in this Guidance to make reference in certain contexts to the same words and expressions without capitals. This is necessary when the Guidance is not alluding specifically to the definition in the Rules.

(A) ...the following words or expressions... (Rule 1.1)

Certain words and expressions used in the Rules are defined in Rule 1.1 and any such definition will be applied in the interpretation of the Rules, notwithstanding any other meaning that the relevant word or expression may have when used elsewhere. In order to distinguish words and expressions which are given a specified meaning under Rule 1.1, they appear as capitalised terms when used in the Rules.

Advance Call... (Rule 1.1)

The total premium payable in respect of an entry for a Policy Year is divided into Advance Call payments and Deferred Call payments. The Advance Call is payable in the course of the Policy Year1 whereas payment of any Deferred Call is deferred to later years. The proportion of the total premium payable by any one entry which shall be collected as Advance Call is decided before the commencement of the Policy Year.2

Affiliate... (Rule 1.1)

An Affiliate is a person3 to whom P&I cover can be extended in respect of a claim by the exercise of discretion by the Association4 although he is not specifically named in the terms of entry for the Ship and is therefore not a Member or a Co-Assured. Affiliates include persons affiliated to or associated with the Member, but not those affiliated to or associated with a Co-assured. The words ‘affiliated’ and ‘associated’ are not defined, but will include the ultimate holding company of the Member and any other subsidiary of that ultimate holding company.

Articles of Association...Association (Rule 1.1)

This definition recognises the fact that the provisions which govern the rights and obligations of the Members of Assuranceforeningen Gard -gjensidig- and Gard P. & I. (Bermuda) Ltd. are currently found in different governing instruments but introduces a common definition which enables reference to be made to the governing instrument of the relevant Association in the relevant circumstances. Any reference in the Rules to the Articles of Association is to be construed as a reference to the Statutes of Assuranceforeningen Gard -gjensidig- and/or the Bye-Laws of Gard P. & I. (Bermuda) Ltd. as the context requires.

1 Advance Call payments are made in three instalments. See the Guidance to Rule 20 in this regard.
2 See the Guidance to Rule 12.
3 Under Rule 1.4 a ‘person’ is deemed to include incorporated or unincorporated bodies.
4 See also the Guidance to Rule 78.1.a.
Bill of Lading... (Rule 1.1)
A Bill of Lading may be either a ‘to order’ bill of lading in the traditional sense, e.g. made out ‘to the order of X’, or a straight bill of lading, e.g. made out ‘to X’. A straight bill of lading is referred to in the Rules as ‘non-negotiable bills of lading’.  

A ‘similar document of title’ is for the purposes of the Rules any other document which, like a ‘to order’ bill of lading, gives its holder the right to possession of goods and the right to transfer that possession to a third party. Whether a document has such an effect will depend on the custom of the trade and the applicable law. Examples are ‘received for shipment’ and ‘through’ bills of lading, but not non-negotiable receipts, consignment notes and charterparties.

A more detailed explanation of these documents can be found in the Guidance to Rule 34.

Certificate of Entry... (Rule 1.1)
The Certificate of Entry is the document issued by the Association to evidence the terms and conditions of the contract of insurance in respect of the Ship or a fleet of Ships. The certificate will also include any endorsement notes in respect of the relevant entry setting out variations in the terms and conditions as agreed between the Association and the Member, as well as the date from which such variations take effect.

Charterer’s Entry... (Rule 1.1)
Rule 3.1 provides that an application for entry of a ship may be made to the Association by “any owner, operator, charterer (including a bareboat or demise charterer) or any other insurer of that ship” and that the entry shall be made on the basis of either an Owner’s Entry or a Charterer’s Entry. Rule 1.3 clarifies that a Charterer’s Entry is an entry of a charterer other than a demise (bareboat) charterer, i.e. normally a time or voyage charterer that is associated to or affiliated to the Owner of a Ship. There can only be one Member insured on a Charterer’s Entry, but the entry may also provide cover for Co-assureds and Affiliates pursuant to Rule 78.

Consortium Agreement... (Rule 1.1)
The term is defined in Appendix II, Paragraph 5.1 as ‘any arrangement under which a Member agrees with other parties to the reciprocal exchange or sharing of cargo space on the Ship and Consortium Vessels’. Consortium Agreements are common in the liner container trade where container ship operators seek to maximise global utilisation of cargo space on the ships owned or chartered by them.

5 See (J) to the Guidance to Rule 34.
6 See also Article 2 of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and 4 of the Statutes of Assuranceforeningen Gard -gjensidig-.
Consortium Claim... (Rule 1.1)
The term is defined in Appendix II, Paragraphs 5.1 and 5.2 as a claim that
• arises under a P&I entry of a Ship; and
• arises out of the carriage of cargo on a Consortium Vessel; and
• the Member and the operator of the Consortium Vessel are parties to a
  Consortium Agreement; and
• at the time cover pursuant to the special provisions in this section 5 initially
  attaches, the Member employs a Ship pursuant to that Consortium Agreement.

Consortium Vessel... (Rule 1.1)
The term is defined in Appendix II Paragraph 5.1 as ‘a ship, feeder vessel or
space thereon, not being the Ship, employed to carry cargo under a Consortium
Agreement’.

Co-assured... (Rule 1.1)
A Co-assured is any person who is insured pursuant to Rule 78.1.b, and will be
named on the Certificate of Entry as such. Subject to the terms of Rule 78, a Co-
assured has a right of recovery from the Association for covered liabilities, losses,
costs and expenses and has joint and several liability under Rule 79 to pay all
sums due to the Association in respect of such entry. However, unlike a Member, a
Co-assured cannot exercise any membership rights such as voting at the General
Meetings of the Association.7

Crew... (Rule 1.1)
The term Crew encompasses officers and seamen, including non-marine personnel
such as stewards and hotel/catering staff on cruise ships, who are obliged to serve
on board the Ship as a part of its regular complement under the terms of a contract
of service or employment. However, not all persons working on board the Ship are
Crew. A pilot, for example, would not form a part of the Crew as, although he is
obliged to serve on the Ship under the terms of his employment contract, he is not
part of the regular complement of the Ship.

Defence cover and Defence entry... (Rule 1.1)
Defence cover is insurance in respect of legal and other costs necessarily and
reasonably incurred in establishing or resisting claims as set out in Part IV of the
Rules. A Defence entry is the entry of a Ship for Defence cover.

Deferred Call... (Rule 1.1)
The total premium payable in respect of an entry for a Policy Year is divided into
Advance Call payments and Deferred Call payments. The Advance Call is payable in
the course of the Policy Year whereas the payment of any Deferred Call is deferred
to later years when the claims on that Policy Year are better known. A forecast

7 See Rule 78.2.
Deferred Call will be notified at the time of notification of the Advance Call for the Policy Year. The actual Deferred Call may be collected either in whole or in part, or may in some circumstances be waived.  

**Group Excess Loss Policies… (Rule 1.1)**

These are reinsurance policies placed by the parties to the Pooling Agreement in order to reinsure those parties in respect of claims exceeding the agreed retention level for the Pool. Any shortfall of recovery under the Group Excess Loss Policies will be shared by the parties to the Pooling Agreement.

**Group Reinsurance Limit… (Rule 1.1)**

The term is defined in Appendix VI, Paragraph 1 as ‘the amount of the smallest claim (other than any claim arising in respect of oil pollution) incurred by the Association or any other party to the Pooling Agreement which would exhaust the largest limit for any type of claim (other than any claim arising in respect of oil pollution) from time to time imposed in the Group Excess Loss Policies.’

**Hull Policies… (Rule 1.1)**

The Hull Policies are the insurance policies that cover the hull and machinery of the Ship and include any excess liability policy that covers liabilities that may be incurred by a Ship in excess of the maximum amounts recoverable under such policies because the liabilities exceed the valuation of the Ship under such policies. Depending on the terms and conditions of the Hull Policies, e.g. the Nordic Marine Insurance Plan, Institute Time Clauses or International Hull Clauses, the term ‘hull and machinery’ may also include the Ship’s materials, equipment, spare parts and other items regularly on board the Ship.

**Insurance Tax Premium… (Rule 1.1)**

A number of countries have laws and regulations that provide that certain taxes and dues are imposed in respect of insurance premiums that are payable to the Association as insurer. Such taxes and dues are usually referred to as Insurance Premium Tax (IPT).

The Member’s obligation to pay IPT may vary depending on the particular country and the scope of the relevant IPT legislation.

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8 See the Guidance to Rule 12.
9 The level of agreed retention may change. Therefore, reference should be made to the Association’s website for information as to the level of agreed retention that may be applicable from time to time.
10 See the Guidance to Rule 20A.
Joint Members… (Rule 1.1)
This includes the named Members for an entry where the Ship is entered in the names of more than one Member. All Joint Members have the same rights and obligations under the contract of insurance, but will together exercise the same voting rights as if there had been only one Member in respect of the entry.

Member… (Rule 1.1)
Unless the context suggests otherwise a Member is an assured who has full cover with the Association and who (unlike a Co-assured) is entitled to membership of the Association including the right to vote at the General Meetings of the Association.

Where the context allows, the term Member will also include other parties insured under an entry, e.g. any Co-assured as well as any Affiliate to whom cover can be extended under Rule 78. The wider interpretation of the term ‘Member applies throughout the Rules11 in relations to the rights and obligations of those insured. For example, the duty of disclosure under Rule 6 is equally binding on a Co-assured who is the manager of the Ship as on the Member who is the owner of the Ship.12

In certain circumstances the acts or omissions of the person effecting the insurance, such as a broker, an officer or employee in the Member’s organisation or independent contractors to whom the Member has delegated important functions in the management and operation of the Ship, may be deemed to be the acts or omissions of the Member.13

Overspill Call… (Rule 1.1)
The term is defined in Appendix VI, Paragraph 1 as ‘a call levied by the Association pursuant to Paragraph 5 for the purpose of providing funds to pay part of an Overspill Claim’. Appendix VI contains specific terms and conditions concerning the recoverability and payment of Overspill Claims; the expert determination of issues pertaining to Overspill Claims; the levying and closing of Policy Years and the provision of security for Overspill Calls.

Overspill Claim… (Rule 1.1)
The term is defined in Appendix VI, Paragraph 1 as ‘that part (if any) of a claim (other than a claim arising in respect of oil pollution) incurred by the Association or by any other party to the Pooling Agreement under the terms of entry of a ship which exceeds or may exceed the Group Reinsurance Limit’. The parties to the Pooling Agreement have agreed to pool Overspill Claims.

11 See the Guidance to Rules 6, 7 and 72 respectively concerning the concept of ‘identification’ under Norwegian law. See also the Guidance to Rule 2 concerning the scope of cover for a Member who indemnifies an officer, employee or agent for a liability incurred to a third party.
12 See also the Guidance to Rule 79.4.
13 See the Guidance to Rules 72 and 79.4.
**Owner’s Entry… (Rule 1.1)**
An Owner’s Entry is an entry effected by an owner, bareboat or demise charterer or an operator of a Ship, but not by a time or voyage charterer. A time or voyage charterer that is associated to or affiliated to the Owner of a Ship can be named on such an entry as a Co-assured or may be covered\(^1\)\(^4\) as an Affiliate but any other charterer can be covered only under a separate Charterer’s Entry.

**P&I cover and P&I entry… (Rule 1.1)**
P&I cover is the insurance for P&I risks set out in the terms of entry for the Ship and the P&I Rules for Ships. A P&I entry is a Ship entered in the Association for P&I cover.

**Policy Year… (Rule 1.1)**
The date of 20 February has historically been used as the commencement date of a Policy Year by P&I clubs and is now uniformly adopted by clubs in the International Group of P&I Clubs.

**Pooling Agreement… (Rule 1.1)**
The Pooling Agreement is an agreement between the P&I clubs which are members of the International Group of P&I Clubs, whereby the clubs have agreed to apportion between themselves certain claims (as defined) that exceed the maximum sum that each club is to bear individually.\(^1\)\(^5\) The terms and conditions of the Pooling Agreement are revised from time to time; usually from the inception of each new Policy Year.

**Premium Rating… (Rule 1.1)**
The Premium Rating will reflect the Association’s overall assessment of the risk that the Ship represents in terms of future claims exposure. The Premium Rating is agreed, for example, as a rate per gross ton for the Ship or as a lump sum and is sometimes referred to as the Estimated Total Call (ETC).\(^1\)\(^6\) All other issues being equal, the average Premium Rating will in most circumstances be reduced if more Ships are entered by the Member because of improved distribution of risk and reduced claims volatility.

**Release Call… (Rule 1.1)**
The Release Call is an additional premium that the Member may elect to pay when an entry is terminated or ceases. Payment of the Release Call will release the Member from any and all liability to pay Deferred Calls and Supplementary Calls for the entry. However, by electing to pay such a Release Call, the Member also gives up his right to receive any share of distributed surpluses.\(^1\)\(^7\)

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\(^1\)\(^4\) See the Guidance to Rule 78.4.
\(^1\)\(^5\) Further information concerning the Pooling Agreement and the International Group of P&I Clubs is available on www.igpandi.org.
\(^1\)\(^6\) See the Guidance to Rules 10 and 11 with regard to the setting and variations of the Premium Rating.
\(^1\)\(^7\) See the Guidance to Rule 15.
**Ship... (Rule 1.1)**

There is no universally accepted definition of ‘ship’, although it is frequently interpreted as a ‘vessel used in navigation’. However, the Association has the discretion under Article 2 of the Statutes of Assuranceforeningen Gard and/or Article 1 of the Bye-Laws for Gard P. & I. (Bermuda) Ltd. to consider other types of floating structures as ships and to provide cover for them on terms that the Association deems appropriate. Such discretion is not hindered by the definition of ‘Eligible Vessel’ in Appendix II of the Pooling Agreement since the latter merely determines whether a structure is to be treated as a Ship for purposes of access to the Pool and the collective reinsurance that is arranged by the International Group of P&I Clubs through the Pool. If there is doubt as to whether a vessel can be classified as a Ship, the Association may still nevertheless accept it for entry as a floating structure under the Rules for Mobile Offshore Units.

**Supplementary Call... (Rule 1.1)**

A Supplementary Call is premium payable in addition to the Advance Call and Deferred Call considered necessary to cover claims on, or costs, expenses and outgoings of the Association, including any allocation to reserves that the Association may deem appropriate. The right to levy Supplementary Calls on the Members is a cornerstone of mutual P&I insurance.18

**(B) Headings and notes are for reference only... (Rule 1.2)**

The purpose of this provision is to make clear that the headings and notes to the Rules do not form part of, and therefore shall not materially affect the rights and obligations of the parties to the contract of insurance. The headings and notes are included simply to make it easier to ‘navigate’ the Rules.

**(C) Any reference to a Charterer... (Rule 1.3)**

For the purposes of the Rules a distinction is drawn between demise and bareboat charterers on the one hand and any other type of charterer on the other. Under a demise or bareboat charter the ship is leased ‘bare’ by the charterer, i.e. without officers and crew. The demise or bareboat charterer will employ the officers and crew. Hence, demise and bareboat charterers are generally treated vis-à-vis third parties as the effective owners of the ship and, accordingly, they require P&I cover for owners’ risks. The aim of the proviso in Rule 1.3 is to make clear that any reference to a ‘charterer’ in the Rules shall mean a charterer other than a demise or bareboat charterer. In other words, the Rules which set out the rights and obligations of a ‘charterer’ do not apply to a demise or bareboat charterer. They apply to time, voyage, cross, space, slot, consortium and other types of charterers, subject to specific terms and conditions that may apply to any particular type of charterer, e.g. Consortium Agreements as per Appendix II, Paragraph 5.

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18 See the Guidance to Rule 13.
(D) Any reference to a person... (Rule 1.4)
Where there is a reference to a person, for example where a Member is referred to as ‘he’, this will be deemed to include female persons as well as corporate and unincorporated bodies. A ‘body corporate’ is an entity which is distinct and separate in law from its owners, e.g. a limited liability partnership or a company incorporated under the English Companies Act. An unincorporated body is any other body or group of persons, for example an unlimited partnership under English law.

(E) A person shall be deemed to be the manager or the operator of a Ship... (Rule 1.5)
It is important to determine whether a person is a manager or an operator of a Ship for various purposes under the Rules.19 Rule 1.5 provides that such a determination is to be made by the Association in its discretion. A manager is a person who performs some or all of the technical, crewing or commercial functions on behalf of and for the account of the owner of a Ship, and is usually an organisation which is wholly independent from the owner and which renders such services to different principals under different ship management agreements. An operator will usually be a person who performs similar functions on behalf of the owner to that of a manager, but for his own risk and account, and may be affiliated to or associated with the owner.

(F) Where any matter requires the agreement, approval or consent of the Association... (Rule 1.6)
This Rule clarifies and emphasises that a Member is not entitled to rely on any agreement, approval or consent given by the Association20 where it is given orally. It must be confirmed by the Association in writing, e.g. by e-mail, facsimile or letter, if it is to be binding on the Association. The purpose of this Rule is to avoid disagreements or disputes as to whether the Association has given its agreement, approval or consent.

19 See for example the eligibility for an entry applications under Rule 3.1 and cesser under Rule 25.2.f.
20 E.g. for the purpose of approving contracts under Rule 55.a.
Rule 2 The cover

1 A Member shall be covered for such of the risks specified in Parts II, III and IV of these Rules as are agreed between the Member and the Association.

2 A Member with P&I cover shall be covered for such of the additional risks specified in Appendix I as are either:
   a expressed in Appendix I to be available to such a Member; or
   b expressly agreed between the Member and the Association.
   
   Note: The risks specified in Appendix I are separately treated as they are excluded from the Pooling Agreement and are subject to a separate reinsurance programme.

3 The cover afforded by the Association to a Member shall be subject to the Articles of Association and to these Rules and to any special conditions agreed between the Association and the Member.

4 A Member is only covered in respect of liabilities, losses, costs and expenses incurred by him which arise:
   a in direct connection with the operation of or, in the case of Defence cover, acquisition or disposal of the Ship; and
   b in respect of the Member’s interest in the Ship; and
   c out of events occurring during the period of entry of the Ship for the relevant risk in the Association.

5 Subject always to the provisions of Rule 2.4, the Association may in its absolute discretion exercise powers conferred in the Articles of Association to pay compensation in respect of a liability, loss, cost or expense which is not otherwise covered under these Rules.

6 It shall be a condition of Defence cover that the Ship has valid and subsisting P&I cover with the Association, except in the case of building or purchase contracts where there must be an undertaking by the Member to enter the Ship for P&I cover at the latest on taking delivery of the same.

Guidance

(A) …such of the risks…as are agreed between the Member and the Association. (Rule 2.1)

The insurance cover provided by the Association is not a general liability cover. It is ‘named risk insurance’ which provides cover only against the specific risks identified in the Rules and agreed in writing¹ with the Association. P&I cover for Ships are available under Part II of the Rules, with optional additional cover for Defence risks under Part IV. A Member may also be covered for additional risks as specified in Rule 2.2.² However, the cover for mobile offshore units available under Part III is outside the scope of this Guidance.

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¹ See the Guidance to Rule 1.6.
² See (B) below.
It follows that the Association does not cover any risks not specified in the Rules. However, the Association may, nevertheless, in its absolute discretion pay compensation in such circumstances under Rule 2.5 provided that the particular risk otherwise complies with the provisions of Rule 2.4 and does not extend beyond the purpose of the Association.

Some of the P&I risks specified in Part II may be excluded from cover as a result of special terms of entry agreed with the Member. Any such exclusion will be set out in the Certificate of Entry or an endorsement note.4

(B) ...the additional risks specified in Appendix I... (Rule 2.2)

The principal scope of P&I cover for Ships offered by the Association is set out in Part II. These are traditional P&I risks insured by all the P&I clubs that are members of the International Group of P&I Clubs, and, consequently, the Association is able to reinsure these risks under the terms of the Pooling Agreement.

The Association may also make cover available for the risks set out in Appendix I to the Rules. These risks are either covered by the Association itself and not reinsured or reinsured by it outside the Pooling Agreement, or arranged by the Association on behalf of the Member as agent only through market facilities which have been negotiated by the Association. The Association has no liability under the terms of cover arranged by it as agent only.

Cover for certain of the risks itemised in Appendix I is automatically available to a Member who has P&I cover with the Association. However, cover for other risks which are not automatically available to a Member in Appendix I, is available only if specifically agreed and are normally subject to payment of additional premium.5

Finally, the Association is also able to provide cover on specified terms and in appropriate circumstances for risks that are not traditional P&I risks that are covered on a mutual basis by the P&I clubs that are members of the International Group of P&I Clubs. Such cover is not reinsured under the Pooling Agreement and is subject to the payment of additional premium. Further details can be obtained in the Gard publication Additional Covers – Terms and Conditions a detailed commentary on which can be found in the Chapter on Additional Covers in this Guidance.

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3 See (J) below.
4 See Rule 5.
5 See the Guidance to Rule 10.3.
(C) The cover...shall be subject to the Articles of Association...these Rules and
to any special conditions... (Rule 2.3)
The contract of insurance between the Member and the Association is governed
by the Bye-Laws of Gard P. & I. (Bermuda) Ltd. for entries with Gard P. & I.
(Bermuda) Ltd., the Statutes of Assuranceforeningen Gard -gjensidig- for entries
with Assuranceforeningen Gard -gjensidig- and the Rules and any special terms of
entry agreed in writing between the Member and the Association. The Member
and the Association are, in general terms, free to enter into such special terms as
are considered necessary in respect of the contract of insurance, subject only to the
mandatory sections of the Norwegian Insurance Contract Act of 1989 and Article 3
of the Statutes.

(D) A Member is only covered...which arise... (Rule 2.4)
The conditions itemised in sub-sections a, b and c of Rule 2.4 are cumulative.
Members will therefore be covered only for those liabilities, losses, costs and
expenses which satisfy all of these conditions. These conditions represent the
fundamental principles of P&I cover.

(E) ...liabilities, losses, costs and expenses... (Rule 2.4)
‘Liabilities’ means legal liabilities. The Association does not cover voluntary
payments made by the Member to third parties for the Member’s own commercial
or other reasons in the absence of any legal liability to do so. Legal liabilities can
arise under contract, in tort, bailment, or statute. The basis of the legal liability and
the law or jurisdiction under which it arises, is immaterial for the purpose of cover.
Such liability may be based on negligence, e.g. in the case of a collision, or on strict
or absolute liability created by statute and imposed without negligence, e.g. as
sometimes happens in the case of damage to fixed or floating objects.

Liabilities, losses, costs or expenses which would not have arisen but for the terms of
a contract or indemnity entered into by or on behalf of the Member are not covered
unless the terms have previously been approved by the Association. Similarly, no
cover is available for liabilities which arise as a result of contractual terms prohibited
by the Association or which arise where a Member has omitted to use contractual
terms required by the Association.

6 See the Guidance to Rule 90.
7 The Association has never to date refused to cover a liability because of onerous provisions of the
governing law, but special provisions may apply. See for example the Guidance to Rule 53.2, concerning
pollution liabilities pursuant to the US Oil Pollution Act 1990.
8 See the Guidance to Rule 36.
9 See the Guidance to Rule 37.
10 See Rule 55.a.
11 See Rule 55.b and Appendix IV.
The words ‘losses, costs and expenses’ cover not only losses which arise as a result of a Member’s liability to a third party but also losses, costs and expenses incurred by the Member himself, where the Rules permit the Member to recover them from the Association. Examples include diversion expenses,\(^{12}\) extra handling costs,\(^{13}\) expenses incurred in dealing with stowaways and refugees,\(^{14}\) the costs and expenses of wreck removal,\(^{15}\) irrecoverable general average expenditure,\(^{16}\) the cost of measures taken to avert or minimise loss\(^ {17}\) and disinfection and quarantine expenses.\(^ {18}\) However, some losses, costs and expenses may be recoverable only when incurred with the prior approval of the Association (e.g. pursuant to Rule 32 (Stowaways, Refugees or Persons saved at sea) or Rule 44 (Legal Costs)).

\( \text{(F) …incurred by him… (Rule 2.4)} \)

The liabilities, losses, costs and expenses must be ‘incurred’ either by the Member directly or by servants, agents or independent contractors for whose acts or omissions the Member is held vicariously liable.\(^ {19}\)

For example, the Member may have a direct liability to a third party for loss or damage caused by the acts or omissions of his employees, on the basis that an employer is vicariously liable for the acts of his employees which are performed in the course of their employment.

Where a servant, agent or independent contractor of a Member incurs a direct liability to a third party in the course of his employment, the Member may be obliged to indemnify him for that liability. This obligation may arise under a specific term of the contract between the Member and the servant, agent or independent contractor, or under general law.\(^ {20}\) The Association does not insure the servant, agent or independent contractor directly and will, therefore, not reimburse him for liabilities that he incurs. However, cover is available to the Member for his liability to indemnify the servant etc., if the third party liability incurred by the servant etc., would have been covered by the Association had it been incurred by the Member.

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12 See Rule 31.
13 See the Guidance to Rule 35.
14 See Rule 32.
15 See Rule 40.
16 See Rule 41.
17 See Rule 46.
18 See Rule 48.
19 See the Guidance to Rule 72 for discussion on how a Member is identified with the acts or omissions of others.
20 The relation of principal and agent or employer and employee raises by implication a contract on the part of the principal or employer to reimburse the agent or employee for all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency or employment, provided that such implication is not excluded by the express terms of the contract between them, and provided that such expenses and liabilities are in fact occasioned by his employment.
The liability must be incurred by the Member. The Association will not cover in rem claims\textsuperscript{21} against the Ship incurred by someone other than the Member, e.g. a previous owner or a bareboat charterer that was not entered with the Association at the time when the incident giving rise to that party’s liability occurred.

The Association does not require any liability incurred by a Member to a third-party claimant to have been determined by a competent court or arbitration tribunal before compensation can be paid. It is sufficient that the Association is satisfied after investigation that the Member is liable (or likely to be liable) to the claimant. Frequently, particularly in the case of cargo and personal injury claims, it is arguable whether or not the Member is liable to the claimant and it is therefore possible to settle the claim on a compromise basis. In such circumstances, cover is available for the Member’s compromised liability, provided that the Association has approved the settlement.\textsuperscript{22} If, however, a Member admits liability for a claim or settles a claim without prior reference to the Association, this may prejudice his cover for that claim.\textsuperscript{23}

The Member’s right of recovery is usually dependent on the liability, loss, cost or expense first being discharged or paid by the Member.\textsuperscript{24} In certain circumstances, however, the Association may make or commit itself to making a payment to a third party on behalf of the Member either by provision of the ‘Blue Cards’ that are mandatory pursuant to various international conventions\textsuperscript{25} or otherwise in anticipation of a liability, loss, cost or expense being incurred. Examples of the latter situation are where:

\textbf{a} the Association makes a payment into court with the approval of the Member;
\textbf{b} the Association, at the request of the Member, provides its letter of undertaking or other form of security to a third-party claimant as security for its claim against the Member.

The making of such a payment or the provision of such security is, however, entirely discretionary on the part of the Association, and the Member may ultimately be obliged to indemnify the Association for any payment made, or liability incurred, by the Association.\textsuperscript{26}

\textsuperscript{21} A lawsuit against an item of property, not against a person.
\textsuperscript{22} See the Guidance to Rule 87.
\textsuperscript{23} See the Guidance to Rule 82.2.
\textsuperscript{24} See the Guidance to Rule 87.
\textsuperscript{25} See the Guidance to Rules 27 (Liabilities in respect of passengers), 38 (Pollution), 87 (Payment first by the Member).
\textsuperscript{26} See the Guidance to Rule 88.
(G) …direct connection with the operation…acquisition or disposal of the Ship… (Rule 2.4.a)
The insurance cover that is provided by the Association mirrors that of the Pooling Agreement and is limited to liabilities, losses, costs and expenses which are incurred in direct connection with the operation of a Ship. In the case of Defence cover, liabilities, losses, costs and expenses incurred in direct connection with the acquisition or disposal of the Ship are also covered.27

There must, therefore, be a direct causal link between the operation of the Ship or, in the case of Defence cover only, its acquisition or disposal, and the incident giving rise to the relevant liability, loss, cost or expense. The cover “follows the Ship” rather than any other operations or activities of the Member that are possibly connected to the operation of the Ship but do not arise in direct connection with the operation of the Ship. For example, the Member may also have an interest in the operation of a terminal that is used in connection with the operation of a Ship and may incur losses or liabilities in that capacity when the terminal has been used to store cargo that has been carried on the Ship. However, such losses or liabilities are not incurred in direct connection with the operation of the Ship and cover is not, therefore, available under the P&I Rules. However, separate cover may be available from the Association for such risks under Gard’s Additional Covers.28

The liability, loss, cost or expense must relate specifically to the entered Ship. For example, the Association will not cover liabilities incurred in connection with personnel who form part of the Member’s general workforce, but who are not serving on any particular entered Ship at the time the liability is incurred.

(H) …the Member’s interest in the Ship… (Rule 2.4.b)
The Association provides cover only for liabilities, losses, costs and expenses which arise in respect of the Member’s interest in the Ship. This will generally be taken to mean the capacity in which the Member has been insured by the Association.29 For example, a Member who is the charterer of the Ship and also the owner of the cargo on board the Ship, will be covered only in his capacity as charterer and not as cargo owner.

(I) …events occurring during the period of entry… (Rule 2.4.c)
The cover provided by the Association is limited to liabilities, losses, costs and expenses which arise as a result of events which occur during the period of entry of the Ship in the Association.

27 See the Guidance to Rule 66.
28 See the Gard publication Additional Covers – Terms and Conditions a detailed commentary on which can be found on page 607 of this Guidance.
29 A Member with full cover will enter a Ship in his capacity as owner, operator or charterer of the Ship. A Co-assured or Affiliate may be insured in a different capacity. See Rule 78.
In many cases, the loss or damage will be manifest at the time of, or immediately after the causative event. In other cases, however, the physical loss or damage may not occur or become apparent until some time after the causative event. In order for cover to be available for the liability, loss, cost or expense, the Member must demonstrate that the causative event has occurred during the period of entry even if the loss or damage has not become manifest during the period of entry.

It can sometimes be very difficult to establish when a causative event has occurred, but this may nonetheless be crucial in order to determine whether cover is available for the event. Ships may be sold during a cargo voyage, or the P&I entry of a Ship may change if a cargo voyage crosses into the new Policy Year. Accordingly, see the Guidance to Rule 80 which has provisions which are intended to determine when an event giving rise to certain types of claim is deemed to have arisen.

(J) …compensation in respect of a liability…not otherwise covered… (Rule 2.5)
This Rule is commonly called the Omnibus Rule. It enables the Association, upon the application of a Member, to pay compensation in respect of a claim which falls outside the classes of liability, loss, cost and expense specified elsewhere in the Rules. The Omnibus cover is a particular feature of P&I insurance and provides the Association with some measure of flexibility to meet the changing needs of its Members.

Claims put forward for consideration under the Omnibus Rule must be within the spirit of, or closely related to, existing heads of cover and must be consistent with the mutual interests of the Members. Furthermore, the exercise of discretion by the Association under the Rule can only be exercised in respect of liabilities, losses, costs and expenses which satisfy the conditions set out in Rule 2.4.

Certain Rules make reference to cover not being available ‘…unless and to the extent that the Association in its discretion shall decide otherwise…’ or by words of a similar nature. Those provisions should be read in conjunction with Rule 2.5.

It is entirely in the discretion of the Association whether a Member shall be indemnified in respect of a claim under this Rule. Such discretion is exercised by the Board of Directors of the Association under the terms of Article 6 of the Bye-Laws for Gard P. & I. (Bermuda) Ltd. and/or Article 9 of the Statutes of Assuranceforeningen Gard. The decision of the Board of Directors is final and subject to judicial review only when it is alleged that the Directors have exceeded their authority or have

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30 See, for example, Rule 34.1 concerning cargo liability and Rule 47.2 concerning fines and penalties.
31 See Article 6.2.h of the Bye-Laws for Gard P. & I. (Bermuda) Ltd. and Article 9.2.g of the Statutes of Assuranceforeningen Gard -gjensidig-. 
failed to apply the rules of natural justice. A court will normally assume that the Directors have acted in good faith and the onus of proving otherwise is on the party making the allegation.

**(K) Condition of Defence cover that the Ship has...P&I cover... (Rule 2.6)**

Defence cover is available to all Members, Co-assureds and Affiliates. Cover is available only in respect of a Ship which is entered for P&I cover, except that cover is available for disputes arising under contracts to build or buy a Ship, on the basis that P&I cover is not available before the Ship has been delivered to the Member and therefore is not yet operated by him. In such circumstances, Defence cover is available if the Member undertakes to enter the Ship for P&I cover no later than the date on which he takes delivery of the Ship. Since P&I cover is stated to be a condition of Defence cover, the Defence cover will lapse automatically if the P&I cover is terminated or ceases for any reason.

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32 See Vainqueur Jose (1979) 1 LL Rep 557. This is a decision of the English court but other courts and tribunals are likely to follow the same approach.


34 See the Guidance to Rules 65 – 70 for a further understanding of the nature and scope of the Defence cover.

35 See the Guidance to Rule 66.
Chapter 2

Entries and duration of cover
Rule 3 Entries
1 Application for an entry of a ship may be made by any owner, operator, charterer (including a bareboat or demise charterer) or other insurer of that ship, and the entry shall be on the basis of either an Owner’s Entry or a Charterer’s Entry.
2 A ship may be entered with the Association for less than its full tonnage.
3 Application for an entry of a ship shall be made in such form as may from time to time be required by the Association. The particulars given in any application form, together with any other particulars or information given in writing in the course of applying for insurance or negotiating changes in the terms of insurance, shall form the basis of the contract of insurance between the Member and the Association.
4 The Association may refuse to accept an application for the entry of a ship, or may accept an application for P&I cover but not for Defence cover, without stating grounds therefore, and whether or not the applicant is already a Member of the Association.

Guidance
(A) Application…may be made by any owner, operator, charterer…or other insurer of that ship… (Rule 3.1)
The application for the entry of a ship may be made only by a person who is eligible to be a Member of the Association, i.e. by an owner, operator, charterer, or, where the entry is by way of reinsurance, by another insurer of the ship since an application for the entry of a ship also constitutes an application for membership of the Association, if the applicant is not already a Member.

Others who have an interest in the Ship can also be insured; but must do so in the capacity of a Co-assured.¹

(B) …entry of a…charterer... (Rule 3.1)
The Association, like most other P&I clubs, was originally established to insure risks incurred by shipowners and operators. Cover has since been made available to charterers, but there is a limit to the extent to which the Association is willing to insure risks which are not traditional shipowners’ risks, bearing in mind the mutual nature of the Association and the interests of the predominantly shipowning membership.

Charterers can be categorised as falling into three main groups, according to the nature of the charterparty: time, voyage and bareboat (sometimes called demise) charterers.² Vis-à-vis third parties, a bareboat or demise charterer is usually deemed by law to have rights and responsibilities which are effectively commensurate with

¹ See the Guidance to Rules 78 and 79.
² See also the Guidance to Rule 1 in relation to the applicability of the Rules to charterers other than demise and bareboat charterers.
those of a shipowner and for this reason a bareboat (or demise) charterer of a Ship will normally be covered under an Owner’s Entry. The following discussion of cover for charterers will therefore consider the position of, principally, time and voyage charterers, i.e. charterers that are not bareboat (or demise) charterers.

It is important that charterers obtain P&I insurance because of the third party liabilities that they may incur in their capacity as charterers, for example:

a. The charterers may have nominated a port or berth which is found to be unsafe, and as a result they may be in breach of their obligation under the charterparty to nominate safe ports or berths. The breach may be the cause of the grounding of the ship, which has caused damage to the ship, cargo and the environment. Consequently, the charterers may be found liable to compensate the shipowner for damage to the ship, and to indemnify the shipowner in respect of liabilities, losses, costs and expenses incurred by him vis-à-vis third parties – such as pollution liabilities and salvage costs.

b. The charterers may be liable to cargo interests as ‘carrier’ under a contract of carriage evidenced by bills of lading issued in their own trading name. Alternatively, bills of lading may have been issued by the charterers – not in their trading name – but as agent of the shipowner. However, even if the bills of lading contain a ‘demise’ or ‘identity of carrier’ clause, the purpose of which is to identify the owner or bareboat (or demise) charterer as the carrier, such a clause is not recognised as valid in all jurisdictions. In such circumstances, the charterers may be exposed to cargo liability as ‘carrier’. Finally, charterers may be liable to indemnify the owners in respect of cargo claims pursuant to the terms of the charterparty.

c. The charterers may also be exposed to liability for personal injury to personnel considered to be the servants or agents of the charterers rather than the shipowner, or as a result of injury inflicted by such personnel for which the charterers may incur vicarious liability.

Most P&I clubs, including the Association, accept charterers’ entries, but charterers can also obtain insurance protection against third-party liabilities from charterers’ mutual associations and market insurers generally. Some charterers look for protection in more indirect ways, e.g. by a ‘benefit’ clause in the charterparty which

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3 For example, such liability may arise under the New York Produce Exchange form of time charterparty in respect of which the clubs who are parties to the International Group of P&I Clubs have agreed to allocate responsibility for claims between owners and charterers inter se according to the provisions of the Inter-Club Agreement.

4 Examples can be ‘supercargoes’ employed by the charterer to supervise the proper stowage and securing of cargo for which the charterer is the ‘carrier’, or stevedores contracted by the charterer to load and/or discharge cargo carried by him.
purports to give the charterers the benefit of the owner’s P&I insurance. However, P&I Rules including those of the Association invariably disallow such transfer of benefits.\(^5\)

The Rules provide cover for charterers in three ways.

i  Bareboat (or demise charterers) may effect their own Owner’s Entry, thereby obtaining P&I cover in the same way as a shipowner, or they may be insured as a Joint Member.

ii  Charterers who are affiliated to or associated with a Member who has an Owner’s Entry, may be Co-assured under that entry.\(^6\) In this case, the charterers do not receive the full benefits of membership and may obtain more limited cover.

iii  Charterers may obtain a separate and independent Charterer’s Entry.\(^7\) Such form of entry has been available to time and voyage charterers for many years and in view of the development of the liner container trade, it has become available also to for space or slot charterers.

Cover under a Charterer’s Entry, as in the case of an Owner’s Entry, is restricted by the general requirement that the liabilities, losses, costs and expenses must arise in direct connection with the operation of, and in respect of the charterers’ interest, in the Ship.\(^8\)

Charterers may, however, be exposed to liabilities for which cover is not available under the Rules, e.g. where the charterers cause damage to the Ship. Damage to the entered Ship is an excluded risk.\(^9\) However, additional cover is available from the Association for such liabilities.\(^10\)

Whilst shipowners and charterers are both given the right to limit their liability in accordance with international limitation conventions or under the applicable local law, the ability of charterers to do so is often more restricted.\(^11\) Consequently, the Rules impose express limitations on the Association’s liability for claims from

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5 See Rule 89 and the disclaimer incorporated into the Certificate of Entry by Rule 5.2. In Canadian Transport Co. Ltd. v Court Line Ltd. [1940] A.C. 934, the House of Lords held that such a benefit clause was of no avail to the charterer where the club rules provided that no assignment or subrogation by the Member would bind the club.

6 See the Guidance to Rule 78.4.

7 For the difference between Owner’s Entries and Charterer’s Entries – see (C) below.

8 See Rule 2.4. Although ‘interest’ is generally associated with an ownership or possessory interest under English law, it should not be read so narrowly in Rule 2.4, as the charterer does not normally have any proprietary interest in the Ship – see (H) of the Guidance to Rule 2.

9 See Rule 63.1.a.

10 Gard has for many years offered the Comprehensive Charterers’ Liability Cover, which includes cover in respect of the charterers’ liability for damage to the Ship. See further details on www.gard.no.

11 Under English law, charterers are given the right to limit their liability under the 1976 International Convention on Limitation of Liability for Maritime Claims, and the 1996 Protocol thereto, to the same extent as an owner. It follows that the charterer cannot limit liability in respect of claims for which the owner could not have relied on the right to limit, such as claims concerning damage to the ship. See AEGEAN SEA (1998) 2 LL. Rep 39 and CMA DJAKARTA (2004) 1 LL. Rep 460.
charterers. Since charterers’ cover is limited to specific sums, the Association is able to assess more accurately the risks represented by the Charterer’s Entry. Therefore, the premium payable by charterers can therefore be fixed and charterers are normally covered on a fixed premium basis.

(C) …an Owner’s Entry or a Charterer’s Entry. (Rule 3.1)
In essence, Owner’s Entries are entries effected by shipowners, bareboat or demise charterers or operators, whereas Charterer’s Entries are effected by other types of charterer, e.g. time, voyage, space or slot charterers. The nature of the entry dictates the level of cover available and the eligibility for co-assurance.

Unlike an Owner’s Entry, which can be in the names of more than one person, each of whom is entitled to the full benefits of membership, a Charterer’s Entry can only name the charterer as Member. Such form of entry can include Co-assureds or Affiliates, but these parties are not entitled to membership and enjoy only a limited cover.

(D) A ship may be entered for less than its full tonnage… (Rule 3.2)
The Rules of the Association permit the entry of a Ship for part of its tonnage. For example, an owner may enter a Ship for 75 per cent of its tonnage with the Association and for 25 per cent of its tonnage with another P&I club. This is similar to the situation where a percentage of a ship’s hull and machinery risk is placed with one insurer, with the balance of the risk being placed elsewhere, or retained by the owner. However, practice between the two markets may differ. In the case of hull and machinery insurance, the so-called ‘following underwriters’ will normally be bound by the claims handling decisions made by the ‘lead underwriter’, whereas, in the case of P&I insurance there is no automatic obligation for one club to follow the lead of another club. However, it is common for the clubs to enter into an agreement to such effect. Nevertheless, insofar as premium rating is concerned, one club will not normally be bound by the risk evaluation made by another club.

The entry of a Ship for part of its tonnage should be distinguished from the entry by the owner of a fleet of ships some of which are insured (for their full tonnage) with one club and others with another (or other) club(s). This is currently a much more common practice than entering ships for part of their tonnage in the manner described above.

12 See the Guidance to Rules 52 and 78.4 as well as Appendix II, Paragraphs 2 and 3 in this regard.
13 See the Guidance to Rules 10 and 11 on setting and variation of Premium Ratings.
14 See the definition of ‘Owner’s Entry’ and ‘Charterer’s Entry’ in Rule 1, as well as the scope of cover for Co-assureds in Rule 78.
Where a Ship is entered for part tonnage only, the Member is entitled to recover from the Association only such proportion of any liability, loss, cost or expense as the entered tonnage bears to the full tonnage.\textsuperscript{15} Moreover, the Advance Call, Deferred Calls and Supplementary Calls will be calculated in accordance with the entered (i.e. part) tonnage.\textsuperscript{16} Similarly, the Member’s voting rights will be determined by the entered tonnage.

\textbf{(E) Application...shall be made in such form as may...be required by the Association... (Rule 3.3)}

The Association has standard application forms for the entry of ships, known as ‘entry forms’. Currently, there are separate forms for passenger ships, dry cargo ships, tankers and small craft. The forms prescribe, and the Association will expect to receive, the following information, together with such additional information that the applicant/Member has a duty to disclose in the circumstances.\textsuperscript{17}

\begin{itemize}
  \item the persons to be named as assureds or Co-assureds;
  \item the name of the ship;
  \item the port of registry and flag and IMO number;
  \item the classification of the ship;
  \item the gross and net tonnage;
  \item the date of construction;
  \item the description of the ship, including details of the cargo or passenger capacity;
  \item the intended trading area and the types of cargo to be carried;
  \item the number and nationality of the officers and crew, together with details of their employment contracts;
  \item the cover required under Rule 36 (Collision with other ships) and Rule 37 (Damage to fixed or floating objects).
\end{itemize}

The application must be submitted to the Association’s underwriting department, who may request further information including information relating to the vessel’s condition. Pursuant to Rule 9.5 the Association may require the vessel to be surveyed and/or may require details from other P&I clubs that are members of the International Group of P&I Clubs of any earlier surveys have been conducted for them. At the conclusion of any such discussions, and subject to any amendment made to the original application, the Association will then either reject the application, or decide the terms on which an offer of insurance should be made to the applicant. When making its decision, the Association will have regard to

\textsuperscript{15} See the Guidance to Rule 75.
\textsuperscript{16} See the Guidance to Rules 12 and 13.
\textsuperscript{17} See the Guidance to Rule 6.
the terms and conditions of the International Group Agreement in the case of a ship which was previously or is currently entered with another member of the International Group of P&I Clubs.

The following commentary assumes that Norwegian law will apply to the making of the contract.

Any offer made by the Association will contain details of the proposed Premium Rating and of other proposed terms of insurance for the ship. If the applicant decides to accept the offer, he should send a written notice to the Association to such effect. In certain cases the Association may impose a time limit for acceptance. In other cases, the Association will be bound by the acceptance only if it is received within a reasonable time after the making of the offer.

A contract of insurance will be concluded when the offer is accepted by the applicant, or by a broker or other agent acting on behalf of the applicant. There may be a binding contract even though the Association and the applicant have not agreed all minor items, provided that all of the essential items of the contract have been agreed.

Although the contract of insurance is concluded at a certain point in time, the actual entry of the Ship and the commencement of insurance cover may occur at a later date. For example, a contract may be concluded on 1 February committing the Association to enter the Ship and to make cover available, and committing the Member to pay premium, with effect from 20 February.

Membership of the Association will commence on the date that the insurance cover commences, although the contract of insurance may have been concluded at an earlier date.

Brokers are frequently used as intermediaries for the purpose of placing P&I insurance. Under both Norwegian and English law, a P&I broker is regarded as an agent of the applicant, i.e. the Member, unless the Member and the Association otherwise expressly agree. However, brokers must be distinguished from agents

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18 For example, the International Group Agreement contains provisions concerning the acceptance of entry of a ship in one International Group P&I club that has been held to be ‘substandard’ by another International Group P&I club. This provision is designed to combat substandard shipping.
19 For further details concerning the International Group Agreement, see www.igpandi.org.
20 In limited and exceptional circumstances a contract may be deemed to be concluded prior to formal offer and acceptance, where section 3-1 of the Norwegian Insurance Contract Act of 1989 applies. This provision is, however, only applicable to standard consumer contracts and is unlikely to apply to P&I insurance save possibly in the case of certain types of small craft.
21 See the Guidance to Rule 4.
22 The procedures followed by the Association after the conclusion of the contract of insurance are discussed in (A) of the Guidance to Rule 5.1 below.
appointed by the Association to offer insurance on its behalf. For example, Gard AS in Norway and Gard (UK) Limited in London act as the Association’s agents in this regard.

The broker normally receives remuneration for his services by the payment of commission (or brokerage), which is usually a percentage of the premium. Liability for payment of a broker’s commission varies from market to market. Traditionally, the premium was paid directly to the Association by the Member, upon receipt of which the broker commission was paid by the Association. This practice has largely been changed in most markets to one where the broker deducts the commission from the gross premium payment received from the Member, and pays the premium net of commission to the Association. In some markets, e.g. the United States, it is more common for the Member to pay remuneration for broker services on a fee basis. Whichever method of remuneration payment is applicable, Norwegian law requires there to be full transparency and this requirement is mirrored in the guidelines that have been promulgated by the International Group of P&I Clubs. Furthermore, the Association, like all other members of the International Group, are not permitted to pay commission to a broker without first having obtained the consent of the Member.

The extent to which payment of premium by the Member to a broker will discharge the Member’s liability to the Association, and the extent to which payment of claims by the Association to a broker will discharge the Association’s liability to the Member, varies from jurisdiction to jurisdiction, and will depend on the circumstances of each case. This issue will be particularly relevant where the broker becomes insolvent before passing on the premium to the Association, or the claim compensation to the Member. Under Norwegian law, payment of premium by the Member to the broker will not normally discharge the Member’s liability to pay premium to the Association. Therefore, if the broker fails to forward to the Association the premium received from the Member, the Member remains liable to pay it.

(F) The particulars...shall form the basis of the contract of insurance... (Rule 3.3)

The contract of insurance is entered into by the Association in reliance on the particulars and information which are given in writing by the applicant for membership. The applicant has a general duty under Norwegian law to disclose to the Association all information that the applicant considers, or reasonably should consider, relevant to the Association’s evaluation of his application. Similar duties apply under most other systems of law which may be relevant to the placement of the insurance.

23 The Association is not authorised to pay commission or brokerage to a broker unless this has been approved by the Member.
24 See the Guidance to Rule 6.
(G) The Association may refuse to accept an application… (Rule 3.4)
Rule 3.4 reinforces the Association’s rights under Norwegian law. There is no
obligation on the Association to accept an application. Furthermore, the
Association may accept an entry for P&I cover, but not for Defence cover. In neither
case is the Association obliged to give reasons for its refusal.

Rule 3.4 states expressly that the fact that an applicant is already a Member of the
Association will not prejudice the Association’s right to refuse an application. The
Member, therefore, cannot oblige the Association to accept an application on the
basis that there has been a course of dealing between himself and the Association
which entitles him to enter an additional ship.

The Association will not normally accept an entry only for Defence cover except
in the case of building and purchase contracts where ‘pre-delivery’ Defence cover may
be offered on the condition that the Member undertakes to enter the ship for
P&I risks at the latest on taking delivery of the ship.

The power to accept or reject an application and the power to agree special terms
and conditions for the entry of a ship is vested in the Board of Directors of the
Association but exercised by the managers of the Association pursuant to the
debated authority to do so that has been granted by the Board.

25 See, however, the provisions of the Norwegian Insurance Contract Act of 1989, section 3-1 and footnote
22 above.
26 However, the Association is licensed to insure Defence risks as a ‘stand-alone’ insurance even if the
Member is not also entered for P&I risks.
27 See Rule 2.6.
28 Pre-delivery defence cover is available to Members contracting to buy a newbuilding, or Members
buying an existing Ship. As the term ‘pre-delivery’ implies, the cover starts when the Member enters into
a contract to build or buy the Ship and applies to the period before the member takes delivery of the
Ship, whether from the shipyard at which it is being built, or from the sellers. Cover is available for the
disputes listed in Rules 65 and 66, provided that cover for claims related to the building, purchase or
mortgaging of the ship is subject to the Ship being entered in the Association for Defence cover at the
latest on signing the relevant contract governing the building or purchase, as required by Rule 66 a.
29 See paragraph (c) to the Guidance to Rule 66.
30 See Article 9.3.a of the Statutes.
Rule 4 Duration of cover

The cover shall commence at the time and date agreed by the Association and shall continue until immediately prior to noon GMT on the 20th February next ensuing, and thereafter, unless terminated in accordance with these Rules, from Policy Year to Policy Year.

Guidance

(A) …time and date agreed by the Association… (Rule 4)

The Association and the Member will agree the time at which cover is to commence at the time of conclusion of the contract between them.¹ The time and date of commencement of entry will be recorded in the Certificate of Entry.² The cover will continue until immediately prior to noon GTM on the following 20 February, unless it has ceased or been terminated before then.

Cover is available for a claim only if it arises out of an event³ occurring at or after the time of commencement of cover and before the termination or cesser of cover.⁴

(B) …cover…shall continue…unless terminated in accordance with these Rules… (Rule 4)

The P&I cover does not automatically terminate at the end of the Policy Year. It continues unless cover is terminated or ceases pursuant to the provisions of Rules 23-25. In the circumstances outlined in Rule 25 the Member ceases to be covered immediately on the occurrence of the particular event unless the Association decides otherwise. Under Rule 23 the Member may terminate the entry as from the end of the Policy Year by giving written notice thereof prior to 20 January. Under Rule 24 the Association may terminate cover by giving written notice of termination. Importantly, the Member cannot terminate the entry on any date other than at the end of the Policy Year except with the agreement of the Association. However, the Association can, in the circumstances outlined in Rule 24, terminate an entry on a date before the end of the Policy Year.

¹ See (E) of the Guidance to Rule 3 in relation to the time of conclusion of the contract.
² See the Guidance to Rule 5.
³ For the time of occurrence of an event see the Guidance to Rule 80.
⁴ See (I) of the Guidance to Rule 2.
Rule 5 Certificate of Entry

1 After an entry has been accepted, the Association shall issue a Certificate of Entry which shall evidence the terms and conditions of the contract of insurance.

2 The following provision will be deemed to be incorporated into all Certificates of Entry:

“This Certificate of Entry is evidence only of the contract of indemnity insurance between the above named Member(s) and the Association and shall not be construed as evidence of any undertaking, financial or otherwise, on the part of the Association to any other party.

In the event that a Member tenders this Certificate as evidence of insurance under any applicable law relating to financial responsibility, or otherwise shows or offers it to any other party as evidence of insurance, such use of this Certificate by the Member is not to be taken as any indication that the Association thereby consents to act as guarantor or to be sued directly in any jurisdiction whatsoever. The Association does not so consent.”

3 If the Association and a Member shall at any time agree a variation in the terms and conditions of the contract of insurance the Association shall issue an endorsement note stating the terms of such variation and the date from which such variation is to be effective.

Guidance

(A) After an entry has been accepted, the Association shall issue a Certificate of Entry... (Rule 5.1)

The Certificate of Entry (COE) is normally sent to the Member when the contract of insurance has been concluded, and copies of the Articles of Association, Rules and other relevant publications follow separately. Furthermore, the Association will, at the time of conclusion of the contract of insurance, arrange any undertakings or confirmations which are required for the issuance of agreed certificates which are reasonably needed for the trading of the Ship, e.g. certificates of financial responsibility for liabilities arising under international conventions\(^1\) or local law.\(^2\)

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2 For example, guarantees that are required to be given to the US Federal Maritime Commission by the owners or charterers of passenger ships that are engaged in voyages to or from US ports or that are required by the European Union pursuant to the EU Passenger Liability Regulation (EC) No. 392/2009 (the PLR) for passenger ships that are engaged in domestic seagoing voyages or inland waterways.
(B) ...which shall evidence the terms and conditions of the contract of insurance. (Rule 5.1)

The COE names and describes the Ship and identifies the Member and other assureds which are subject to the contract, either as Joint Members, or as Co-assureds.³

The COE also identifies in broad terms the risks covered by the Association in respect of the Ship, whereas the detailed terms and conditions of cover, and of membership, are found in the Rules and the Articles of Association. The COE refers to these Articles of Association and Rules, but they are expressly subject to any special terms and conditions recorded in the COE.⁴ The COE also normally itemises any special or additional terms, which are set out in full on separate endorsement notes that must be read together with the COE. If the terms of the standard contract of insurance are amended, these amendments are also set out in separate endorsement notes.⁵

Currently, virtually all flag states are prepared to accept an electronically signed PDF version of the COE accompanied by access to a regularly updated and searchable register of covered vessels on the webpage of the Association as the equivalent of the original document. The Association currently has such a searchable register for Owner’s Entries which can be found on www.gard.no.

The COE is only evidence of the contract of insurance as the contract itself is concluded earlier when the Association issues its acceptance.⁶

(C) The following provision shall be deemed to be incorporated into all Certificates of Entry... (Rule 5.2)

The provision quoted in Rule 5.2 underlines the nature of the COE and, more generally, the extent of the obligations undertaken by the Association in respect of a Member. The provision is deemed to be incorporated into all COEs, and is, in practice, expressly recorded on each COE. This ensures that it takes effect as a condition of the contract that binds the Member and is also brought to the attention of any third party who seeks to rely on the COE. However, it will not prevent the Association from incurring direct liability to third parties if the Association has by any other form of conduct assumed obligations towards them.⁷

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³ Affiliates are not identified at the time the contract of insurance is entered into. See the Guidance to Rule 78.
⁴ See Rule 2.2.b and Rule 2.3.
⁵ See Rule 5.3.
⁶ See the Guidance to Rule 3. For a further discussion of the effect of the Certificate of Entry, see Hazelwood Steven, P&I Clubs: Law and Practice, pp. 48-51.
⁷ For example, if the Association provides security on behalf of the Member under Rule 88, or if there is an assignment of rights under Rule 89 by the Member.
The Association may incur liabilities to third parties indirectly as a result of its insurance of the Member’s liabilities. In some cases, third parties may be allowed by law to claim directly against the Association. However, the contract remains one which is purely between the Association and the Member, and the COE cannot be relied upon by third parties as evidence of an undertaking given by the Association directly to such third parties.

The COE is also used by shipowners in other ways, for example as evidence of employers’ liability insurance for personal injury suffered by employees. The Association does not object to the reasonable use of the COE in this way as it is appreciated that failure to have such a document on board can result in the costly detention of the Ship. Nonetheless, the Association does not by such use of the COE by the Member, assume the status of a guarantor of the Member’s liabilities. The Association has no direct responsibility for the Member’s liabilities to port authorities or to anyone else to whom the COE is shown and no acceptance of such responsibility can be implied as a result of such use of the COE by the Member. Furthermore, the presentation to interested third parties of the COE does not constitute any acceptance by the Association of liability for claims against the Association or to a submission to the jurisdiction of any court in respect of such claims.

**D** …endorsement note stating the terms of…variation… (Rule 5.3)

The terms of the contract of insurance can be amended from time to time by agreement between the Association and the Member. They can either be included in a new COE issued by the Association or evidenced by the issue of an endorsement note which will state the terms of the amendments and the date from which the amendments take effect. Therefore, the terms and conditions of the contract of insurance at any one time may not be recorded solely in the COE. Any and all endorsement notes must be considered in conjunction with the COE.

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8 Some jurisdictions allow direct claims against insurers where the insured is insolvent. See the position under Norwegian law, discussed in (A) of the Guidance to Rule 87.

9 The Association does not approve of the presentation to port authorities or other third parties of the COE as anything other than evidence that the Ship is entered with the Association for P&I risks as identified in the COE.

10 As required, for example, under Schedule 2 paragraph 12 of the English Employers Liability (Compulsory Insurance) Regulations 1998, (S.I. 1998 No. 2573).
Chapter 3

Conditions of cover
Rule 6 The Member’s duty of disclosure

1 The Member shall prior to the conclusion of the contract of insurance make full disclosure to the Association of all circumstances which would be of relevance to the Association in deciding whether and on what conditions to accept the entry. Should the Member subsequently become aware of any such circumstances as are mentioned above, or of any change in such circumstances as previously disclosed, he must without undue delay inform the Association.

2 Where the Member at the conclusion of the contract of insurance has neglected his duty of disclosure and the Association would not have accepted the entry at the Premium Rating agreed if the Member had made such disclosure as it was his duty to make, the Association is free from liability. Where the Association would have accepted the entry at the same Premium Rating but on other conditions, the Association shall only be liable to the extent that it is proved that any liability, loss, cost or expense would have been covered under those conditions the Association would have accepted.

3 Where the Member neglects his duty of disclosure subsequent to the conclusion of the contract of insurance and the Association would not have accepted the entry at the same Premium Rating had it known of the circumstances prior to the conclusion of the contract, the Association is free from liability. Where the Association would have accepted the entry at the same Premium Rating but on other conditions, the Association shall only be liable to the extent that it is proved that any liability, loss, cost or expense would have been covered under those conditions the Association would have accepted.

Guidance

(A) The Member shall…make full disclosure… (Rule 6.1)

An important principle of insurance law is that the contract of insurance is based upon the good faith of the parties.1 The applicant for insurance has a duty to disclose to the insurer every fact or circumstance which may influence the insurer in deciding whether or not to enter into the contract. Rule 6 emphasises the duty of disclosure that the Member has prior to and at the conclusion of the contract of insurance with regard to aspects of risk which are relevant to the Association. For example, this would include but would not be limited to disclosure of any survey evidence relating to the Ship2 or any evidence relating to the status and character of the applicant. The Member is required to inform the Association of every fact which would influence its judgement in estimating the risk or in assessing the premium or the terms and conditions on which the entry or renewal of a Ship should be accepted. Such duty is not predicated on, or simply triggered by, any request for information that may be made by the Association but is a duty to make full disclosure of any such material facts regardless of whether the Association has made

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1 This principle of ‘utmost good faith’ (or uberrimae fidei) is enshrined in Section 17 of the English Marine Insurance Act. Norwegian law adopts similar principles.

2 See also the Guidance to Rule 9.
any request for such information. ‘Member’ in this context includes both prospective Members and Members who are renewing their previous year’s entry. ‘Member’ may also include Co-assureds and Affiliates and any Joint Member or Co-assured.³

The Member’s duty of disclosure extends to circumstances known, not just to the Member, but also to an officer or employee in the Member’s organisation or to independent contractors, such as managers, to whom the Member has delegated important functions relating to the management and operation of the Ship,⁴ even if these circumstances were not known to the Member personally.

The knowledge of a broker⁵ or other person who effects the insurance on the Member’s behalf may also be considered to be the knowledge of the Member, for the purpose of Rule 6, even if the circumstances are not known to the Member himself. For example, if a broker has insured a Ship for a previous owner, material facts known to him when effecting that insurance may need to be disclosed in the context of a later application for entry made by that broker on behalf of a subsequent owner.

The use of the term ‘Member’ hereinafter in the Guidance to this Rule includes all such persons.

The Association has no liability for a claim⁶ where it would not have accepted the entry at the Premium Rating agreed if, at the time of conclusion of the contract, full disclosure had been made of all relevant circumstances.⁷ The Association may also terminate the insurance (by giving 14 days’ notice) of any or all Ships entered by a Member who has neglected the duty of disclosure.⁸

(B) …prior to the conclusion of the contract of insurance…Should the Member subsequently become aware of any such circumstances as are mentioned above, or of any change in such circumstances… (Rule 6.1)

Under Rule 6 the Member has a continuing duty, commencing before, and continuing both at the time of the conclusion of the contract of insurance⁹ and thereafter, to disclose to the Association all facts and circumstances which would be relevant to the Association when deciding whether to accept the entry and/or the terms upon which it should be accepted. He also has the duty once the contract

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³ See the Guidance to Rules 1 and 79.
⁴ See also the Guidance to Rule 72 on identification issues under Norwegian law.
⁵ Brokers normally act as agents of the applicant or prospective Member – see the Guidance to Rule 3.
⁶ See (E) below and the Norwegian Insurance Contract Act of 1989, sections 4-2 and 4-3 concerning the consequences for the assured of failing to comply with the duty of disclosure. See also Rule 90.
⁷ See (C) below.
⁸ See the Guidance to Rule 24 and (E) below.
⁹ The contract of insurance is normally concluded when the Member or the person placing the insurance on his behalf (usually the broker) accepts the Association’s terms for entry or renewal. See the Guidance to Rule 3.
of insurance has been concluded to inform the Association if there has been any change to those facts and circumstances. For example, such a duty would arise if the Member, after concluding the contract of insurance realises that his broker has informed the Association that the Ship has segregated ballast tanks when in fact it has not.

A Member must inform the Association of a change in circumstances ‘without undue delay’. The Member must ensure that information which in the hands of, or channelled through, managers, brokers or other parties identified with the Member is relayed speedily to the Association. Delay or failure to disclose new or changed circumstances on the part of such managers, brokers or other parties may be deemed delay or non-disclosure by the Member.

The continuing duty of disclosure under Rule 6 should also be read in conjunction with Rule 7 but not confused with the requirements of Rule 7. Rule 6 deals with circumstances existing at the time of conclusion of the contract of insurance, whereas Rule 7 deals with alterations of risk occurring thereafter (See the example given at the end of the Guidance to Rule 7).

(C) …all circumstances which would be of relevance to the Association...

(Rule 6.1)
The Member must advise the Association of every fact, matter and circumstance which would be relevant to the Association’s assessment of the risk. The duty extends not only to circumstances relating to the Ship herself, but also to her ownership, management and operation.

Although the Association requires applicants to complete entry forms they cannot and do not embrace every detailed aspect of a particular Member’s business. Accordingly, Members must not assume that the only information required by the Association is that requested in the entry form. In addition, Members must provide on the entry form, or otherwise in writing, all other information that would be relevant to the Association’s assessment of the risk. It is not sufficient justification for a Member to say ‘if it was relevant why did the Association not ask?’

A circumstance will be ‘of relevance’ if it is a fact or matter that would influence the judgement of the Association in estimating the risk, particularly if that circumstance tended to increase the risk. Although it is not possible to make an exhaustive list, relevant circumstances would include a Member’s intention to trade the Ship

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10 See (E) of the Guidance to Rule 3 for details of the information required on the Association’s entry forms.
11 The provisions of Rule 6.1 are similar to the provisions in the Norwegian Marine Insurance Plan, which require disclosure of all relevant information, regardless of whether the insurer has made pertinent enquiries. This goes further than the position under the Norwegian Insurance Contract Act of 1989, section 4-1, which is based on the principle that the insured need only give correct replies to the insurer’s questions.
substantially outside ‘warranty limits’,\(^ {12}\) to carry a cargo or cargoes on a Ship not constructed, designed or adapted for the carriage of such cargo, i.e. containers on a bulk carrier, to change substantially the contractual terms under which the Ship is operating, or to change the manning level\(^ {13}\) or the nationality of the Crew with a commensurate increase in contractual death, disability or other compensation benefits. The guideline must be that, if in doubt, all matters should be disclosed to the Association.

(D) Where the Member…has neglected his duty of disclosure… (Rules 6.2 and 6.3)

Under Norwegian law, the Member, or any manager, broker or other person identified with the Member, will be considered to have neglected his duty of disclosure only if he has been negligent in not disclosing information to the Association. If none of the aforesaid people could have known about the relevant circumstances, the duty of disclosure will not be considered to have been neglected.\(^ {14}\)

The Member and those identified with him cannot, however, ‘turn a blind eye’ by failing to make diligent enquiries or to exercise rights to obtain information from others, and will be deemed to know every material circumstance which ought to be known in the ordinary course of business. For example, the Member will normally have the right to receive all information regarding the Ship which is in the possession of the Ship’s classification society. Accordingly, the Member will be deemed to have been aware of such information, even if the Member has not inspected the class records.

(E) Where the Association…would not have accepted the entry… (Rules 6.2 and 6.3)

The consequences of a breach of the duty of disclosure are described in Rules 6.2 and 6.3. Where full and proper disclosure has not been made by the Member a distinction is drawn between circumstances in which it can be said (a) that the Association would not have accepted the entry either at all or at the agreed Premium Rating; and (b) those where it can be said that the Association would have accepted the entry at the agreed Premium Rating but on different terms.\(^ {15}\)

In the case of (a) the failure to disclose need not be causative of the event giving rise to the claim\(^ {16}\) and the Association has no liability for any claim made under the contract of insurance in respect of the Ship or Ships to which the failure to disclose

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12 See the Norwegian case of MK Anna II ND (1953) page 376, discussed in (B) of the Guidance to Rule 7.
13 See the Norwegian case of Ormlund ND (1978) page 31.
14 See the Norwegian case of Onega ND (1962) page 270.
15 For comment on (b) see (F) below.
16 In contrast, Rule 7 requires a link of causation between the alteration of risk and the liability, loss, cost or expense which the Member has incurred. See (E) of the Guidance to Rule 7.
is relevant.\(^{17}\) For example, if the Member informs the Association prior to or at the time of entry of a Ship that it is classed by a classification society that is approved by the Association\(^{18}\) when in reality it is not, the Association will be free from any liability arising in respect of that Ship, but not in respect of the other Ships entered by the Member where correct information has been given, unless the contract of insurance is in respect of more than one Ship.

The neglect by the Member of his duty of disclosure under Rule 6 also gives the Association a right to terminate the entry subject to 14 days’ notice of such termination pursuant to Rule 24.2.c.

The Association has the burden of proving that the entry would not have been accepted at the same Premium Rating, if the Association had known of the circumstances which the Member has neglected to disclose. However, it is sufficient for these purposes if the Association establishes that it would not have accepted the entry in such circumstances, regardless of the attitude of other P&I clubs or insurers.

(F) Where the Association would have accepted the entry at the same Premium Rating but on other conditions... (Rules 6.2 and 6.3)

Where, notwithstanding the non-disclosure, the Association would nevertheless have accepted the entry at the same Premium Rating, but subject to other conditions, the Association is liable to indemnify the Member only in respect of liabilities, losses, costs and expenses that would have been covered under the conditions that the Association would have accepted had full and proper disclosure been made.

For example, if the Member failed to disclose the fact that the Ship would be trading exclusively between Japan and the US with high value steel cargo, and the Association would have accepted the entry at the same Premium Rating subject to a cargo claim deductible three times higher than that which was actually agreed, then the Association would be liable to indemnify the Member in respect of covered cargo liabilities, but on the basis that the Member would bear such increased deductible.

The Association has the burden of proving the terms and conditions which it would have required in order to accept the entry if full and proper disclosure had been made. In turn, the Member has to prove that the liability, loss, cost or expense which the Member has incurred would have been covered under the conditions that the Association would have required in such circumstances.

\(^{17}\) See the Norwegian case of Fønix ND (1938) p. 188 for an example of an insurer being relieved of liability for non-disclosure by the assured.

\(^{18}\) See Rule 8.1.a.
**Rule 7 Alteration of risk**

1. Where after the conclusion of the contract of insurance circumstances occur which result in an alteration of the risk, the Member shall disclose such circumstances to the Association without undue delay.

2. Where there is an alteration of the risk which has been intentionally caused or agreed to by the Member and the Association would not have accepted the entry at the same Premium Rating if it had known of such an alteration prior to the conclusion of the contract of insurance, the Association is free from liability to the extent that the liability, loss, cost or expense incurred by the Member was caused or increased by the alteration. Where the Association would have accepted the entry at the same Premium Rating but on other conditions, the Association shall only be liable to the extent that it is proved that any liability, loss, cost or expense would have been covered under the conditions the Association would have accepted.

**Guidance**

1. See the Guidance to Rule 6. The type of circumstances which the Member must disclose under Rule 7 may be similar in kind to those that should be disclosed under Rule 6.
2. See the comments below under (D).
3. See (E) of the Guidance to Rule 6 for discussion of the meaning of ‘neglect’.
4. See (F) of the Guidance to Rule 24.
Furthermore, the Association has no liability for a claim made by the Member in the circumstances described in Rule 7.2.5

(B) …circumstances occur which result in an alteration of the risk... (Rule 7.1)
‘Circumstances’ covers every fact or matter relating to the ship; however, it is only those circumstances which ‘result in an alteration of the risk’ that are subject to the duty of disclosure. The altered circumstances must be relevant or material in the sense that they affect or influence the judgement of the Association in assessing the risk,6 in deciding the correct premium rating or in determining the terms and conditions imposed for the ship’s entry or renewal in the Association.7 An example of such a circumstance would be the conversion of, or a radical change of trade of, a Ship.8

(C) …without undue delay... (Rule 7.1)
The above words permit some delay, but not to the extent that the delay becomes ‘undue’ or excessive. A Member must inform the Association as soon as practically possible of the circumstances that cause an alteration of the risk.

Entries in the Association are often effected through intermediaries such as brokers or managers whose acts are deemed to be those of the Member.9 It is important that such brokers, managers and others whose knowledge may be deemed to be that of the Member understand this Rule and that they comply by disclosing promptly all relevant and material information relating to changed circumstances.

(D) …an alteration of risk which has been intentionally caused or agreed to by the Member... (Rule 7.2)
The consequences of any alteration of the risk are described in Rule 7.2. Whilst an alteration of the risk must in both cases have been intentionally caused or agreed to by the Member a distinction is drawn between circumstances in which it can be said that;

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5 The provisions of Rule 7.2 apply irrespective of whether the Member has neglected his duty of disclosure – see (D) below.
6 Furthermore, Rule 92.2 also allows the Association to amend the Rules (upon notice to Members) where a substantial alteration of risk occurs affecting the whole or a substantial part of the Association’s Members.
7 The Nordic Marine Insurance Plan provides that there is an alteration of risk where an alteration occurs in the circumstances which, according to the contract, are to form the basis of the insurance, and the risk thereby is changed contrary to the implied conditions of the contract. As to the information which forms the basis of the contract of insurance, see Rule 3.3.
8 The Norwegian case of *MK Anna II* ND (1953) p. 376 is illustrative in this regard: The ship sank in open seas carrying a cargo of fish. The hull insurer was allowed to deny cover as the ship was insured only as a fishing vessel and not as a cargo vessel. The Oslo City Court found that the shipowner should have informed the hull insurer of the ship’s alternative use to carry cargo since the insurer would have either increased the premium or issued an additional policy.
9 See (A) of the Guidance to Rule 6.
a the Association would not have accepted the entry either at all or at the agreed premium rating if it had known of the altered risk prior to the conclusion of the contract of insurance (See (E) and (F) below); and
b those where it can be said that the Association would have accepted the entry at the agreed premium rating but on different terms (See (G) below).

(E) Where there is an alteration of the risk...and the Association would not have accepted the entry... (Rule 7.2)
The Association has no liability for the Member's liability, loss, cost or expense caused or increased by the alteration of the risk, if: (a) it was intentionally caused by, or agreed to by the Member, and (b), where the Association would not have accepted the entry either at all or on the same premium rating if it had known about it prior to the conclusion of the contract of insurance.

The Association has the burden of proving that, if it had received information about the circumstances causing the alteration of the risk at the time of entry or renewal, the entry of the ship in the Association would not have been accepted at the same premium rating.10

(F) ...the Association is free from liability to the extent that the liability...was caused or increased by the alteration. (Rule 7.2)
It is necessary to distinguish between two situations:
i Where the liability, loss, cost or expense has been caused by the alteration of the risk the Association has no liability to reimburse the Member for any such liability, loss, cost or expense.

ii However, where the liability, loss, cost or expense has been merely increased by the alteration of the risk, the Association is free from liability to only to the extent that the liability, loss, cost or expense which the Member has incurred has been thereby increased.

Therefore, there must in both cases be a link of causation between the altered circumstances and the incident which forms the basis of the Member's claim upon the Association.11 For example, if the ship no longer complies with her statutory manning requirements, the Association is free from liability if the incident would not have taken place had she been properly manned.12 However, if the breach of manning requirements is not relevant to the claim, the Association cannot avoid liability under Rule 7.13

10 See the comments on burden of proof under (F) of the Guidance to Rule 6.
11 Such a causal link is not required to enable the Association to avoid liability for non-disclosure under Rule 6 – see (E) of the Guidance to that Rule.
12 See the Norwegian case of Ormlund ND (1978) page 31.
13 However, the Member may not be entitled to recover if in breach of Rule 8.1.
An example of increased risk is where the Member, after the conclusion of the contract of insurance, alters the trading pattern of the ship to call regularly at ports in jurisdictions where the port safety systems are less developed and/or where the exposure to legal liability is much higher as a result of strict liability regimes and/or the deprivation of the right to limit liability. For example, should the Ship suffer a grounding incident as a result of local port conditions with the result that the Member incurs substantial liability which he cannot resist or limit under the applicable local law, the Member might have been able to resist and/or limit such liability if the incident had occurred in a port in the trading area which had been advised to the Association at the time of conclusion of the contract of insurance. In such circumstances, cover is available only for the liability that would have been incurred if the risk had been as originally disclosed.

(G) …Where the Association would have accepted the entry at the same Premium Rating but on other conditions… (Rule 7.2)

The second sentence of Rule 7.2 reduces the danger of potential loss of cover pursuant to the first sentence of the Rule,14 i.e. where the alteration of risk is of such a character that the Association would still have accepted the entry at the same premium rating, but subject to other conditions. For example, this could occur when, as a result of a change in her trading pattern, the ship operates in an area for which the Association would have applied a special deductible for liabilities, costs and expenses as a result of stowaway activities.

Example of the relationship between Rules 6 and 7

The Member has notified the Association before the Entry of the Ship that the Ship would not be engaged in the carriage of ammunition, but subsequently learns following the Entry that the time charterers had always intended to carry ammunition on the Ship. That could be considered to be both “a change in such circumstances as previously disclosed” for the purposes of Rule 6.1 and “an alteration of the risk... after conclusion of the contract” for the purposes of Rule 7.1.

If the Member has “intentionally caused or agreed to” the carriage of the ammunition then that is likely to be an “alteration of the risk” and the provisions of Rule 7 apply. However, if the Member has not “intentionally caused or agreed to” the carriage of the ammunition, then this is, nevertheless, likely to be “a change in such circumstances as previously disclosed” for the purposes of Rule 6 with the result that the Association is entitled to rely on the provisions of Rule 6 only if the Member has failed to disclose such facts to the Association without undue delay after becoming aware of such circumstances. Therefore, if the Member has not “intentionally caused or agreed to” the carriage of the ammunition and has made prompt disclosure once he has become aware of it, the Member is entitled to cover.

14 See (H) of the Guidance to Rule 6 for discussion of the burden of proof.
Rule 8 Classification and certification of the Ship

1 Unless otherwise agreed in writing between the Member and the Association it shall be a condition of the insurance of the Ship that:
   a the Ship shall be and remain throughout the period of entry classed with a classification society approved by the Association;
   b the Member shall promptly call to the attention of that classification society any incident, occurrence or condition which has given or might have given rise to damage in respect of which the classification society might make recommendations as to repairs or other action to be taken by the Member;
   c the Member shall comply with all the rules, recommendations and requirements of that classification society relating to the Ship within the time or times specified by the society;
   d the Association is authorised to inspect any documents and obtain any information relating to the maintenance of class of the Ship in the possession of any classification society with which the Ship is or has at any time been classed prior to and during the period of insurance and such classification society or societies are authorised to disclose and make available such documents and information to the Association upon request by it and for whatsoever purpose the Association in its sole discretion may consider necessary.
   e the Member shall immediately inform the Association if, at any time during the period of entry, the classification society with which the Ship is classed is changed and advise the Association of all outstanding recommendations, requirements or restrictions specified by any classification society relating to the Ship as at the date of such change;
   f the Member shall comply or procure compliance with all statutory requirements of the state of the Ship’s flag relating to the construction, adaptation, condition, fitment, equipment, manning, safe operation, security and management of the Ship and at all times shall maintain or procure the maintenance of the validity of such statutory certificates as are issued by or on behalf of the state of the Ship’s flag in relation to such compliance.

2 The Association shall notify the Member when it intends to inspect classification documents or request information from a classification society in accordance with Rule 8.1.d.

3 The Member shall not be entitled to any recovery from the Association in respect of any claim arising during a period when the Member is not fulfilling or has not fulfilled the conditions in Rule 8.1, provided always that where the entry of a Ship is solely in the name of or on behalf of a charterer, and the charterer is not responsible for the maintenance of the Ship, or for compliance with classification or statutory requirements, the rights of recovery of such charterer shall not be dependent on the fulfilment of the conditions in Rule 8.1(b), (c), (d), (e) and (f) above.
Guidance

It is obviously desirable both for the membership as a whole and for the wider international community that Ships should meet internationally recognised safety standards but the Association has no inherent authority to impose statutory regulations that are intended to ensure such standards. However, flag states do have such legislative powers and exercise such powers by delegating the necessary authority to classification societies. The Association expects Members to take their responsibilities in this regard very seriously. Therefore, to ensure compliance with such regulations for the benefit of the membership as a whole, Rule 8 requires all Members, unless the Association exercises its discretion in writing to the contrary, to comply with the requirements of the ship’s classification society and its Flag State and emphasises that the right of the insured to make a recovery under the contract of insurance is made conditional upon compliance with such safety rules and regulations. If the Member does not comply with this condition, it is no longer entitled to cover regardless of whether the breach is or is not causative of the relevant claim.

(A) Unless otherwise agreed in writing between the Member and the Association it shall be a condition of the insurance of the Ship… (Rule 8.1)

Rule 8.1 emphasises that, unless the Association agrees otherwise in writing, it is a condition of the insurance that the Member must comply with the requirements of the Ship’s classification society and the technical and certification requirements of the flag state. A condition is a solemn promise given by the assured to the insurer. Therefore, any breach of the requirements of Rule 8.1 entitles the Association to refuse cover in relation to the particular Ship.¹

However, the Association is given the discretion to agree otherwise in writing. This is an example of the flexibility that is given to the Association pursuant to Rule 2.3 to agree any special conditions that it may consider to be relevant to a particular entry. Therefore, based on its risk assessment of the particular entry, the Association may consider that strict compliance with the provisions of the Rule may not be necessary in particular circumstances. Such flexibility is recognised to be a desirable feature of P&I cover and is mirrored by the provisions of the Pooling Agreement which allow the Association to confirm in appropriate circumstances that a breach of some or all of such requirements does not constitute a breach of condition. However, the Association will not lightly agree to waive compliance with the requirements of Rule 8 and can be expected to exercise its discretion to the contrary only if the Member can put forward strong and persuasive reasons why it should do so.

¹ See the Guidance in (L) below.
Rules Part I – Availability of cover

(B) ...the Ship shall be and remain throughout the period of entry classed with a classification society approved by the Association... (Rule 8.1.a)

As stated above, classification societies were and are established to ensure the observance by shipowners of safety standards set both by themselves and by flag states for the construction and maintenance of ships. Such classification societies are usually private companies which act under the terms of a contract with the owner or operator of the ship.

There are many such classification societies, some of which are international whilst others are confined to a particular nation’s fleet. These societies compete for tonnage and revenue. In order to ensure that such a competitive environment does not cause certain classification societies to lower their standards in order to attract tonnage, the Association keeps itself appraised of the performance of classification societies. Therefore, it is a requirement that each Ship is classed with a classification society which is approved by the Association. The Association normally requires Ships to be classed with classification societies which are members of the International Association of Classification Societies (IACS).2

Since the Member must ensure that the Ship remains classed with an approved classification society throughout the period of the Ship’s entry with the Association, cover ceases automatically in respect of that Ship in the event that the Member fails to do so, or in the event that its class with an approved society is suspended, unless the Association determines pursuant to Rule 25.5 to maintain or reinstate cover.3

Since time and voyage charterers are not normally responsible for maintaining a ship’s classification status, a charterer Member is exempt from some of the provisions of Rule 8.4

(C) ...the Member shall promptly call to the attention of that classification society... (Rule 8.1.b)

The Member5 is required to give prompt notification to the classification society of any relevant incident, together with sufficient information to enable the society to decide whether its surveyor needs to visit the Ship immediately or whether a survey can be deferred.

Although Rule 8.1.b places obligations on the ‘Member’, this does not necessarily mean that it is only the Member who can and should notify the classification society. Such a duty is also imposed on those who are on board the Ship, i.e. the master and Crew, as well as on other servants or agents to whom the Member has delegated

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2 There are exceptions to this policy, for example smaller Norwegian coastal vessels ‘classed’ directly with the Norwegian Maritime Directorate (Skipskontrollen).
3 See Rules 25.2.h and 25.5.
4 See the proviso to Rule 8.3 and (M) below.
5 Other than a charterer Member – see (M) below.
important functions relating to the management and operation of the Ship, all of whom are expected to have a proper understanding of when the classification society should be notified, and to ensure that proper and timely notification is given to class, either directly or via the Member’s office. Therefore, the Member is required and expected to employ personnel and representatives who have the appropriate competence and experience, and to maintain systems which safeguard the proper inspection, ascertainment and repair of any damage to, and/or defects in, the Ship, and which ensure that the classification society is properly informed whenever necessary.

(D) any incident, occurrence or condition which has given or might have given rise to damage in respect of which the classification society might make recommendations... (Rule 8.1.b)

The requirement of Rule 8.1.b is very wide since it requires the reporting by a Member not only of damage which has occurred, but also of incidents, occurrences or conditions that may have caused damage to the Ship, even though such damage may not yet have become apparent, e.g. the grounding of a Ship on a soft bottom which does not seem to have caused any apparent damage to either the Ship’s propeller or rudder. Although the incident may have caused no apparent damage, it may, nonetheless, have affected the structural condition of the Ship. Consequently, the fact that the Ship has grounded, and the surrounding circumstances, should be reported promptly to the classification society so that it can properly assess whether the Ship should be inspected and which other action should be taken.

(E) the Member shall comply with all the rules, recommendations and requirements of that classification society... (Rule 8.1.c)

The classification society may require the Member to carry out repairs, a further survey or take some other action within specified time limits. The Member must abide by these requirements, comply with any time limit that has been set and, generally, follow all class rules, recommendations and requirements. In particular, Members must maintain the validity of all relevant class certificates and establish proper systems for maintaining the complete and valid certification of the Ship.

The absence of valid class certificates may not only prejudice the Member’s defence to third party claims but may also affect the Member’s cover with the Association. Rule 8.3 disentitles the Member to any recovery for claims which arise whilst the Member is in breach of any of the obligations of Rule 8.1. Furthermore, it is unlikely that cover would normally be available in respect of fines which result from the fact that prescribed certificates are not on board the Ship.

6 See (B) of the Guidance to Rule 72 for further discussion on identification of the Member with the actions of third parties.
7 See the Guidance in (L) below.
8 See Rule 47.
(F) ...the Association is authorised to inspect any documents and obtain any information relating to the maintenance of class... (Rule 8.1.d)

The Association may require access not only to documents and information supplied by the Member, but also to documents and information held by any classification society with which the Ship is or has been entered in the past. In such event, the Association will notify the Member pursuant to Rule 8.2. Such documents and information may be required in order to investigate an incident, assist the Member’s defence of third party claims or to verify the Member’s compliance with the Association’s Rules.

Classification societies do not normally release documents and information except with the shipowner’s approval. By virtue of Rule 8.1.d, the Association is authorised by the Member to inspect any relevant documents and to obtain information concerning the maintenance of class directly from the relevant classification society or societies, and the Member is deemed to have authorised the relevant classification society or societies to make such documents and/or information available to the Association upon the request of the Association. However, where the Member is not the shipowner, the Member is required to obtain the necessary authority from the shipowner. Normally, the Association will request such documentation and/or information from the Ship’s current classification society, but the authority extends to any classification society in which the Ship has been entered during and/or since her construction.

(G) ...the Member shall immediately inform the Association if...the classification society with which the Ship is classed is changed... (Rule 8.1.e)

Since the classification society has to be approved by the Association any change of the Ship’s classification society must be immediately reported to the Association by the Member. If the new classification society is one which is approved by the Association, cover will continue to be available. If, however, the new classification society is not approved by the Association, cover will not continue to be available in respect of claims arising after the change.

(H) ...advise the Association of all outstanding recommendations, requirements or restrictions... (Rule 8.1.e)

The Member may change the Ship’s classification society for various reasons. One common reason is that the Member and the classification society do not agree on the extent of any ship repairs or maintenance that may be required. Consequently, the Member may wish to appoint a classification society which imposes less stringent requirements. As part of its overall duty to all Members to monitor the standards of maintenance of entered Ships, and, indeed, to monitor the performance of

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9 See Rule 8.1.a.
10 Other than a charterer Member – see (M) below.
11 See Rule 8.3.
classification societies, the Association requires Members that are changing the Ship’s class to advise the Association of all outstanding recommendations, requirements or restrictions that exist at the date of the change. This obligation to advise applies to any and all classification societies with which the Ship has been previously entered and not merely the Ship’s current classification society at the time of the change.

(I) …the Member shall comply or procure compliance with all statutory requirements of the state of the Ship’s flag relating to the construction, adaptation, condition, fitment, equipment, manning, safe operation, security and management of the Ship… (Rule 8.1.f)

The Ship’s flag state will have imposed various statutory requirements with which a Member must comply. The principal (but not the only) requirements are compliance with:

- the Safety of Life at Sea (SOLAS) Convention,\(^\text{12}\) which regulates many aspects of safety at sea, in particular the safe construction and equipment of the Ship, including its navigational, life-saving and communications equipment;
- The International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL) which is designed to minimise pollution of the seas by discharges of oil and other harmful substances.
- the International Safety Management (ISM) Code which sets out regulations and procedures relating to the safe management of the Ship, as well as the International Ship and Port Security (ISPS) Code that focuses on enhancing Ship and port security in relation to terrorism, piracy and other malicious acts;
- the Load Line\(^\text{13}\) Convention which regulates the maximum depth to which the Ship may be loaded when arriving at, sailing through or putting to sea in different load line zones;
- the Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) which regulates training standards for seafarers;
- the Maritime Labour Convention (MLC) which establishes minimum standards for the welfare of seafarers.

(J) …at all times shall maintain or procure the maintenance of the validity of such statutory certificates as are issued by or on behalf of the state of the Ship’s flag in relation to such compliance. (Rule 8.1.f)

This provision applies both to statutory certificates issued by the flag state directly and to those issued by some other body (e.g. a classification society) on its behalf since the monitoring of compliance with the flag state’s statutory requirements is often sub-contracted to the Ship’s classification society. The Member is under an

\(^{12}\) The International Convention for the Safety of Life at Sea, London, 1974, with subsequent amendments.

\(^{13}\) Load lines are sometimes referred to as ‘Plimsoll Lines’ and their positioning is determined by rules agreed at international conferences on load lines which have been ratified by many countries.
obligation to maintain the validity of all the statutory certificates issued by or on behalf of the flag state and Rule 8.3 emphasises that failure by the Member to do so may cause him to lose a right of recovery.

(K) The Association shall notify the Member when it intends to inspect classification documents or request information from a classification society… (Rule 8.2)
The Association will, insofar as practicable, give the Member reasonable notice of its intention to inspect documents or request information from the classification society or societies with which the Ship is or has been classed. After giving such notification, the Association is entitled to approach classification societies directly without involving the Member further.14

(L) …any claim arising during a period when the Member is not fulfilling or has not fulfilled the conditions in Rule 8.1… (Rule 8.3)
The effect of Rule 8.3 is that the Member loses his right to recover from the Association in respect of any claim which arises during a period when the Member has not fulfilled any one of the conditions of Rule 8.1. Any failure to comply gives the Association the right to reject claims arising during the period of non-compliance irrespective of whether there is any causal connection between the circumstances which have given rise to the claim on the Association and the non-compliance, e.g. if the Ship does not carry valid certificates as mandated by the rules of the flag state. However, if the Ship does carry all the required certificates, but the incident arises as a result of the acts and/or default of the Crew which constitute non-compliance with the regulations for which a certificate has been issued, the Association is not entitled to deny cover under Rule 8.3., e.g. where the circumstances causing the incident and/or the subsequent handling and reporting of the incident constitute non-compliance with the ISM Code.

It should also be remembered that a Member whose Ship ceases to be classed with an approved classification society or has its class suspended will cease to be covered by the Association in respect of that Ship under the terms of Rule 25 unless the Association determines pursuant to Rule 25.5 to maintain or reinstate cover.15

(M) …provided always that…the rights of recovery of such charterer shall not be dependent on the fulfilment of the conditions… (Rule 8.3)
This proviso to Rule 8.3 exempts charterer16 Members from the duty to comply with the obligations imposed by Rule 8.1, other than those imposed by Rule 8.1.a, since they are not customarily responsible for the maintenance of the Ship’s classification

14 See (F) above.
15 See (K) and (P) in the Guidance to Rule 25.
16 Other than demise or bareboat charterers – see Rule 1.3.
status.\textsuperscript{17} The exemption applies only where the Ship is entered solely in the name of, or on behalf of, a charterer and will not apply if the charterer is Co-assured on an Owner’s entry.\textsuperscript{18}

The exemption does not apply to Rule 8.1.a. Ships entered in the Association on behalf of charterers must also remain classed by the owner in an approved classification society throughout the period of the Charterer’s Entry. However, cover is, nevertheless, available under a Defence entry for a charterer to pursue a claim against the shipowner for breach of the charterparty or the relevant contract of carriage to the extent that the relevant breach preceded (or even caused) the withdrawal or suspension of class.\textsuperscript{19}

\textsuperscript{17} See (A) above.
\textsuperscript{18} See the Guidance to Rule 78.4.
\textsuperscript{19} See also Guidance to Rule 80.3.a concerning definition of ‘event’ for the purposes of a Defence entry.
Rule 9 Survey

1. The Association may at any time during the period of entry appoint a surveyor to inspect the Ship on behalf of the Association.

2. Where the Ship has been laid-up for a period exceeding six months, the Member shall give the Association not less than seven days notice prior to the Ship leaving the place of lay-up for recommissioning, to afford the Association an opportunity to inspect the Ship pursuant to Rule 9.1.

3. Should the Member refuse to co-operate in an inspection under Rule 9.1, or fail to give notice in accordance with Rule 9.2, the Association will thereafter be liable only to the extent that the Member can prove that any liability, cost or expense is not attributable to defects in the Ship that would have been detected in the course of an inspection under Rule 9.1.

4. Where an inspection reveals matters which, in the sole determination of the Association, represent a deficiency in the Ship, the Association may exclude specified liabilities, losses, costs and expenses from the cover until the deficiency has been repaired or otherwise remedied.

5. By applying for an entry of a ship or upon the continuation of the entry of the Ship in the Association, the Member:
   a. consents to and authorizes the disclosure by the Association to any association which is a party to the Pooling Agreement the findings of any survey or inspection of such ship undertaken on behalf of the Association either pursuant to an application for, or after entry in, the Association.
   b. waives any rights or claims against the Association of whatsoever nature arising in respect of or relating to the contents of or opinions expressed in any survey or inspection report so disclosed, provided that:
      i. such survey or inspection reports may only be disclosed to another association when an application for entry of such ship is made thereto; and
      ii. the disclosure of the survey or inspection shall be for the limited purpose only of that association considering an application to enter such ship for insurance.

Guidance

In some instances, the claims which are made on the Association can be attributed to defects or deficiencies in the Ship, her machinery or equipment or to deficiencies in respect of the Crew. Whilst inspections by classification societies, flag states and port states are crucial in identifying these problems, the Association also plays an active role in supervising its own entered tonnage by carrying out ship inspections. Such inspections can be required before the entry of a Ship is accepted and, also, thereafter during the period of entry.

All non-tanker Ships which are larger than 1,000 gross tonnes, and all tankers irrespective of size, that are 12 years of age or older, are subject to survey prior to or shortly after entry. However, special rules apply to tankers which have carried heavy fuel oil as cargo in the previous year; all such tankers that are 10 years of age
or older are subject to an entry survey. It is a condition of entry of such Ships that the deficiencies identified, and recommendations made, by the surveyor have been rectified or complied with either prior to entry or within a specified time thereafter and the Association will monitor compliance by the Member in this regard. Practical problems can arise where a bank demands confirmation of P&I cover prior to advancing a loan for the purchase of a ship, but the seller refuses to allow the P&I surveyor to board the ship. In such cases the Association may forego an entry survey, but may instead make the entry conditional on a survey being conducted at the earliest possible opportunity after the new Member has taken delivery of the Ship, and on such survey not revealing any serious condition that would lead to refusal of the entry.

(A) The Association may at any time during the period of entry appoint a surveyor to inspect the Ship… (Rule 9.1)

The Association has a discretionary right under Rule 9.1 to inspect any entered Ship during the period of entry.

Ships may be selected for survey during the period of entry for a range of reasons, e.g. a consistently poor loss record, a sudden increase in the frequency of claims or as a result of information received from surveyors in connection with a casualty or event. Alternatively, a certain category of Ship or Ships which are engaged in a particular trade will be inspected, on the basis of statistical information derived from the Association’s claims database.¹

The words ‘at any time’ give the Association complete discretion as to the timing of an inspection. The Association may exercise its right immediately following a casualty, other event or period of lay-up or during the Ship’s routine trading. However, the Association will, insofar as possible, co-operate with the Member to ensure minimum disruption to the Ship’s trading pattern.

The Member normally pays the cost of any entry survey whereas the Association normally pays the cost of condition surveys for Ships that are already entered. However, in the latter event, all costs and expenses incurred will be charged to the Member’s loss record.²

To enable it to carry out such surveys the Association has the right of access to inspect all parts of the Ship’s hull, machinery, equipment, fittings, certificates, records, logbooks and documents and also to examine the certification, qualifications and general competence of officers and Crew. The inspector may

¹ In addition, any Ship that is denoted as ‘black-listed’ or ‘banned’ by any port state control co-operation regime, such as the Paris Memorandum of Understanding, shall be surveyed immediately.
² See (C) of the Guidance to Rule 10 for a discussion of loss records.
require the owner, operator or manager to provide access for inspection of all relevant areas of the Ship, or for carrying out trials under his supervision and to require the Member to bear the cost of providing such access.

Since the surveys and inspections that are subject to Rule 9 are carried out ‘on behalf of the Association’, the surveyor’s report and other written information pertaining to the survey or inspection is the property of the Association. However, a copy of the report will normally be sent to the Member or to such other party that he has designated, e.g. the technical manager of the Ship.

(B) Where the Ship has been laid up for a period exceeding six months...
(Rule 9.2)
A Ship is considered to be laid up when it is anchored or moored in a safe and sheltered place without cargo on board. Most ships are laid up because it is uneconomical for the owner or operator to keep trading the Ship under the prevailing market conditions. When the Ship has been laid up, it will usually only have maintenance Crew and/or watchmen on board.

The laying-up of an entered Ship is a relevant circumstance for the purposes of Rule 6 (Member’s duty of disclosure) and represents an alteration of risk as defined in Rule 7. Accordingly, in order to comply with the obligations imposed by those Rules, a Member should immediately advise the Association of any lay-up of the entered Ship with details of the intended lay-up location and period.

Rule 9.2 applies when the Ship is laid up for a continuous period exceeding six months. Therefore, periodical lay-ups for shorter periods will not bring the Rule into operation. However, a Member may be entitled to a return of premium if his Ship is laid up for a period of at least 30 consecutive days.3

(C) …the Member shall give the Association not less than seven days’ notice prior to the Ship leaving the place of lay-up... (Rule 9.2)
A Member who wishes to ‘recommission’, i.e. bring back into service, a Ship which has been laid up for more than six months, must give the Association at least seven days’ notice of his intention to do so, in order to give the Association the opportunity to inspect the Ship before she is recommissioned. Seven days is considered a reasonable period of time for the Association to arrange for an inspection should it wish to do so. Cover may be forfeited in whole or in part4 if the Member fails to give the requisite seven days’ notice.

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3 See the Guidance to Rule 22.
4 See (E) below. Rule 9 Survey.
The Association will decide on a case-by-case basis whether or not to inspect the Ship, but usually it will decide to inspect, because a prolonged lay-up period may have caused the condition of the Ship to deteriorate.

**(D) Should the Member refuse to co-operate in an inspection under Rule 9.1...**

*(Rule 9.3)*

The issue of co-operation must be seen in conjunction with the purpose of the survey, which is to obtain as accurate and comprehensive an assessment as possible of the P&I risk represented by the Ship and Crew. Therefore, the phrase “refuse to co-operate” is given a broad interpretation and includes not only a refusal to allow the Association’s inspector on board the Ship, but also any failure to allow the inspector to gain proper access to any part of the Ship’s hull, machinery, equipment, fittings or any documentation that the inspector might wish to examine.

**(E) ...the Association will thereafter be liable only to the extent that...** *(Rule 9.3)*

Any refusal on the part of the Member to co-operate with a survey or inspection, or to give proper notice under Rule 9.2 is likely to prejudice the Member’s cover. In such circumstances, cover is available only for those liabilities, losses, costs and expenses which the Member can prove were not caused by defects in the Ship which would have been detected during an inspection by the Association’s surveyor.

**(F) Where an inspection reveals matters which, in the sole determination of the Association represent a deficiency in the Ship...** *(Rule 9.4)*

A ‘deficiency’ in the Ship includes anything which renders the Ship’s hull, machinery, equipment, fittings, design, documents or personnel unfit or unsuitable for the Ship’s intended trading and the safe carriage of passengers or cargo.

The Association has the sole and unfettered right to decide whether or not a particular deficiency constitutes a ‘deficiency in the Ship’ for the purposes of the Rule and the Member is bound by the decision of the Association in this respect.

**(G) ...the Association may exclude specified liabilities, losses, costs and expenses from the cover until the deficiency has been repaired or otherwise remedied.** *(Rule 9.4)*

If a deficiency is found following a survey or inspection conducted on behalf of the Association, the Association may notify the Member that cover is not available for certain risks until the deficiency is remedied. For example, if a survey revealed that the Ship’s hatches were not water-tight, the Association might impose an exclusion of cover for cargo liability resulting from water ingress through the hatches.
Alternatively, the Association may decide not to exclude the risk completely, but to impose a higher deductible with the result that the Member must bear a higher financial risk if further cargo loss or damage occurs as a result of that deficiency. This may be considered a more appropriate measure where the Member and the Association have different views as to the importance of the deficiency or condition.

(H) By applying for an entry of a ship or upon the continuation of the entry of the Ship in the Association, the Member;

a consents to and authorizes the disclosure by the Association to any association which is a party to the Pooling Agreement... (Rule 9.5.a)

As a result of cases resulting in the foundering of, and the consequent pollution from, ships such as the ERIKA off the coast of Brittany, France in 1999 and the PRESTIGE off the coast of Galicia, Spain in 2002, the European Union called for a review of various safety aspects relating to shipping in general and tankers in particular. As a response to public expectations\(^5\) that the international marine insurance industry should do more to combat ‘substandard shipping’, i.e. to make it more difficult for ships of an unacceptable technical standard to obtain the insurance cover necessary to enable them to continue trading, the members of the International Group of P&I Clubs agreed various rules relating to the exchange of information relating to the ships that are entered with them.

Rule 9.5 makes it clear that upon application for entry of a ship in the Association, the Member will be deemed to have consented to, and authorised the Association, to disclose to the other associations that are parties to the Pooling Agreement, information pertaining to the condition of the Ship which is in the possession or control of the Association.\(^6\) Therefore, the Association need not obtain the express approval of the Member in order to disclose such information.

(I) …the findings of any survey or inspection of such ship… (Rule 9.5.a)

The information that can be disclosed pursuant to Rule 9.5.a is the findings of any survey or inspection relating to an entered Ship or a ship that has previously been entered in the Association, and which is being considered for entry by another association which is a party to the Pooling Agreement. The Association will itself have similar rights to request such information from those associations in similar circumstances, pursuant to the Rules of the other associations which are parties to the Pooling Agreement. However, the Association is not authorised under Rule 9.5.a to provide any other information relating to the Member or prospective member, e.g. credit balance data or management audit reports.

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\(^6\) Rule 9.5 accords with the relevant provisions of the Norwegian Ship Safety Act of 2007 (Skipssikkerhetsloven 2007). Prior to its enactment, the Norwegian P&I clubs (Gard and Skuld) were not legally entitled to comply with the provisions of the Pooling Agreement in this regard.
(J) …undertaken on behalf of the Association either pursuant to an application for, or after entry in, the Association. (Rule 9.5.a)

The Member’s deemed consent and authorisation is limited to the findings of any survey or inspection that has been undertaken on behalf of the Association and does not extend to information concerning the condition of the ship that the Association has received from the Member, or from a third party such as a classification society pursuant to Rule 8.1.d, nor to the findings of any survey or inspection of the ship that has been obtained from another P&I club, which a third P&I club that is party to the Pooling Agreement may wish to obtain at a later time. Such information can be provided to any other P&I club who is a party to the Pooling Agreement, only with the express consent of the Member.

(K) …waives any rights or claims… (Rule 9.5.b)

Surveys and inspections of ships that are conducted on behalf of the Association can be critical of the technical, crewing and other conditions found on board. The Member may not agree with the contents of a survey report or with the opinion expressed by the surveyor in attendance, and may consider that the reports and other written material produced have caused or may cause material prejudice, commercial disadvantage and/or financial loss to him.

Similarly, the sharing of information between the associations who are parties to the Pooling Agreement may lead to a refusal of entry by all, as a result of which the owner may be forced to seek insurance cover outside the International Group of P&I Clubs, and possibly to pay a higher premium as a result.

Nevertheless, Rule 9.5.b makes it clear that the Association will be free from any and all liability to the Member or prospective Member in relation to information procured or provided in accordance with Rule 9.5.a. The purpose of Rule 9.5.b is to avoid the possibility of the Association being embroiled in a subsequent legal dispute with the Member or prospective Member in relation to the content of any findings and/or disclosure made pursuant to Rule 9.5.a. The words ‘of whatsoever nature’ refer to the words ‘rights or claims’ and are deliberately strongly worded in order to discourage any Member from taking legal action in this regard.

(L) …provided that:

i such survey or inspection reports may only be disclosed to another association when an application for entry of such ship is made thereto; and

ii the disclosure of the survey or inspection shall be for the limited purpose only of that association considering an application to enter such ship for insurance. (Rule 9.5.b.i and ii)

These two provisos refer to both Rule 9.5.a and Rule 9.5.b, and make it clear that disclosure is only permitted in the limited circumstances, and for the limited purpose, described therein.
Firstly, the Association is not authorised under Rule 9.5.a to disclose the relevant survey or inspection report to another association unless an application for the entry of the subject ship has been made to that other association. However, it is not a requirement that such application for entry has been made by the same owner as that which had entry of the Ship in the Association. For example, the ship may have been sold to another party in the meantime.

The second proviso makes it clear that the disclosure is to be made only in order to assist the other association in its consideration of the application of entry and for no other purpose. This means that the Association is bound to exercise caution if the other association indicates that it may need the information for any other purpose. The Association is then under an obligation not to disclose the information until it has been clarified that it will be used for the sole purpose of considering an application for entry of the Ship in the other association.
Chapter 4

Premiums and Calls
Rule 10  Setting of Premium Ratings

1 Each Ship’s Premium Rating shall be set taking into account all matters, including the Member’s loss record, which the Association may consider relevant in assessing the degree of risk involved. All Ships under the same management may at the discretion of the Association be deemed, for the purpose of determining the loss record or otherwise for the determination of Premium Rating, to be owned by one Member.

2 A Ship may be entered on the basis of a fixed premium in an amount agreed between the Association and the Member. The provisions of Rules 12, 13, 15, 16, 17, 18 and 19 shall not apply to fixed premium entries.

3 The Association may, in its discretion, levy an additional fixed premium for cover made available pursuant to Rule 2.2. The provisions of Rule 12 shall not apply to any such fixed premium.

Guidance
The principal aim of the Association is to offer insurance to Members predominantly on a mutual basis. The Association does not have any shareholders and is not therefore aiming to make a profit, but aims merely to ensure that the premium that is payable by Members should be sufficient to cover claims that are retained by the Association, the Association’s reinsurance costs and administration expenses. In other words, the Association provides ‘insurance at cost.’ However, this means that apart from the additional premium that can be levied on the membership, the Association has no other ready source of additional capital that can be raised if required in order to fund unexpectedly high claims costs, reinsurance costs and/or administration costs. Nevertheless, this does not restrict the Association from offering, as an adjunct to its core business, ancillary insurance on a non-mutual, fixed premium basis to certain categories of assureds. The premium for such insurances is determined by individual risk assessment and the prevailing market forces and the aim of the Association is to make a profit in that regard for the benefit of the whole of the membership. Accordingly, whilst all Members enter into a contract of insurance with the Association, the premium arrangements for Members will differ depending on whether the entry is on mutual or fixed premium terms.

(A) …Premium Rating… (Rule 10.1)
In the case of mutual Members the Association will at the inception of cover for a Ship determine a Premium Rating for the Ship.1 The Premium Rating will be equivalent to the estimated total cost of insuring the Ship for a Policy Year,2 taking

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1 A separate Premium Rating will be determined for P&I cover and Defence cover for each Ship.
2 The Premium Rating is sometimes referred to as the estimated total call or ETC.
into account not only general considerations affecting the Association, such as reserves, inflation, reinsurance costs and other outgoings, but also considerations which are particular to the Ship.\(^3\)

Thereafter, premiums are collected from mutual Members as follows:

a. the Association will not usually collect the full estimated total premium in advance but will require payment of an Advance Call which is a percentage of the estimated total premium; payment of the balance (i.e. the Deferred Call) is usually deferred to after the end of the Policy Year.\(^4\) This allows the Association the flexibility to require payment of less than the originally estimated total premium should the results of the Policy Year be more favourable than originally estimated.

b. the Association has the right to call for additional premium by way of Supplementary Calls if the total claims and expenses exceed initial expectations and/or other revenue such as investment income is less than expected;\(^5\)

c. the Association has the right to return premium to Members in whole or in part if the claims and expenses are less than initially expected or the reserves are considered to be higher than what is considered to be desireable.\(^6\)

On renewal of cover for a further Policy Year, a comprehensive review will be carried out by the underwriter responsible for an entry before renewal terms are submitted to the Member. This review will encompass changes in the risk exposure, such as the composition of the fleet, types of ships covered and their trade and crewing arrangements. The Premium Rating for a Ship may be adjusted to take account of the Member’s loss record, alteration of risks or any other factors that the Association may deem relevant.\(^7\) Well in advance of the renewal date, usually in October, the Association will send each Member a complete loss record covering all Ships for the loss record period,\(^8\) which shows claims paid and estimated; apportioned abatement costs,\(^9\) pool costs\(^10\) and market reinsurance costs, premiums etc., and concluding with a loss ratio expressed as a percentage. The loss ratio will be discussed with the Member before a renewal offer is made.

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\(^3\) Where a Ship transfers to the Association from another club in the International Group of P&I Clubs, the provisions of the International Group Agreement will be relevant.

\(^4\) See the Guidance to Rule 12.

\(^5\) See Rule 13.

\(^6\) See Rule 17.

\(^7\) Such an adjustment will be applied after any general variation under Rule 11 – see (A) and (B) of the Guidance to that Rule.

\(^8\) See (C) below.

\(^9\) The total claims costs incurred for the Association within the ‘abatement layer’ as apportioned to the Ship(s) concerned. The purpose of applying an ‘abatement layer’ is to distribute the costs of large claims over the membership as a whole on the basis that such claims occur randomly within the membership and should be treated as a mutual risk. Currently, the ‘abatement layer’ runs from USD 3 million to USD 9 million.

\(^10\) The entered Ship’s proportion of the total estimated costs incurred by the Association under the Pooling Agreement for all Policy Years pertaining to the loss record period.
(B) …all matters…the Association may consider relevant… (Rule 10.1)

The Premium Rating fixed for each Ship is dependent on ‘all matters’ which the Association considers relevant to the risk. Those matters normally include the following:

- **a** The Ship’s particulars, including type, flag, age, tonnage and trade;
- **b** Intended trading area(s);
- **c** Intended cargoes;
- **d** The terms of the charterparties, contracts of carriage or other contracts used in the Ship’s trade;
- **e** Crewing arrangements, including the number and qualification of officers and the number of other Crew members. The nationality of the Crew may also be relevant, as this may affect the Member’s liability for matters such as personal injury, death and repatriation expenses;
- **f** The terms of other insurances that apply to the Ship, as such terms may fully or partly duplicate the P&I cover. For example, the Ship’s Hull Policies may cover liabilities in respect of collision and/or damage to fixed and floating objects;
- **g** The deductible which the Member agrees to bear. Increased or lowered deductibles can be negotiated and the Premium Rating will be adjusted accordingly;
- **h** The extent of the cover required by the Member, including any variations of the standard cover under Part II of the Rules. A Member may wish to exclude certain liabilities included under the standard P&I cover, either because he has other cover available, or because he agrees to bear these liabilities as a self-insured;
- **i** The management of the Ship. The Association will require sufficient information to assess the quality and experience of the managers of the Ship;
- **j** The Member’s loss record, which will usually be a guide used in the assessment of future risk and, therefore, of Premium Rating. Information relating to measures taken by the Member to reduce risks, control claims exposure and generally ensure quality operations, may also be relevant.

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11 A number of factors, in addition to the assessment of risk, are dependent on the Ship’s tonnage including voting rights at General Meetings, the Association’s liability under the Pooling Agreement and its liability to contribute to the costs of the Group Excess Loss Policies. For these purposes each Ship has an ‘entered tonnage’ based on its gross tonnage or, where the Ship has not been measured, on such other basis as the Association shall determine.

12 The Association’s exposure may be affected by any social security scheme in the country of domicile of the Crew member and by any personal injury and life insurance provided by the Member, and the Association will also require details of the terms of the contracts of employment, which may impose particular liabilities on the Member.

13 See the Guidance to Rule 76 and Appendix V.

14 See (A) of the Guidance to Rule 2.

15 See (C) below.

16 It is sometimes the case that a Member will argue that his Premium Rating should be reduced on the basis of measures taken to reduce operational risk. The Association will usually not accept any particular adjustment of the Premium Rating until such measures actually show an effect in the form of reduced claims and improved loss record.
(C) ...loss record... (Rule 10.1)
The loss record of a Member is essentially a comparison made for all Ships that are or have been entered by that Member in the relevant loss record period, of, on the one hand, the premium charged in respect of such Ships and, on the other hand, claims, paid and estimated, plus apportioned abatement, pool and market reinsurance costs applicable to those Ships. When calculating the loss record of individual Members, no account is taken of the Association’s administration costs or its investment income\(^\text{17}\) except in the case of a Defence entry in which case an administration expense is shown on the Member’s loss record. The administration expense is estimated based on the number and characteristics of defence claims registered, and is included due to the fact that, in comparison with P&I entries, a significantly greater proportion of the total cost of defence claims can be attributed to internal costs in view of the substantial service element.

It is normal for the Association to assess the Premium Rating on the basis of a loss record period of six years preceding the current Policy Year. A period of six years is considered necessary because P&I claims are sometimes not reported to the Association until several years after the incident which gave rise to them, and furthermore, they may not be finalised until a long time thereafter. What is not shown on the loss record are the claims incurred but not reported, which can be a substantial factor where a Member is known to have a ‘long tail’ in relation to claims\(^\text{18}\). The Association may apply a lower acceptable loss ratio level for Members who are historically prone to such claims\(^\text{19}\).

The loss record for the current Policy Year will usually not be significant in this regard as it may not represent a sufficiently accurate claims picture. Claims may still be reported and claims that have been reported may develop significantly. However, where, in the current Policy Year, there has been one or more significant claims affecting the overall record substantially, and it is clear at the time of the renewal discussions what the claims cost will be, e.g. because the claim has been compensated, this is likely to be taken into account.

\(^{17}\) About 10 per cent of any premium is generally held to be necessary to cover incurred but not reported (IBNR) claims, which means that an acceptable net loss ratio will be in the range of 90 per cent rather than 100 per cent.

\(^{18}\) A Member is stated to have a ‘long tail’ when the claims to which he is subject take a substantial time to resolve. The usual reason for a ‘long tail’ is the nature of the claims incurred by the Member. For fleets where personal injury claims represent the majority of claims incurred, e.g. cruise and passenger ships, there is usually a longer tail than average, because the claimant generally has a longer time available to file suit in respect of a claim than is the case for e.g. cargo claims. The most notable example is occupational disease claims, which may materialise many years after the (alleged) event that caused the disease.

\(^{19}\) The Association may for example use a 10 or 15 year record to assess the IBNR claims factor of the loss record.
When the Association is asked to consider accepting the transfer of a ship or fleet from another club which is a party to the International Group of P&I Clubs, the loss record of the former club must be made available to the Association to assist it in its risk and Premium Rating assessment.\(^{20}\)

(D) ...All Ships under the same management... (Rule 10.1)

The Association has the discretion to treat all Ships deemed to be under common ownership or management\(^{21}\) as one entity, and to treat the entry of all such Ships as a ‘fleet entry’. The Association will assess a composite loss record for all Ships on a fleet entry and entry on a fleet basis may affect the Premium Rating of any given Ship in that fleet.

(E) ...fixed premium... (Rule 10.2)

The premium arrangements for fixed premium entries differ from those described in (A) above for mutual Members. In the case of a fixed premium entry a single premium for the Policy Year is agreed at inception, and is payable in one instalment at that time.\(^{22}\) The principal categories of fixed premium entries are charterers and mobile offshore units.\(^{23}\)

A fixed premium rating can be varied for the next Policy Year under Rule 11, but the provisions which apply to mutual Members under Rules 12, 13, and 15-19 do not apply to fixed premium entries. In other words, the Association cannot levy additional premium or return any surplus in the case of such entries. The fixed premium rating is therefore assessed in a manner which includes a margin to cover uncertainty in the development of the Policy Year. The objective is to ensure that the total premium income from fixed premium entries will be higher than the claims produced by such entries, so that in the aggregate and over time, a surplus will be generated which will contribute to the Association’s funds.

(F) ...additional fixed premium... (Rule 10.3)

A fixed premium may also be levied for additional insurances made available under Rule 2.2. Such fixed premium will be payable in one instalment on inception of cover\(^{24}\) and the provisions of Rule 12 relating to Advance Calls and Deferred Calls will not apply to such additional insurances.

\(^{20}\) The procedures concerning transfer of ships from one club in the International Group of P&I Clubs to another is regulated by the International Group Agreement. See www.igpandi.org.

\(^{21}\) See the Guidance to Rule 1.5 as to whether persons are deemed to be managers of a Ship.

\(^{22}\) See Rule 20.4.

\(^{23}\) See Rule 64. Separate Rules apply to mobile offshore units, but they are outside the scope of this Guidance.

\(^{24}\) See Rule 20.4.
Where additional insurances are made available to a mutual Member, the provisions of Rules 12, 13, and 15-19 will nevertheless, continue to apply to that Member’s liability for payment of premium relating to his underlying P&I cover.
Rule 11 Variation of Premium Ratings

1 The Association may determine that for the next ensuing Policy Year the Premium Ratings of the Ships entered in the Association shall generally be varied by a fixed percentage, before any further adjustment is made in order to take account of the Member’s loss record, alteration in the extent of the risk or any other factor the Association may deem relevant.

2 Notification of variation of Premium Ratings effective for the following Policy Year shall, if practicable, be given to Members prior to 20th December.

Guidance

(A) …Premium Ratings…shall generally be varied… (Rule 11.1)

This Rule entitles the Association to make a general variation of the Premium Ratings for the next Policy Year. A general variation pursuant to Rule 11 applies across the board to all mutual P&I entries and Defence entries, as the case may be, and should not be confused with the individual premium adjustments which may be applied to any particular Ship, fleet or Member. However, different percentage variations may be applied to P&I and Defence cover. The P&I clubs that are members of the International Group of P&I Clubs have usually given effect to such general variation in the form of a ‘general increase’ since there has been an increase in most cases in recent times, although historically, there has sometimes been no increase and sometimes even an overall reduction in premium levels.

The premium policy which the Association adopts for any given Policy Year is based on the expected financial results of the Association for the current year, the financial strength represented by the total contingency and claims reserves held in trust by the Association, as well as an assessment of the liabilities, costs and investment returns during the next ensuing Policy Year. This includes claims trends and the development of cost drivers such as Pool claims, new and changed industry risks, legislation or international conventions affecting ships generally. The premium policy will also take account of inflation, expected increase or reduction in investment income, changes in reinsurance costs and administration expenses. However, such factors may also be affected by the new solvency capital requirements that will be imposed on P&I clubs that are domiciled in the EU and EEA pursuant to the Solvency II Directive as from 1 January 2016 which will require higher on-balance capital levels.

(B) …any further adjustment… (Rule 11.1)

In addition to adjusting the general variation in premium for all Ships, the Association may also adjust the premium for individual Ships or categories of Ships, based on the loss record of the Member and/or any change in the risks covered.

1 See Rule 14.
2 See the definition in Rule 1.1, as well as the Guidance to Rule 2.6 and Rules 65 – 70.
3 See the Guidance to Rule 14
(C) Notification... (Rule 11.2)

Variations in Premium Rating pursuant to Rule 11 are decided by the Board of Directors of the Association. 4

Whilst Rule 11.2 provides that notification of variations of Premium Ratings for the following Policy Year shall, if practicable, be given to all Members before 20 December, the Association’s practice has been to provide such notification by way of a circular distributed to Members immediately after the meeting of the Board of Directors at which the issue has been resolved. This is usually in October. However, the actual new Premium Ratings, and individual adjustments, are not usually advised to Members until January since the variations of the reinsurance rates of the Group Excess Loss Policies will not usually be known before then.

4 See Articles 9.2.d of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and 9.2.c of the Statutes of Assuranceforeningen Gard -gjensidig-.
Rule 12 Advance Calls and Deferred Calls

1 Before the commencement of each Policy Year, the Association shall decide what percentage of the Premium Ratings of all Ships entered for that year is to be collected by way of Advance Calls in the Policy Year to which it relates and what proportion shall be deferred for call in later years (the Deferred Calls).

2 The Association may at any time after the end of a Policy Year call for the Deferred Call in whole or in part. All Deferred Calls so made shall be calculated pro rata of the Advance Calls in the relevant Policy Year.

3 Notification of Advance Calls and Deferred Calls effective for the following Policy Year shall, if practicable, be given to Members prior to 20th January.

4 A Ship entered in the course of the Policy Year shall pay a daily pro rata proportion of the stipulated Advance Calls and Deferred Calls for the year.

Guidance

The provisions of Rule 12 do not apply to fixed premium entries.1

(A) …what percentage of the Premium Ratings...is to be collected by way of Advance Calls... (Rule 12.1)

The total Premium Rating to be paid by mutual Members for any given Policy Year consists of Advance Calls and Deferred Calls, the sum of which is sometimes referred to as the estimated total call or ETC. The Advance Calls and Deferred Calls for, respectively, P&I cover and Defence cover, are calculated separately.

The Advance Call for any Policy Year is expressed as a fixed percentage of the ETC, and such percentage is applicable to all Ships entered on a mutual basis. The Advance Call represents premium that is payable during the course of the Policy Year to which it applies and is collected in three instalments,2 which is intended to assist the Member’s cash flow.

(B) …and what proportion shall be deferred for calls in later years (the Deferred Call)... (Rule 12.1)

Deferred Calls are premiums which are payable in relation to a particular Policy Year but payment of which is deferred until the subsequent Policy Year or later Policy Years. Therefore, it is important to understand that Deferred Calls constitute an integral part of the Premium Rating3 for the entry for the particular Policy Year; it is only the time of payment of a proportion of that premium that has been deferred.4 As a result of such deferral the Association is able to gain a better view of the overall financial result for the Policy Year before the Deferred Call is levied on the membership. Therefore, if the financial result for the Policy Year is substantially

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1 See the Guidance to Rule 10.2.
2 See Rule 20.1.
3 See the Guidance to Rule 10.
4 Deferred Calls are due on the date specified by the Association. See Rule 20.5. Rule 12.
better than anticipated, the Association may decide to waive the Deferred Call in whole or, more likely, in part. Although Rule 17 provides for repayment of premium, the ability of the Association to review the quantum of the originally estimated total call by quantifying the level of Deferred Call is likely in most cases to make use of Rule 17 redundant.

(C) The Association may at any time after the end of a Policy Year call for the Deferred Call... (Rule 12.2)
Payment of the Deferred Call can be required at any time after the end of the Policy Year. The Association normally endeavours to call for payment during the course of the first twelve months following the end of the following Policy Year, but it is not obliged to do so and the Deferred Call can, if necessary, be deferred for a longer period of time, but cannot be levied after the Policy Year to which it relates has been closed.5

(D) All Deferred Calls shall be calculated pro rata of the Advance Calls... (Rule 12.2)
The Deferred Call for any Policy Year will be calculated as a percentage of the Advance Call that has been levied for that year. For example, a Deferred Call of 25 per cent will be one fourth of the Advance Call. In such a case, the Advance Call will be 80 per cent of the ETC while the Deferred Call will be 20 per cent of the ETC. However, the actual Deferred Call when finally levied may be for a lesser sum than that which was initially forecast.

(E) Notification of Advance Calls and Deferred Calls... (Rule 12.3)
Members need to know well in advance what the Premium Rating will be for any Policy Year including any variation that may be applicable to them pursuant to Rule 11 in order to enable them to decide whether to continue to have their Ships entered in the Association, and/or to incorporate the expected premium cost into their own budgets. Therefore, Rule 12.3 provides that notification of Advance Calls and Deferred Calls for the following Policy Year shall be given whenever practicable prior to 20 January.

(F) ...pro rata proportion of...Advance Calls and Deferred Calls... (Rule 12.4)
Ships which are entered after 20 February in any Policy Year pay that proportion of the Advance Calls and Deferred Calls for the whole of that Policy Year which the number of days of entry for such Ships bears to the total Policy Year. The reason for this is that each Ship constitutes a risk as from the time of entry and has to share proportionately in the risk of all other entered Ships.

5 See the Guidance to Rule 16.2 concerning the closing of Policy Years.
Where the entry of a Ship is terminated or ceases during the Policy Year, the Member remains liable for Advance and Deferred Calls on a pro-rata basis pursuant to the provisions in Rule 26. The proportionate liability of such Ships to pay such Calls relates to all claims incurred by the Association during the Policy Year, regardless of whether the events giving rise to some or all of such claims occurred before or after the entry of the Ships.6

6 See the Guidance to Rule 26.
Rule 13 Supplementary Calls

If the Advance Calls and Deferred Calls for any Policy Year are considered insufficient to cover the claims on, or costs, expenses and outgoings of the Association, including any allocation to reserves the Association may deem appropriate and including the excess, if any, of claims costs, expenses and outgoings of any closed Policy Year over the provisions or reserves made thereof, the Association may at any time during or after the end of the relevant Policy Year call for one or more Supplementary Calls which shall be levied on each Member in proportion to the net Advance Calls for such year, unless the entry has been accepted on special terms which otherwise provide.

Guidance

The fundamental principle of mutuality is that the funds which are necessary to meet the liabilities of a mutual association are provided by the members of that association. Such funds are the predominant source of capital for a mutual association which, unlike joint stock companies, cannot raise extra capital by new share issues. Accordingly, if the funds originally made available by the membership to the association subsequently prove to be insufficient to meet the expected liabilities, further funds need to be provided by the membership. Therefore, all mutual associations have rules enabling the association to call for further funds from the membership in such circumstances. Rule 13 is the vehicle which enables the Association to do so if necessary in the form of a Supplementary Call which is premium that is payable in addition to the Premium Rating that was originally forecast.¹

The provisions of Rule 13 do not apply to fixed premium entries.²

(A) …Advance and Deferred Calls…are considered insufficient to cover…

(Rule 13)

The Premium Ratings for Ships entered in the Association are collected by way of Advance Calls and Deferred Calls³ that are set at a level which is expected to meet the total liabilities of the Association for the Policy Year after taking into account anticipated income from investments, fixed premium entries and additional business operations. In most Policy Years, this will be sufficient, but the envisaged financial result for a Policy Year may become severely undermined by unexpected developments such as a significant downturn in investment income, a significant shortfall in reinsurance recoveries and/or significantly adverse claim developments.

¹ A Supplementary Call is sometimes referred to as either an ‘additional call’ or an ‘unbudgeted call’, the latter phrase illustrating the unexpected nature of the premium payable.
² The final words of Rule 13 make this clear ‘unless the entry has been accepted on special terms which otherwise provide’.
³ See (A) and (B) of the Guidance to Rule 12.
Accordingly, it may be necessary to levy one or more Supplementary Calls on the membership to achieve a balance between total income and expenditure\textsuperscript{4} for the relevant Policy Year.

(B) …including any allocation to reserves the Association may deem appropriate… (Rule 13)
Supplementary Calls are designed to maintain the financial strength of the Association and therefore, when deciding whether or not to levy a Supplementary Call, the Association is not bound to consider the Policy Year in isolation. The Association may levy a Supplementary Call if it considers it appropriate at any particular point in time to make an allocation to the general reserves. The Association is also entitled to do so if, for example, after the closing of a Policy Year, the claims made during that year develop adversely and it does not wish to draw down on the reserves.

(C) …may at any time… (Rule 13)
The Association may levy one or more Supplementary Calls at any time during or after the end of the relevant Policy Year, but the Supplementary Call(s) that is/are levied on the Members for the relevant Policy Year cannot be levied after that Policy Year is closed.\textsuperscript{5}

(D) …one or more Supplementary Calls… (Rule 13)
In practice, many years may elapse before the total liabilities of the Association for a Policy Year are finally settled. However, it is usually possible to assess, within 12 months of the end of the relevant Policy Year, whether any Supplementary Call will be necessary in respect of that Policy Year. Therefore, in most cases, the Association would expect to be able to give a firm indication within two years of the end of the Policy Year.

A Member continues to be liable to pay Supplementary Calls in respect of any Policy Year for as long as that Policy Year remains open and the Member will be relieved of his obligation to pay Supplementary Calls in respect of that Policy Year only upon payment of a Release Call\textsuperscript{6} or upon closing of that Policy Year.\textsuperscript{7}

\textsuperscript{4} Any income shortfall or unexpected expenditure may necessitate a Supplementary Call, e.g. significant shortfall in reinsurance recoveries, shortfall in premium payment from Members etc. Such unrecoverable sums are considered an expense of the Association under Rule 20.8.

\textsuperscript{5} The Association cannot levy a Supplementary Call in respect of a closed Policy Year, i.e. call upon further premium from Members in respect of their entries in that year, but may levy a Supplementary Call in respect of any open year to make allocation to the reserves so as to regain the financial strength considered necessary to make up for the adverse development of the closed year.

\textsuperscript{6} See Rule 15.

\textsuperscript{7} See Rule 16.
There is no limit to the number or amount of Supplementary Calls that can be levied in respect of a Policy Year. While the Association rarely\(^8\) levies Supplementary Calls, it is entitled to levy more than one Call where this is deemed necessary.

A decision to levy Supplementary Calls is made by the Board of Directors\(^9\) of the Association and a Supplementary Call is due for payment on the date specified by the Association.\(^10\)

\((E) \text{ …in proportion to the net Advance Premiums… (Rule 13)}\)

A Supplementary Call is calculated as a percentage of the net Advance Calls for each year. The net Advance Calls are calculated after deducting any applicable rebates, laid up returns and other deductions.

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\(^8\) No Supplementary Call has been levied since 1992 (which was in respect of the 1991 Policy Year).

\(^9\) See Articles 6.2.e of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and 9.2.d of the Statutes of Assuranceforeningen Gard -gjensidig-.

\(^10\) See Rule 20.5.
Rule 14 Determination of Supplementary Calls and Deferred Calls etc.
The Association may determine Advance Calls, Deferred Calls and Supplementary Calls and variations in the Premium Rating, either generally for all entries or separately for any entry or category of entries.

Guidance
Rule 13 is the vehicle that gives the Association the power to levy the Advance, Supplementary and Deferred Calls that may be required to ensure that the Association has the funds that are necessary to meet the liabilities and expenses of a mutual association, and Rule 14 is the vehicle that determines how such Calls are to be quantified.

...may determine...generally...or separately... (Rule 14)
Whereas Rules 11-13 are primarily designed to enable the Association to calculate Premium Ratings and Calls which are applicable to all Ships which are entered with the Association, Rule 14 enables the Association to make further adjustments in relation to a particular entry or to particular categories of entries. For example, it permits the Association to take account of enhanced risks which apply specifically to a particular Ship or class of Ship or Member or trade. For example, Members engaged in the carriage of persistent oil as cargo to the United States were for several years obliged to pay premium surcharges either per voyage or in some cases a lump sum covering all such voyages. However, the Association ceased to require such surcharges at the commencement of the 2014 Policy Year.

Rule 14 also allows the Association to determine the Premium Rating for a P&I entry and Defence entry of the same Ship on a different basis, which may be necessary due to underlying differences in the risk profiles of these different types of cover.
Rule 15 Release Calls

When an entry is terminated or shall cease, the Association may, without awaiting the fixing of Deferred Calls and Supplementary Calls, determine an additional premium for each open Policy Year based on, but not limited to, the anticipated rate(s) of Deferred Calls and Supplementary Calls for each year. Upon payment of such Release Calls, the Member shall be released from all liabilities for further Deferred Calls and Supplementary Calls in respect of the said entry and shall under no circumstances be entitled to participate in the distribution of any surplus decided upon thereafter.

Guidance

(A) When an entry is terminated or shall cease...an additional premium...

(Rule 15)

When a Member enters one or more Ships in the Association, he agrees implicitly to share the liabilities of the membership as a whole for the Policy Years in which he is insured, and accepts liability for the payment of any Deferred Calls or Supplementary Calls which the Association may consider necessary to balance the income and expenditure for those Policy Years. The Member’s obligation to pay such calls for any Policy Year which has not yet been closed continues even if his entries are terminated or cease for any other reason. In such circumstances, it can be inconvenient for the Association and wasteful of the Association’s funds to have to continue to pursue the Member for Deferred Calls or Supplementary Calls, and it may also be inconvenient for the Member to have a continuing and uncertain liability for such Calls.

Were it not for the Release Calls provisions of Rule 15, the liability of a Member to pay Deferred Calls and Supplementary Calls for all open Policy Years in which he had been insured with the Association would continue without limitation as to time or amount until those Policy Years had been closed in accordance with Rule 16. However, pursuant to Rule 15, the Association is entitled to calculate a ‘once-and-for-all’ Release Call which, when paid, will release the Member from liability to pay any future Deferred Call or Supplementary Call. The Association is not obliged to agree to calculate a Release Call and could, should it so wish, insist on the payment by Members of Deferred Calls and Supplementary Calls as and when they are levied until that Policy Year is closed. However, once Members have been notified...

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1 See the Guidance to Rule 16.
2 See the Guidance to Rule 24.
3 See the Guidance to Rule 25.
4 The Deferred Calls and Supplementary Calls pertaining to the current Policy Year would be calculated by reference to a reduced Advance Call under the prorating provisions of Rule 26, if the entry was terminated or ceased during the course of that year.
5 However, payment of Release Calls does not release the Member from his liability to pay Overspill Calls in relation to any Policy Year during which his Ships were entered in the Association. See (D) below.
6 See Rule 16.
that a Release Call has been calculated, a Member is entitled to opt to pay such Release Call and thereby avoid exposure to future liability for Deferred Calls and Supplementary Calls.

The Association may, in certain circumstances, agree to accept a guarantee or cash deposit from the Member instead of levying a Release Call. Should the Association agree to accept a guarantee, the guarantee must be issued by an independent financial institution acceptable to the Association and must cover the estimated Deferred Calls and Supplementary Calls for each open Policy Year in which the Member has been insured by the Association. A Member who provides a guarantee or cash deposit in lieu of paying a Release Call remains liable to pay future Deferred Calls and Supplementary Calls as and when they are levied. However, the Member is entitled in such circumstances to share in any repayment of premium pursuant to Rule 17.

(B) …based on, but not limited to, the anticipated rate(s) of Deferred Calls and Supplementary Calls… (Rule 15)

In calculating the Release Call the Association will take into consideration all the open Policy Years during which the Ship has been entered and make an estimate of the likely future Deferred Calls and Supplementary Calls for those Policy Years. The Association will also take into account, on the one hand, the risk that the Policy Years may develop more adversely than expected and, on the other hand, the benefit to the Association of receiving earlier payment of the Release Call.

The level of Release Calls is determined by the Board of Directors of the Association. Following the European Commission's investigation into the claims' sharing and reinsurance arrangements of the International Group of P&I Clubs, the Clubs that are members of the Group have agreed to publish an annual statement explaining the factors which they take into account when assessing the level of Release Calls and the risk of collecting such Calls. As a result of such discussions, the Association, in common with all other clubs that are members of the International Group of P&I Clubs, have determined that the Release Call, whilst still based on the anticipated Deferred Calls and Supplementary Calls, should be assessed as a percentage of the Estimated Total Call (ETC) for the relevant entry for the relevant Policy Year.

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7 See Articles 6.2.f of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and 9.2.e of the Statutes of Assuranceforeningen Gard -gjensidig-. 
When assessing the relevant percentage of the ETC the Directors will take into account the following factors:

- The risk that the published levels of expected premiums may be exceeded assessed on the basis of the Association’s methodology for calculating the capital required, taking into account premium risk, reserve risk, market risk and other significant categories;
- The wish to maintain a set structure for reducing the Release Call percentage per Policy Year under normal circumstances.

(C) Upon payment…shall be released… (Rule 15)
The Member is released from liability to pay Deferred Calls and Supplementary Calls only when the Release Call has been paid. Therefore, if a Release Call has been debited but not paid, the Association remains entitled to levy Deferred Calls and Supplementary Calls pursuant to, respectively, Rules 12 and 13, and the Member remains bound to pay them.

(D) …all liabilities for further Deferred Calls and Supplementary Calls… (Rule 15)
The release given to the Member is only in respect of future Deferred Calls and Supplementary Calls, not for any other Calls that have already been levied, but not paid, by the Member at the time that the entry was terminated or ceased. However, and importantly, payment of the Release Call does not release the Member from his obligation to pay Overspill Calls pursuant to Rule 18.

(E) …under no circumstances be entitled to participate in…any surplus… (Rule 15)
Upon payment of a Release Call, the Member loses the right to share in any subsequent repayment of premium pursuant to Rule 17 relating to any Policy Year in which he had entered a Ship or Ships. This is a logical consequence, since by virtue of payment of a Release Call, the Member will be freed from any liability to pay future Deferred Calls or Supplementary Calls.
Rule 16 Closing of Policy Years

1. The Association may decide to close a Policy Year at such time as it deems expedient.

2. No further Deferred Calls and Supplementary Calls, other than Overspill Calls, shall be levied in respect of a closed Policy Year.

Guidance

(A) The Association may decide to close a Policy Year... (Rule 16.1)

A Policy Year runs from noon GMT on 20 February in any year to immediately prior to noon GMT on the 20 February in the following year. Each Policy Year is treated as a separate year of account, with the income for that year being applied to the claims, costs, expenses and other outgoings of that year. Policy Years remain open until the Association is satisfied that it has an accurate assessment of the level of claims etc., which are likely to be made against the Association for events arising in that Policy Year and that it has sufficient funds to meet such claims. A cornerstone of mutuality is that the Members entered for any given Policy Year are liable to pay their share of the claims, costs, expenses and outgoings of that year. Therefore, unless the Member's entries have been terminated or have ceased and the Member has paid Release Calls pursuant to Rule 15, he remains liable for Deferred Calls and Supplementary Calls in respect of a Policy Year in which he was insured until that year is closed.

(B) ...such time as it deems expedient... (Rule 16.1)

The time of closing of a Policy Year is entirely in the discretion of the Association and is decided by the Board of Directors. The decision will normally be taken when a reasonable estimate can be made of the total final liabilities, costs and other outgoings for that year.

It is not necessary for all claims to have been settled before a decision can be made to close a Policy Year. P&I insurance is a so-called ‘long tail’ business where certain claims may take years to resolve, particularly if they are the subject of litigation. But, as time goes by, the uncertainty concerning the overall outcome of the Policy Year is reduced. Therefore, approximately two and a half years after the end of a Policy Year, the Association will usually be in a position to estimate the final outgoings for that year with satisfactory accuracy, and on that basis, can decide whether or not it is necessary to levy a Supplementary Call, following which, the Policy Year can be closed. Consequently, it has been the recent practice of the Association to try to close a Policy Year three years after the end of the Policy Year.

1 See Rule 1.
2 See Articles 6.2.g of the By-Laws of Gard P. & I. (Bermuda) Ltd. and 9.2.f of the Statutes of Assuranceforeningen Gard -gjensidig-. However, it is the policy of parties to the Pooling Agreement to keep Policy Years open for at least two years after they have ended.
(C) No further Deferred Calls or Supplementary Calls, other than Overspill Calls... (Rule 16.2)

The closing of a Policy Year relieves the Member from liability for payment of further Deferred Calls or Supplementary Calls in relation to that year other than Calls which have already been levied before the Policy Year is closed. However, in rare instances if a Policy Year has been closed, but the premium paid for that Year has proved to be insufficient to cover all liabilities, costs and expenses relating to that year, the shortfall may be covered by reserves, i.e. surplus funds, accrued in other Policy Years and/or by Supplementary Calls levied on one or more other Policy Year(s) which are still open. Reserves set aside from the surplus generated in one Policy Year can be applied to claims occurring in another Year.

Furthermore, the closing of a Policy Year does not relieve the Member from an obligation to pay Overspill Calls in relation to an Overspill Claim arising out of an event that occurred during a closed Policy Year. The rules that apply to the closing of a Policy Year for the purposes of Overspill Calls differ from those that apply to the closing of a Policy Year pursuant to Rule 16.

3 For example, if ‘long-tail’ claims prove to be significantly more expensive than originally thought.
4 See the Guidance to Rule 13.
5 See the Guidance to Rule 19.
6 See the Guidance to Rule 18.
7 See the Guidance to Rule 18 and Appendix VI, Paragraph 6 to the Rules for Ships.
Rule 17 Repayment of premium

If, at the time of the closing of a Policy Year pursuant to Rule 16, the Advance Calls, Deferred Calls and Supplementary Calls in respect of that year shall exceed the claims, costs, expenses and outgoings of the year, the Association may decide that such excess shall be distributed, in whole or in part, to the Members entered in that Policy Year in proportion to their net Advance Calls.

Guidance

The repayment of excess premium to Members under Rule 17 must be distinguished from the distribution of surplus assets upon dissolution of the Association.1 Furthermore, the right to participate in a distribution of any such excess is restricted to mutual Members since they are the ones that share the risk of claims arising during the relevant Policy Year and contribute funds to cover such risks. Consequently, it is logical and fair that they are the ones that are entitled to benefit from any excess. Therefore, Members who have fixed premium entries are not eligible to receive any such excess or a return of premiums in respect of the fixed premiums that they have paid in respect of their entries.2

(A) …the Association may decide that such excess shall be distributed…

(Rule 17)

A Policy Year may be closed pursuant to Rule 16 when the Association decides that no further Deferred Calls or Supplementary Calls will be required for that Policy Year. If, at that time, the Policy Year’s accounts are in surplus because the total income from premium and investment returns exceeds the actual and anticipated claims, costs, expenses and outgoings for that Year, the Association may decide to distribute the excess to the Members.

A decision to distribute the excess can be made only at the time that the Policy Year is closed. The Association has complete discretion3 whether to distribute all or part or none of the excess to Members or whether to allocate all or part or none of it to the reserves.4 Normally, it is the practise of the Association consistent with that of most P&I clubs, to decide to allocate any excess to the reserves.

(B) …distributed…to the Members entered in that Policy Year… (Rule 17)

All Members who have paid Advance Calls in that Policy Year are entitled to participate in a repayment of premium with the exception of Members who have elected to be released from their obligation to pay Deferred Calls or Supplementary

1 See Article 12.2 of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and 19.2 of the Statutes of Assuranceforeningen Gard -gjensidig-.
2 See Rule 10.2.
3 The discretion rests with the Board of Directors pursuant to Article 6.2.e of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and 9.2.d of the Statutes of Assuranceforeningen Gard -gjensidig-.
4 See Rule 19.
Calls by payment of Release Calls.\(^5\) Members who have failed to pay all or part of their Advance Calls, Deferred Calls or Supplementary Calls are entitled to participate in a repayment of premium, but the Association is entitled to set off\(^6\) any amounts due to the Association from the Member against such repayments.

The allocation of excess premium to reserves may result in funds generated by Members in one Policy Year being used to offset losses of (other) Members in another Policy Year. However, Members very often continue their membership of the Association from year to year, which means that, in practice, the majority of those Members who benefit from the fact that the reserves that have been accumulated in one Policy Year are used in order to balance the accounts in another Policy Year are those same Members that have contributed to the allocation of that excess to reserves in the other Policy Year.

The maintenance of such ongoing reserves benefits existing and future Members and is essential for the Association’s continued financial strength. From a regulatory\(^7\) point of view, it has also become increasingly necessary for providers of insurance, including the P&I clubs, to keep adequate reserves to cater for unexpectedly large claims, whether caused by single, catastrophic incidents or an unprecedented large number of claims.

\(\text{(C) ...in proportion to their net Advance Calls. (Rule 17)}\)

A repayment of premium to Members is made in proportion to the net Advance Calls levied in respect of those Members for that Policy Year. The net Advance Calls are calculated after deducting any applicable premium discount granted by the Association under special terms of entry and laid up returns.\(^8\)

\(^5\) See the Guidance to Rule 15.
\(^6\) See Rule 21.1.
\(^7\) The legal requirements for the Association in this regard are governed by regulations issued and monitored by the Financial Supervisory Authority of Norway (Finanstilsynet). Furthermore, the European Union is expected, with effect from 1 January 2016, to enact new regulations concerning solvency requirements for insurance companies operating within the EU/EEA area (Solvency II) that will make P&I clubs subject to more stringent requirements in relation to the reserves which must be held to meet unexpected claims, shortfalls in reinsurance recoveries and other insurance and operational risks.
\(^8\) See the Guidance to Rule 22 considering laid-up returns.
Rule 18 Overspill Calls

If the Association shall at any time determine that funds are or may in the future be required to pay part of an Overspill Claim (whether incurred by the Association or by any other party to the Pooling Agreement), the Association may levy one or more Overspill Calls to meet the Association’s liability for its proportion of such Overspill Claim, pursuant to the terms and conditions as set out in Appendix VI to these Rules.

Guidance

Overspill Calls can be levied only on Members who are entered on a mutual basis for P&I cover. Members entered on a fixed premium basis are not liable for such Calls.¹

(A) …funds…required to pay part of an Overspill Claim (whether incurred by the Association or by any other party to the Pooling Agreement)... (Rule 18)

An Overspill Claim is a claim on either the Association or any one of the other P&I clubs which are parties to the Pooling Agreement that exceeds or may exceed the Group Reinsurance Limit.² The Group Reinsurance Limit may vary from Policy Year to Policy Year. For owners’ mutual entries it is currently USD 2 billion in excess of USD 80 million save for claims concerning oil pollution where a special limit of USD 1 billion applies.³

The Pooling Agreement provides that parties to it will share between themselves in agreed proportions the amount by which any claim which may be made against any one or more of them exceeds the sum recoverable under the Group Excess Loss Policies. The proportion payable by the Members of any such P&I Club (including the Association) is calculated by reference to the tonnage that is entered in that club on the Overspill Claim Date.⁴

Due to the potentially severe financial consequences of an Overspill Claim the level of reserves already held by the Association may not be sufficient to meet the Association’s liability for its proportion of such a claim, or there may be a need to avoid significant depletion of those reserves. Therefore, an Overspill Claim may require special funding which is achieved by the levying of additional calls on the membership. In order to reduce the need to levy Overspill Calls the Association has, in conjunction with the other P&I clubs which are parties to the Pooling Agreement,

¹ See Rule 10.2.
² See Appendix III, Paragraph 1 as well as the Guidance to Rule 1.1.
³ See Rule 53.1 and Appendix III, Paragraph 2. Since claims in respect of oil pollution are subject to a special limit of cover of USD 1 billion, which is fully reinsured, no Overspill Claim can arise solely in respect of oil pollution.
⁴ The Overspill Claim Date is defined in paragraph 1.1 of Appendix VI of the Rules as “the time and date on which there occurred the incident or occurrence giving rise to the Overspill Claim in respect of which the Overspill Call is made, or if the Policy Year in which such incident or occurrence has been closed in accordance with the provisions of paragraphs 6.1 and 6.2, noon GMT on 20 August of the Policy Year in respect of which the Association makes a declaration under paragraph 6.3.”
arranged overspill reinsurance which protects the Association and the other clubs against loss up to a fixed amount.\(^5\)

\textbf{(B) …shall at any time… (Rule 18)}

Rule 18 emphasises that the Association may ‘at any time’ determine that funds are either immediately required or ‘may in the future be required’ to pay its proportion of an Overspill Claim. Therefore, the Association may levy an Overspill Call even after the Policy Year in which the Overspill Claim has been made has been closed pursuant to Rule 16 for claims other than Overspill Claims. This provision gives the Association the flexibility subject to the provisions of Appendix VI (see below) to levy Overspill Calls at whatever time it considers it to be necessary and to thereby enable the Association to be ready to pay its part of the Overspill Claim as and when required. It is not a prerequisite for the levying of Overspill Calls that the Association has first been requested to pay its part of the Overspill Claim. However, Overspill Calls cannot be levied unless and until an Overspill Claim has actually occurred.

\textbf{(C) …may levy one or more Overspill Calls… (Rule 18)}

If the Association concludes that funds are or may be required to pay its proportion of an Overspill Claim it is not obliged to use any of the reserves in order to avoid levying an Overspill Call. Rule 18 gives the Association the right to levy Overspill Calls should it deem this to be in the better interests of the membership as a whole. Should the Association decide that an Overspill Call should be levied, the Association’s liability to pay its proportion of the Overspill Claim falls due as and when such funds are received from the membership.\(^6\)

The power to levy Overspill Calls is vested in the Board of Directors,\(^7\) which may levy such Calls more than once in respect of any given Overspill Claim should this be deemed necessary. However, neither the Association nor any other member club of the International Group of P&I Clubs has ever levied an Overspill Call to date.

Historically, the Member’s liability to pay Overspill Calls was unlimited, but is now limited for any entered Ship\(^8\) to 2.5 per cent of the limit of liability in respect of property claims for that Ship pursuant to the provisions of the International Convention on Limitation of Liability for Maritime Claims 1976.\(^9\) The Association’s limit of liability under the Pooling Agreement in respect of any Overspill Claim is the

\(^5\) The Overspill reinsurance for the 2013 Policy Year has a limit of USD 1 billion per Overspill Claim.

\(^6\) See Paragraph 3.4 to Appendix VI.

\(^7\) See Article 6.2.e of the Bye-Laws of Gard P&I (Bermuda) Ltd and Article 9.2.d of the Statutes of Assuranceforeningen Gard -gjensidig-.

\(^8\) If a Ship is entered for a proportion of its tonnage pursuant to Rule 3.2, then the limit will be that proportion of the full limit.

\(^9\) See Appendix VI Paragraph 5.4. Despite the fact that higher limits have been introduced by the 1996 Protocol to the 1976 Convention, the applicable limit for the purposes of Rule 18 remains at the limit set by the 1976 Convention.
aggregate of the individual limits set out for all Ships entered as Owner’s Entries in the Association on the Overspill Claim Date.

(D) …pursuant to the terms and conditions as set out in Appendix VI... (Rule 18)

Because of the potentially profound financial consequences of any Overspill Claim for the parties to the Pooling Agreement, there is a need to have clear and detailed provisions regulating the inter-related rights and obligations of those parties, as well as rights and obligations between each club and its members.

These provisions are set out in Appendix VI to the Rules which mirror similar provisions in the Pooling Agreement. They deal with the interpretation, recoverability, payment and expert determinations of Overspill Claims, the levying of Overspill Calls, the closing of Policy Years for Overspill Calls, and with security for Overspill Calls on termination or cessation of entries.

The provisions are very comprehensive and have yet to be invoked in any given case. This Guidance, therefore, offers no further detailed review of them. However, a few observations are made for ease of reference:

i Where a club becomes aware that an incident has occurred that may give rise to an Overspill Claim in a given Policy Year that is not yet closed, it is obliged to give notice of this fact to the other parties to the Pooling Agreement and to declare that the Policy Year shall remain open for the purpose of levying an Overspill Call or Calls until the club is satisfied that their obligations in respect of the Overspill Claim have been discharged. If the subject Policy Year has been closed at the time such notice is given, the club concerned must declare that the earliest subsequent Policy Year which is still open shall remain open for this purpose;

ii A Policy Year will be closed for the purpose of levying Overspill Calls if no club has submitted any notice concerning a possible Overspill Claim within 36 months of the commencement of the Policy Year in question;

iii Overspill Calls are, in the first instance, levied only in respect of Ships entered in the Policy Year during which the event that gave rise to the Overspill Claim occurred;

iv Ships entered for less than a full Policy Year are liable to pay Overspill Calls on a pro rata basis, e.g. one-third of the full Call if entered for four months, and this principle applies irrespective of whether the Ship was entered on the actual date on which the event that gave rise to the Overspill Claim occurred;

v If an entry of a Ship terminates or ceases after it has been declared that a Policy Year should remain open for Overspill Calls, the Association has the right to demand that the Member provides security to pay any future Overspill Calls in respect of that Ship. The Association also has the right to withhold payment of claim compensation to the Member until such security has been provided. The purpose of this Rule is to assist the Association to collect Overspill Calls in the interests of the membership as a whole.

10 See also the Guidance to Rule 26.1.
Rule 19 Reserves

1 The Association may establish and maintain such reserves as it may deem appropriate and may decide that any part of such reserves shall be applied to reduce Deferred Calls and Supplementary Calls including Overspill Calls.

2 Reserve funds may not be distributed to the Members except as provided for in the Articles of Association.

Guidance

(A) …such reserves as it may deem appropriate… (Rule 19.1)

The basic function of reserves is to enable the Association to ensure that it has sufficient funds available to indemnify Members for liabilities that they have incurred, and for which the Association is liable to indemnify them under the Rules and individual terms of entry, and to cover the Association's administrative costs and any direct liability that it may be obliged to incur to third parties pursuant to certificates of financial security such as those that may be required under the CLC, Bunkers, Athens or Nairobi Wreck Removal Conventions.¹ The Association has the right to allocate funds to the reserves by transferring to the reserves any excess funds that have been generated in a Policy Year or by levying Supplementary Calls for that purpose.²

The Board of Directors will determine the amount, if any, that is to be allocated to the reserves after having approved the financial statements of the Association. In doing so, the Board will usually have regard to factors such as the level of accounted surplus of premium and other income earned over claims and other costs expended, the current and desired solvency margin of the Association and the desirability of calling for less premium than originally forecast.

(B) …applied to reduce Deferred Calls and Supplementary Calls including Overspill Calls. (Rule 19.1)

It can sometimes take years for claims which are made against the Association to be finally determined and compensated. Therefore, the Association will, in the meantime, invest the accrued reserve funds. The investment return generated thereby is a very important part of the Association's overall income and has over the years served to strengthen its reserves and to avoid the necessity of making any Supplementary Call.³ It has also made it possible for the Association not to charge, or to reduce, the forecast Deferred Call in some Policy Years. Investment activities are administered by a number of selected professional investment managers in

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¹ Further commentary can be found in para. (A) to the Guidance to Rule 38 regarding the CLC and Bunkers Conventions, para. (J) to the Guidance to Rule 28 regarding the Athens Convention and para. (B) to the Guidance to Rule 40 regarding the Nairobi Convention.
² See the Guidance to Rule 13.
³ The Association has not levied any Supplementary Call since 1992 (in respect of the 1991 Policy Year.)
accordance with guidelines determined by the Board of Directors. A sufficient proportion of the funds is invested in such a way that it can be easily liquidated as and when necessary in order to generate cash for e.g. large claim payments.

The Association has a wide discretion to utilise reserves to pay claims and/or other outgoings which would otherwise have to be funded by Supplementary Calls. Furthermore, the reserves may, at the discretion of the Association, be applied inter alia:

i  to meet any deficit which occurs in respect of a Policy Year that has been closed;
ii  to stabilise the level of Calls;
iii  to pay losses arising from a shortfall in any reinsurance cover;
iv  to cushion the Association against investment losses;
v  to eliminate or reduce the need for an Overspill Call or Calls.

(C) Reserve funds may not be distributed... (Rule 19.2)
Whilst reserves can be used to meet claims and thereby reduce Calls, they cannot be paid out to Members except upon the dissolution of the Association.

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4 See Article 9.2.c of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and 9.2.b of the Statutes of Assuranceforeningen Gard -gjensidig-.
5 Such discretion is exercised by the Board of Directors. See Article 6.2.e of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and Article 9.2.d of the Statutes of Assuranceforeningen Gard -gjensidig-.
Rule 20 Payment

1 Subject to Rule 20.3, Advance Calls are due in three instalments as follows:
   a for the period 20 February – 20 June, on 20 March;
   b for the period 20 June – 20 October, on 5 July;
   c for the period 20 October – 20 February, on 5 November.

2 Where the ship is entered in the course of a Policy Year, a pro rata Advance Call for the four-monthly period in which it is entered is due at once, with the remaining instalments, if any, due at the times specified in Rule 20.1.

3 Advance Calls for Defence cover and Advance Calls of less than USD 5,000 (or the equivalent in any other currency, as determined by the Association) per Ship are due in full on 20 March.

4 Fixed premiums are due on inception of cover.

5 Deferred Calls and Supplementary Calls, other than Release Calls, are due on the date specified by the Association.

6 Any other sums debited by the Association to a Member, including Release Calls, Overspill Calls, reimbursement of deductibles, interest, costs or expenses, are due on demand.

7 If any sums due to the Association from the Member are not paid on or before the due date interest is chargeable on such unpaid sums at such rate as the Association may from time to time determine.

8 Members’ Advance Calls, Deferred Calls, Supplementary Calls, Overspill Calls, other premiums and other sums which cannot be collected shall be deemed to be an expense of the Association.

Guidance

(A) ...Advance Calls are due in three instalments... (Rule 20.1)

Advance Calls constitute part of the Premium Rating\(^1\) that is collected in the Policy Year to which it relates and the Association requires payment of the Advance Calls to be made in three instalments in order to minimise cash flow difficulties for Members. Each instalment must be paid before or at the due date. Whilst a Member is permitted to pay any instalment before the relevant due date for the instalment, he is not entitled to receive any discount for doing so.

The payment requirements of Rule 20.1 are ‘subject to Rule 20.3’ which has special provisions relating to the payment of Advanced Calls for Defence cover and Advanced Calls of less than USD 5,000.\(^2\)

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1 See the Guidance to Rule 10.1 and Rule 13.1, respectively.
2 See (C) below.
(B) ...Ship...entered in the course of a Policy Year... (Rule 20.2)
Where a Ship is entered during the course of a Policy Year it makes practical sense
to collect the pro rata Advance Call relating to the first four-monthly period of the
Ship’s entry at the time of entry and any remaining instalments at the dates specified
in Rule 20.1.

(C) ...Advance Calls for Defence Cover and...less than USD 5,000... (Rule 20.3)
The Premium Rating per Ship for Defence cover is usually much less than that for P&I
cover and it is considered impractical and uneconomical both for the Association
and the Member to collect/pay the premium in instalments. Therefore, such
Advance Calls are payable in full on the 20 March when such entries take effect from
20 February, but if not, are payable in full at the time of entry

For similar reasons the same rule applies to Advance Calls for P&I cover of less
than USD 5,000, or the equivalent of USD 5,000 if the premium is payable in
another currency.3

(D) Fixed premiums are due on inception of cover (Rule 20.4)
This provision makes it clear that the full premium for fixed premium entries4 will
be due for payment as and when the cover commences regardless of when that
is. Fixed premium charterer’s entries take effect from the time that the Member
charters the Ship, but the Association may agree to defer the due date for premium
payments to a later time.

(E) Deferred Calls and Supplementary Calls...are due... (Rule 20.5)
Deferred Calls can be levied by the Association ‘at any time after the end of the
Policy Year’5 while Supplementary Calls can be levied ‘at any time during or after
the end of the relevant Policy Year’.6 Since it is not possible to determine in advance
whether, or when, such Calls will be levied, the due date for payment of such Calls
will be specified by the Association only as and when such Calls are levied.

3 The Association can agree to terms of entry for payment of premium in a currency other than US Dollars,
e.g. Euros, Pounds Sterling, Norwegian Kroner, Swedish Kroner, Japanese Yen etc. Compensation
of liabilities, losses, costs and expenses will in such cases be made in the premium currency. See the
Guidance to Rule 86 in this regard.
4 See Rule 10.2.
5 See Rule 12.2.
6 See Rule 13.
(F) Any other sums debited by the Association to a Member...are due on demand. (Rule 20.6)

This provision applies to payment of any sums debited to a Member other than Advance Calls, Deferred Calls or Supplementary Calls; e.g. Release Calls, Overspill Calls, reimbursement of loans, deductibles, interest, costs or expenses. Under Norwegian law ‘due on demand’ means that the amount falls due for payment immediately after the debit note has been submitted to the Member.

(G) If any sums...are not paid on or before the due date...interest is chargeable... (Rule 20.7)

It is important that the Association receives timely payment of sums that are due to it in order, inter alia, to avoid cash flow constraints, counterparty credit risk and the consequent need to liquidise profitable investments in order to generate cash. Furthermore, it would be unfair to other mutual Members if any individual Member were to receive cash flow and earnings benefits as a result of withholding payments without any form of redress. Accordingly, this Rule gives the Association the right to claim interest on late payments.7 In the case of non-payment, the Association is also entitled to take other measures against the Member, including the exercise of the right of set-off8 or the right to terminate cover.9 The Association may also take legal action against the Member and anyone else insured under the same entry10 to recover unpaid sums.

(H) Members’ Advance calls, Deferred calls, Supplementary Calls, Overspill Calls, other premiums and other sums which cannot be collected shall be deemed to be an expense... (Rule 20.8)

Given the predominantly mutual nature of the Association, sums, including fixed premiums, which cannot be collected are deemed to be an expense of the Association which must, ultimately, either be covered by the Association’s reserves, or by the levying of Supplementary Calls.11

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7 According to the Norwegian Interest on Overdue Payments Act of 1976 (Forsinkelsesrenteloven 1976), interest is chargeable in the case of payments which are ‘due on demand’ upon the expiry of one month after the debit note has been submitted.
8 See the Guidance to Rule 21.
9 See the Guidance to Rule 24.2.b.
10 See the Guidance to Rule 79.1.
11 See the Guidance to Rule 13.
Rule 20A Insurance Premium Tax

The Member shall indemnify the Association and hold it harmless in respect of any liability, cost or expense incurred or amount paid by the Association in respect of any Insurance Premium Tax for which the Member is liable.

Guidance

(A) The Member shall indemnify the Association...in respect of any Insurance Premium Tax for which the Member is liable. (Rule 20A)

A number of countries provide that certain taxes or dues commonly referred to as Insurance Premium Tax (IPT) are payable to their tax authorities in respect of insurance premiums and calls that are payable to the Association as an insurer.¹ For example, the domestic legislation of countries that are members of the EU/EEA is based on the Second Council Directive (88/357/EEC) of the EU article 2 (d) of which provides that premiums are payable in the “Member State where the risk is situated”. In the case of vehicles, including ships, this means that the premiums are taxable in the member state where the ship is registered, and that premiums that are payable for risks related to the company are normally taxable in the member state where the policy holder’s head office is established. Therefore, the Member’s liability to pay IPT will normally depend on the type of insurance product and the risks that it covers.

It is the Member that has the primary obligation to pay the IPT and the responsibility to do so in full and in time in compliance with the applicable laws and regulations. The Association’s involvement is limited to the collection of the necessary funds from the Member and the subsequent remittance of those funds to the relevant tax authorities on the Member’s behalf.² However, in some countries, the Association may be obliged to pay the IPT to the relevant tax authorities even if the Member has failed to pay the IPT in compliance with the applicable laws and regulations, or to provide the Association with the necessary funds to enable them to do so on the Member’s behalf, or even for other non-related reasons.

Rule 20A makes it clear that it is the Member that has the primary responsibility to pay the IPT and that any payment of IPT that the Association may be obliged to make to the relevant tax authorities does not absolve the Member from that primary responsibility, or from the responsibility to indemnify the Association in respect of such payment and any liability, costs or expenses that the Association may incur in so doing. Therefore, Rule 20A reflects the responsibility that the Association has to the Membership as a whole to have the right of recourse against a Member in such circumstances in order to safeguard membership funds. Furthermore, Rules 20.6

¹ See the Guidance to Rule 1.1 for the definition of Insurance Premium Tax (IPT).
² The IPT is normally collected from the Member by the Association but may in some cases be collected by brokers on behalf of the Association.
and 20.7 provide that any sum debited by the Association to the Member for IPT for which the Member is primarily responsible is to be paid on demand and shall incur interest if not paid on or before the due date.
Rule 21 Set-off

1 Without prejudice to anything elsewhere contained in the Articles of Association or these Rules, the Association shall be entitled to set off any amount due from a Member to the Association against any amount due from the Association to such Member or its Co-assureds or Affiliates.

2 A Member shall not set off against any amount due from it to the Association the amount of any claim it or its Co-assureds or Affiliates may have against the Association.

Guidance

(A) Without prejudice to anything elsewhere... (Rule 21.1)

The right of set off which is conferred on the Association by this Rule does not affect any other rights which it may have as a result of the non-payment by a Member of sums due to the Association.1

(B) …the Association shall be entitled to set off... (Rule 21.1)

The Association has the right to set off any amounts due from the Member to the Association in respect of, inter alia, outstanding and/or overdue Advance Calls, Deferred Calls, claim deductibles2 or payments made by the Association to third parties on behalf of the Member3 against any amount due from the Association to the Member (or to any Co-assured or Affiliate4 or any transferee or assignee5 of that Member). The Association’s rights of set-off under Rule 21 are wider than the rights of set-off conferred under Norwegian law, which restricts the insurer’s right to premium due from the assured under contracts of insurance.6 Rule 21.1 applies to ‘any amount due’, whether premium or otherwise, from the Member to the Association and whether or not arising under the entry of a particular Ship.7

However, the Association’s rights of set-off against a claim brought against it by a third party (i.e. someone other than a Member or Co-assured or Affiliate or transferee or assignee of the Member) that has an interest in the contract

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1 See (G) of the Guidance to Rule 20.
2 See Rule 76 and Appendix V.
3 See, for example, Rule 88.
4 See Rule 79.1.
5 See Rule 89.
6 The Norwegian Insurance Contract Act of 1989 (Forsikringsavtaleloven 1989), section 8-3, first paragraph. However, parties to a contract of marine insurance have a wide degree of freedom to contract under Norwegian law and any provision which extends one party’s rights of set-off beyond those prescribed by law, such as that contained in Rule 21.1, is valid and enforceable.
7 Ship management companies may enter Ships in the Association on behalf of different principal shipowners or operators as one fleet for insurance purposes. Depending on the terms of the particular ship management contract the premium payable in respect of such Ships may be paid by each shipowner to the ship manager who then pays it to the Association. If the Ships are entered in the name of the ship manager as Member, the Association cannot and does not distinguish between the different owners of the Ships for the purpose of set-off. The Association may set off unpaid premiums due from the owners of any Ship in the fleet entry against payments due from the Association to the owners of any other Ship in the fleet.
of insurance may be more restricted. For example, if a Member is insolvent, a third party may in some circumstances have a direct right of action against the Association\(^8\) and, in such a case, the Association’s right to set-off against the third party is limited to sums that are due from the Member in respect of premium that is payable under the contract of insurance pursuant to which the third party’s claim is made. Moreover, such a right of set-off is restricted to premium that is payable within two years prior to the date of set-off.

(C) A Member shall not set off... (Rule 21.2)

A Member must pay any sum which is due to the Association in full on the due date specified in Rule 20. The Member is not entitled to set off any sum that he claims to be due to him from the Association against any sum that is due from him to the Association. The reason for this is that the Member’s obligation to pay sums to the Association is usually unarguable both as to liability and quantum whereas the basis for, and the quantification of, sums that may be due from the Association to the Member is not so readily ascertainable since much will depend on the facts of the case, the availability of cover and a proper assessment of quantum. Accordingly, were the Member to be entitled to set-off, this would be contrary to the best interests of the membership as a whole, since other Members would then be obliged to fund shortfalls in income caused by the delayed payment or non-payment of premium or other sums due to the Association from the Member.

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Rule 22 Laid-up returns

1 Subject to any special terms which may have been agreed, if the Ship has been laid up with no cargo on board at a safe lay-up location for a period of at least 30 consecutive days, excluding the day of arrival at and the day of departure from the lay-up location, such proportion as the Association may decide of the Advance Call or of the fixed premium payable, pro rata for the period of the lay-up, shall be returned to the Member.

2 No claim for laid-up returns shall be recoverable from the Association unless the Member has informed the Association of the lay-up of the Ship within 30 days after the commencement of the lay-up and the claim for laid-up returns is made within 30 days of the end of the lay-up period.

Guidance

(A) Laid-up returns... (Rule 22)

A Ship is considered to be laid up when the owner or operator has taken a clear-cut and unfettered decision to have her anchored or moored in a safe and sheltered place without cargo on board. Therefore, a Ship is not considered to be laid up for the purposes of this Rule when it is, for example, arrested, detained or otherwise physically or legally prevented from trading. Most ships are laid up because it is uneconomical for the owner or operator to keep trading the Ship under the prevailing market conditions. When the Ship has been laid up, it will usually only have maintenance Crew and/or watchmen on board.

The fact that a Ship is laid up does not affect the Member’s obligation under the Rules to keep the Ship in class¹ or to comply, or to procure compliance, with all statutory requirements of the flag state.² Furthermore, if the Member does not keep the Ship fully insured on standard terms for hull and machinery risks during the period of lay-up, cover is not available from the Association in respect of liabilities, losses, costs and expenses that would otherwise have been covered by the Hull Policies had the Ship been so insured.³ For example, if the laid-up Ship should drag her anchor in a storm and make contact with a port installation causing the Member to be liable for repair and loss of use claims, cover will not be available under Rule 37 if the Member has allowed the Hull Policies to expire and, but for such expiry, the relevant liability etc., would have been covered under those Policies.

If the Ship is laid up for a period which exceeds six months, the Member is obliged, pursuant to Rule 9.2, to give the Association the opportunity to carry out an inspection before it leaves the place of lay-up for recommissioning, and the failure to do so may prejudice the Member’s rights to cover.⁴

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¹ See Rule 8.1.a.
² See Rule 8.1.f.
³ See Rule 71.1.a.
⁴ See Rule 9.3.
(B) ...laid up with no cargo on board... (Rule 22.1)
The Premium Rating that is set by the Association pursuant to Rule 10 takes into account all matters affecting the risk that is presented by the particular entry, including the risk presented by the intended trade of the Ship. A Ship which is laid-up without cargo on board is not trading and therefore represents a lower P&I risk. Consequently, Rule 22 enables the Association to permit a proportion of premium, including fixed premium, to be returned to the Member in appropriate circumstances to reflect the lower risk. However, a Ship that is not trading, but still has cargo on board, does not normally qualify for a return of premium as the reduction of risk is not considered sufficient to allow such return.5

(C) ...at a safe lay-up location... (Rule 22.1)
The Association will be able to consider a return of a proportion of premium under Rule 22 only if the Ship is laid up ‘at a safe lay-up location’. However, that which constitutes a ‘safe lay-up location’ for the purposes of Rule 22 is not necessarily construed so restrictively as that which is considered to be a ‘safe port’ for trading purposes. Generally, the Association will regard the location as safe if it has been approved as such by the Ship’s hull insurers.

(D) ...at least 30 consecutive days... (Rule 22.1)
The Ship must be laid up for 30 consecutive days in order to qualify for a laid-up return. However, the day of the Ship’s arrival at, and the day of the Ship’s departure from, the lay-up location do not count in the calculation of that period. The 30 days will be treated as continuing to run consecutively if the Ship remains in a laid-up condition and simply shifts her lay-up location within the same port or within the same lay-up area. However, if the Ship moves from one port or lay-up location to another, and ceases to remain in a laid-up condition during such transit, time is interrupted. Consequently, if the Member wishes to claim a laid-up return of premium in such circumstances, a fresh period of 30 consecutive days will commence to run from the day after the Ship’s arrival in the new safe port or lay-up location. Members are encouraged to inform the Association about the change of lay-up location for any Ship that has been laid up, in order to clarify whether the change may cause the lay-up period to be interrupted for the purpose of this Rule.

(E) ...Advance Calls or...fixed premium...shall be returned in such proportion as the Association may decide... (Rule 22.1)
The fact that a Ship has been laid up does not eliminate the risk that a claim may be made by the Member against the Association during such period of lay-up. The degree of residual risk will depend upon various matters and the Member may still wish to bring claims, for e.g. illness or injury to, or for the death of, Crew members.

5 A Ship which is idle with cargo on board may represent a higher risk, e.g. in respect of liability caused by delay in delivery of cargo.
who remain on board during the lay-up. Similarly, lay-up will not reduce the risk of Defence claims and the Association will also continue to incur some costs regardless of the fact that the Ship is laid up, e.g. administration costs.

Consequently, the Association needs to retain a sufficient proportion of the premium to cover such costs and to cover both the residual risk retained by the Association and that which is passed on to market reinsurers. For such reasons Rule 22.1 gives the Association the right when considering a return of a proportion of premium pro rata to the period of lay-up to retain that proportion of Advance Calls which it considers necessary in order to cover such contingencies. However, for the reason explained above, a laid-up return of premium is not usually made in respect of Defence cover premiums.

Fixed premium Members may also be entitled to a laid-up return of a proportion of their fixed premium. The relevant proportion will be decided by the Association based on the factors described above.

(F) …unless the Member has informed the Association of the lay-up of the Ship within 30 days after the commencement of the lay-up… (Rule 22.2)

The Association has the right to reject a claim for laid-up return of premium unless the Member has informed the Association of the lay-up of the Ship within 30 days after the commencement of the lay-up. The purpose of this notification requirement is to ensure that the Association has proper and timely notice of lay-ups to enable it to estimate its overall insurance risk exposure and premium income at any given time and to make adequate and timely provision for laid-up returns.

(G) …unless…the claim for laid-up returns is made within 30 days of the end of the lay-up period (Rule 22.2)

A claim for laid-up returns must be made in writing within 30 days of the end of the lay-up period. If this is not done, the Association has the right to reject the claim. It is important both for accounting and evidentiary reasons that a claim is made promptly and the period of 30 days is considered to be a reasonable period for the submission of a claim for laid-up returns.
Chapter 5

Termination and cesser
Introduction
The rights and obligations of the Member and the Association pertaining firstly to membership of the Association and secondly, to the cover provided by the Association relate to the period during which Ships are entered in the Association. Accordingly, it is important to know when entries are terminated or cease and the effect of such termination or cesser on the rights and obligations of the Member and Association. A distinction is drawn in the Rules between termination and cesser. Rules 23 and 24 describe the circumstances in which the entry of one or more Ships may be terminated, i.e. by the positive act of, either, the Member or the Association. Rule 25 describes the circumstances in which cover will cease automatically on the occurrence of certain events without any such positive act. Rule 25.1 describes the circumstances in which cover will cease in respect of any and all Ships whereas Rule 25.2 describes the circumstances in which cover will cease in respect of individual Ships. Rule 26 describes the effect of termination or cesser on the respective rights and obligations of the Member and the Association.

Rule 23 Termination by a Member
A Member may terminate the entry with effect from the end of the Policy Year in respect of one or more Ships by giving written notice thereof prior to 20 January. Except with the agreement of the Association, a Ship may not be withdrawn nor may notice of termination be given with effect from any other date.

Guidance
(A) A Member may terminate… (Rule 23)
Unless an entry is terminated in accordance with the Rules, the cover provided by the Association continues automatically from Policy Year to Policy Year. Rule 23 provides the only circumstances in which a Member may unilaterally terminate the entry. However, provided that he complies with the formal requirements of the Rule, the Member can terminate for any reason whatsoever and need not give reasons for the termination. The effect of termination of cover is described in Rule 26.

(B) ...with effect from the end of the Policy Year... (Rule 23)
Provided written notice is given prior to 20 January, the termination will take effect from the end of the Policy Year, i.e. from noon GMT on 20 February. The Member can give notice at any time prior to the 20 January but the entry will not terminate before noon GMT on 20 February unless the Association so agrees.

(C) ...written notice…prior to 20 January... (Rule 23)
In order to exercise his right to terminate an entry unilaterally, a Member must give notice in writing before the end of the Policy Year, that is, prior to 20 January. Such notice of termination has legal effect when it is received by the Association or its
A Member that has entered more than one Ship may terminate the entry of one or all of his Ships by one single written notice to the Association.

(E) ...a Ship may not be withdrawn...with effect from any other date. (Rule 23)
The reason why a Ship may not be withdrawn or why a notice of termination cannot take effect at any time other than at the end of the Policy Year is because the Association will have entered into commitments, such as reinsurance arrangements, on the premise that entries will continue for the full Policy Year. However, if this provision is shown to cause material hardship or prejudice to the Member, the Association may agree that the termination of the entry can take effect from an earlier date on specific terms to be agreed with the Member.

3 See the Guidance to Rule 3.
Rule 24 Termination by the Association

1 The Association may terminate the entry with effect from the end of the Policy Year in respect of one or more Ships by giving written notice thereof prior to 20 January.

2 The Association may also terminate the insurance of any or all of the Ships entered by a Member:
   a without notice, where a casualty or other event has been brought about by wilful misconduct on the part of the Member, as defined in Rule 72;
   b on three days’ notice, where the Member has failed to pay when due and demanded any Advance Call, Deferred Call, Supplementary Call or other amount due from him to the Association;
   c on 14 days’ notice, where the Member has neglected a duty of disclosure under Rule 6 or Rule 7 or where there has been an alteration of the risk after the conclusion of the contract of insurance;
   d on 45 days’ notice, without giving any reason

3 Notwithstanding and without prejudice to Rules 24.1 and 24.2 and Rule 25.4, the Association may, on such notice in writing as the Association may decide, terminate the entry in respect of any and all Ship(s) in circumstances where the Member has exposed or may, in the opinion of the Association, expose the Member or the Association to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever by the State of the Ship(s) flag, by any State where the Association has its registered office or permanent place of business or by any State being a Major Power or by the United Nations or the European Union. For the purpose of this Rule 24.3 “Major Power” means any of the following States: United Kingdom, United States of America, France, the Russian Federation and the People’s Republic of China.

Guidance

(A) The Association may terminate... (Rule 24.1)

Rule 24.1 is the ‘mirror image’ of the right to terminate that is given to the Member by Rule 23. Unless an entry is terminated in accordance with the Rules, the cover provided by the Association continues automatically from Policy Year to Policy Year.1 Rule 24.1 sets out the circumstances in which the Association may unilaterally terminate the entry at the end of the Policy Year. Provided it complies with the formal requirements of the Rule, the Association has the right to terminate an entry for any reason whatsoever and need not give reasons for the termination. The effect of termination of cover is described in Rule 26.

1 See the Guidance to Rule 4.
(B) ...terminate...with effect from the end of the Policy Year... (Rule 24.1)
Provided written notice is given prior to 20 January, the termination will take effect from the end of the Policy Year, i.e. from noon GMT on 20 February. If the Association wishes to terminate the entry before noon GMT on 20 February it must comply with the procedures stipulated in Rule 24.2.

(C) ...written notice... (Rule 24.1)
In order to exercise its right to terminate the entry unilaterally pursuant to Rule 24.1, the Association must give notice in writing prior to 20 January. Such notice of termination is deemed sufficient for the purpose of termination of entry pursuant to Rule 24.1 when it is received at the Member’s address2 that has been notified most recently by the Member to the Association. When the entry has been made through a broker, a notice of termination that has been sent by the Association to the broker is to be deemed to have the same effect as if it had been sent to the Member as a broker is deemed to be the agent of the Member.3

(D) ...in respect of one or more Ships... (Rule 24.1)
The Association may terminate the entry of one, some or all of the Ships that have been entered by a Member, by sending one single written notice of termination.

(E) ...may also terminate the insurance of any or all of the Ships... (Rule 24.2)
Whereas Rule 24.1 entitles the Association to terminate an entry for any reason at the end of the Policy Year, Rule 24.2 gives the Association the right to terminate during the course of the Policy Year the insurance4 of any or all of the Ships that have been entered by a Member either immediately or on the giving of notice depending on the particular circumstances. Rule 24.2 gives the Association the right to do so even though the circumstances giving rise to the termination may relate to only one or some of the Ships that have been entered by him.

(F) ...without notice where a casualty or other event has been brought about by wilful misconduct on the part of the Member, as defined in Rule 72...
(Rule 24.2.a)
Rule 24.2.a states expressly that the Association has the right to terminate an entry ‘without notice’ where a casualty or other event has been brought about by the wilful misconduct of the Member. The term ‘wilful conduct’ is defined in Rule 72 as: “...an act intentionally done, or a deliberate omission by the Member, with knowledge that the performance or omission will probably result in injury, or an act done or omitted in such a way as to allow an inference of a reckless disregard of the probable consequences”.

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2 See also the Guidance to Rule 23. Communications sent to one Joint Member or Co-assured shall be deemed to be sent to all insured under that entry. See Rule 79.3.
3 See the Guidance to Rule 3.
4 Whilst the phrase ‘terminate the insurance’ has been used in Rule 24.2, as opposed to the phrase ‘terminate the entry’ in Rule 24.1, no material difference is intended.
Whilst it is inevitable in practise that some form of notice will need to be given to the Member at some point in time, the right to terminate ‘without notice’ in Rule 24.2.a represents a material and important distinction. Where the Rules require the giving of notice as a pre-requisite for termination, the termination will not take effect until the notice is received by the Member, whereas under Rule 24.2.a, termination takes effect upon the occurrence of the event and before the Association has given notice confirming the termination.

**G** ...a casualty...brought about by wilful misconduct... (Rule 24.2.a)

The right to terminate immediately without notice is restricted to the most serious of circumstances namely, where the wilful misconduct of the Member has brought about a casualty or other event. The phrase ‘other event’ is construed restrictively and includes only those events similar in nature to a casualty. However, in order to justify termination of cover, the relevant misconduct must be that of the Member himself, or that of the ‘alter ego’ of the Member, i.e. the person(s) whose “action is(are) the very action of the company itself”. This would normally include the directors of the company but could also, depending on the circumstances, include other senior personnel and independent contractors to whom important functions relating to the management and operation of the Ship have been delegated. Therefore, the wilful misconduct of other personnel who cannot be considered to be the ‘alter ego’ of the Member is not sufficient to justify termination pursuant to Rule 24.

The fact that the Member’s wilful misconduct has brought about the event is sufficient to cause the Association to invoke this provision regardless of whether the relevant event has resulted in the making of a claim on the Association. However, if the event does result in a potential claim against the Association, the Association also has the right under Rule 72 to decline cover for liabilities, losses, costs or expenses caused by such conduct.

**H** ...the Member has failed to pay...any...amount due... (Rule 24.2.b)

Rule 20 lays down strict time limits for payment of amounts that are due to the Association and payment is deemed to have been made by the Member only when funds have been received in the Association’s account in an immediately useable form. Therefore, the sending of a cheque or the giving of bank instructions does not amount to payment for these purposes since no funds have been received at that point by the Association in readily useable funds.

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5 See (C) above.
6 See the Guidance to Rule 72.
7 See paragraph (C) to the Guidance to Rule 72.
8 See the Guidance to Rule 20.
9 Payment by the Member to his broker is not usually sufficient as a broker is normally deemed to be the agent of the Member not of the Association. See the Guidance to Rule 3.
When the Member is in breach of his duty to make payment under the Rules the Association has the right to terminate an entry under Rule 24.2.b at any time by giving three days’, i.e. 72 running hours, notice. The period of notice is calculated from the time that the notice is served,\(^{10}\) and includes Saturdays, Sundays and Bank Holidays. The entry will terminate at the expiry of the three days’ notice even though the Member may have paid the overdue amount during the course of the three days’ notice period.\(^{11}\) However, the Association may exercise its discretion to continue the entry in such circumstances.

Since the entry is not terminated until the expiry of the three days’ notice period the Association remains at risk for events that give rise to recoverable claims during the notice period. Similarly, the Member remains liable for any premium that is payable up to the date of termination, and the Association may be obliged to repay any premium which has been pre-paid by the Member in respect of the period after the date of termination.\(^{12}\)

(I) ...the Member has neglected a duty of disclosure or...there has been an alteration of the risk... (Rule 24.2.c)

A failure to disclose material facts whether before or after the Ship’s Entry in the Association or an alteration of the risk after Entry can affect the exposure of not only the Member but that of the membership as a whole. Therefore, Rule 24.2.c gives the Association the right to terminate the entry in such circumstances. If the Member has neglected to disclose material facts before the conclusion of the contract of insurance,\(^{13}\) or if there has been an alteration of the risk after Entry,\(^{14}\) the Association is not only protected against liability to the extent that Rules 6.3 and 7.2 allow but also has the right to terminate the insurance by giving 14 days’ notice, i.e. 14 running days. For example, there would be an alteration of risk if a passenger ship that had been trading solely between the UK and France were to be relocated during the course of the Policy Year to operate solely on US to Caribbean roundtrips. Since the exposure of the Member and that of the membership as a whole to personal injury and pollution liabilities would increase substantially as a result of the change in the Ship’s trading area, the Association has a right to terminate cover under Rule 24.2.c.

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10 See (C) above.
11 By virtue of Rule 90, the Association has excluded the application of the Norwegian Insurance Contract Act of 1989 and, thereby, a provision in that Act which provides that payment during a notice period will cure the default.
12 See the Guidance to Rule 26.
13 See the Guidance to Rule 6.
14 See the Guidance to Rule 7.
(J) ...without giving any reason. (Rule 24.2.d)

The Association has the right to terminate an entry during the course of a Policy Year in circumstances other than those described above by giving 45 days’ notice to the Member, i.e. 45 running days. It is rare for the Association to make use of this provision, but it may be invoked, for example, where the relationship between the Member and Association has become adversarial and it is, therefore, considered to be in the best interest of the membership as a whole that the entry is terminated. The Association does not need to give any reason for the termination and 45 days is considered to be a sufficiently long period of time to enable the Member to arrange alternative insurance cover.15

(K) Notwithstanding and without prejudice to Rules 24.1 and 24.2 and Rule 25.4, the Association may, on such notice in writing as the Association may decide, terminate the entry (Rule 24.3)

Rule 24.3 was introduced in 2010 to give the Association power to terminate an entry or entries if the relevant Ship(s) is(are) involved in activities that have exposed or may expose the Association or the Member to the risk of being, or becoming, the target of, or subject to, any sanction, prohibition or adverse action in any form whatsoever from the state of the Ship’s flag, the state where the Association has its registered office or has a permanent place of business or a state that is a permanent member of the UN Security Council, or from the United Nations or the EU.16

However, further international sanctions have been introduced since 2010 against a number of countries which the international community has deemed to have broken internationally accepted norms of behaviour and the US have introduced further enhanced sanctions against Iran. Therefore, the Association is of the opinion that the scope for yet further sanctions, whether against these or other countries, and the potential impact of such sanctions, is extremely wide and constitutes a substantial increase in risk in that it envisages, inter alia, the imposition of sanctions on organisations and individuals “underwriting or otherwise providing insurance or reinsurance” relating to such trade.17 Consequently, the Association considers that it is necessary to protect the membership and itself against a risk which may otherwise be beyond the control of the Association and the membership and the purpose of Rule 24.3 is to protect the Association as much as possible against a charge that it is providing insurance for a prohibited activity and, thereby, being itself subject to sanctions.

15 For the responsibilities of the Association and the Member during the period of notice, see (H) above.
16 A corresponding amendment was also introduced in relation to Rule 25.5 regarding cesser of cover. See Guidance to that Rule.
Rule 24.3 entitles the Association to terminate the entry of “any and all Ship(s)” if the Member has by his conduct either exposed or may expose the Member and/or the Association to the risk of “any sanction, prohibition or adverse action in any form” by any one or more of the states identified in the Rule. For example, the Association would invoke this provision where it becomes apparent that the Member is or will be using the vessel in activities that violate any applicable sanctions legislation, as would be the case for example if a EU based member and/or a EU flagged vessel had participated in the supply or export of goods and technology for the Iranian oil and gas industry as prohibited pursuant to EU Council Regulation 267/2012 Article 8.

In such circumstances, the Association is entitled to terminate the entry by giving notice in writing for such period as the Association considers to be appropriate. However, Rule 24.3 must be read in conjunction with Rule 25.4 and is expressly stated to be without prejudice to Rule 25.4 which provides for immediate and automatic cesser in the circumstances described in that Rule (subject to the discretion given to the Association to continue or reinstate cover under Rule 25.5).

The imposition of sanctions may also have an impact on the ability of the Association to indemnify the Member against liabilities, costs or expense.\(^\text{18}\)

\(^{18}\) See the Guidance to Rule 77.2 and 77.3.


Rule 25  Cesser

1 A Member shall (subject to Rule 25.5) cease to be covered by the Association in respect of any and all Ships entered by him in the following circumstances:

   a where the Member is a corporation, a resolution is passed for the voluntary winding up of the Member or an order is made for its compulsory winding up or it is dissolved or a receiver or similar official to all or part of its affairs is appointed or any secured party takes possession of any of its property or it seeks protection from its creditors under any applicable bankruptcy or insolvency laws or any similar event occurs (in the determination of the Association) in any applicable jurisdiction; and

   b where the Member is an individual, the Member dies or becomes incapable by reason of mental disorder of managing or administering his property and affairs or he becomes bankrupt or he makes any composition or arrangement with his creditors generally or a receiving order is made against him or any secured party takes possession of any of his property or any similar event occurs (in the determination of the Association) in any applicable jurisdiction.

2 The Member shall (subject to Rule 25.5) cease to be covered by the Association in respect of any Ship entered by him in the following circumstances:

   a the Ship becomes a total loss;

   b the Ship is, in the determination of the Association, abandoned by the Member on account of its total loss appearing to be unavoidable;

   c the Ship is accepted by the hull underwriters (whether of marine or war risks) as a constructive total loss;

   d the Ship suffers damage and the cost of repairs (as determined by the Association) will equal or exceed the higher of 80 per cent of its insured value or of its value in repaired condition (as determined by the Association);

   e the Ship is transferred to a new owner by sale or otherwise;

   f new managers of the Ship are appointed or there is a change in the operator of the Ship;

   g any mortgagee or other secured party enters into possession of the Ship;

   h the Ship ceases to be classed with a classification society approved by the Association, or its class is suspended;

   i the Ship is requisitioned;

   j the Ship, with the consent or knowledge of the Member, is being used for the furtherance of illegal purposes.

3 Where a Ship disappears, it shall be deemed to be a total loss ten days from the day it is last heard of.

4 Notwithstanding and without prejudice to Rules 25.1, 25.2 and 25.3 a Member shall forthwith cease to be insured by the Association in respect of any and all Ship(s) entered by him if any Ship is employed by the Member in a carriage, trade or on a voyage which will thereby in any way howsoever expose the Association to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever by any State where the Association has its registered office or permanent place of business or by any State being a Major
Power or by the United Nations or the European Union. For the purpose of this Rule 25 (3) "Major Power" means any of the following States: United Kingdom, United States of America, France, the Russian Federation and the People’s Republic of China.

5 Notwithstanding the provisions of Rules 25.1, 25.2 and 25.4, the Association may decide in any particular case that cover shall be continued without interruption, or that cover shall be reinstated, in either case on such terms as the Association shall determine.

6 Notwithstanding the provisions of Rule 25.2.a, b, c and d, the Association shall cover subject to these Rules and the terms of entry agreed, liabilities, losses, costs and expenses flowing from the casualty which gave rise to the total loss or constructive total loss of the Ship.

Guidance

(A) A Member shall...cease to be covered... (Rules 25.1 and 25.2)

Rule 25 provides for cessation of cover on the occurrence of certain events. Cover will cease automatically on the occurrence of such events, i.e. without a need for the Member or the Association to give notice to the other party. This is to be contrasted with the position under Rules 23 and 24, which, with the exception of Rule 24.2.a, require the service of notice by the Member or the Association. The effect of a cessation of cover is described in Rule 26.

(B) ...in respect of any and all Ships entered by him... (Rule 25.1) ...in respect of any Ship entered by him... (Rule 25.2)

The events described in Rule 25.1 are ones that affect the Member’s personal status and his ability to perform his obligations as a Member of the Association, whereas the events described in Rule 25.2 are ones that affect individual Ships. The entry of all Ships which have been entered by the Member will cease on the occurrence of the events described in Rule 25.1, whereas it is only the entry of the particular Ship that is affected by the events described in Rule 25.2, which entry will cease on the occurrence of such events.

(C) ...in the following circumstances... (Rules 25.1.a and b)

It is clearly important for the continued financial well-being of the Association and its membership that individual Members remain able and willing to contribute funds as and when required. The occurrence of any of the events described in Rule 25.1 may seriously affect the Member’s continuing ability to do so and therefore, it is considered prudent that the entry of all Ships entered by the Member should cease on the occurrence of such events. Rule 25.1.a applies where the Member is a corporation and Rule 25.1.b where the Member is an individual.

The circumstances itemised in Rule 25.1.a apply when the Member is a corporation are the following:
“...a resolution is passed for the voluntary winding up of the Member...” i.e. a decision is taken by the corporation itself to wind up the business;

“...an order is made for the compulsory winding up of the Member...” i.e. a court order which declares that the corporation is insolvent or has to be wound up for any other reason;

“...the Member...is dissolved...” e.g. the partners of a limited liability partnership decide to part company;

“...a receiver or similar official to all or part of its affairs is appointed...” e.g. a consortium of banks from which the Member has borrowed funds to finance the Ships decides to exercise its mortgage rights by administering the affairs of the Member;

“...any secured party takes possession of any of its property...” e.g. banks who exercise mortgage rights to acquire ownership of Ships;

“...it seeks protection from its creditors under any applicable bankruptcy or insolvency laws...” as may happen pursuant to Chapter 11 proceedings in the USA. For example, a Member may file a declaration of bankruptcy, which is granted, but the creditors subsequently accept the Member’s offer to continue to operate the business of the corporation on their behalf.

“...any similar event occurs...” The Association’s Members are domiciled in many different countries and there is a wide diversity of laws, as well as legal and administrative procedures, in those different jurisdictions which affect the liquidation, dissolution etc., of a corporation. Therefore, the Association is given the right in the interests of the membership as a whole to determine whether a particular event shall cause the Member’s cover to cease. However, such an event must be similar in nature to those expressly enumerated.

Rule 25.1.b applies where the Member is an individual and the listed circumstances are:

“...the Member dies...” In such circumstances, the Association will require confirmation of the death from a reliable source, such as the police authority or other public authorities;

“...the Member...becomes incapable by reason of mental disorder of managing or administering his property and affairs...” In most circumstances, the Association will require confirmation of the mental disorder by medical certification or attestation;
“...the Member...becomes bankrupt...” i.e. when a court order of bankruptcy is issued;

“...any similar event occurs...” See the Guidance above relating to similar words in Rule 25.1.a.

(D) ...the Ship becomes a total loss... (Rule 25.2.a)
Rule 25.2.a provides that cover for a Ship shall cease upon the total loss of the Ship. In this context, ‘total loss’ means an actual total loss (ATL), which should be distinguished from a constructive total loss (CTL) to which applies Rule 25.2.c.1 A total loss occurs when the Ship is physically lost without any prospect of it being recovered, e.g. when it has foundered in deep waters, or has been damaged so badly that it cannot be repaired.2 It is necessary to read Rule 25.2.a together with Rule 25.3,3 which provides that, for the purposes of the Rules, a Ship is deemed to be a total loss upon the expiry of ten days after the date on which it was heard of last. Although cover for the Ship will cease as soon as it becomes a total loss, the Association will, pursuant to Rule 25.6, continue to cover liabilities, losses, costs and expenses ‘flowing from the casualty which gave rise to the total loss’, e.g. wreck removal and pollution prevention/clean-up costs.4

(E) ...the Ship is in the determination of the Association abandoned... (Rule 25.2.b)
Rule 25.2.b enables the Association to treat the entry of a Ship as having ceased when the Association judges that the Member has abandoned the Ship on the basis that it appeared inevitable that the Ship would become a total loss. For example, if a Member were to order the Crew to abandon the Ship in the interests of safety, Rule 25.2.b would enable the Association to determine whether the Ship had been merely temporarily abandoned in the expectation that it could be saved, in which case the entry would not cease, or whether the Ship had been abandoned in the expectation that it would inevitably become a total loss, in which case the entry would cease.

(F) ...constructive total loss... (Rule 25.2.c)
Whereas Rule 25.2.a treats the entry as having ceased when the Ship has become an actual total loss, Rule 25.2.c treats the entry as having ceased when where the Ship has been accepted by the hull underwriters, whether for marine or war risks, as

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1 See (F).
2 A ‘constructive total loss’ (CTL), is a term used for insurance purposes where the cost of repair of the Ship is higher than a prescribed percentage of its insured value or of its value in repaired condition with the result that the insured has the right to claim compensation for the sum insured under the Hull Policies.
3 See (N).
4 See the Guidance to Rules 25.6, 38 and 40, respectively.
a constructive total loss. The opinion of the Association as to whether the Ship has actually become a CTL is irrelevant for the purposes of this provision. However, see (G) below.

A ship will usually be accepted as a CTL under the Hull Policies when either:

i. the Member has lost possession or control of his Ship and is unlikely to be able to regain possession of it, or that the costs of doing so will exceed the Ship's value when regained; or

ii. the Ship is damaged to such an extent that the cost of repairs will exceed the insured value of the Ship or its market value when repaired, whichever is the higher (or a certain percentage5 of either of those values as agreed in the Hull Policies).

Cesser of cover under Rule 25.2.c is not affected by the subsequent decision of the hull underwriters to abandon their interest in the Ship after it has been accepted by them as a CTL. Although cover for the Ship will cease when it is accepted by the hull underwriters as a CTL, the Association will, pursuant to Rule 25.6, continue to cover liabilities, losses, costs and expenses ‘flowing from the casualty which gave rise to the...constructive total loss.’ However, the cesser of cover will protect the Association against future claims which may affect the Ship, e.g. claims arising during subsequent towage to a scrap yard.

(G) ...where...the cost of repairs will equal or exceed 80 per cent of...

(Rule 25.2.d)

Cover will cease pursuant to Rule 25.2.c only where the Ship is accepted by the hull underwriters as a CTL. However, Rule 25.2.d gives the Association the additional and separate right to determine that the cover shall cease even if the Ship is not accepted by the hull underwriters as a CTL if the Ship has suffered damage and the repair costs are equal to, or exceed, 80 per cent of the insured value of the Ship or of its value in repaired condition,6 whichever is higher. This Rule gives the Association the flexibility to determine that cover shall cease if the hull underwriters are unable for whatever reason to determine whether or not to accept the Ship as a CTL, or delay in doing so for an unreasonable time.

(H) ...transferred to a new owner... (Rule 25.2.e)

The entry of a Ship is accepted by the Association partly on the basis of the Association’s assessment of the owner. It is a basic principle of mutual insurance that the benefit of the insurance contract cannot be transferred by the owner to a

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5 Clause 11-3 of the Nordic Marine Insurance Plan determines that a Ship is a CTL when the cost of repairs and other essential costs such as those relating to the removal of the ship exceeds 80 per cent of the hull value or 80 per cent of the market value (when repaired), whichever is the higher.

6 The phrase ‘value in repaired condition’ means the market value of the Ship as determined by the Association after consultation with a professional ship valuation broker, after complete and permanent repairs of the relevant damage.
third party without the consent of the Association. Therefore, Rule 25.2.e brings the entry of the Ship to an end when ownership is transferred. Such a transfer may be the result of a positive act, e.g. sale or gift, or of an involuntary act, e.g. by a forced sale of the Ship pursuant to a court order. Where the transfer is from one company to another within the same group, e.g. as a result of a change in flag, the Association will generally consider a request from the former owner for the entry to be continued in the new ownership in a sympathetic manner.

(I) ...new managers...or...change in the operator... (Rule 25.2.f)
Whereas Rule 25.2.e applies in the event that there is a change of ownership, Rule 25.2.f applies where there is a change in the identity of those managing or operating the Ship. The identity of the manager or operator is a material fact which is relevant to the risk which is insured by the Association and which must, therefore, be disclosed to the Association. In many respects a change of manager or operator is as important to the Association as a change in owner, since the manager or operator will normally be responsible for the technical management and crewing of the Ship. The Rules do not define manager or operator, but these terms include companies that are responsible for the commercial or technical functions that relate to the ownership, maintenance, operation and control of a Ship. If there is uncertainty, the Association has the right to decide whether there has been a change of manager or operator.

(J) ...any mortgagee or other secured party enters into possession...
(Rule 25.2.g)
Whilst it is relatively unusual for a mortgagee bank or any other secured party to take physical possession of a Ship rather than enforcing a sale of the Ship, this does happen from time to time. Such an act has much the same effect, from the perspective of the Association, as a change of owner or operator, and will, in any event, probably only arise because the Member is in financial difficulties and, therefore, has not paid amounts due that are secured by the mortgage. The steps that are required to enable a secured party to take possession of a ship will depend on the law that governs the terms of his security, or the law of the place where the ship is located. Under English law, no formal steps are required, whereas under other systems of law a secured party may only take possession pursuant to a court order. An action taken by a secured party which falls short of taking possession does not constitute cesser for the purposes of Rule 25.2.g.

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7 See the Guidance to Rule 89.
8 See the Guidance to Rule 25.5 in (P).
9 See the Guidance to Rules 6 and 7.
10 The Association may agree to maintain cover when there is a change of manager or operator by the exercise of its discretion under Rule 25.5. Any Member who intends to make such a change should discuss the matter with the Association well in advance of the intended change.
11 See Rule 1.5.
12 See the Guidance to Rules 78 and 89.
Rule 8.3 provides that a Member cannot be compensated by the Association in respect of any claim that arises during a period when the Ship is not complying with the classification requirements of Rule 8.1 and Rule 25.2.h provides that cover for the Ship ceases when the Ship is no longer in class. Cover also ceases if the class is ‘suspended’, i.e. when the relevant classification society is not prepared to maintain the Ship in class until certain identified conditions have been remedied. Cover ceases since a Ship which has a class suspension is likely to expose the Association to unacceptable risks which were not contemplated at the time that the contract of insurance was concluded.

If the Member fails to comply in time with the classification society’s recommendations or requirements, such failure may not cause that society to cease or to suspend class, in which case cover will not cease pursuant to Rule 25.2.h. However, such non-compliance is likely to represent a breach by the Member of Rule 8.1.c and, therefore, to cause him to lose rights of recovery during the period of non-compliance pursuant to Rule 8.3. Similarly, whilst a change of classification society must be advised to the Association in accordance with Rule 8.1.e, such a change does not, per se, cause cover to cease under Rule 25.2.h so long as the new classification society is also one that is approved by the Association. However, if the new classification society is not approved by the Association, cover will cease under Rule 25.2.h.

A requisition of the Ship, whether by the authorities of the country in which the Ship is registered or where the Member has his principal place of business, or by any other country, will cause cover to cease. In some cases, the requisition has the effect of depriving the shipowner of the ownership of the Ship whereas in other cases, the requisition amounts to an enforced charter or hire of the Ship. Cover will cease in either case, since the requisition has the same effect, insofar as the Association is concerned, as a change of owner or operator.

Cover will cease if the Ship is being used for the furtherance of illegal purposes with the consent or knowledge of the Member. Purposes are considered to be illegal when there is contravention of the laws of the country where the Ship is registered, or where the Member has his principal place of business or carries out operations, or where there is a breach of the laws of the country where the Ship is being used for such purposes. It is necessary in this regard to distinguish between circumstances in which the Ship is, on the one hand, being used deliberately for the furtherance of purposes that are clearly illegal, e.g. when used wilfully as a
means of drug smuggling, and, on the other hand, where the Ship is being used for a lawful purpose but in an illegal manner, e.g. the discharge to shore of slops in contravention of port regulations whilst carrying out an, otherwise, lawful trade. In the latter case, cover does not cease pursuant to Rule 25.2.j, but the Association has the right to decline cover on other grounds.  \(^{14}\)

The phrase ‘consented to’ means that the Member has approved the use of the Ship for illegal purposes, whilst ‘knowledge of’ means that the Member is aware, or should reasonably have been aware, that the Ship is used for illegal purposes and does not take immediate action to remedy the situation. Therefore, cover will cease if the Member, although aware of the fact that the Crew is using the Ship for drug smuggling purposes, fails to take any action to prevent them from doing so.

Cover will cease from the time that the Ship is first used for the furtherance of any illegal purpose with the consent or knowledge of the Member. It is the time of the Member’s consent or knowledge that determines the time when cover shall cease, and not the time when the Ship is in fact first being used for illegal purposes.

(N) Where a Ship disappears... (Rule 25.3)
It is necessary to regulate how cover is to operate in circumstances where a Ship disappears and appears to be lost. On the one hand, the Member has a need for cover for a reasonable period of time while he tries to ascertain what has happened to the Ship. On the other hand, it is not in the best interests of the membership that the Association should be exposed for an unlimited period of time to unknown risks in respect of a Ship which cannot be traced. Therefore, Rule 25.3 seeks to strike a balance between the two competing concerns by providing that cover shall cease 10 days after the last reported sighting or position of the Ship.

It should be noted that cover which has ceased pursuant to this Rule will not be automatically reinstated if the Ship is subsequently traced. In such circumstances, the Member must make a new application for entry since the discretion which the Association has to reinstate cover under Rule 25.5 does not extend to Rule 25.3.

(O) Notwithstanding and without prejudice to Rules 25.1, 25.2 and 25.3 a Member shall forthwith cease to be insured by the Association in respect of any and all Ship(s) entered by him if any Ship is employed by the Member in a carriage, trade or on a voyage which will thereby in any way howsoever expose the Association to the risk of being or becoming subject to any sanction prohibition or adverse action in any form whatsoever by any

\(^{14}\) For example, see Rules 72 and 74.
State where the Association has its registered office or permanent place of business by any State being Major Power or by the United Nations or the European Union... (Rule 25.4)

For the background relating to the introduction of this Rule and to the subsequent amendments to it see the commentary in paragraph (K) of the Guidance to Rule 24.

Whereas Rule 24.3 gives the Association the right to terminate entry on the giving of notice in the circumstances described in paragraph (K) of the Guidance to Rule 24, Rule 24.3 also emphasises that the provisions of Rule 24.3 are without prejudice to the provisions of Rule 25.4.

Rule 25.4 emphasises that if “any Ship is employed by the Member in a carriage, trade or on a voyage which will thereby in any way howsoever expose the Association to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever by the State where the Association has its registered office or has a permanent place of business, a State being a permanent member of the UN Security Council or the United Nations or the EU”, cover shall cease immediately and automatically without any need for notice. The Association is of the opinion that the potential impact of existing and any future sanctions regulations that are or may be imposed by any of the above-mentioned States is extremely wide and constitutes a substantial increase in risk in that it envisages, inter alia, the imposition of sanctions on organisations and individuals “underwriting or otherwise providing insurance or reinsurance” in relation to such trade. Therefore, the Association is of the view that such a form of automatic cesser is necessary in order to protect the interests of the Association and its assets for the benefit of the membership in general.

For example, the cover will cease in a situation where the vessel is participating in the transportation of Iranian origin petroleum products in violation of EU Council Regulation 267/2012 article 11.1 (a) and/or (c).15, 16, 17 In such circumstances, the Association would be in breach of article 11.1 (d) of such Regulation and the corresponding Norwegian regulation relating to restrictive measures against Iran18 and, therefore, exposed to considerable risk if it continued to provide cover.

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17 Certain oil products, such as crude oil, can be transported from Iran to countries benefiting from the US National Defence Authorisation Act (NDAA) waivers outside the EU. At the time of publication, these are, China, India, South Korea, Taiwan and Turkey. For example, an EU owned or registered vessel would be permitted to transport oil cargoes from Iran, or cargoes that originate in Iran, and which fall within the scope of the Annex I of Council Regulation 42/2014 to a country outside the EU benefiting from the NDAA waiver. However a shipowner involved in the transportation of, and an insurer providing insurance cover for, an oil or petroleum cargo from Iran to a non NDAA waiver country will be in breach of the US and/or EU sanctions in force at the time of publication.
18 Forskrift om sanksjoner og tiltak mot Iran av 9. februar 2007 nr. 4 § 11.1 d).
The imposition of sanctions may also have an impact on the ability of the Association to indemnify the Member against liabilities, costs or expense.19

(P) ...the Association may decide that cover shall be continued...or...be reinstated (Rule 25.5)

Rule 25.5 gives the Association the right, where it is considered beneficial to the Association, to let the cover continue, or to reinstate cover where it has ceased pursuant to any of the provisions in Rules 25.1, 25.2 and 25.4, but not Rule 25.3. A decision to continue the cover means that the existing cover will continue without interruption. However, a decision to reinstate cover entitles the Association to make the reinstatement subject to altered terms, e.g. payment of additional premium or the pre-condition that the Ship must pass an inspection conducted on behalf of the Association pursuant to Rule 9.

(Q) Notwithstanding...the Association shall cover...liabilities...flowing from the casualty... (Rule 25.6)

The events that may cause cover to cease pursuant to Rule 25.2.a, b, c and d may occur as a result of a casualty which arises in direct connection with the operation of the Ship. However, some of the liabilities, losses, costs and expenses that arise as a result of such a casualty may do so only after the Ship has become a total loss, CTL etc., and, therefore, at a time when cover for the entry has already ceased. Therefore, Rule 25.6 continues to make cover available for all liabilities, losses, costs and expenses ‘flowing from the casualty’. In this regard, Rule 25.6 must be distinguished from Rule 26.2 which states that the Association shall have no liability whatsoever ‘by reason of anything occurring after cessation or termination’ of the entry. Rule 26.2 applies to new events which occur after the entry has ceased whereas Rule 25.6 applies to the event which causes the entry to cease and which is, therefore, an ‘event that occurs during the period of entry of the Ship’.20

The cover that is available under Rule 25.6 applies only to events that flow from the casualty which caused the Ship to become an actual total loss or a constructive total loss. Therefore, there must be a clear causal connection between that casualty and the liabilities, losses, costs and expenses which have been incurred by the Member. For example, cover is available under Rule 25.6 for liability to remove the wreck or for liability for damage caused by oil pollution from the wreck. However, cover is not available under Rule 26.2 for liability for pollution from the wreck that has been caused by another ship subsequently dragging its anchor over the wreck. Such liability would not flow from the casualty which gave rise to the total loss of the Ship, but would be the result of a new and independent subsequent event, which occurs after cover has ceased.

19 See the Guidance to Rule 77.2 and 77.3.
20 See Rule 2.4.c.
Rule 26 Effect of cesser or termination

1 Where the insurance ceases or is terminated, the Member shall remain liable for all Advance Calls, Deferred Calls, Supplementary Calls, Overspill Calls and other premiums in respect of the then current Policy Year pro rata for the period up to the date of cesser or termination, and for all Deferred Calls, Supplementary Calls, Overspill Calls and premiums in respect of prior Policy Years.

2 The Association shall be under no liability whatsoever by reason of anything occurring after cessation or termination.

Guidance

(A) ...the Member shall remain liable for all...premiums... (Rule 26.1)

Notwithstanding termination or cesser of cover under Rules 23, 24 or 25, the Member remains liable to pay premiums in accordance with Rule 26. The term 'premiums' includes not only Advance Calls, Deferred Calls, Supplementary Calls and Overspill Calls, as separately identified in the Rule, but also fixed premiums and other special premiums which are due from time to time, such as premium for additional insurances that have been arranged by the Association for the Member.

(B) ...in respect of the then current Policy Year pro rata for the period up to... cesser or termination... (Rule 26.1)

If cesser or termination occurs during the course of the Policy Year then, notwithstanding that fact, the Member remains liable to pay on a pro rata basis all premiums that are levied for the Policy Year whether they are levied before or after the date of termination or cesser. This means that the Member is obliged to pay calls that are needed to cover the Association’s overall liabilities which occur in that Policy Year whether before or after the date on which the entry is terminated or ceases. However, the Member is obliged to pay only that proportion of such calls which the period of entry of his Ship(s) in that Policy Year bears to the whole of the Policy Year. For example, if a Member ceases to be insured on 20 August (half way through the Policy Year) and in the second half of the Policy Year an unusual series of incidents gives rise to exceptional claims on the Association, the Member remains liable to pay 50 per cent of any Supplementary Calls which are levied to meet those unexpected claims, even though he was not a Member of the Association, and, therefore, not insured by the Association, when the claims occurred. On the other hand, if the Member’s cover ceases on 21 March, at which time he has paid one third of his Advance Calls, he will be entitled to a rebate of approximately three-quarters of the payment made, i.e. for three out of the four months, and his liability for Deferred Calls, Supplementary Calls and Overspill Calls will be for 1/12th of

1 See the Guidance to Rule 12.
2 See the Guidance to Rule 12.
3 See the Guidance to Rule 13.
4 See the Guidance to Rule 18 and Appendix VI to the Rules.
5 For the first four months of the Policy Year, pursuant to Rule 20.1.a.
such Calls, commensurate with the one month entry. However, the Member can be released from his liability for Calls, other than Overspill Calls, by the payment of a Release Call pursuant to Rule 15.

(C) ...premiums in respect of prior Policy Years. (Rule 26.1)
The Member also remains liable following termination or cesser of an entry for all premiums that have been levied before the date of such termination or cesser, or which will be levied thereafter in respect of prior Policy Years during which he was insured with the Association, including Overspill Calls levied in respect of any such year under Rule 18. However, the Member can be released from his liability for such Calls, other than Overspill Calls, by the payment of a Release Call pursuant to Rule 15.

(D) The Association shall be under no liability... (Rule 26.2)
Rule 26.2 must be read in conjunction with Rule 2.4.c, which provides that cover is available for the Member ‘in respect of liabilities, losses, costs and expenses incurred by him which arise out of events occurring during the period of entry.’ Therefore, the Association has no liability for events which occur after the date of termination or cesser, but the Association continues to make cover available for liabilities arising out of events occurring before the date the entry was terminated or ceased.6 For the purpose of assessing whether cover is available it is the date of the event that causes the liability that is material and not the date on which the consequences of the event became manifest or apparent, nor the date when the Member’s liability was determined. Difficulties may arise in determining which event, or which event out of several possible contributory events, was the cause of the Member’s liability and in determining when that event occurred. These issues are considered elsewhere in this Guidance7 and can be important where, for example, the potential events span several Policy Years and the Member has changed P&I club during that period, or where some events occur before and other events occur after termination or cesser of cover.

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6 See the Guidance to Rule 25.6.
7 See the Guidance to Rules 2 and 80.
Part II – P&I Cover
Chapter 1

Risks covered
Introduction
Chapter 1 of Part II of the Statutes and Rules describes the cover that is available from the Association. However, it must be appreciated that the cover available under these Rules is subject not only to the various limitations on cover specified in each individual Rule and the more general provisions of Chapter 2 of Part II, but is subject also to all other relevant provisions of the Rules and the Statutes of the Association.

In some situations the restrictions which have traditionally been placed on P&I cover may not provide the Member with fully adequate cover in relation to the particular trade in which the Member is engaged. Accordingly, Gard has developed additional covers to meet the Members’ insurance needs, e.g. the Extended Cargo Cover, Comprehensive Carriers Cover and Extended Crew Cover, details of which are available on Gard’s website: www.gard.no. The additional covers are provided on a fixed premium basis and are reinsured in the commercial market.

Rule 27 Liabilities in respect of crew
1 The Association shall cover:
   a liability to pay hospital, medical, maintenance, funeral and other costs and expenses incurred in relation to the injury to, or illness or death of, a member of the Crew, including costs and expenses of repatriating the member of the Crew and his personal effects, or sending home an urn of ashes or coffin and personal effects in the case of death, and costs and expenses necessarily incurred in sending a substitute to replace the repatriated or dead man;
   b liability to repatriate and compensate a member of the Crew for the loss of his employment caused in consequence of the actual or constructive total loss of the Ship or of a major casualty rendering the Ship unseaworthy and necessitating the signing off of the Crew;
   c liability to pay compensation or damages in relation to the injury to, or illness or death of, a member of the Crew;
   d liability for costs and expenses of travelling incurred by a member of the Crew when the travelling is occasioned by a close relative having died or become seriously ill after the Crew member signed on, and costs and expenses necessarily incurred in sending a substitute to replace that Crew member;
   e liability for wages payable to an injured or sick member of the Crew or on death to his estate;
   f liability in respect of loss of or damage to the personal effects of a Crew member,
   provided that under this Rule 27.1:
      i where the liability arises under the terms of a crew agreement or other contract of service or employment, and would not have arisen but for those terms, the liability is not covered by the Association unless those terms have been previously approved by the Association;
      ii there shall be no recovery in relation to liability which arises under a contract of indemnity or guarantee between the Member and a third party;
iii the cover shall not include liabilities, costs or expenses arising out of the carriage of specie, bullion, precious or rare metals or stones, plate or other objects of a rare or precious nature, bank notes or other forms of currency, bonds or other negotiable instruments, whether the value is declared or not, unless the Association has been notified prior to any such carriage, and any directions made by the Association have been complied with.

iv references to personal effects shall exclude valuables and any other article which in the opinion of the Association is not an essential requirement of a Crew member.

2 The Association shall cover:

a costs and expenses which are not recoverable under Rule 27.1 and which are necessarily incurred in sending a substitute to replace a member of the Crew who has been left behind;

b costs and expenses which are not recoverable under Rule 27.1, which are necessarily incurred under a statutory obligation in repatriating a member of the Crew of the Ship and in sending a substitute to replace him and which would not have been incurred had there been no such statutory obligation; and

c costs and expenses incurred as a direct consequence of complying with an order for the deportation of a member of the Crew which would not have been incurred had no such order been made,

provided that such costs or expenses as are referred to in paragraphs a, b and c do not arise out of or in consequence of:

i the termination of any agreement; or

ii breach by the Member of any agreement or other contract of service or employment; or

iii sale of the Ship; or iv any other act of the Member in respect of the Ship.

3 The Association shall cover liability to repatriate a member of the Crew pursuant to any statutory enactment giving effect to the Maritime Labour Convention 2006 or any materially similar enactment, provided always that there shall be no recovery in respect of liabilities arising out of the termination of any agreement, or the sale of the Ship, or any other act of the Member in respect of the Ship, save and to the extent permitted by this Rule 27.3 in respect of the Member’s liability for such expense under the Maritime Labour Convention 2006.

Guidance
For more comprehensive commentary in relation to Crew claims see Chapters 11 and 22.5 of the Gard Guidance on Maritime Claims and Insurance.

(A) Explanatory remarks (Rule 27)
Cover is available under Rule 27 for legal liabilities, costs and expenses in respect of Crew. Such liabilities etc., will arise in most instances under the terms of the contract of employment of the Crew, including any collective bargaining agreement (CBA) incorporated by reference into the contract of employment. However, cover
is also available when the basis of liability is not the contract of employment, but the provisions of a statute or international convention such as the Maritime Labour Convention 2006 (see (Q) below) or the provisions of national law, e.g. maintenance and cure obligations arising under the general maritime law of the United States.¹

Where liability in respect of Crew arises under contract, and would not have arisen but for that contract, the Member must obtain the prior approval of the Association to such contractual provisions if cover is to be available.² In order to consider whether to give such approval the Association may require a copy of the contract of employment and the terms of any incorporated CBA, as well as additional information relating to the nationality and the number of Crew members who serve on board and the trading pattern of the Ship.³ Depending on the circumstances, the Association may either decline to provide cover, or, more likely, to charge extra premium for the additional risks represented by the contractual terms and conditions.

(B) Liabilities in respect of Crew (Rule 27)

Crew is a defined term for the purpose of Rule 27: It means ‘officers, including the master, and seamen contractually obliged to serve on board the Ship⁴ and their substitutes. It follows that all ranks, ranging from the master to ratings and cadets, are covered whether they perform duties in relation to navigation, engine, cargo or any other usual shipfaring functions. However, in the case of passenger ships, Crew also includes staff members who perform hotel and catering functions. Furthermore, various personnel⁵ may be employed by the Member on board a Ship prior to the delivery of the Ship from a building yard, e.g. in order to either supervise work which is required before delivery or to familiarise themselves with the Ship before it is put into service. Cover is available in respect of the Member’s liability to such personnel in such cases although the Ship has not yet been delivered and, therefore, has not yet been entered with the Association for P&I risks. However, cover is available only if the Member has made a commitment to the Association that the Ship will be entered with the Association for P&I risks after delivery of the Ship to the Member.


² Contractual terms are not usually approved if they commit the Member to a liability for medical care which is unlimited in time since the Member and the Association would be exposed in such circumstances to liability for an illness for which there is no medical cure and for which continued treatment is purely palliative, e.g. AIDS. See also the Guidance to Rule 27.1 below as well as Rule 55.

³ Prior to the conclusion of the contract of insurance, the Member has the duty to disclose all circumstances which would be of relevance to the Association in deciding whether to accept the entry of the Ship and, if so, on what conditions. See the Guidance to Rule 6.

⁴ There may be persons carried on board who are not Crew within the meaning of the Rules, e.g. spouses and children of Crew members. Cover is available in respect of such persons under Rule 29 unless they are certain types of non-maritime personnel for whom cover is excluded by virtue of Rule 56.

⁵ Strictly speaking, such personnel are not Crew as defined in Rule 1.1 because they do not serve on board an entered Ship.
Similar cover can be agreed in respect of personnel who perform services on board a second-hand vessel that has been purchased, but not yet delivered to the Member, or in respect of personnel who, for an agreed period of time, remain on board a Ship that has been sold, e.g. in order to help the buyer’s crew to familiarise themselves with the vessel. Cover is available in respect of any such personnel only to the extent that the Association has given its prior approval as it may be necessary to charge extra premium for the additional risk.

Crew means Crew members who are employed to serve on board the Ship that is named as a P&I entry in the Association, and cover is available not simply in respect of the periods when they are actually working on board the Ship, but for the whole period that they are contractually obliged to serve on board the Ship. This means that cover is available for Crew members whilst they are travelling to and from the Ship, to and from the place where they were hired, and also whilst they are temporarily ashore at times when they remain under an obligation to return to the Ship to continue service.

Cover is also available for such Crew members while they are on earned leave, i.e. at home or on vacation between periods of service on the Ship or between the Ship and any other Ship that is in a fleet that has been entered by the Member in the Association. However, cover is available only to the extent that the Member is liable to the Crew members during such periods under the terms of a contract of employment which have been approved by the Association. If the Member has entered some Ships in the Association and some ships in another P&I club, cover is available only in respect of Crew members who were employed on board a Ship entered in the Association immediately before the commencement of the earned leave.

**(C) The Association shall cover… (Rules 27.1 and 27.2)**

The cover which is available under Rule 27.1.a to f is subject to the provisos in 27.1.i to iv, which are considered in (K) below and the cover which is available under Rule 27.2.a to c is subject to the provisos in Rule 27.2.i to iv which are considered in (O) and (P) below.

The cover that is available under Rule 27 can be categorised as follows:

i. The liability of the Member to Crew members to pay expenses, costs, wages, compensation or damages in respect of illness, injury or death;

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6 The P&I cover ceases automatically when the Ship is transferred to a new owner by sale or otherwise. See the Guidance to Rule 25.2.a.

7 See Rule 1.1.

8 If the Crew member’s next employment is on a ship which is not entered in the Association and the Crew member falls ill or is injured during the course of travel to join that ship, the Member would have to seek recovery from the club with which that ship was entered.
ii The liability of the Member for costs and expenses incurred in order to repatriate Crew members following illness, injury or death, or the loss of the Ship, or a major casualty rendering the Ship inoperable, or the granting of compassionate leave due to the serious illness or death of a close relative, or the service of a deportation order;

iii The liability of the Member for costs and expenses incurred in order to provide Crew members to serve as substitutes for those who are no longer able to serve as a result of illness, injury or death, or compassionate leave, or as a result of having been left behind or deported;

iv The liability of the Member to compensate Crew members upon the loss of the Ship, or after a major casualty which has rendered the Ship inoperable, for wages that would have been earned under their contract of employment but for that event;

v The liability of the Member to compensate Crew members for lost or damaged personal effects.

(D) ...liability to pay hospital, medical, maintenance, funeral and other costs and expenses...in relation to injury illness or death... (Rule 27.1.a)

The cover which is available for hospital and medical costs and expenses includes the cost of acute treatment, diagnostic measures, surgery, post-surgery treatment, nursing care and medicines. Such costs may vary to a large degree depending on the type and extent of the illness or injury, on whether the hospital or other medical facility is a private or state-owned facility, on the methods of treatment employed, and on the country where treatment and care is provided. However, cover is available for that level of medical treatment and maintenance\(^9\) which is necessary to ensure that the Crew member will receive proper treatment and care bearing in mind the type of illness and injury, the location of the Ship when the need for medical treatment arose, the urgency with which immediate treatment must be given, and the standard of treatment available in the country where the Crew member is domiciled. Proper treatment and care is a relative term, but the medical treatment facility where it is given should be certified and accredited for the type of treatment which is needed unless the urgency of treatment combined with the particular location makes it impossible to find such a facility.

Cover is also available in respect of other costs and expenses which may be necessary and reasonable in particular circumstances, such as those incurred when evacuating a Crew member from Ship to shore by helicopter, or by other forms of air transportation from a small local hospital to a larger central hospital. However, cover may not be available for the full cost of treatment in private hospitals and rehabilitation centres which give the highest level of medical treatment, care and

\(^9\) In this context, the term 'maintenance' includes all care, accommodation, food, transportation etc., that is provided in connection with the medical treatment of the Crew member. See also footnote 1 above.
maintenance. In such circumstances, the Member has an obligation to advise and consult the Association before incurring substantial costs and expenses, since he is required to take active steps to ensure that treatment costs and expenses are kept at a reasonable level. In some cases this might necessitate the transfer of a Crew member from a foreign hospital to a facility in the Crew member’s country of domicile where the provision of adequate treatment and rehabilitation is less expensive; where the Crew member can communicate with medical and nursing staff in his native language; where the family of the Crew member may visit more regularly, and where surroundings are more familiar. In other instances, e.g. in the USA, it is frequently necessary to appoint a medical case manager to assist with the choice of hospital and the monitoring of treatment, as well as a medical auditor to review hospital and rehabilitation bills.

Cover is also available for costs and expenses incurred in circumstances where it is considered medically necessary for one or more persons to escort a Crew member who is ill or injured to a medical treatment facility, or between such facilities, or when the Crew member is being repatriated. Such escorts can be doctors, nurses and/or others who have the skills considered necessary in the circumstances to ensure the well-being of the Crew member, e.g. an interpreter. Cover is also available for the cost of visits to the medical treatment facility by relatives of Crew members provided that the doctor responsible for the treatment has confirmed that such visits are likely to promote the medical recovery of the Crew member, or such relative may replace an escort that would otherwise have been necessary during repatriation. However, it is recommended that Members should consult with, and seek the prior approval of the Association in such circumstances.

Cover is also available for travel expenses incurred by a Crew member who has become ill shortly before he is due to go on earned leave in circumstances where a doctor has certified that the Crew member should travel either at an earlier date or to a different destination. However, if the Crew member’s medical condition does not necessitate the alteration of the original travel plan, cover is not available for such travel costs as it would have been incurred in any event, and is, therefore, considered to form part of the Member’s normal operating costs.

In the case of the death of a Crew member, cover is available for the Member’s liability to pay basic funeral and burial expenses including the cost of returning the body or ashes, and the personal effects of the deceased, but not for the cost of wreaths.

10 See Rule 82 concerning obligations with regard to claims.
11 See the Guidance to Rule 82 concerning the Member’s obligations with respect to claims.
Failure on the part of the Member to properly care for Crew members who are ill or injured may increase the Member’s liability. For example, the shipowner is strictly liable under the law of the United States to pay a daily subsistence allowance (maintenance) and reasonable medical expenses (cure) to a sick or injured Crew member and to take all reasonable steps to ensure that the sick or injured Crew member receives proper care and treatment. This obligation continues until the Crew member has reached maximum medical improvement, which is the point beyond which further medical treatment would probably not improve his condition. Unreasonable denial of maintenance and cure payments can give rise to a liability to pay compensatory damages, e.g. for aggravation of the Crew member’s condition and indifference in this regard can also give rise to a liability to pay the attorney fees incurred by the Crew member. Therefore, in order to enable the Association to assist and advise in relation to the provision of medical care, repatriation and other issues Members are urged to inform the Association promptly\(^{12}\) of any injury or illness that may give rise to a claim in respect of a Crew member since a failure to do so may prejudice cover.\(^{13}\)

Some countries have laws that oblige an employer to arrange and pay for insurance that gives protection to their employees with regard to work-related illness, injury or death regardless of liability on the part of the employer or fault on the part of the employee. Such insurance usually gives the insured employee (or, in the case of death, the next of kin) a right to seek recovery directly from the insurance company for treatment costs, disability compensation and other costs and expenses incurred in connection with the illness, injury or death. Furthermore, some countries have social security or national insurance systems which give any person who is a member of such a system a right to claim compensation for treatment costs, disability compensation and a number of other benefits.\(^{14}\) Cover is not available from the Association to the extent that the Member or the Crew member is entitled to receive compensation under any such social, public or private insurance.\(^{15}\)

Liability in respect of Crew illness, injury and death is an area of high exposure both for the Members and the Association. Therefore, in order to ensure that they are eligible for cover, Members are always required to take reasonable steps to minimise the exposure of the Association to such claims. The Member is also expected to ensure that all contracts of employment contain provisions which will disentitle Crew members from relying on contractual benefits in respect of any pre-existing illness or injury that has been wilfully concealed by the Crew member at the time of examination.

\(^{12}\) See the Guidance to Rule 82.
\(^{13}\) See the Guidance to Rule 72 (Conduct of Member).
\(^{14}\) In such circumstances, the Member will usually seek to agree special terms of entry for the Ship that exclude cover in respect of liabilities, costs and expenses for which cover would normally be available pursuant to Rule 27.
\(^{15}\) See the Guidance to Rule 71.1.c.
(E) ...liability for costs and expenses necessarily incurred in sending a substitute
(Rule 27.1.a)
Cover is available in respect of costs and expenses that are reasonably incurred by
the Member in order to send a substitute to replace a repatriated or deceased Crew
member. However, the Member must satisfy the Association that the substitute was
needed in order to ensure that the Ship was properly manned and seaworthy, and
that the remaining Crew members could not manage to operate the Ship safely in
the absence of the repatriated or deceased Crew member. Cover is not available
for such costs if the repatriation of the injured or ill Crew member occurs at the time
when he would have travelled home in any event since such costs are considered to
be part of the Member’s normal operational costs. Similarly, cover is not available
for the wages of substitute Crew members as such costs are also considered to be
normal operational costs.

Cover is available for the travel expenses and associated maintenance costs
incurred in sending to the Ship one substitute for each replaced Crew member.
Consequently, if a temporary substitute is subsequently replaced by a permanent
substitute, cover is available only for costs incurred in relation to one of the
two replacements.

(F) ...liability to repatriate and compensate in consequence of loss of the Ship
or major casualty (Rule 27.1.b)
Cover is available for the costs incurred in repatriating Crew members as a necessary
consequence of an event which causes the actual or constructive total loss\(^{16}\) of the
Ship, or which causes the Ship to become unseaworthy by reason of a casualty\(^{17}\),
except where the Crew member(s) would have been repatriated in any event
regardless of the event or casualty, e.g. upon the planned expiry of their contract of
employment. However, if Crew members are required to remain on board the Ship
in order to carry out repairs or for some other reason, cover is not available for any
additional costs thereby incurred, or for the ultimate repatriation of the Crew, to the
extent that these costs may be recoverable under the Ship’s Hull Policies.\(^{18}\)

In the event of the loss of the Ship or of a casualty which has rendered the Ship
unseaworthy it may be necessary to terminate the contracts of employment
of Crew members for that reason. In such circumstances, the contracts of
employment normally give Crew members a right to receive compensation for
loss of employment which may, pursuant to the provisions of the Maritime Labour
Convention (MLC) be limited to two months wages. Similar compensation rights may

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\(^{16}\) See the Guidance to Rule 25.2 for further comments concerning the actual or constructive total loss of
a Ship.

\(^{17}\) A casualty is an event caused or occasioned by a maritime peril, that is, an event which is likely to give
rise to a claim under a marine insurance policy, such as a grounding, collision, sinking or fire.

\(^{18}\) See the Guidance to Rule 71.1.a.
also arise under international convention\textsuperscript{19} or statute\textsuperscript{20} or the common law in order to compensate the Crew member for the loss of the wages that would have been earned under the contract but for the casualty, and also for lost earnings during the time that it takes the Crew member to find new employment. Cover is available for the Member’s liability to pay such compensation, but not for the proportion of wages already earned, but not yet paid, at the time of the incident, which is considered to be a part of the Member’s normal operational cost.

(G) …liability to pay compensation or damages in relation to injury, illness or death (Rule 27.1.c)

Under most legal systems a person is entitled to receive full compensation from the party liable for the reasonably foreseeable financial loss sustained by the injured person as a result of the negligent act or omission of the party that caused the loss, damage or injury.

The Member’s liability to pay compensation in relation to the injury, illness or death of Crew members can arise either under the contract of employment,\textsuperscript{21} which often incorporates the terms of a CBA, or under international or national statutory provisions such as the Maritime Labour Convention 2006, or at common law.\textsuperscript{22} Cover is available under Rule 27 regardless of the basis of liability.

In the majority of cases the basis and level of compensation payable to Crew members in respect of permanent disability caused by illness or injury (or to their legal beneficiaries in the case of death) will be set out in the contract of employment and/or CBA, and this helps in clarifying the rights and obligations of the parties. Cover is available for such contractual liability unless the basis and/or level of compensation is considered disproportionate to that which the Association has approved previously, whether for the particular Member or for other Members. Because of the diversity of the terms of Crew contracts of employment and CBAs, and the uncertainty that may, therefore, arise as to the extent to which compensation is payable by the Association pursuant to different contractual terms, it is recommended that Members should consult the Association if they are in any doubt as to the scope of cover.

\textsuperscript{19} See (Q) below.
\textsuperscript{20} For example, section 21 in the Norwegian Seafarer’s Act provides, inter alia, that the seaman is entitled to all contractual wages if the duration of the voyage turns out to be shorter than contemplated in the contract of employment.
\textsuperscript{21} However, in the case of liability which arises under contract, and which would not have arisen but for that contract, the Member must either obtain the prior approval of the Association to such contractual provisions or obtain confirmation that the Association has approved other similar provisions, if cover is to be available.
\textsuperscript{22} For more detailed commentary see Chapters 11.2 and 22.5 of the Gard Guidance on Maritime Claims and Insurance.
Some CBAs contain no fault liability terms, i.e. the employer (Member) is liable to pay compensation for illness, injury or death regardless of whether there is fault or negligence on the part of the employer, and no deduction is usually allowed in the event that there is contributory negligence on the part of the Crew member. However, some CBAs exempt the employer from liability to pay compensation in the event that death is proved to have occurred as a result of suicide, or that some other form of self-inflicted death/injury is attributable to a wilful act, or to an illness or injury that is not considered work-related. A CBA will also normally contain a compensation schedule setting out how much is to be paid in the event of permanent disability or death. The level of compensation will normally vary depending on rank and position and the degree of disability, and the quantum of the compensation is also frequently pre-determined in a schedule according to the severity of the deprivation of bodily functions.

Disputes may arise as to whether any compensation is payable for illness or injury to Crew members, or if so, as to the amount of compensation, e.g. what is the degree of disability sustained? is the disability permanent? or is there some form of vocational training that may qualify the Crew member for other positions on board or ashore? Disputes may also arise as to the law and jurisdiction which is to apply to the contract of employment, as to whether claims in tort can be brought in addition to the claims arising under the contract of employment, and if so, whether any contractual compensation paid or payable can be deducted from any damages that may be payable in tort. Furthermore, in the event of the death of a Crew member, disputes may arise as to who is entitled to receive compensation particularly if there are competing heirs.

Cover is available not only for the Member’s liability to pay compensation, i.e. pre-determined contractual payments, but also for any liability that he has at law, i.e. other than under contract, to pay damages for the injury, illness or death of a Crew member sustained as a result of a tortious act or omission on the part of the Member or his servants or agents. Under most contracts of employment damages are not payable in addition to the contractual compensation since the contractual

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23 However, a high threshold is usually applied to prove that suicide has been committed. The fact that a Crew member has gone missing at sea during a voyage would probably not be sufficient.
24 See for example Section 21 of the standard (and minimum) contract terms provided by the Philippine Overseas Employment Administration (POEA).
25 The Supreme Court of the Philippines has on several occasions ruled that, as a matter of Philippine law, a seafarer is entitled to permanent disability compensation if he has not recovered sufficiently to be considered fit for sea duty when 120 days have lapsed since the time of injury or illness. 120 days is the maximum number of days for which a Filipino seafarer is entitled to receive sick wages under the Philippine Overseas Employment Agreement (POEA) and most CBAs. The permanent disability compensation payable will be determined by the rank of the seafarer and his degree of disability ascertained by a physician designated by the employer as and when the 120 days have passed. Whilst shipowners and manning agents alike have protested against these judgments, they stand at the time of writing, and there is no doubt that P&I cover is afforded for the liability incurred by shipowners in this regard.
compensation is payable regardless of fault, but, as noted above, this is sometimes challenged by claimants who rely on statutory provisions or common law principles that apply in the jurisdiction where the claim is brought. Consequently, cover is also available for the Member’s legal liability to pay damages, whether or not in addition to the contractual compensation. Such liability to pay damages may in certain circumstances exceed the financial loss which has been sustained or which was anticipated. For example, the Member may be held liable by a court or tribunal to pay damages for non-pecuniary losses such as pain and suffering (or conscious pre-death pain and suffering) and cover is available for such legal liability. Cover may also be available for exemplary or other forms of punitive damages unless such liability results from the wilful misconduct or reckless disregard of the Member.26

(H) ...liability for costs and expenses...occasioned by a close relative having died or become seriously ill (Rule 27.1.d)
Should a Crew member, whilst serving on a Ship, learn of the serious illness or death of a close relative, e.g. a spouse, parent, child, adopted child or stepchild, the terms of the contract of employment or of any applicable statutory provisions may give him a right to take compassionate leave, and may oblige the employer (Member) to pay the costs of travel, either to the location of the funeral or, in the case of serious illness, to the residence of the close relative, whether or not this is the same residence as that of the Crew member. Cover is available for such travel costs and expenses, including any costs and expenses which are reasonably incurred for food and lodging whilst en route.

Cover is also available for costs and expenses necessarily incurred in sending to the Ship a substitute for the Crew member who has been granted compassionate leave. However, the Member must satisfy the Association in such circumstances that the substitute was needed in order to ensure that the Ship remained properly manned and seaworthy and that the remaining Crew members could not manage to operate the Ship safely in the absence of the Crew member who has been granted compassionate leave. However, cover is not available for the liability of the Member to pay wages to the Crew member whilst on compassionate leave, or to pay the wages of any substitute Crew member as such wages are considered to be normal operational costs.

(I) ...liability for wages payable to Crew (Rule 27.1.e)
The provisions of most Crew contracts, CBAs and statutes and the provisions of the MLC 2006 and the common law oblige employers to pay sick wages to injured or ill Crew members. The quantum of the wages that are payable pursuant to the contract of employment may be less than the full wages, e.g. the monthly basic wage without provision for overtime, and such wages are usually payable until the Crew member

26 See the Guidance to Rule 72 (Conduct of Member).
has recovered and is again fit for duty, or until he has been declared permanently disabled, or until the maximum number of days for which sick wages are payable, as specified in the contract of employment, has been reached.

Cover is available for the Member’s liability to pay such wages provided that the incapacity of the Crew member for work has been medically certified. However, cover is not available for any liability that the Member has to pay sick wages indefinitely pursuant to the terms of the contract of employment unless the Member has a mandatory statutory obligation to continue to pay sick wages beyond the maximum number of days stipulated in the contract of employment.

Upon the death of a Crew member, the employer is usually obliged to pay the sick wages which he was entitled to receive during the period of illness or injury leading up to the death to the legal beneficiaries of the Crew member. Cover is available for such liability. However, the Member must ensure that such payment is made only to those beneficiaries who are entitled under the applicable law to receive such payment.

(J) …liability in respect of loss of or damage to personal effects (Rule 27.1.f)
Since the Ship is the temporary home of Crew members during their periods of service it is important that they be allowed to take on board personal belongings that can support their welfare. However, such personal effects can be lost or damaged during the period of service and most contracts of employment oblige the employer to reimburse Crew members for such loss or damage regardless of whether it has been caused by the fault or negligence of the Member. Some employment contracts oblige the employer to reimburse the Crew member only if the effects are lost or damaged as a result of a total or constructive loss of the Ship, or as a result of a major casualty, whilst other contracts oblige the employer to reimburse the Crew member for all accidental loss or damage that may arise during the course of the Crew member’s service on board the Ship.

However, most contracts also impose a limit on the employer’s liability for such loss or damage (commonly in the range of USD 2,000-4,000 per Crew member) and require the Crew member to submit written details of the items lost or damaged and of their value together with supporting documentation.

Similar liability for loss of or damage to personal effects may also arise under international convention, statute or the common law. Cover is available for such liability whether it arises under contract, international convention, statute or the common law provided, in the case of liability that arises pursuant to the terms of a contract, and which would not have arisen but for such terms, that those terms have been previously approved by the Association.27

27 See Rule 27.1.i and (K) below.
(K) The Association shall cover: …[liabilities pursuant to Rule 27.1.a-f] provided that under this Rule 27.1: (Rule 27.1 provisos i-iv)
Comment has already been made in relation to proviso i in (I) above. Crew contracts of employment that give rise to liability that would not have arisen but for those terms, must have been previously approved by the Association if cover is to be made available for such liability. Proviso ii makes it clear that cover is not available for liabilities that are incurred by the Member by virtue of indemnities or guarantees given by them to third parties. For example, if the Member has agreed to indemnify the manning agent for liability incurred by the manning agent in relation to the Crew, cover is not available under Rule 27 in respect of such liability.28

Crew members sometimes bring cash, jewellery, collector’s items or other items of high value on board the Ship. Therefore, proviso iii makes it clear that cover is not available in the event of the loss of, or damage to, such items, even if the Member is liable to compensate the Crew member for such loss or damage, unless the Association has been informed in advance of the presence of such items and the Member has complied with any directions given by the Association in such circumstances. However, cover is normally available for liability that the Member has for loss of cash belonging to Crew members and which has been held in custody in the Ship’s safe. Such loss can occur, for example, when the Ship has sunk or has been attacked by pirates. Proviso iv makes it clear that, whilst cover is available for liability for loss of or damage to personal effects, this does not extend to valuables or to any other article which does not, in the opinion of the Association, constitute an essential requirement for the Crew. In a literal sense something is essential if it can be said that the Crew member would face difficulty living and working on board the Ship without it, e.g. spectacles and hearing aids. However, the Association takes a pragmatic view of what is essential for the purposes of the Rule and normally makes cover available in respect of the Member’s liability for loss of or damage to articles that are normally found in living quarters ashore and which have been taken on board to improve the welfare of the Crew, e.g. books, mobile phones and other electronic devices.

(L) …costs and expenses incurred in sending a substitute to replace Crew left behind (Rule 27.2.a)
A Crew member may be left behind if he fails to re-board the Ship prior to departure from the port of call. The risk of such occurrences has substantially decreased in recent years due to a number of factors: less time is spent in port, the rules relating to alcohol consumption while in port are more stringent, ports and terminals tend to be located further away from city centres and leisure amenities, and there are improved personal communication systems such as mobile phones. Therefore, a Crew member is now unlikely to miss the sailing of his Ship unintentionally.

28 Liability arising solely by virtue of such indemnity will be covered if the Association approves the terms of the indemnity. See also the Guidance to Rule 55.a.
The more likely modern scenario is that a Crew member decides to stay behind intentionally, i.e. he deserts the Ship. In such circumstances the Ship may become unseaworthy due to the fact that she is insufficiently manned and it may be necessary to send for a substitute or substitutes. Cover is available for expenses incurred in sending substitute Crew members to the Ship, in such circumstances, to the extent that they are necessarily incurred and to the extent that they are not recoverable under Rule 27.1. Cover is also available under Rule 31 for the costs itemised in that Rule, which are incurred whilst waiting for such substitute Crew members.

(M) ...costs and expenses incurred in repatriating a member of the Crew (Rule 27.2.b)
Where a Member has a statutory obligation\(^29\) to repatriate Crew members who have been left behind, and the costs and expenses of doing so are not recoverable under Rule 27.1, cover is available for such repatriation costs and substitution expenses under Rule 27.2.

(N) ...costs and expenses incurred as a direct consequence of complying with an order for deportation (Rule 27.2.c)
The most common situation which gives rise to a claim under Rule 27.2.c is where Crew members who have deserted the Ship in a foreign port or place are apprehended by the authorities after having broken local immigration laws and have become subject to a deportation order. Most countries will charge the cost of deportation to the carrier of the persons who are in breach of the immigration laws, and in the case of Crew members, this will usually be the shipowner. Cover is available for the Member's liability to pay or reimburse such deportation costs, but, in the event that the Member is able to deduct such costs from any wages which are due to the relevant Crew members, cover is limited to the unrecovered costs.

(O) The Association shall cover: [costs and expenses pursuant to Rule 27.2.a-c] provided that such costs and expenses do not arise out of or in consequence of termination or breach of any agreement (Rule 27.2 provisos i and ii)
Rule 27.2 excludes cover for costs and expenses arising out of, or in consequence of, the termination of an agreement, or as a result of a breach by the Member of any agreement or any other contract of service or employment. For example, cover is not available where:

\(^{29}\) For example, the employer of a seaman serving on board a UK-registered ship which has been shipwrecked has a legal obligation to repatriate the seaman (and maintain him until his return) when he is left behind in or taken to any country outside the UK.
i a Crew member is left behind due to the fact that his contract of employment has terminated or due to the fact that the Member has abandoned him in breach of the contract of employment;\(^\text{30}\)

ii the Member repatriates a Crew member pursuant to a statutory obligation to repatriate seafarers on termination of their contracts of employment;

iii a Crew member is deported after the Member has left him behind on termination of his contract of employment.

(P) The Association shall cover: [costs and expenses pursuant to Rule 27.2.a-c] provided that such costs and expenses do not arise out of or in consequence of sale of the Ship; or any other act of the Member in respect of the Ship. (Rule 27.2 provisos iii and iv)

Proviso iii makes it clear that cover is not available for repatriation and deportation costs which become necessary as a result of the sale of the Ship since such costs are considered to be for the Member’s own account and not costs and expenses which should be shared between the membership as a whole. Furthermore, proviso iv makes it clear that cover is not available for costs and expenses incurred in the deportation or repatriation of Crew members who have been left behind as a result of the personal and intentional acts of the Member. For example, cover is not available where:

i the Member has laid up the Ship and discharged the Crew;

ii the Member has allowed Crew members ashore in circumstances where the likely consequence of such shore leave would be a statutory obligation to repatriate or deport the Crew members;

iii the Ship has sailed early, i.e. before the shore leave for the Crew members has ended;

iv the Member has discharged the Crew members before the Ship entered a war zone;

v a Crew member has been put ashore following a breach of the disciplinary code of the Ship.

(Q) The Association shall cover liability to repatriate a member of the Crew pursuant to any statutory enactment giving effect to the Maritime Labour Convention 2006 or any materially similar enactment, provided always that there shall be no recovery in respect of liabilities arising out of termination of any agreement, or the sale of the Ship, or any other act of the Member in respect of the Ship, save and to the extent permitted by this Rule 27.3 in respect of the Member’s liability for such expenses under the Maritime Labour Convention 2006 (Rule 27.3)

The Maritime Labour Convention 2006 (MLC) has been described as the fourth fundamental pillar of shipping regulation (the other three being the SOLAS, MARPOL and STCW Conventions) and came into force on 20 August 2013. It

\(^{30}\) Ibid.
has been ratified by more than 60 States and is currently in force in more than 40 States. The convention establishes minimum standards for the working conditions of seafarers and requires the flag state to establish an inspection and certification system to ensure that such minimum standards are met. The ship must be issued with, and carry on board, a maritime labour certificate confirming that such minimum standards have been met, and compliance is to be regulated by Port State Control.

The MLC provides amongst other things that member states shall ensure that seafarers on vessels flying their flag are entitled to:

a  repatriation, including repatriation in cases of a shipowner’s insolvency (effectively abandonment) and for which financial security should be in place;

b  unemployment compensation for each day that the seafarer remains unemployed as a result of a ship’s loss or foundering subject to a limit of two months wages compensation in the event of death or long term disability due to an occupational injury, illness or hazard as set out in national law, the seafarer’s employment agreement or collective agreement and for which the shipowner must provide financial security.

However, the MLC does not define what is meant by ‘financial security’ and does not impose a right of direct action against the provider of financial security pursuant to the form of ‘blue cards’ that must be issued pursuant to the CLC pollution conventions. Furthermore, the MLC does not, unlike the IMO liability and compensation regimes, prescribe the form of, or the amount of, coverage. Each state is entitled to determine the precise form of financial security that it requires in the domestic legislation that it uses to implement the MLC, and some form of evidence (such as proof that adequate insurance is in place) is normally necessary to satisfy the requirement of financial security for claims under (a) and (c) above.

The Association provides cover in respect of compensation (limited to two months’ wages) for unemployment caused by the loss or foundering of a ship (paragraph (b) above), and for the compensation specified in the seafarer’s employment agreement or collective agreement or by the relevant national law for death or long term disability caused by an occupational injury, illness or hazard (paragraph (c) above).

Cover is available for costs of repatriating seafarers that have been abandoned as a result of the insolvency of the shipowners pursuant to the provisions of the MLC (paragraph (a) above) and Rule 27.3. However, cover is not available for any other liabilities that may arise as a result of the termination of any agreement, or the sale of the Ship, or any other act of the Member in respect of the Ship arising other
than under the MLC. Furthermore, the cover is limited to an amount equal to the Association’s retention under the Pooling Agreement for the Policy Year in which the event that gives rise to a claim has occurred and applies per Ship per event.31

Notwithstanding the fact that the MLC does not require a ‘blue card’ to be issued, the Association, in tandem with other P&I clubs, has agreed to modify the customary ‘pay to be paid’ principle in order to enable the Member to comply with the financial security requirements of the MLC. However, should the Association be required to pay for such costs as a result of the Member’s failure to do so, the Association does so as agent for the Member and the Member remains liable to reimburse the Association in full.32

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31 See sub-paragraph 3 to Appendix IV. The Association’s retention for the 2015 Policy Year is USD 9 million.
32 See Rule 87.3.
Rule 28 Liabilities in respect of passengers

1 The Association shall cover:
   a liability for injury to, or illness or death of, or loss of or damage to the effects of passengers and hospital, medical or funeral expenses incurred in relation to such injury, illness or death;
   b liability to pay damages or compensation to passengers on board the Ship where such liability arises in consequence of a casualty, including any liability to return passengers to their port of departure or to forward them to their port of destination and to pay for their maintenance ashore;
   c liability pursuant to mandatory rules of law for loss caused by delay in the carriage of passengers and their effects;
   d costs and expenses incurred as a direct consequence of complying with an order for the deportation of a passenger which would not have been incurred had no such order been made,
provided that:
   i the Association’s liability under paragraphs a and b above shall not exceed what it would have been had the passage contract relieved the Member of liability to the maximum extent permitted by applicable law;
   ii the Association’s liability under paragraph d above shall be subject to the provisos to Rule 27.2; and
   iii the cover shall be subject to proviso iii to Rule 27.1; and
   iv for the purpose of paragraph (b) above a casualty shall be defined as an incident or condition on board involving either collision, stranding, explosion, fire or other cause rendering the Ship incapable of safe navigation to its intended destination or a threat to the life, health or safety of passengers.

2 Where liabilities to passengers include liabilities arising under a non-war certificate issued by the Association in compliance with either:
   a Article 4bis of the Athens Convention relating to the Carriage of Passengers and their Luggage by sea, 1974 and the Protocol thereto of 2002, or
   b Regulation (EC) No.392/2009 of the European Parliament and of the Council of 23rd April 2009 on the liability of carriers of passengers by sea in the event of accidents, and such liabilities (“Certified Liabilities”) exceed or may exceed in the aggregate the limit of cover specified in Appendix IV:
      i the Association may in its absolute discretion defer payment of a claim in respect of those liabilities or any part thereof until the Certified Liabilities, or such part of the Certified Liabilities as the Association may decide, have been discharged; and
      ii if and to the extent any Certified Liabilities discharged by the Association exceed the said limit any payment by the Association in respect thereof shall be by way of loan and the Member shall indemnify the Association in respect of such payment.
Guidance
For more comprehensive commentary in relation to passenger claims see Chapter 11.3 of the Gard Guidance on Maritime Claims and Insurance.

Many persons may be carried on board a vessel from time to time and the Member may have obligations to all such persons and require cover for such obligations. Whereas Rule 27 deals with liabilities in respect of Crew members, Rule 28 deals with liabilities in respect of passengers and Rule 29 deals with liabilities in respect of persons who are neither Crew members nor passengers. Passengers can be distinguished from Crew members and other persons since they are carried on board pursuant to a contract of carriage such as a cruise ticket or ferry ticket.

The cover that is available for passenger claims is subject to the restrictions that are imposed by Rule 57 and therefore, Rule 28 and 57 should be read together.

(A) The Association shall cover...liability for injury to...passengers... (Rule 28.a)
Cover is available under Rule 28 for the Member’s liability for:

i. the injury, illness and death of passengers;
ii. damage to, or loss of, the effects of passengers;
iii. compensation to, and the return or forwarding of, passengers following a casualty;
iv. delay in the carriage of passengers and their effects; and
v. costs and expenses arising as a result of an order for the deportation of a passenger.

The primary source for the legal relationship between a passenger and the carrier is the contract of carriage or passage. This is sometimes referred to as the ‘ticket contract’. Contractual provisions may, however, be overridden or otherwise affected by the common law, statute or international conventions, e.g. the Athens Convention, as amended.²

(B) ...liability for injury to, or illness or death of...passengers... (Rule 28.a)
Cover is available for the Member’s liability to passengers for injury, illness or death, including hospital, medical or funeral expenses. Such liability can arise under the cruise or ferry ticket contract between the passenger ship operator and the passenger, or it can be governed by the provisions of the Athens Convention as enacted by the country where the claims are brought. Alternatively, other

1 Passengers have been defined for the purposes of the Athens Convention as “any person carried in a ship, (a) under a contract of carriage, or (b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not governed by this Convention.” See Article 1.4 of the Convention.
provisions of national law may determine the scope of liability.\(^3\) It should also be noted that the laws of several countries consider passengers to be consumers who are entitled to enjoy certain consumer protection rights, and rules of law relating to compensation have been designed for this purpose, such as those embodied in the European Union Directive on Package Travel, Package Holidays and Package Tours.\(^4\) Furthermore, operators of passenger ships that perform voyages to the United States are obliged to arrange financial security from an insurer or other third party in respect of their liabilities to passengers for, e.g. injury, illness or death. The Association may provide such security (denoted FMC guarantee), and if so, may incur liability directly to the passengers as a result.\(^5\)

However, cover is not available for any liability that exceeds that which would have applied had the ticket contract relieved the Member from liability to the maximum extent permitted by the applicable law.\(^6\) Therefore, it is recommended that Members who are uncertain whether a ticket contract includes provisions that are more generous to passengers than those which are permitted by the applicable law should consult the Association.

The cover that is available to the Member is for the liability that he has to passengers for incidents which occur during the time that the Ship is responsible for the passengers under the cruise or ferry ticket contract, and includes not only injuries caused by accidents on board, but also, subject to the restrictions imposed by Rule 57, injuries arising ashore whilst the passenger is temporarily ashore on an excursion.\(^7\) Liability may arise either as a result of an accidental event on board the Ship, e.g. a slip and fall incident, or as a result of a marine casualty, such as a collision, fire or sinking. However, liability for passenger illness is likely to arise only where there is a breach of a more general duty of care on the part of the Member, e.g. if it is found that the failure to maintain adequate hygiene standards in the preparation of food has caused food poisoning, or if the improper cleaning and treatment of pools or spas has resulted in the spread of a virus.

The Member may also incur liability for death or illness or injury caused or aggravated by a failure to arrange proper and/or timely evacuation\(^8\) and/or treatment of an injured or ill passenger, even if the Member is not liable for the occurrence which was the original source of such illness or injury. The Member may also be held vicariously liable for death or illness or injury caused or aggravated

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3 A synopsis of the main national legal regimes (e.g. US law) governing liability in respect of passengers can be found in the Gard Handbook on P&I Insurance, 5th Edition, 2002.
5 See further Guidance to Rule 58.2.i in this regard.
6 See Rule 28.i.
7 See the Guidance to Rule 57.a.iii and b, which explains the scope of cover in this regard.
8 The Association will cover certain extra costs and expenses incurred as a result of a diversion of the Ship to secure treatment of a passenger who is ill or injured. Please see the Guidance to Rule 31 below in this regard.
by a breach of duty on the part of sub-contractors who have been hired by the 
Member to evacuate and/or repatriate passengers for medical reasons. However, in 
most circumstances, passengers enter into a direct and separate contract with the 
shipboard medical personnel who are usually self-employed service providers and 
not members of the Crew. Consequently, the Member is not usually liable for any 
malpractice on their part. Nevertheless, the Member may, in certain circumstances, 
be held vicariously liable for medical malpractice committed by on board doctors 
or nurses which has resulted in the aggravation of passenger illness or injury, if it 
is found, for example, that the Member was negligent in selecting the doctor or 
in accepting him to serve on board. Whilst cover is available in principle for legal 
liability incurred by the Member in such cases the Association will nevertheless, 
expect the Member to have included clauses in the contracts which they have 
concluded with shipboard doctors and other sub-contractors which entitle the 
Member to bring a recourse action against the principal party that is liable and/or 
their liability insurers and a failure to do so may prejudice cover.9

The cover that is available for the following incidents is subject to particular rules:

i Ship-to-shore boat transfers
The Athens Convention applies when the passenger is being carried to the 
Ship by boat at the beginning of the cruise and from the Ship at the end of the 
cruise.10 Cover is available for the Member’s liability for the illness, injury or death 
of passengers arising during such carriage to and from the entered Ship in boats 
owned or operated by the Member. However, if the transfer is effected within a port, 
cover is available even if the boat is not owned or operated by the Member.11 For 
these purposes the term ‘port’ is not to be understood in its strict geographical, 
legal and fiscal sense but as a practical description of the most convenient area 
or zone for the ship to be situated in order to enable the passengers to be safely 
transferred ashore.12

ii Shore excursions
The cover that is available for shore excursions from the Ship is subject to the 
restrictions that are imposed by Rule 57. Therefore, the provisions of Rule 28 should 
be read subject to, and in the light of, the Guidance to Rule 57.a.iii and b.

The Member may owe a duty to passengers under the applicable law in certain 
countries to ensure their safety during shore excursions, including a duty to warn 
them of risks or dangers which are known, or ought to be known, to the Member. 
Furthermore, the Member may be held liable for the negligent selection of a sub-

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9 See the Guidance to Rule 82.
10 See Article 1 (8) (a) of the Athens Convention.
11 See the Guidance to Rule 57.a.i.
12 See also the Guidance to Rule 57.a.i.
standard shore excursion provider, or, in certain circumstances, be held vicariously liable for the negligence or fault of such provider. Cover is available for such liability and cover is also available provided such liability arises out of the terms of the cruise ticket contract, and provided that the terms of the contract have been previously approved by the Association. When considering whether to approve the terms of such a contract, the Association expects Members to have included in such contract a disclaimer of liability with regard to shore excursions from the entered Ship.

However, cover is not available in respect of liability which arises under the terms of a contract that has been concluded for the excursion whether with the Member or with any other party which is a contract that is separate from the cruise contract, and in circumstances in which the liability would not have arisen, but for those separate terms, i.e. the liability would not have arisen under the terms of the approved cruise ticket contract, or under international convention or national statute or common law.13 Similarly, cover is not available in respect of any additional contractual liability which the Member is obliged to retain by virtue of the fact that he has waived his rights of recourse against the shore excursion provider (or any other third party) in respect of the excursion.14

**iii Recreational diving**
Cover is available on the terms and to the extent described in ii above (shore excursions) for the Member’s liability for the illness, injury or death of passengers who take part in recreational diving activities procured or organised by a Member who utilises the services of a diving excursion provider and/or instructors.15

**iv Pre- and post-voyage incidents**
Many operators of passenger ships and cruise ships have expanded their activities to include not only the sea passage, but also a range of other travel and vacation services which may be governed by other regulations and which may, consequently, expose them to new and more onerous risks. For example, a passenger vessel operator may be considered to be an ‘organiser’ or ‘tour operator’ for the purposes of the European Union Directive on Package Travel, Package Holidays and Package Tours referred to above under (B). Subject to very limited exclusions, the Directive imposes strict liability on the operator for any damage caused to the passenger as a result of the failure of the tour operator to provide a ‘package tour’ in accordance with the contract.

Personal injury, illness or death may occur as a result of incidents occurring either before embarkation on the Ship for the cruise or passage, or after disembarkation. Despite the fact that the passenger may at such time be in the care of a sub-

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13 See the Guidance to Rule 57.b.i.
14 See the Guidance to Rule 57.b.ii.
15 See also the Guidance to Rule 61.b.iii
contractor of the Member, the passenger may, nevertheless, be entitled to bring a claim against the Member in the Member’s capacity as ‘tour operator’. However, cover is not available for such liability unless the incident causing the injury, illness or death has arisen in direct connection with the operation of the Ship\textsuperscript{16} since the liability incurred by the Member will otherwise have been incurred by him not in his capacity as owner or operator of the Ship but in his capacity as tour operator.\textsuperscript{17} For example, if liability arises as a result of incidents occurring during the carriage of the passenger to or from the Ship by land or air transport organised by the Member, cover is not available for such liability.

\textbf{v Incidents caused by third parties on board}

The shipowner will normally be held liable for the acts and omissions of his servants or agents acting in the course of their employment ranging from incidents such as an error in the navigation of the Ship to a failure to ensure proper hygiene standards when preparing food on board or the harassment and the sexual assault of passengers by Crew members. However, the Member will not usually be held liable in cases where one passenger causes injury to another unless it is held that the Member contributed to the incident, e.g. by irresponsibly serving alcohol to a passenger showing violent behaviour or by security guards failing to intervene in a timely manner to protect other passengers against potential harm. Cover is available for liability incurred by the Member in all such circumstances.

\textbf{vi Liability caused by acts or omissions of ‘concessionaires’}

Cruise and passenger ships carry on board various service providers who are not employees of the shipowner. These service providers (concessionaires) hire shipboard space and amenities for the purpose of running their own business on board, which activities are of benefit to the shipowner because it serves to improve the attractiveness of cruising for the general public. Such ‘concessionaires’ include the operators of beauty salons, spas and photo shops, as well as a variety of entertainers. If illness, injury or death is caused to a passenger by an act, default or omission of a concessionaire or his servants or agents, the claimant may decide to bring a claim against the shipowner instead of, or in addition to, a claim against the concessionaire. If the Member incurs liability in such circumstances cover is available only to the extent that the Association has given prior approval to the terms of the contract which has been concluded with the relevant concessionaire, or to materially similar terms and conditions.\textsuperscript{18}

\textsuperscript{16}See Rule 2.4.a.
\textsuperscript{17}The Association has developed an additional cover (the Tour-Op Cover) to accommodate the needs of Members for protection against these risks.
\textsuperscript{18}See the Guidance to Rule 55.
Concessionaires may be named as Co-assureds\(^{19}\) under the Ship’s P&I entry in which case a so-called ‘waiver of subrogation’ clause is often included in the Certificate of Entry.\(^{20}\) The purpose of such a clause is firstly, to ensure that the shipowner and the concessionaire cannot sue each other since both are protected by the same insurance, and secondly, to preclude the Association from exercising any recovery action against the concessionaire. If a concessionaire is not a Co-assured under the Shipowner’s P&I entry, the Member should ensure that the contract that is concluded with the concessionaire should contain appropriate indemnity provisions which hold the Member harmless and give him a right to be indemnified by the concessionaire in the event that the Member incurs liability as a result of the acts or omissions of the concessionaire or his servants or agents. Moreover, the Member should ensure that the concessionaire has adequate insurance to cover such indemnity.

(C) ...liability for loss of or damage to the effects of passengers... (Rule 28.a)

Cover is available for the Member’s liability to passengers for the loss of or damage to the passenger’s effects which include not only cabin luggage, but also other luggage and vehicles, as defined by the Athens Convention.\(^{21}\) Cabin luggage includes those effects that are kept in the possession, custody or control of the passenger, including those kept in a vehicle, whilst other luggage includes property that has been entrusted by the passenger to the carrier under the ticket contract and includes vehicles\(^{22}\) carried pursuant to the ticket contract on the car deck of a passenger/ro-ro ship. However, cover is not available for the Member’s liability for loss of or damage to valuables such as cash, negotiable instruments, jewellery, or rare metals unless the Association has been notified of such carriage in advance and the Member has complied with any directions that may have been given by the Association.\(^{23}\)

A passenger who brings a claim against the carrier will not normally succeed unless he proves that the incident occurred due to the fault or neglect of the carrier or his servants or agents. However, the burden of proof is reversed if the loss of or damage to cabin luggage arose from, or in connection with, the shipwreck,

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\(^{19}\) The cover afforded to concessionaires who are Co-assureds under the Member’s P&I policy is limited by Rule 78.3 to liabilities, losses, costs and expenses that arise out of operations and/or activities customarily carried out by, or at the risk and responsibility of, shipowners in the operation, management and manning of the Ship. In the context of cruise and passenger Ships the services provided by concessionaires are considered essential to the operation of the Ship, which is not just a means of passenger transportation, but a venue for their leisure activities, entertainment and general welfare.

\(^{20}\) See the Guidance to Rule 5 for more details of the Certificate of Entry.

\(^{21}\) Pursuant to Article 1(8)(b) of the Athens Convention, the carrier has responsibility for the passenger’s luggage not only whilst it is on board the Ship or in transit to and from the Ship but also whilst it is ashore in a marine terminal.

\(^{22}\) This situation should be distinguished from that where vehicles are carried as cargo or used for the carriage of cargo, under a Bill of Lading or waybill contract of carriage. Cover is available for liabilities in respect of cargo under Rule 34.

\(^{23}\) See Rules 28.iii and 27.1.iii.
collision, stranding, explosion or fire, or defect in the Ship.24 In such circumstances, it is the carrier who will have to prove that there is no fault or neglect on his part and the claimants are normally given the benefit of the doubt if there are factual uncertainties after both parties have presented the relevant evidence.

Cover is available for only that liability to which the Member would have been subject if he had exonerated himself from, and/or limited his liability for such claims, to the maximum extent permissible under the applicable law. For example, the Athens Convention provides that the carrier is not liable in respect of valuables unless they have been deposited with the carrier for safekeeping and that, even if this is done, the carrier is able to limit his liability for loss of or damage to such items to the sum of SDR 1,200 per passenger per carriage.25

(D) ...liability to pay damages or compensation to passengers on board the Ship in consequence of a casualty...including any liability to return passengers to their port of departure or to forward them to their port of destination and to pay for their maintenance ashore. (Rule 28.b)

Cover is available for the liability that the Member has to pay damages or compensation to passengers who are on board the Ship where such liability arises as a result of a ‘casualty’, and includes any liability to return passengers to their port of departure or to forward them to their port of destination and to pay for their maintenance ashore.

‘casualty’

The obligation of the Association to indemnify Members for passenger claims may result in claims being made by the Association against other clubs participating in the International Group Pooling Agreement. Therefore, it is important that the definition of ‘casualty’ for the purposes of Rule 28 (b) should be the same as that in the Pooling Agreement. Consequently, for the purposes of Rule 28.b, the term ‘casualty’ means ‘an incident or condition on board involving either collision, stranding, explosion, fire or other cause rendering the Ship incapable of safe navigation to its intended destination or a threat to the life, health or safety of passengers’.26 This phrase is somewhat broader than the manner in which the word ‘casualty’ is used elsewhere in these Rules, i.e. an event likely to give rise to a claim under a marine insurance policy, such as a grounding, collision or fire.27

Therefore, cover may be available under Rule 28.b following the outbreak of a contagious disease since such an event may be ‘an incident or condition on board involving a threat to the life, health or safety of passengers.’28 However, if ‘an

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24 See Article 3 of the Athens Convention.
25 See Article 8.3 of the Athens Convention.
26 See Rule 28. iv.
27 See the Guidance to Rule 27.1.b.
28 See also the Guidance to Rule 48.
incident or condition on board’ is to constitute a ‘casualty’ within the meaning of the Rule, the incident or condition must represent a threat to passengers in general and not merely to any particular passenger, but this does not mean that all passengers need to be exposed to the same degree of risk or that the incident or condition must have originated on board. Therefore, the Rule would apply if a contagious disease originating ashore resulted in a general threat to passengers on board the Ship while in port.

However, cover is not available for the Member’s liability to pay damages or compensation to passengers in circumstances where a voyage is terminated for commercial reasons, e.g. due to the fact that the vessel has been inadequately equipped or maintained, or due to a war risk, since it cannot be said that there has been a ‘casualty’ in the above sense in either case.

‘passengers on board the Ship’
Cover is available for the Member’s liability to passengers who are on board the Ship at the time of the casualty. In this context, the phrase ‘passengers on board the Ship’ means passengers who have embarked for their voyage with the entered Ship and who have not yet disembarked. Therefore, so long as the passengers have commenced their cruise or passage, they need not be physically on board the Ship at the time of the incident. For example, if, during the course of a cruise, an explosion and consequent fire occurs on board while many passengers are ashore, cover is available for the liability of the Member to pay damages or compensation to those passengers for voyage interruption. However, whilst the Member may also have liabilities in such circumstances to passengers who have booked passage on the Ship but who are still waiting to embark at the next port(s) of call, such passengers are not considered to be ‘passengers on board the Ship’ with the result that cover is not available for any liability that the Member may have to such passengers. Consequently, it follows that, if a casualty occurs shortly before the embarkation of new passengers and renders the Ship incapable of performing the voyage, cover is not available for any liability that the Member has to those passengers to pay for their food and lodging costs.

‘liability to pay damages or compensation’
The Member may incur liability to pay compensation under contract and/or to pay damages pursuant to a convention, statute or the common law. Cover is not available for any contractual obligations that the Member may have to pay compensation if, in the absence of such contractual provisions, the Member would have had no such obligations pursuant to convention, statute or the common law.

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29 See Rule 58.
30 See also the Guidance to Rule 63.1.g concerning the exclusion from cover of liabilities, losses, costs and expenses arising out of cancellation of a charter or other engagement of the Ship.
31 Such liabilities are covered under the additional Tour-Op Cover provided by the Association.
32 See Rule 28.i.
Therefore, where no such obligations exist under convention, statute or common law, the Member is expected and strongly urged to include appropriate exoneration clauses in the passage contract.

Furthermore, cover is not available for payments which are made otherwise than in satisfaction of a legal obligation to do so, such as payments made in order to protect the Member’s commercial reputation, or to promote the likelihood that the passengers may return for a future cruise, or simply in order to keep the passengers happy for the remainder of the voyage. Therefore, cover would not normally be available for the cost of free drinks and food for the rest of the voyage, for free or substantially discounted future cruises or for tickets to special events during port calls. However, it sometimes makes commercial sense to seek to settle a legal liability by, for example, offering a future cruise or passage at a discounted or free fare. Nevertheless, it is strongly recommended that Members who wish to settle claims in this manner should seek prior approval and clarification of cover from the Association before doing so.

‘liability to return passengers to their port of departure or to forward them to their port of destination and to pay for their maintenance ashore’

Whilst the Athens Convention does not oblige the carrier in the event of a casualty to return or forward passengers and to pay maintenance to them whilst ashore, such an obligation may, nevertheless, arise under statute or the common law. For example, under the Norwegian Maritime Act, the carrier has a legal liability in the event of a casualty to provide and pay for the return of passengers to their respective port of departure or to forward them to their respective port of destination, and to provide and pay for their maintenance ashore while in such transit. Cover is available for additional costs and expenses incurred by the Member in order to meet such obligations, e.g. the cost of chartering another vessel or an airplane to carry passengers in a timely fashion to the contractual destination or, if necessary, home, as well as hotel accommodation and food ashore. If the Member, in an attempt to save costs, makes use of another passenger Ship in his fleet to transfer the affected passengers, cover is available for the costs and expenses necessarily and reasonably incurred as a result, as well as for any liability to the passengers already on board that Ship for partial curtailment of their cruise. However, Members are strongly advised to consult the Association closely before taking such steps since any failure to do so may prejudice any claim that the Member may wish to make on the Association for reimbursement.

33 The following test was once suggested: Would the passenger ship operator have paid (similar) compensation on the last day of operating the vessel before winding up the business?
34 See the Guidance to Rule 82.
36 See the Guidance to Rule 82.
If a casualty renders the Ship incapable of continuing the voyage, the carrier may also be legally liable to pay additional sums to passengers as damages for the interruption or early termination of the voyage. Cover is available for any legal liability that the Member may have to pay such damages which may include items such as additional return trip airfare expenses incurred by passengers due to the need to book alternative air tickets, or such payments that are adjudged by a court or awarded by a tribunal for loss of holiday or inconvenience caused to the passengers. However, should the early termination of a voyage result in a saving for the Member, e.g. saved fuel, food or port dues, the Association is entitled to deduct such amounts from any compensation that is otherwise payable to the Member and the Member is obliged in such circumstances to provide the Association with details of the amounts saved.

A serious casualty may not only cause interruption and the early termination of the pending voyage, but may also have a ‘domino effect’ on subsequent voyages. For example, if the casualty renders the Ship an actual or constructive total loss, all future engagements of the Ship will be cancelled. However, as stated above, cover is not available for liabilities, losses, costs and expenses arising as a result of the cancellation of a charter or of any other engagement of the Ship. This means that a Member whose cruise ship is on charter at the time of the casualty will not be covered in respect of any non-performance penalties that may be payable to the charterer under the terms of the charterparty, e.g. during the period of repair. However, the Member may be able to obtain cover for such loss of income under loss of hire insurance, subject to a deductible period, usually 14 days counting from the time of the casualty.

(E) …costs and expenses incurred as a direct consequence of complying with an order for the deportation of a passenger… (Rule 28.d)

Passengers may be deported when they are found not to be in possession of the necessary documents for the anticipated journey, e.g. passports or any necessary visas. The ticket contract will normally require passengers to reimburse the shipowner for expenses incurred as a result of a deportation order being served in such circumstances, However, cover is available for costs and expenses incurred by the Member in complying with a deportation order whether the ticket contract does or does not contain such a provision but the Member has an obligation to take whatever reasonable measures that are within his control in order to minimise the costs of deportation, e.g. by allowing the passengers to return to their point of embarkation on the Ship if the Ship calls regularly and frequently at this port.

37 Under German law, a cruise operator may be liable to pay in damages for ‘loss of holiday’ up to three times the cruise fare paid by the passenger, whilst the EU Directive on Package Travel etc., provides a remedy in damages for inconvenience caused by, inter alia, disruption of the package tour.
38 See the Guidance to Rule 54.
39 See Rule 82.
40 See Rule 63.1.g.
(F) ...the Association’s liability under...a and b...shall not exceed what it would have been had the passage contract relieved the Member of liability to the maximum extent permitted by applicable law; (Rule 28.i)

Cover is not available for any liability that would not have arisen had the passage contract relieved the Member of liability to the maximum extent permitted by the applicable law. However, the Association recognises that cruise or passenger Ships trade to various jurisdictions with different rules of law governing passenger liability, and that, consequently, it is difficult to ensure that the terms of their ticket contracts terms will always be able to provide the maximum protection against liability whilst at the same time meeting the practical need for standardised terms. In the circumstances, the Association exercises some discretion when accepting ticket contract terms which appear to be more generous to passengers than the minimum standard which is applicable under the relevant law or when deciding whether the Member should be reimbursed even in the absence of such acceptance. For example, cover may be available if the Member incurs liability under a ticket contract which incorporates the Athens Convention provisions, in circumstances where the liability is incurred in a state which is not a party to the Athens Convention and where less stringent liability would have been imposed as a matter of local law.

(G) ...the Association’s liability under...d...shall be subject to the provisos to Rule 27.2. (Rule 28.ii)

The cover that is available under Rule 28.d is subject to the same provisos as those which apply to the deportation of Crew members under Rule 27.2. For example, if the passenger ship operator is found liable to pay deportation costs and expenses in respect of passengers who do not have immigration visas because of the unjustified deviation of the passenger Ship to a port in a country for which the passengers could not expect to obtain visas, the resulting costs must be borne by the Member since cover is not available from the Association.

(H) ...the cover shall be subject to proviso iii to Rule 27.1.(Rule 28.iii)

The cover that is available for valuable items owned and brought on board by passengers is subject to the same exclusions as those which apply for Crew members under proviso iii to Rule 27.1. However, it is more common for passengers, particularly in some cruise segments, to bring valuable items such as jewellery on board during the journey. Cruise ship operators are protected to some extent against liability for the loss of, or for damage to, passengers’ valuables since the Athens Convention exonerates the ‘carrier’ from such liability unless the valuables have been deposited with the carrier for safekeeping. Furthermore, even if they have been so deposited, the carrier can limit his liability to SDR 1,200 per passenger per carriage (i.e. per voyage rather than per incident). If a passenger

41 See Rule 55.a.
42 See paragraphs (N)-(P) of the Guidance to Rule 27.
43 See paragraph (K) of the Guidance to Rule 27.
elects to deposit valuables with the carrier for safekeeping, the Association will
not cover any liability for loss of or damage to such valuables, even for the Athens
Convention limit, unless the Association has been notified in advance of such
carriage and has been satisfied that the arrangements on board for such safekeeping
are adequate.

(I) Where liabilities to passengers include liabilities arising under a non-war
certificate issued by the Association in compliance with either:
   a) Article 4bis of the Athens Convention relating to the Carriage of
      Passengers and their Luggage by sea, 1974 and the Protocol thereto of
      2002, or
      Council of 23rd April 2009 on the liability of carriers of passengers by
      sea in the event of accidents, and such liabilities (“Certified Liabilities”)
      exceed or may exceed in the aggregate the limit of cover specified in
      Appendix IV:
         i the Association may in its absolute discretion defer payment of a claim in
            respect of those liabilities or any part thereof until the Certified Liabilities,
            or such part of the Certified Liabilities as the Association may decide, have
            been discharged; and
         ii if and to the extent any Certified Liabilities discharged by the Association
            exceed the said limit any payment by the Association in respect thereof
            shall be by way of loan and the Member shall indemnify the Association in
            respect of such payment. (Rule 28.2)

The 2002 Protocol to the Athens Convention is now in force and the European Union
has, by means of the EU Passenger Liability Regulation (EC) No 392/2009, sought
to extend the provisions of the 2002 Protocol to passenger ships that are engaged
in domestic sea-going voyages and to certain classes of vessels operating on inland
waterways. The Regulation is intended to work in tandem with the 2002 Protocol
and requires EU member states to ratify or accede to the 2002 Protocol.44

The 2002 Protocol includes many of the principles that have been implemented
in other international maritime liability conventions, such as the Civil Liability
Convention regulating pollution liability and compensation, and its provisions
differ significantly from the original Athens Convention in several respects. The key
features of the 2002 Protocol to the Athens Convention are as follows:
• The carrier is strictly liable up to a-specified limit (the ‘strict liability limit’) in the
  event of the death of, or personal injury to, a passenger resulting from a ‘shipping
  incident’ which is defined as the “shipwreck, capsizing, collision or stranding
  of the ship, explosion or fire in the ship, or defect in the ship”, unless the

44 At the time of going to print the following EU member states have ratified the 2002 Protocol: Belgium,
Bulgaria, Croatia, Denmark, Greece, the Netherlands and the United Kingdom.
carrier proves that the incident resulted from "an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character"; or "was wholly caused by an act or omission done with the intent to cause the incident by a third party". The strict liability limit is SDR 250,000 per passenger for each distinct occasion on which the passenger may be injured.

- If, and to the extent that, losses suffered as a result of injury to, or death of, a passenger caused by a ‘shipping incident’ exceed the strict liability limit of SDR 250,000, the carrier remains liable up to an increased limit of SDR 400,000 per passenger for each distinct occasion on which the passenger may be injured unless he is able to prove that the incident which caused the loss occurred without his fault or neglect.

- Should a passenger be injured or killed as a result of an incident other than a ‘shipping incident’ as defined above, the carrier is liable up to the limit of SDR 400,000 per passenger per distinct occasion if the incident causing such injury or death is due to fault or neglect on the carrier. However, in such circumstances, the burden of proving fault or neglect on the part of the carrier lies with the claimant.

- Under the Athens Convention 1974, the liability of the carrier for the death of, or for personal injury to, a passenger caused by a ‘shipping incident’ is SDR 46,666 per passenger per carriage (i.e. per voyage). However, the 2002 Protocol has introduced strict liability for passenger death or injury caused by a ‘shipping incident’ and much higher limits of liability which apply on each distinct occasion during the carriage rather than merely one limit for all claims that the passenger may incur during the carriage. This means that the carrier’s liability exposure is substantially increased compared to the Athens Convention 1974.

- Carriers are required to maintain insurance or other financial security (such as the guarantee of a bank or similar financial institution) to secure liabilities arising under the 2002 Protocol whether or not caused by a ‘shipping incident’ and to provide documentary evidence in the form of a certificate attesting that insurance or other financial security is in force. The limit of such compulsory insurance or other financial security shall not be less than SDR 250,000 per passenger per each distinct occasion.

- Notwithstanding the limits of liability specified above, the shipowner may be entitled to limit his liability for all passenger claims arising on any distinct occasion pursuant to the London Convention on Limitation of Maritime Claims 1976 (the LLMC) or the 1996 Protocol of that Convention. However, Article 6 of the 1996 Protocol to the LLMC allows a state party to regulate by specific provisions in national law the system of liability that is to be applied to claims for loss of life and personal injury to passengers. Therefore, in parallel with the implementation of the 2002 Protocol and the EU Passenger Liability Regulation, many states are considering increasing the global limitation figure for passenger claims.

- The Protocol introduces a tacit acceptance procedure that is intended to simplify the procedures for raising limits of liability again in the future.
The International Group of P&I Clubs have agreed to provide certificates of financial security for both international and domestic voyages pursuant to the 2002 Protocol and EU Regulation but since such Clubs do not provide cover for war risks, such certificates (which are known as Non-War Passenger Blue Cards) will not provide cover for war and terrorism risks (which will have to be provided by other insurers).

Such Non-War Passenger Blue Cards are supported by the International Group pool and reinsurance arrangements so that the Association is able to provide P&I cover for passenger claims up to a limit of USD 2 billion per event.45 Nevertheless, the substantially increased limits that apply under the 2002 Protocol and the EU Regulation now makes it more likely that the P&I limit could be exceeded in the event of a major passenger ship casualty.

Therefore, to enable the Association to provide the financial security that Members may require under the 2002 Protocol and the EU Regulation whilst at the same time protecting the assets of the Association and the membership as a whole, Rule 28.2 provides that:

- If passengers are able to bring claims both under the Non-War Passenger Blue Cards and in some other manner against the Member and, in the opinion of the Association, the totality of the claims gives rise to the risk that it may exceed the Association’s aggregate liability as specified from time to time in Appendix IV,46 the Association has the discretion to give priority to the settlement of claims that arise under the Non-War Passenger Blue Cards.

- If the claims that the Association is obliged to pay under the Non-War Passenger Blue Cards exceed the Association’s aggregate liability as specified from time to time in Appendix IV, any payments that have been made by the Association in excess of such limit are deemed to have been paid by way of loan to the Member and the Member must indemnify the Association in full for such payments.

45 See Appendix IV, paragraph 2.
46 USD 2 billion per event at the time of going to print.
**Rule 29 Liability for other persons carried on board**

1. The Association shall cover liability arising out of the injury to, or illness or death of, or liability for loss of or damage to the effects of persons carried on board other than Crew or passengers provided that:
   i. in the case of a person other than a close relative of a member of the Crew, the Association has approved the presence of such persons on board;
   ii. the cover shall be subject to proviso (iii) to Rule 27.1.

2. The Association shall cover costs and expenses incurred as a direct consequence of complying with an order for the deportation of any such other person carried on board which would not have been incurred had no such order been made, subject to the provisos to Rule 27.2.

**Guidance**

**(A) Liabilities for other persons carried on board (Rule 29)**

The provisions of Rules 27 and 28 provide cover to the Member in respect of the Member’s liability to Crew members and passengers. These are persons with whom the Member usually has either an employment or carriage contract which will form the basis of liability. However, the cover that is available to a Member under Rule 29 is for liability that a Member has to others carried on board who are not Crew members or passengers. Such persons include repairmen or maintenance personnel, pilots, coast guard officers, supercargoes, relatives of the Crew and even stowaways and refugees.

Rule 29 applies when such persons are ‘carried on board’ which means that they remain on board the Ship for the whole or part of its voyage between ports.¹ Some persons may be on board on a temporary, short duration basis, such as pilots and coast guard officials, whereas others, e.g. relatives of the Crew, may be on board more regularly and/or for longer periods. However, the duration of the stay does not affect the scope of cover. Cover is available for the Member’s legal liability for the injury, illness or death of such persons whether such liability arises under contract, statute or the provisions of a national law.

**(B) The Association shall cover liability arising out of...injury...illness...death...of persons carried on board... (Rule 29.1)**

The presence on board of repairers, maintenance men, supercargoes or buyer’s representatives that have been put on board may be subject to the terms of a contract which has been concluded between them and the Member. Cover is available for liability that the Member has for the injury, illness or death of such persons arising under the terms of such contract unless such terms are substantially

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¹ Other persons may work or attend on board while the Ship is idle in port, at anchor, in dry dock or elsewhere, but are not ‘carried on board’, e.g. stevedores, shipyard workers, port state control officers, ship chandlers and other visitors. Cover is available in respect of such persons under Rule 30.
more onerous than those of standard contracts which are customarily used in such circumstances. Members are strongly advised to consult the Association if in doubt whether this may be the case.

The Member may also incur liability by virtue of the provisions of national law and regulations in the relevant country. This may be the country where the incident occurred, or where the person came on board, or where the Member is domiciled, or the flag state, or the country of domicile of the person (or relatives) affected. Most laws impose a duty on the shipowner, on the one hand, to ensure that his vessel is safe for persons who are carried on board and impose liability for failure to ensure such safety, whilst, on the other hand, imposing a duty on the person carried on board to exercise such level of care for his own safety as is reasonable given his knowledge and experience of ships, and to comply with all shipboard instructions regarding safety precautions.

Cover is available for the Member’s legal liability in respect of injury, illness or death where the Member has failed to provide the person with a safe place to work or stay on board, or, particularly in the case of pilots, failed to provide a safe means for embarkation and disembarkation. In the event that such persons become ill, cover is available for any breach by the Member of his duty to take proper steps to provide first aid and timely evacuation in acute circumstances, including breach of the duty to divert the ship to a port or another place where the person can be transported ashore by another ship or conveyance, if this is the only, or most effective, means of ensuring proper treatment. However, Members are strongly recommended to ensure that sub-contractors and other persons, including family members of the Crew, that board their Ships from time to time on a temporary basis should have travel insurance or some other similar form of insurance before they are allowed to board.

(C) liability for loss of or damage to effects of persons carried on board...

(Rule 29.1)

Cover is also available for the Member’s liability to other persons carried on board for loss of or damage to their effects. This includes work tools brought on board by repairmen, equipment used by pilots and the personal belongings of close relatives of Crew members. However, cover is not available in respect of the valuables listed in proviso iii to Rule 27.1 even if the Member is liable to pay compensation in respect thereof. Members should ensure that persons who are carried on board for a prolonged period of time and/or who bring on board expensive personal effects, should provide a written indemnity holding the Member harmless for any liability which exceeds that which applies under the Athens Convention in the case of cabin luggage or other luggage.

2 See Rule 55.
3 See also the Guidance to Rules 27 and 28.
(D) Provided that in the case of a person other than a close relative of a member of the Crew, the Association has approved the presence of such persons on board… (Rule 29.1 proviso i)

The Member need not seek the prior approval of the Association in order to carry on board close relatives of Crew members. A close relative in this context means the spouse, parent or child of the Crew member and any other person considered by the Association in its discretion to be a close relative. Members are advised to ensure that close relatives of Crew members who are carried on board should provide a written indemnity which holds the Member harmless in respect of claims to the maximum extent permissible under the applicable law, or, as a minimum, restricts the Member’s exposure to the limit of liability that applies in relation to the injury, illness death of passengers and for the loss of or damage to their personal effects under the Athens Convention.5

Cover is not available for the Member’s liability to persons other than close relatives of Crew members if the presence of such persons has not been notified to, and approved by, the Association. The Association does not, however, require to be notified of, and to approve, the presence on board, of each and every pilot or coast guard or similar official who comes on board for short periods of time whereas such approval is required in the case of persons who are regularly on board and/or are on board for long periods. In such cases, the Member should ensure that their presence on board is governed by a contract which has been approved by the Association.

The presence on board of persons other than the close relatives of the Crew for prolonged periods may constitute an alteration of the risk which should be disclosed by the Member to the Association since this may necessitate the payment of additional premium and a failure by the Member so to do may prejudice the Member’s right to cover from the Association.6 The Association will weigh the additional risk against the cost, time and administrative burden for both the Member and the Association of providing and receiving notification and approval in each and every case.7

Cover is available only in respect of the legal liability of the Member and not in respect of expenditure which has been voluntarily incurred unless prior approval has been obtained from the Association. A Member may well be required in practise in the event of injury or illness of a person carried on board to make advances or to provide a financial guarantee in respect of past or future costs of treatment. However, unless this is obligatory under the terms of a contract governing the

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4 More comprehensive advice regarding which precautions to take in respect of non-fare paying passengers is available on www.gard.no as is a recommended specimen form for such persons to sign.
5 Ibid 8.
6 See Rule 7.2.
7 The Association’s current practise is that prior notification is only required if the Member intends to allow carriage of more than ten non-fare paying passengers on any one voyage.
presence on board of the person concerned, the Member will usually have no such obligation, and cover is not available for any such voluntary payments. Members are advised to check whether the person has travel or other insurances that may cover such expenses and whether cover is available if payment is made in the first instance by the Member.\(^8\)

(E) The Association shall cover costs and expenses incurred as a direct consequence of complying with an order for the deportation... (Rule 29.2)

Cover is available for the Member’s liability for costs and expenses incurred as a direct consequence of complying with an order for the deportation of other persons carried on board, subject to the provisos in Rule 27.2 and Rule 28.ii that apply, respectively, to Crew members and passengers. However, whereas the scope of cover is similar, the risk of incurring such liability may be greater in the case of persons other than Crew members or passengers. The close relatives of Crew members should normally be equipped with visas and immigration rights that are the equivalent of those held by the Crew members themselves. However, this may not be possible in the case of repairmen, supercargoes and others carried on board for several port calls since the Member is not likely to be the party who has provided such passes and visas and cannot, therefore, exercise the same level of control as he can in relation to his Crew members. Therefore, the ‘hold harmless’ and indemnity provisions to which reference is made in (C) and (D) above should include a right for the Member to be indemnified by the person, or his employer or principal, should the Member have to pay deportation costs.

\(^8\) Notwithstanding the above, and as a ‘safety net’ should there be no insurance funds to pursue for the Member, and as an ‘add-on’ to the standard P&I cover without any additional premium charged, the Association will cover the below mentioned type of expenses voluntarily incurred by Members up to a maximum limit of USD 300,000 per relevant person per voyage, subject to an aggregate limit of USD 1 million per event. The cover is net of the deductible.
Rule 30 Liability for persons not carried on board

The Association shall cover liability resulting from the injury to, or illness or death of persons other than the Crew, passengers and other persons carried on board, provided that where the liability arises under the terms of a contract or indemnity and would not have arisen but for those terms, the liability shall only be covered when and to the extent that those terms have been approved by the Association.

Guidance

Under this Rule cover is available in respect of the Member’s liability for injury, illness or death to persons other than Crew members, passengers and other persons carried on board. Cover is not available under this Rule for liability for loss of, or damage to, the effects of persons that are not carried on board, but cover for such liability is available under Rule 39.

(A) Liability for persons not carried on board (Rule 30)

Rule 30 normally applies to two main categories of persons that are not carried on board:

a Persons who perform work or other functions on board or visit the Ship whilst the Ship is not in transit between ports, e.g. stevedores, shipyard workers, port agents, surveyors, port state control officers, ship chandlers and other visitors; and

b Persons who have no association with the Ship, but are, nonetheless, affected by an incident arising in direct connection with the operation of the Ship, e.g. persons who are at or near a berth or terminal or the crew of another ship or members of the general public ashore.

(B) ...liability resulting from...injury, illness or death... (Rule 30)

Such liability normally arises under statutory or common law (tort) provisions. Liability can also arise by virtue of contract, but is less commonplace, and is, in any event, often affected by statutory provisions. ¹ Therefore, there is, normally, little opportunity for the Member to control the jurisdiction in which the claim is brought, which could be where the incident occurred, or where the claimant resides, or where the owner is domiciled.

If liability arises pursuant to contractual terms but would not have arisen if there had not been any such terms, cover is available, only to the extent that the contract terms have previously been approved by the Association. ² In some cases, the person suffering injury, illness or death will be the employee of the Member’s contract

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¹ For example, the work of longshoremen in US ports is based on a contractual relationship between the ship operator or charterer and the stevedoring company (the longshoremen’s employer), but there is no direct contractual relationship between the longshoremen and the ship. The remedy of longshoremen against the ship (and shipowner) has a statutory foundation in the Longshore and Harbor Workers’ Compensation Act (1972).

² See Rule 55.
partner, and the contract may contain ‘hold harmless’ and/or indemnity provisions. Mutual indemnity (i.e. ‘knock-for-knock’) provisions whereby each contractual party agrees to hold the other harmless for injury etc., to its own employees, and to indemnify the other party for losses resulting from the acts of its own employees, are generally acceptable, but Members are, nonetheless, advised to consult the Association prior to accepting such provisions.

Cover is available for the Member’s liability for any type of injury or illness so long as the court or tribunal seized of the case has ruled that a medical condition has given rise to a right to compensation or damages, and is the result of an incident for which the member is legally liable. Cover is available not only in respect of physical conditions but also in respect of psychological conditions such as emotional distress, impairing anxiety or post-traumatic stress disorder.

Whilst cover is available for the Member's liability for illness as well as for injury or death, cover is called upon in most cases in relation to liability for injury or death. However, liability for illness could arise in relation to the working environment on board, e.g. an asbestos-related disease contracted by shipyard workers that can be traced to the entered Ship. Citizens ashore can also suffer illness or death as a result of toxic fumes escaping from a chemical tanker or from a container ship carrying hazardous cargo on deck.

The cover that is available under Rule 30 is subject to the overriding provisions of Rule 2.4 which make it clear that cover is available only for liabilities that the Member incurs in direct connection with the operation of the Ship and in respect of the Member’s interest in the Ship. Therefore, if the Member is the owner or operator of a terminal, berth, port installation and/or equipment, and injury, illness or death is caused by the Member to persons who are not carried on board by an accident for which the Member is liable in his capacity as owner or operator of such other facility rather than in his capacity as shipowner, cover is not available for such liability.

3 This reflects the provisions of the Pooling Agreement.


**Rule 31 Diversion expenses**

The Association shall cover extra costs of fuel, insurance, wages, stores, provisions and port charges attributable to a diversion, over and above the costs that would have been incurred but for the diversion, where these are incurred solely for the purpose of securing treatment for an injured or sick person on board, or for the purpose of searching for a person missing from the Ship, or necessarily incurred while awaiting a substitute for such person, or for the purpose of saving persons at sea.

**Guidance**

(A) …costs attributable to a diversion… (Rule 31)

Diversion must be distinguished from deviation. It is generally accepted that a ship which diverts from its intended course or route is fully justified in doing so and may, indeed, be obliged to do so in certain circumstances, e.g. in order to ensure the evacuation of ill or injured Crew members or to search for crew members who are missing at sea. Basic humanitarian and moral principles apply in this regard, but there may also be a legal duty to divert to assist persons in distress\(^1\) and breach of such duty may give rise to liability.

Deviation, on the other hand, is a term which is used to describe an intentional and unenforced alteration of course or route or delay, that cannot be justified in the sense discussed above since it is done for the sole benefit of the shipowner and often contrary to the interests of the cargo owners or other parties to the adventure.

Whereas a deviation usually results in liabilities and losses and may deprive the carrier of defences or rights of limitation that might otherwise be available to him, as well as his rights to P&I cover, a justified diversion should not result in liability.

However, the Member may well incur extra costs when his Ship is diverted and cover is available under Rule 31 in respect of certain extra costs incurred by the Member in the event of such diversion.

(B) The Association shall cover extra costs and expenses… (Rule 31)

Cover is available only for those costs that are specifically listed in the Rule, i.e. fuel, insurance, wages, stores, provisions and port charges and only to the extent that such costs exceed what would have been incurred regardless of the diversion. When making a claim on the Association the Member must calculate the extra costs and explain how they have been caused by the diversion.

Cover is available for the cost of additional fuel, which includes not only extra fuel consumed as a result of extra distance steamed, but also as a result of extra speed necessitated by the desire to reach the rescue site as quickly as possible. Additional

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\(^1\) See Article 10 of the International Convention on Salvage 1989.
port charges include not only calls at unscheduled ports, but also extra costs incurred as a result of a prolonged stay in a port to await a substitute Crew member and include the cost of pilots, tugs and port dues etc.

Additional stores include the extra consumption of any kind of ship’s stores, such as lubricating oil, electric components etc., whilst additional provisions refers to the extra consumption of food, beverages etc.

Extra insurance costs may be incurred if the diversion requires the Ship to move into areas which require the payment of additional premium such as that required by war risk underwriters when the vessel sails in certain war risk areas, or that required by hull insurers if the Ship is not ice-strengthened and is diverted to an area with ice. However, cover is not available for a claim for a proportionate return of premium paid during the time of diversion.

The extra cost of wages does not include wages which are paid to Crew members for the extra time taken by the Ship to complete its original voyage as a result of the diversion, but does include the payment of overtime to Crew members who take part in searches for missing persons at sea, as well as additional wages that are payable to the Crew if the Ship enters a war risk zone during the course of the diversion.

Cover is not available for extra costs incurred as a result of the diversion in respect of items other than those listed, e.g. extra hire or freight, or for other loss arising as a result of delay caused by the diversion, e.g. the loss of a subsequent fixture.²

However, should the Member incur liability to third parties as a result of delay in the carriage of cargo or passengers, cover is available for such liability under Rules 34 and 28 respectively.

(C) …incurred solely for the purpose of securing treatment for an injured or sick person on board…searching for a person missing from the Ship…or necessarily incurred while awaiting a substitute, or for the purpose of saving persons at sea. (Rule 31)

Cover is available under Rule 31 for extra costs incurred by the Member in diverting the Ship when such extra costs are incurred in the following circumstances:
1 When the Ship is diverted in order to secure treatment for an injured or sick person on board;
2 When the Ship is diverted in order to search for a person who is reported to be missing from the entered Ship;
3 When the Ship is diverted in order to search for a person who is reported to be missing from another ship;

² See the Guidance to Rule 63.2.
4 When the Ship is waiting for a substitute for the person (usually a Crew member) who is reported missing or who has been taken off the Ship to secure his treatment, provided that the Member can demonstrate to the satisfaction of the Association that it was necessary for the Ship to wait for the substitute, i.e. the Member needs to prove that the Ship is not seaworthy to continue the voyage without the substitute and that it is not possible to obtain a temporary permit from the relevant authorities in this regard;\(^3\)

5 When the Ship is diverted to assist in the saving of persons at sea. For instance, when a foundering fishing vessel broadcasts an emergency at sea and coastal authorities instruct all vessels in the area to divert and head for the stricken fishing vessel in order to save the lives of its crew.

The persons to whom Rule 31 refers include all the persons described in the Guidance to Rules 27-29 and even persons who are on board illegitimately and without the master’s consent, e.g. stowaways. Cover is available in the above circumstances even if the diversion is unsuccessful, e.g. the Crew member dies before treatment can be given ashore or missing persons are not found.

While the above named categories of persons refer to individuals who are usually found on board the entered vessel, it is important to note that the Rule also refers to diversion “…for the purpose of saving persons at sea.” This includes persons on other vessels, boats, rafts etc., who are facing a situation of maritime distress. One may note, therefore, that there is some overlap between Rule 31 and Rule 32, discussed below.

However, cover is available only if the relevant costs are incurred solely as a result of one of the reasons described in 1 – 5 above. Therefore, if the diversion has been caused partly by one of those reasons, and partly by another reason, cover is not available for extra costs incurred as a result of the diversion unless the Member can identify precisely what costs can be attributed to one of the reasons in 1 – 5 above.

\(^3\) See Article 10 of the International Convention on Salvage 1989.
Rule 32  Stowaways, Refugees or Persons saved at Sea

The Association shall cover costs and expenses directly and reasonably incurred in consequence of the Ship having stowaways, refugees or persons saved at sea on board, but only to the extent that the Member is legally liable for the costs and expenses or they are incurred with the approval of the Association. The cover does not include consequential loss of profit or depreciation.

Guidance

The cover that is available under Rule 32 is becoming increasingly more important in view of the steadily increasing number of instances in which refugees and other persons attempt to gain access by sea to countries where they hope to lead a better life. The likelihood that a Member may become involved in such instances either as a result of the fact that the Ship may have stowaways on board or of the fact that the Ship may have saved other persons at sea during the course of their attempt to gain access to such other countries is steadily increasing and can result in complex and costly cases which also involve safety and security issues as evidenced by the difficulties incurred by the TAMPA off Christmas Island in 2000.

(A)  Stowaways, refugees or persons saved at sea (Rule 32)

A ‘stowaway’ has been defined as “a person who, at any port or place in the vicinity thereof, hides himself in a ship without the consent of the shipowner or the Master or any other person in charge of the ship and who is on board after the ship has left that port or place”,¹ whereas a ‘refugee’ is defined as “someone who, due to fear of persecution for reasons of race, nationality, political beliefs or other similar factors, is unable or does not want to stay in the country where he is and wishes to move to a new country”.² A ‘person saved at sea’ is any person who is neither a stowaway nor a refugee, e.g. a crew member saved from another ship that is in distress.

(B)  The Association shall cover costs and expenses... (Rule 32)

The Member may incur additional costs and expenses in maintaining stowaways,³ refugees⁴ or persons saved at sea which expenditure may continue after the Ship reaches port. Cover is available for the Member’s liability for such costs and expenses and includes costs and expenses incurred in relation to guarding, custody, immigration, deportation and repatriation.

¹ The International Convention Relating to Stowaways, Brussels 1957. Although this Convention is not in force it is generally considered to be persuasive in these circumstances.
⁴ While cover is available for reasonable claims in respect of refugees, such expenses may be recoverable from the United Nations High Commissioner for Refugees (UNHCR). Members are advised to consult the Association in this regard.
(C) ...directly and reasonably incurred in consequence of... (Rule 32)
Cover is only available for costs and expenses that are considered by the Association to be “directly and reasonably incurred in consequence of having stowaways, refugees or persons saved at sea on board”. Costs and expenses may include, e.g. subsistence, medication, as well as costs incurred to disembark stowaways. Whether the costs and expenses are “reasonably incurred”, will be assessed on the merits of each case. For example, cover is available for the cost and expenses of diverting the Ship to an unscheduled port in order to land stowaways if the Member can demonstrate that it was reasonable to do so and that it was in the best interests of the Association. Assuming that the above test is met, there is in principle no limitation on the types of costs and expenses for which cover is available under Rule 32, but in most cases these will be restricted to the types listed in Rule 31, i.e. extra costs of fuel, insurance, wages, stores, provisions and port charges – over and above what would have been incurred but for the diversion to disembark the stowaway(s). However, it is important to note the proviso in Rule 32 that the cover does not include consequential loss of profit or depreciation.

(D) ...only to the extent that the Member is legally liable for the costs and expenses or they are incurred with the approval of the Association...
(Rule 32)
The immigration authorities of many countries maintain a watch over a vessel which has stowaways or refugees on board or, alternatively, place such persons in custody ashore for the duration of the vessel’s call at that port. In one case, the ship was not permitted by the coastal state to land refugees saved at sea and the state used military forces to enforce this. Whatever the circumstances, cover is available under Rule 32 either when the Member has a legal liability for the costs or expenses or when the expenditure has been incurred with the approval of the Association.

Cover is also available for the Member’s liability to pay costs and expenses incurred whilst the immigration authorities consider asylum or other immigration applications by the alleged refugees, including the cost of repatriation, if the application for asylum or other immigration is denied and the cost of accompanying guards if considered necessary.
Rule 33 Life salvage
The Association shall cover sums legally due to third parties by reason of the fact that they have saved or attempted to save the life of any person on or from the Ship, but only if, and to the extent that, such payments are not recoverable under the Hull Policies or from cargo owners or underwriters.

Guidance

(A) Life salvage (Rule 33)
The laws of most countries provide that if a person voluntarily saves property from danger at sea, he is legally entitled to claim a financial reward from the owners of that property which is commensurate to his success, i.e. salvage. Salvage remuneration is not usually payable for the saving of life at sea in circumstances where no property is salved, but if life is saved together with property this will usually serve to increase the remuneration that is payable by the owners of the properties salved. However, even when life is saved together with property the persons rescued would rarely – if ever – be held personally liable to make payment to their rescuer,1 who must therefore, enforce his right to remuneration against the owners and underwriters of any property that has been salved, e.g. the Ship and cargo. Nevertheless, different statutory rights of compensation may exist in some countries.2

(B) The Association shall cover…but only to the extent that such payments are not recoverable under the Hull Policies or from cargo owners or their insurers. (Rule 32)
Cover is available for the Member’s liabilities to third parties who have saved or attempted to save the life of any person on or from the Ship, provided that payments made in this regard are not recoverable from either the hull underwriters or from the cargo owners or their insurers. Some countries, such as England, draw a distinction between, on the one hand, life salvage at common law in which case the whole of the salvage award is payable by the hull insurers or the insurers of cargo or any other property saved even though the value of the award made against such property has been increased by the saving of life, and, on the other hand, statutory life salvage in which case the statutory life salvage element is recoverable from P&I insurers.

So long as the Member is legally liable to pay the third party, cover is available regardless of the identity or function of the person who has been saved, e.g. they may be Crew members and their relatives, passengers, pilots and even stowaways, and regardless of whether the person saved was on board at the time of rescue.

2 For example, under English law, if the value of the property saved is not sufficient as remuneration for the saving of life from a UK flagged ship, or a ship in UK waters regardless of its flag, the UK government will pay such remuneration.
Therefore, cover is available in the case of persons who have abandoned the Ship and are rescued from lifeboats or rafts and even if persons are rescued a considerable period of time after the incident which necessitates the rescue.

Cover is not available if the payments which are legally due from the Member to third parties are recoverable under the Hull Policies or from cargo owners or their underwriters. However, even if payments are not in fact recovered from such other interests they are deemed to be recoverable for the purposes of Rule 33 if they are recoverable in principle but cannot be recovered in fact due to the inability of the Member to enforce payment, e.g. due to the bankruptcy of such interests. Similarly, payments are deemed to be recoverable under the Hull Policies for the purposes of Rule 33 if they would have been recoverable if the Ship had been fully insured on standard terms.\(^3\)

\(^3\) See the Guidance to Rule 71.
Rule 34 Cargo liability

1 The Association shall cover the following liabilities when and to the extent that they relate to cargo intended to be or being or having been carried on the Ship:

a liability for loss, shortage, damage or other responsibility arising out of any breach by the Member, or by any person for whose acts, neglect or default he may be legally liable, of his obligation properly to load, handle, stow, carry, keep, care for, discharge or deliver the cargo or out of unseaworthiness or unfitness of the Ship;

b liability for loss, shortage, damage or other responsibility in respect of cargo carried by a means of transport other than the Ship, when the liability arises under a through or transhipment Bill of Lading, or other form of contract, providing for carriage partly to be performed by the Ship, provided that unless and to the extent that the Association in its discretion shall otherwise decide, the cover under this Rule 34.1 does not include:

i liabilities, costs and expenses arising out of delivery of cargo under a negotiable Bill of Lading without production of that Bill of Lading by the person to whom delivery is made except where cargo has been carried on the Ship 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 the Member may be liable under the terms of a negotiable Bill of Lading issued by or on behalf of a party other than the Member providing for carriage in part upon the Ship and in part by another mode of transport;

ii liabilities, costs and expenses arising out of 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 member is required by any other law to which the Member is subject to deliver, or relinquish custody or control of, the cargo, without production of such document;

iii liabilities, costs and expenses which would not have been incurred by the Member if the cargo had been carried on terms no less favourable to the Member than those laid down under the Hague or Hague-Visby Rules, save where the contract of carriage is on terms less favourable to the Member solely because of the relevant terms of carriage being of mandatory application;

iv liabilities, costs and expenses arising out of the discharge of cargo at a port or place other than that stipulated in the contract of carriage;

v liabilities, costs and expenses arising out of the failure to arrive or late arrival of the Ship at port of loading or the failure to load any particular cargo or cargoes in the Ship, other than liabilities, costs and expenses arising under a Bill of Lading already issued;
vi liability arising out of carriage under an ad valorem Bill of Lading where a value of more than USD 2,500 (or the equivalent in any other currency) per unit, piece or package is declared and in the case of Bills of Lading subject to the Hague or Hague-Visby Rules where a value of more than USD 2,500 (or the equivalent in any other currency) per unit, piece or package is also inserted in the Bill of Lading, to the extent, in any such case, that such liabilities, costs and expenses exceed in the aggregate USD 2,500 (or the equivalent in any other currency) in respect of any unit, piece or package;

vii liabilities, costs and expenses arising out of the carriage of specie, bullion, precious or rare metals or stones, plate or other objects of a rare or precious nature, bank notes or other forms of currency, bonds or other negotiable instruments, whether the value is declared or not, unless the Association has been notified prior to any such carriage, and any directions made by the Association have been complied with;

viii liability for shortage arising from failure to discharge all cargo on board unless the Member can show that all reasonable and applicable discharge methods were attempted;

ix liabilities, costs and expenses arising out of 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;

x liabilities, costs and expenses arising out of the issue of a Bill of Lading, waybill or other document containing or evidencing the contract of carriage, known by the Member or the Master to contain an incorrect description of the cargo or its quantity or its condition;

xi liabilities, costs and expenses arising out of a deviation or departure from the contractually agreed voyage or adventure which deprives the Member of the right to rely on defences or rights of limitation which would otherwise have been available to him.

2 The Association shall cover liability pursuant to compulsorily applicable rules of law for loss caused by delay in the carriage of cargo, provided that the Association shall in no circumstances cover liabilities, costs or expenses arising out of the failure to arrive or late arrival of the Ship at the port or place of loading.

Guidance
For further commentary see Chapters 3 and 4 of the Gard Guidance on Maritime Claims and Insurance.

(A) Preliminary explanatory remarks
Ships exist primarily because of their ability to transport huge volumes of internationally traded goods over long distances in a safe and cost-effective manner. Apart from cruise and passenger ships, tugs and certain specialist craft, virtually
all merchant ships are used to carry goods by sea. In this context the term ‘goods’ includes all manner of products provided that they are the property of a third party to whom the carrier owes a duty of care in respect of them. Therefore, for example, ‘goods’ do not include containers or equipment owned by, or leased to, the carrier.

The carrier’s principal obligations are: to present a seaworthy ship; to receive the cargo on board; to issue correct documentation to the shipper for the cargo received; to carry the cargo in a timely fashion to the agreed destinations, and to deliver it undamaged in the correct quantity to the correct receivers. This is what happens most of the time, but not in all instances, which is why liability in respect of cargo is perhaps the most frequently incurred liability for shipowners and charterers, and why the cover for such liability is a cornerstone of P&I insurance.

A fundamental characteristic of the carriage of goods by sea is that the carrier’s liability is, in most instances determined by mandatory rules of law that implement international conventions such as the Hague¹ and Hague-Visby² Rules and in some instances the Hamburg³ Rules. These conventions have promoted the international uniformity of law and thereby enhanced the efficacy of international seaborne trade.⁴ A fourth international convention, the Rotterdam Rules⁵ is currently awaiting acceptance by the international community but has not at the time that this publication goes to print gained a sufficient number of ratifications to come into force and does not, therefore, have binding international force.

There are several points of general application to be borne in mind when considering the Association’s cover for cargo liabilities:

i  Cover is available for liabilities, losses, costs and expenses resulting from the loss of, shortage of or damage to cargo, as well as for ‘other responsibility’ arising as a result of the carriage of cargo on the Ship, which includes financial loss or damage suffered by a third party.

ii  Cover is available for the Member’s liability arising as a result of any breach of the obligations that he has in respect of cargo under the contract of carriage, or in tort, or in bailment, or by virtue of the fact that the carrier is a ‘common carrier’.

¹ The full title of the convention is the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924.
² The full title of the convention is the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924 as amended by the Protocol signed at Brussels on 23 February 1968.
⁴ The United Nations Commission on International Trade Law (UNCITRAL) has been working with the Comité Maritime International (CMI) for some years to create a new convention relating to the carriage of goods by sea, as well as multimodal transport arrangements where part of the carriage is done by sea. The work has now resulted in a new draft convention which is likely to be accepted at a meeting organised by UNCITRAL in July 2008. This new convention will amend many aspects of the Hague, Hague-Visby and Hamburg Rules. For more information, see www.uncitralt.org.
iii Cover is available on the basis that the Member has acted as a prudent and responsible carrier. Cover is not available for liabilities etc., resulting from the imprudent, unreasonable or fraudulent conduct of the Member, or as a result of any similar conduct, which, in the opinion of the Association, would not be the conduct of a responsible Member.6

**Intentional acts of the Member which may increase the risk of cargo damage/loss**

Shippers and charterers will often instruct carriers to load, handle, stow, carry, keep, care for or discharge the cargo in a particular manner, particularly in the case of sensitive cargoes, which, on the face of it, may increase the risk of cargo damage/loss. For example, cargo interests may provide the Ship with carriage temperatures for perishable cargoes which are in fact wrong. Should the carriers rely on this information and maintain the temperature in accordance with the instructions given to them, the carriers ought to be able to defend a claim for cargo damage by reliance on “the act/omission of the shipper or owner of the goods” exception in Article IV Rule 2 (i) of the Hague/Hague-Visby Rules. However, if this defence fails and the carriers make a claim for reimbursement under the Rules, the master must be able to convince the Association that the reliance that he placed on the information given by the cargo interests was reasonable in all the circumstances.

Carriers are often requested to undertake numerous acts in relation to the cargo which could increase the risk of cargo damage/loss. The following are examples:

- handling ‘dry’ cargo during precipitation;
- commingling or blending cargo, or adding dyes or additives to the cargo for cargo quality purposes, typically in relation to liquid bulk cargoes;
- stowing different grades of liquid bulk cargo otherwise than in accordance with the vessel’s natural segregation, or stowing different grades of dry bulk cargo in the same hold separated only by temporary separation material;
- in-transit fumigation, typically in the case of bulk grain cargoes;
- a particular ‘risky’ stowage method, e.g. California Block Stowage for steel.

It could be said that these operations put the Member at risk of contravening either Rule 72 which excludes liabilities costs and expenses for “acts intentionally done with knowledge that the performance will probably result in injury”, or Rule 74 which excludes liability where “the Ship...is employed in or on an...unsafe or unduly hazardous trade or voyage”. Furthermore, Rule 2 makes it clear that the Member is covered only in respect of liabilities, losses, costs and expenses which arise in direct connection with the operation of the Ship. Therefore, blending cargoes or adding dyes to cargo on board may well not be operations that are considered to be directly connected with the operation of the Ship as a cargo.
carrying vessel, whereas the fumigation of a cargo in transit is considered to comply with the provisions of Rule 2 since it is done for cargo preservation purposes during the carriage.

In many such cases, the attitude that the Association will take in relation to cover will be influenced by the degree of probability of cargo loss/damage that may result from the intentional act. For example, there is probably a low risk of damage if lumped iron ore which already contains a significant moisture content is loaded during rain, whereas the probability of such damage in the case of finished steel products is more real and substantial. Therefore, the Association will normally reserve its position in relation to cover when notified by Members that they have been requested to undertake deliberate or intentional acts, especially in the case of those acts which appear unreasonable or not in direct connection with the operation of the ship. Should the Member then decide to comply with the request, he does so in the knowledge that he may not be covered by the Association for any liability that arises as a result. In other words, the decision to comply with the request is a commercial decision for the Member. The Association may provide guidance on risk control and mitigation but that is done purely as a service to the Member and does not affect cover. Nevertheless, if the Association has reserved cover, then the extent to which the Member has followed such guidance will often be taken into account when the Association finally decides whether or not to confirm cover. The Association will also usually recommend that the Member should obtain an appropriate Letter of Indemnity (LOI) from the requesting party (often the charterer).

iv The most common form of contract for the carriage of cargo is the bill of lading, but cargo may also be carried under other transportation contracts, such as charterparties, booking notes, contracts of affreightment and waybills. Cover is available for cargo liability arising under all such contracts provided that their terms have been accepted by the Association.

v The Association, in common with other P&I clubs, makes cover available only for cargo liabilities arising under laws which are widely adopted internationally for the carriage of cargo. Therefore, cover for cargo liability is available only to the extent that the Member is or would have been liable under the provisions of the Hague or Hague-Visby Rules, or the Hamburg Rules where incorporated into the contract of carriage solely by operation of law. Additional liabilities assumed voluntarily by the Member under the contract of carriage are not covered unless and to the extent the Association exercises its discretion to cover such liabilities. However, it should be noted that a Member can obtain cover for some risks that are not covered under the Rules for P&I under the Comprehensive Carrier’s Liability

7 See also the commentary in (E) below.
8 For further guidance on LOIs see Chapter 20 of the Gard Guidance on Maritime Claims and Insurance.
9 Most BIMCO and other industry standard forms/clauses would normally be acceptable provided that they are not materially amended.
Cover (CCC) that the Association can provide at an additional fixed premium. For example, the CCC cover protects the Member should carriage be performed on terms more onerous than the Hague-Visby Rules standard.

Cover is available for liabilities incurred as a result of a failure to perform the contract of carriage in a proper manner, but not for liabilities incurred as result of a total failure to perform. This is evident from the wording in 1a, i.e. liability “arising out of any breach…of his obligation properly to load, handle, stow” etc., or “out of unseaworthiness or unfitness of the ship”. Therefore, cover is available only for the manner of performance and not for a failure to perform at all.

(B) …when and to the extent that they relate to cargo intended to be or being or having been carried on the Ship… (Rule 34.1)

Period of responsibility
The Member may incur liability in respect of cargo, not only whilst the cargo is being carried on board, but also both before and after the cargo is on board the Ship, depending on the contractual obligations which the Member has assumed in respect of the cargo. This may depend, inter alia, on the type of cargo and trade. For example, in the liner container trade, carriers often assume more obligations than would normally be the case in the context of pure ocean carriage, e.g. in the case of the temporary storage of the cargo at a container terminal in the port pending shipment or pending delivery to the receiver after discharge. However, in the case of dry bulk cargo shipments such as grain, soybeans or iron ore, the carrier is unlikely to undertake more than the pure loading, carriage and discharging of the cargo, and may sometimes not even undertake the loading and/or discharging operations.

The Hague and Hague-Visby Rules apply compulsorily in most cases from the time that the cargo is attached to the ship’s equipment at the port of loading until it is released from the ship’s equipment at the port of discharge, i.e. tackle-to-tackle, and provide that the carrier must “properly and carefully…care for… the goods” throughout that period. However, the laws of most countries also provide that the carrier must properly deliver the cargo to the person entitled to receive it even if this cannot take place until after discharge, and that the carrier must take proper care of the cargo until it is delivered. When the Hague and Hague-Visby Rules apply, the Rules provide that the carrier cannot give himself more protection than that to which he is entitled under the Rules during the ‘tackle-to-tackle’ period. However, if the carrier has agreed to keep the cargo in his custody before and/or after the ‘tackle-to-tackle’ period at the port of loading or discharge, the Rules do not prevent the carrier from minimising his liability during such ‘pre-tackle’ and ‘post-tackle’ periods. Therefore, most standard form bills of lading for port to port carriage usually include an express term that the carrier is not liable for loss of or damage to cargo before loading or after discharge. By way of contrast, the Hamburg Rules apply

10 Full details can be obtained at http://www.gard.no/ikbViewer/page/covering-risks.
compulsorily throughout the period during which the cargo is in the carrier’s custody whether before, during or after carriage on the ship, and the carrier is obliged to comply with his obligations under the Hamburg Rules throughout such period.

**Scope of cover**

Notwithstanding the fact that the Hague or Hague-Visby Rules apply compulsorily only to the ‘tackle to tackle’ stage, the Member may be legally liable for loss, shortage or damage, or may incur other responsibility in respect of the cargo, even when it has not yet been loaded on board the Ship, and/or even after it has been discharged from the Ship, and cover is available for such liability.

In the case of cargo which has not yet been loaded, cover will be available only if the cargo is intended to be carried on a Ship, i.e. pursuant to a legally binding commitment such as a booking note or a voyage charterparty, to load that cargo on a named Ship which is entered in the Association for P&I risks. Therefore, cover is not available for cargo which is lost or damaged at a time when it has not yet been allocated for shipment on a specific Ship albeit that the intention was to carry the cargo in due course on one of the Ships in the Member’s fleet. This is the case even if all the Ships in the fleet have been entered by the Member in the Association.

Cover is available for liabilities that arise as a result of events which occur whilst the cargo is awaiting shipment in port, or whilst awaiting delivery in port after discharge from the Ship, as a necessary and integral part of the contract of carriage. Such liabilities arise most commonly in the case of container bills of lading under which the carrier assumes responsibility for the cargo from the time that it arrives at the container receiving yard at the port of loading to the time that it is collected by the cargo interests from the container receiving yard at the port of discharge. However, pursuant to the overriding provisions of Rule 2.4, cover is available only to the extent that the liability etc., arises in direct connection with the operation of the Ship and not when the carrier is acting in some other capacity.11

**(C) ...liability for loss, shortage, damage or other responsibility... (Rule 34.1.a)**

**Legal liability**

Cover is available for the Member’s legal liability for loss, shortage, damage etc. A legal liability is a legal obligation under the applicable law to compensate a third party for financial losses, whether adjudged by a court, or awarded by an arbitration tribunal or agreed by the parties with the approval of the Association.12 In most cases, the legal liability will arise by virtue of the terms of a contract of carriage and/

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11 See comments under (G) below, as well as the Guidance to Rule 57.c regarding the cover available for liabilities arising under a through or transhipment Bill of Lading, or other form of contract.
12 See Rule 82.
or by mandatory rules of law. However, in certain circumstances, liability may arise in tort\textsuperscript{13} or as a result of the fact that the carrier is considered to be a ‘bailee’\textsuperscript{14} of the goods or a ‘common carrier’.\textsuperscript{15}

\textbf{Loss, shortage, damage, other responsibility}

\textbf{Loss}

‘Loss’ means either a physical loss, i.e. the total destruction of the cargo as a result of incidents such as fire or sinking in deep waters, or damage which is beyond the possibility of economic repair or restoration or a pure financial loss, e.g. a reduction of on-sale value of the cargo due to changed market conditions.

\textbf{Shortage}

‘Shortage’ means the delivery to the receiver of a quantity or weight of cargo or a number of packages/items which is less than that which is recorded in the bill of lading or other transport document. This may be because a certain amount of cargo has been lost and/or pilfered during the carriage but claims for shortage can also be made even when there is no ‘loss’ in the sense discussed in the previous paragraph. This can be due either (a) to the fact that the Ship has received less cargo than that which is recorded in the bills of lading or other transport documents, i.e. a short shipment, due, for example, to inaccurate calibration of port or terminal scales in the loading port causing the Ship to appear to have ‘lost’ cargo when, in reality, the cargo so ‘lost’ was never shipped, or (b) to the inherent nature of the cargo, e.g. weight or other loss in transit caused by the evaporation of inherent moisture in a cargo of grain, or the inability to pump all of an oil cargo ashore due to its inherent characteristics. In the case of (a), cover may be excluded if the master or Member knows that the quantity stated in the transport document is incorrect (see S below). However, in the case of (b), the carrier will usually have a defence to such liability under Article IV Rule 2 (m) of the Hague and Hague-Visby Rules and may not, therefore, have the need to make a claim on the Association.

\textsuperscript{13} For more detailed commentary see Chapter 3.3 of the \textit{Gard Guidance on Maritime Claims and Insurance}.

\textsuperscript{14} A ‘bailee’ is a person who is in possession of the property of someone else (the bailor) and has a duty to look after it. Such duty can arise even if there is no contractual relationship between the bailor and the bailee. For example, if cargo is lost or damaged whilst in the care or custody of the carrier prior to loading or after discharge, the carrier may held to be liable for the loss or damage in his capacity as a ‘bailee’ of the cargo. A carrier may also be considered a ‘bailee’ when receiving cargo which is being carried pursuant to a contract which has been issued by another carrier, as often occurs on transhipment or where a non-vessel operating common carrier (NVOCC) is involved.

\textsuperscript{15} A Member’s liability to cargo may also arise where the contract has been rescinded following the carrier’s unjustified deviation. In such circumstances, the carrier may, under the laws of some countries, be considered to be a ‘common carrier’ and thereby held to be strictly liable for loss of or damage to the cargo whilst in his care unless caused by the Act of God or public enemies or by inherent vice.
Damage
‘Damage’ means any kind of physical or chemical change\(^{16}\) to the cargo as described in the Bill of Lading or other transport document that has reduced its economic value and has therefore caused a financial loss to the receiver. In most cases, there will be no doubt that the cargo has suffered actual damage and that this has occurred whilst the cargo was in the carrier’s custody, but the carrier is sometimes held to be liable even when the cargo has not been damaged whilst in his custody if the receiver complains that the cargo received by him differs from that described in the contract or other cargo sale documentation. Typically this can occur with liquid cargoes that are shipped out of specification due to the fault of the shipper. One well-known case involved the shipment of kerosene which was found after discharge from the ship to have a yellowish colour despite the fact that its specification should be ‘water white’. It was further ascertained that the discolouration was caused by fuel oil but it was unclear whether the discoloration occurred during the refining process (i.e. a dispute arising under the cargo sale contract) or by contamination on the vessel. Alternatively, the carrier may also be unjustly held liable for damage that is in fact caused during the carriage by the inherent vice of the cargo, particularly sensitive cargoes such as bananas. In either case, the carrier should in principle normally be entitled to a defence under the provisions of Article IV Rule 2 (i), (m) or (q) of the Hague and Hague-Visby Rules and Article 5 of the Hamburg Rules; however, since liability ultimately depends in most cases on the law of the place where the claim is brought, this cannot be guaranteed.

Other responsibility
Cover is also available under Rule 34.1 for the Member’s ‘other responsibility’ in respect of the carriage of cargo, such as a legal liability arising under the applicable law to compensate a third party claimant for loss of profit and other consequential loss. For example, damage may be caused during the course of carriage to a heavy transformer unit which is part of a hydro power plant. The Member may be liable to compensate the receiver not only for the cost of repairing the transformer and for the cost of inspections, transportation and tests, but also for consequential losses sustained as a result of the delayed start-up of the plant. The term ‘other responsibility’ would also include the Member’s liability to indemnify a contractual party, e.g. a charterer, in respect of liability incurred by that charterer to a third party for loss or damage arising from the Member’s breach. This includes claims for indemnity under the Inter-Club New York Produce Exchange (NYPE) Agreement which provides a relatively simple mechanism whereby liability for cargo claims

\(^{16}\) In some instances damage is alleged despite the fact that there has been no such change, but rather as a result of the fact that the cargo or its packaging is tainted, or has a foul smell or has some other feature that creates suspicion either that damage has occurred, or that it will be more difficult for the receiver to make use of the cargo in the intended way.
arising under the New York Produce Exchange Form or Asbatime charterparties and/or contracts of carriage authorised under such charterparties, can be swiftly and fairly apportioned between owners and charterers.\textsuperscript{17}

The phrase ‘other responsibility’ is intended to be construed broadly since a Member may encounter a multitude of unforeseen cargo claims as a result of his failure to perform his cargo carrying responsibilities. In the event of a casualty, numerous claims can arise cover for which will need to be considered under ‘other responsibility’ because the claims may not concern any damage to the cargo. For example, a salvor who has been engaged to save the ship and cargo under a Lloyd’s Open Form (LOF) contract will typically wish to obtain separate security for his salvage remuneration from both ship and cargo interests, with each interest ultimately paying their share of that remuneration, proportional to the value of property saved. Cargo interests may then seek to recover their share from the shipowner, e.g. on grounds that the casualty was caused by the unseaworthiness of the Ship.

A casualty may also give rise to the need to discharge, tranship and forward the cargo on a substitute vessel. If this is arranged and paid for by charterers or cargo interests, and the cost exceeds the costs that would necessarily have been incurred during the period of repairs to the ship at the place of refuge, the costs will usually be excluded from general average.\textsuperscript{18} The cargo interests/charterer may then bring a claim against the vessel owner for such costs on the grounds that the casualty was caused by unseaworthiness. The Association would normally cover the Member’s legal liability in this regard despite the failure of the Member to perform the carriage since the additional cost does not form part of, and is separate from, the normal operational cost of the original transport obligation (which is not covered).

A further example of the broad construction that is normally afforded to the phrase ‘other responsibility’ is that of the case in which cover was afforded for an owner Member against whom a claim had been brought by voyage charterers for breach of the voyage instructions to delay berthing that they were entitled to give pursuant to a standard charterparty term. Before such instructions were given, the master had accepted an invitation from the terminal to berth and commence loading operations. As a result, the loading was completed on 31 July and a bill of lading for the cargo was issued (as it should be) bearing that date. However, the early completion of loading and concurrent issuance of a bill of lading dated 31 July entitled the buyer of the cargo to pay the lower July purchase price rather than

\textsuperscript{17} For more detailed commentary see Chapter 3.4 of the Gard Guidance on Maritime Claims and Insurance.

\textsuperscript{18} For more detailed commentary see Chapter 10 of the Gard Guidance on Maritime Claims and Insurance. The situation discussed in the Guidance to Rule 34 must be distinguished from that discussed in the Guidance to Rule 41. Rule 34 concentrates on claims that are brought against the Ship whereas Rule 41 concentrates on claims that are brought by the Ship.
the higher purchase price that the shipper/seller wished to charge if the cargo had been loaded in accordance with their instructions in August. Consequently, the seller/shipper claimed the difference in the price from the voyage charterers on the basis that they were in breach of their contractual obligations to the shipper and the voyage charterers, in turn, claimed compensation from the vessel's owners. The association was able to provide cover for their Member's legal liability to the charterers since this had arisen in relation to their failure to properly load.

(D) ...arising out of any breach by the Member, or by any person for whose acts, neglect or default he may be legally liable... (Rule 34.1.a)

Cover is available for the Member's legal liability to cargo interests, whether arising as a result of his own breach of duty, or as a result of the acts, neglect or default of any other person for whose acts etc., the Member is legally liable under the applicable law. Such 'other persons' are, first and foremost, the servants of the Member, e.g. the master and Crew of the Ship, but the term also includes ship managers,\(^{19}\) agents and independent contractors who carry out functions in relation to the Ship and/or cargo, e.g. pilots, stevedores, mooring masters, harbour tugs or supercargoes. If the Member has assumed responsibility for cargo prior to loading or after discharge, the 'other persons' for whose acts etc., the Member may be liable, may also include agents and independent contractors who carry out functions in relation to the cargo ashore, e.g. terminal haulage workers, warehouse employees and even customs officers. However, Members are encouraged to include clauses that afford protection to third parties such as Himalaya Clause and Circular Indemnity Clauses in their contracts of carriage whenever possible.\(^{20}\) In some instances cargo interests may bring claims directly against such servants, agents or independent contractors rather than against the Member. For example, in some countries, ships' agents are jointly and severally liable with their principals under local law for liabilities which would normally only attach to the principal. Furthermore, agents are sometimes enjoined in local legal proceedings as a means of establishing jurisdiction for the claim in the claimant's own country. Subject to the terms of agency contract and the facts of each case, the Association will normally appoint a lawyer to jointly defend the agent and the principal (i.e. the Member). However, separate representation is usually arranged where the agent himself has been negligent (e.g. where the agent has issued a bill of lading on behalf of its principal containing an incorrect and unauthorised description of the goods (see also S)), or has acted outside his authority, since agents usually have their own insurance which may respond in those instances, or in the event that the principal is unable to meet its debts. Alternatively, should the Member be held liable for the agent's negligence, the Member may be obliged to claim an indemnity from the agent.\(^{21}\)

\(^{19}\) See the article entitled “Owners beware! – Tort claims against ship managers in the US” in Gard News 168 at: http://www.gard.no/ikbViewer/go/target/52674/.

\(^{20}\) For further commentary see Gard Circulars 11/2010 and 9,2014 and Chapter 3.3.1 of the Gard Guidance on Maritime Claims and Insurance.

\(^{21}\) See the Guidance to Rule 55.
Cover is available for any liability that the Member has to indemnify the servant, agent or independent contractor in respect of liability incurred by them directly to the cargo interests, provided that the terms of the indemnity have been previously approved by the Association. However, the Member is expected to act as a prudent uninsured and to include wherever possible in contracts of carriage standard terms which are intended to protect servants, agents, independent contractors and other third parties against the danger of direct liability to cargo claimants such as Himalaya and Circular Indemnity Clauses.22

(E) ...his obligation properly to load, handle, stow, carry, keep, care for, discharge or deliver the cargo... (Rule 34.1.a)

The Hague and Hague-Visby Rules require the carrier to properly and carefully load, stow, carry, keep, care for and discharge the cargo.23 ‘Properly’ and ‘carefully’ are relative terms. In most cases the carrier will be expected to do what a carrier having the knowledge and expertise of a reasonably competent carrier and exercising reasonable care at the time of carriage would have done in similar circumstances, e.g. would such a reasonably prudent carrier have stowed the cargo in a different manner, or would he have applied additional lashing equipment, or would he have ensured better segregation of the cargoes in order to eliminate the risk of commingling? The Association will not impose its own view of the Member’s conduct. If it is found that the Member is in breach of his obligations in this regard and is adjudged to be legally liable, cover is available subject to any other relevant restrictions on cover.

However, liabilities incurred in relation to these activities must be read subject to the provisions of Rule 2, i.e. they must be incurred in direct connection with operation of the ship. Therefore, if the Member undertakes additional obligations that are not in direct connection with the operation of the ship, such as agreeing to blend on board two different cargo products (typically liquid cargoes) in order to change cargo specifications and incurs liability because that should not have been done or was not done properly, cover will not respond.24

Although the Hague and Hague-Visby Rules25 do not expressly impose any responsibility on the carrier in relation to the delivery, as opposed to the mere discharge, of the cargo, the carrier is, nevertheless, normally also obliged under the contract of carriage to properly ‘deliver’ the cargo, i.e. he must ensure that the cargo receiver or his authorised representative obtains physical and legal custody of it.

22 For more detailed commentary see Chapter 3.3.1 of the Gard Guidance on Maritime Claims and Insurance.
23 For more detailed commentary see Chapter 3.2.9.2.1 of the Gard Guidance on Maritime Claims and Insurance.
24 See also the commentary in (A) above.
25 The Hamburg Rules does impose such responsibility on the carrier since Article 4.2 provides that “...the carrier is deemed to be in charge of the goods...(b) until the time that he has delivered the goods...”
However, a distinction is drawn between delivery of cargo in an incorrect manner to the person that is entitled to receive the cargo (e.g. delivering the wrong quantity of cargo at different ports), and delivery to a party that is not entitled to take delivery of it. In the first case, cover is normally available for liability arising as a result of the failure of the Member to properly deliver the cargo in the correct manner whilst, in the second case, cover is not available pursuant to the provisions of Rule 34.1.i. (See (I) below)

(F) …out of unseaworthiness or unfitness of the Ship… (Rule 34.1a)

The carrier is obliged under the Hague and Hague-Visby Rules to exercise due diligence to make the ship seaworthy before and at the commencement of the voyage.26 A ship may be unseaworthy not only because there is a physical defect to its hull or machinery, but also because it is improperly manned, or because the cargo is improperly stowed, or because the ship does not have the necessary documents and clearances to enable it to perform the required voyage. If the carrier is in breach of this obligation, he cannot under English law rely on the defences that would otherwise be available to him.

The term ‘unfitness’ has generally been used to refer to a particular aspect of unseaworthiness and relates to the condition or suitability of the ship’s cargo holds, cargo handling gear or other equipment or facilities that are required to receive and carry the cargo without damage, viewed in the light of the carrier’s transportation obligations. This requirement is often referred to as the ship’s cargoworthiness.

For example, a ship which has defective cranes would not be considered fit for the carriage of a bulk cargo to a port that has no suitable cranes, but, unless the contract obliges the carrier to give use of the cranes, the ship would probably be considered fit if cranes are available in the discharge port and can be used effectively to unload the cargo. Similarly, a ship that is required to carry sugar in bulk in holds which have previously contained coal and which have not been adequately cleaned in the meantime would not be considered to be fit for the carriage of the sugar. Another example would be where a reefer ship is unable to maintain the temperatures that are required for the safe carriage of the cargo.

The Association will not impose its own view of whether the Ship is unseaworthy or unfit. If it is found that the Member is in breach of his obligation in this regard and is adjudged to be legally liable, cover is available under Rule 34.1.a subject to any other relevant restrictions on cover.

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26 For further commentary see Chapter 3.2.9.2.1 of the Gard Guidance on Maritime Claims and Insurance.
(G) ...liability...in respect of cargo carried by a means of transport other than the Ship, when the liability arises under a through or transhipment Bill of Lading... (Rule 34.1.b)

Whereas Rule 34.1.a focuses on the Member’s liabilities to cargo arising in connection with the entered Ship, Rule 34.1.b applies when the Member incurs liabilities whilst the cargo is not in the care, custody and control of the Ship. Cover is available for liability arising as a result of the carriage of cargo by ‘a means of transport other than the Ship’ and is not restricted to carriage by other ships, i.e. transhipment. Cover is also available in the case of liabilities arising during the course of multi-modal transport where sea carriage is combined with road and/or rail and/or air carriage.

The Member may be liable under a through or transhipment Bill of Lading, or other form of contract, for loss of or damage to cargo that arises as a result of an incident which occurs when the cargo is not being carried on the Ship. A through Bill of Lading usually provides that the issuer of the Bill of Lading (the contractual carrier) undertakes as principal to deliver, or procure others to deliver, the cargo to the final destination. The contractual carrier is responsible for the performance of the entire carriage even for that part of the overall carriage which is actually performed by another carrier (i.e. the actual carrier for that particular segment of the overall carriage). Therefore, the contractual carrier may be liable for cargo loss or damage that occurs whilst the cargo is in the custody of the actual carrier. Such liability is usually determined under the particular transport convention or national law that would have applied compulsorily to the mode of transport during the course of which the cargo loss or damage occurred if a separate contract had been concluded merely for carriage on that leg.27 However, if the transportation stage at which the cargo loss or damage occurred cannot be determined, liability is usually determined by the general provisions of the through Bill of Lading.28

Under a combined transport Bill of Lading, the issuer of the Bill (the contractual carrier) is responsible as principal for only that part of the carriage, usually the sea leg, which he performs himself. The Hague and the Hague-Visby Rules, and in more limited circumstances, the Hamburg Rules, permit the contractual carrier to exclude liability for loss, damage or delay occurring during a stage of the total transport that he does not perform himself and, in such circumstances, he is deemed to act only as an agent for the cargo interests in relation to that part of the carriage which is performed by others, whether that part carriage is by sea or by other means of transport. The terms of the Bill of Lading normally make it clear which parts of the overall carriage are to be performed by the carrier himself and which parts are

27 For example, if the loss or damage occurred during sea transit, the Hague or Hague-Visby Rules are likely to apply whereas, if the loss or damage occurred during the course of cross-border road transport in Europe, the provisions of the Convention on the Contract for the International Carriage of Goods by Road (CMR) are likely to apply.

28 For further commentary see Chapter 3.2.9.6 of the Gard Guidance on Maritime Claims and Insurance.
being arranged by the carrier for and on behalf of the merchant and without any assumption of responsibility on the part of the contractual carrier for events that occur during that particular carriage leg. The carriers that perform that particular carriage leg may, depending upon the terms of the combined transport Bill of Lading and the applicable law and jurisdiction, rely on the terms and conditions of their own bill of lading or other contract issued for the part carriage that they perform, or alternatively, on the terms of the combined transport Bill of Lading issued by the contractual carrier.

Cover is available for liability which arises as a result of through transport, multi-modal and similar transport arrangements even though such liability may not have arisen in direct connection with the operation of the Ship\(^\text{29}\) since such transport arrangements have become commonplace among a sufficiently large number of P&I club Members for the risk to be considered to be a mutual risk despite the fact that liabilities may be incurred that are not the result of maritime risks. Therefore, cover is available for the Member’s liability in such circumstances, if:

i  the cargo liability arises under a through or transhipment Bill of Lading or other form of contract which provides for part of the carriage to be performed by an entered Ship; and

ii  the transport is performed under a form of contract approved by the Association. Whilst many liner operators use their own bill of lading forms, the terms of the majority of such bills are today fairly standard and acceptable to the Association; nevertheless, contractual terms can vary considerably and approval may depend on the exact terms and the circumstances of a particular trade;\(^\text{30}\) and

iii  the cargo liability must arise as a result of an event which occurs during the course of the performance of the (through or transhipment) contract of carriage.

However, cover is not available for liabilities that arise as a result of services provided by the Member that may be ancillary to, but not an integral part of, his obligations under such transport arrangements. For example, cover is not available in respect of liabilities that arise as a result of the storage of cargo in a warehouse that is not deemed to be a natural and integral part of the overall contract of carriage of the cargo. Members are advised to consult the Association about such services in order to clarify in advance the scope of available P&I cover and to see whether there is any need for additional cover.

\(^{29}\) See the Guidance to Rule 2.4.a.

\(^{30}\) See the Guidance to Rule 57.c. Appendix V of the Pooling Agreement lays down guidelines relating to the extent to which such liability may be pooled between the members of the International Group of P&I Clubs. Further commentary on the factors that are considered relevant for the purposes of approval see the article entitled “Through Transport” in Gard News 140 at: http://www.gard.no/ikbViewer/go/target/52159/
provided that unless and to the extent the Association in its discretion shall otherwise decide, the cover under this Rule 34.1 does not include… (Rule 34.1)

NB. In many of the following instances, the Member may be able to obtain cover for claims that are excluded under Rule 34.1 pursuant to the separate Carrier’s Comprehensive Liability Cover that is provided by the Association on a fixed premium basis. For more details see the Additional Covers section of the Guidance and: http://www.gard.no/ikbViewer/Content/67474/Comprehensive%20carriers%20liability%20cover%202013.pdf

Various liabilities are excluded from cover unless the Association exercises discretion to decide otherwise. The rationale that underpins the need for such exclusions is that the Association is a mutual insurer the Members of which agree to share risks which commonly arise as a result of negligence or similar conduct that can be expected to occur notwithstanding the exercise of due diligence and good seafaring practise. However, it is not considered to be within the spirit or intention of mutual insurance to oblige Members to bear liabilities (often very heavy liabilities) that may be incurred by other Members that conduct their affairs in a more risky fashion, particularly when such conduct is the result of intentional or deliberate acts, the result of which may be to deprive that Member of the defences that would otherwise be available to him to refute claims and, thereby, prejudice the interests of the other Members.

However, in some instances, a Member may find that he has incurred a liability for which cover is excluded but which has been incurred in circumstances which could not have been avoided even though due diligence has been exercised. In such circumstances, the spirit of mutuality may not be considered to be contravened and the Board of Directors of the Association is given discretion to decide whether to reimburse a Member for a liability which is otherwise excluded under the Rules31 and, if so, to decide the level of such reimbursement. The issue will normally be considered initially at a senior level by the managers of the Association before it is referred to the Board. Consequently, the Board of Directors will not be required to consider the exercise of their discretion to allow cover unless and until the managers have concluded that one of the express exclusions is applicable to the Member’s particular claim for compensation.

31 See the Guidance to Rule 2.5.
(I) …delivery of cargo under a negotiable Bill of Lading without production of that Bill of Lading by the person to whom delivery is made… (Rule 34.1 proviso i)

A negotiable Bill of Lading is a document which is made out either ‘to the order of’ a named party or generally ‘to order’. It is the words ‘to order’ which indicate that the Bill of Lading is transferable, usually by endorsement, from one party to another during the course of the voyage. Such a Bill of Lading is issued by the carrier or his agents to a shipper in return for delivery of the cargo to the Ship or into the carrier’s care for subsequent loading onto a ship. Such a Bill of Lading has three main functions:

a. it is a receipt for the goods delivered to the Ship for carriage;

b. it is a document of title to those goods in the sense that only the holder of the original Bill of Lading has a right to claim delivery of the goods at the agreed destination; and

c. it is evidence of the contract of carriage for the goods.

Bills of Lading are normally prepared in sets of three originals which, after signature by the master, the ship’s agent or the charterer’s representative if so authorised, are returned to the shipper or his agent. Copies of the original negotiable Bills marked ‘Non-Negotiable Copies’ are sometimes also produced for the benefit of the master and other interested parties to serve as information of the contents of the Bills. These copies marked ‘Non-negotiable’, which should be distinguished from non-negotiable bills of lading which are discussed below under (J), do not, unlike the original negotiable Bills, have the character of documents of title and, accordingly, do not have to be surrendered to the Ship in order to obtain the delivery of the cargo.

The fact that the original Bill of Lading is a negotiable document of title enables the shipper to transfer the title to the goods to another party by transferring the Bill of Lading to that party against payment. This is often done through the medium of bank letters of credit which ensure that the seller/shipper is paid by the bank after having endorsed and transferred the Bill of Lading to the bank, and that the buyer/receiver will not become a holder of the Bill of Lading until he has paid his bank or provided the bank with acceptable security. In similar fashion, the buyer may sell on or assign the cargo to a third party and transfer the Bill of Lading to that third party by endorsement. Some cargoes, in particular those in the oil trade, may be sold in this way several times during a voyage.

Since the Bill of Lading is a transferable document of title, the carrier must deliver the cargo only to the party who is (a) either the consignee named in the Bill of Lading or the endorsee of the Bill pursuant to the endorsements recorded on the

32 For further information and advice about issues pertaining to Bills of Lading, please see Gard Guidance on Bills of Lading, which can be found on www.gard.no.
back of the Bill, and who is (b) able to present the relevant original Bill of Lading to him, since possession of the Bill of Lading in such circumstances is implicit proof that the party demanding delivery is the party (and the only party) entitled to take delivery of the cargo. This is so even if the party who is seeking delivery, but who cannot present the original Bill of Lading, does present evidence of his identity which corresponds with the name of the ‘consignee’ recorded on the Bill of Lading that has been issued. The reason for this is that Bills of Lading issued ‘to the order of’ named parties can be transferred by those parties to other parties. Therefore, to ensure that this has not occurred, the carrier should also require surrender of the original negotiable document of title, i.e. the Bill of Lading. It follows that there are considerable risks involved in the delivery of cargo without production of the original Bill(s) of Lading to the person requesting such delivery. In such circumstances, the carrier has no proof that that person is entitled to receive the cargo.

This rule can sometimes place the shipowner in a difficult situation in circumstances which are not within his control. For example, problems can often arise in countries where the local law or local circumstances require the shipowner to deliver the cargo into the custody of a shore-based licensed customs warehouseman or similar entity who is then authorised to deliver the cargo to the person who produces the original negotiable Bills of Lading to them. It should be clearly understood that if the warehouseman were to release the cargo without obtaining the surrender of the original Bills to someone who was not in possession of the original Bills, the shipowner may be liable for a misdelivery of the cargo since the warehouseman will have been acting as the agent of the shipowner in so doing.

In one case, the master was persuaded to deliver the cargo against an expertly produced counterfeit Bill of Lading which could not have been identified as such notwithstanding all reasonable attempts to do so. Nevertheless, the shipowner was found liable to the party that held the (true) original Bills of Lading since the English court decided that it had no choice in such circumstances but to choose between two innocent parties who had both been defrauded (i.e. the shipowner and the holder of the original Bills) and must implement the fundamental rule that the shipowner is liable if delivery has been given without surrender of the original negotiable Bills of Lading.

It is because of cases such as these that the Rules give the Board of Directors the discretion to confirm cover in appropriate circumstances.

There may be various reasons why the original Bill of Lading cannot usually be produced. The Bill of Lading can often be ‘held up’ in the banking system or, due to the fact that the sale of the cargo has fallen through, the shipper may have retained the original Bills of Lading or negotiated them to a substitute buyer. Finally, there is also the risk that the request to deliver the cargo without surrender of the original Bills is being made deliberately in order to defraud the rightful cargo receiver.
However, whatever the reason for the unavailability of the Bill(s), a carrier who delivers cargo without requiring the surrender to him of the original Bill(s) of Lading does so at considerable risk.

For historical reasons Bills of Lading are often issued in sets of (usually) three, i.e. there are three original negotiable copies of each Bill. In such circumstances, each original negotiable copy of the Bills is itself a document of title giving rise to the possibility that each of the original copies could be negotiated to different parties, each of which could therefore be in a position to demand delivery of the cargo from the Ship. The traditional rule is that the carrier is entitled to deliver the cargo to the party who presents one of the original Bills of Lading to him unless he is put on reasonable suspicion that the other originals are being held by some other party. If there are grounds for such reasonable suspicion, the carrier should check the position with the shipper and request surrender of all originals of the Bill of Lading. If no satisfactory explanation is provided, it may be necessary in some instances to apply to a court to determine who is entitled to receive the cargo.

If the Bills of Lading are lost or stolen the applicable law may allow a term to be implied to the effect that the master must deliver cargo without production of an original Bill of Lading in circumstances where it is proved to his reasonable satisfaction that the Bills of Lading are not being held by, or to the order of, another party and that the person seeking delivery of the goods is entitled to possession and the Bills of lading. However, it is seldom the case that the evidence is so clear and comprehensive that the master can be satisfied that there are no hidden dangers. Consequently, the safest course of action would usually be to apply to the relevant court and ask the court to order delivery of the cargo on terms set by the court. However, even if a court were to order delivery to be made without production of the original Bills of Lading, cover is still excluded under Rule 34.1.b.i subject to the exercise of discretion by the Board of Directors to allow cover. In considering the exercise of such discretion the Board is likely to wish to consider all relevant circumstances, such as whether the Member ought reasonably to have challenged the court’s decision and/or should have taken additional steps to reduce the risk of misdelivery. In practice, one would expect the Member to work closely with the Association in order to obtain the appropriate legal advice, the cost of which would be for the Member’s account in the first instance, unless the Member were to have Defence cover.

As a result of the difficulties which are often incurred in ensuring that the original Bill(s) are available at the port of discharge on arrival of the Ship, the carrier may be asked by the shipper to retain on board one original Bill of Lading out of the set of three which has been issued at the load port, and to deliver that original Bill to a party notified by the shipper, who then surrenders it to the master and demands the delivery of the cargo against surrender of that original Bill. However, this practise is not recommended as it may cause wrongful delivery of the cargo and cover is not
available for liabilities arising as a result of wrongful delivery in such circumstances.\textsuperscript{33} The liability that the carrier may incur as a result of the wrongful delivery of cargo can be very substantial. It is usually for the whole value of the cargo (which may exceed the value of the Ship) plus interest and costs. The carrier will also usually be unable to rely on any contractual defences or exclusions in the contract of carriage and may lose his right to limit liability.

\textit{Letters of Indemnity (LOI)}

When the original Bills of Lading are unavailable at the port of discharge the carrier is often requested to deliver the cargo against the offer of a letter of indemnity, e.g. from the person requesting such delivery and/or from the charterer, which is intended to protect the carrier against any liability which the carrier may face by reason of delivery of the cargo without production of original Bills of Lading.\textsuperscript{34} However, it should be clearly understood that where delivery is given without surrender of the original Bills of Lading against a letter of indemnity, cover is excluded even if the letter of indemnity is in a form which has been suggested by the Association. The Association and the other P\&I clubs that are members of the International Group of P\&I Clubs have jointly produced draft forms of LOI (Forms A and AA) which Members may consider to use in such situations. However, the suggestion of any particular form is made by the Association purely as a service to the Member and it must be clearly understood that the acceptance of a letter of indemnity is a commercial decision for the individual Member in the particular circumstances.\textsuperscript{35} The letter of indemnity is intended to be alternative protection for the Member in view of the fact that P\&I cover has been excluded. Therefore, when considering whether to accept such a letter of indemnity, the Member should carefully assess the risks involved, e.g. the risk that the provider of the letter may not be able or willing to honour it, and if not honoured, the risk that it may not be enforceable. The Member should also be aware that the wording of the letter of indemnity may be crucial in that it may be necessary to enforce such terms quickly and with the minimum of complication. The English court has proved ready to do so in most cases unless there is evidence that the LOI has been given in order to assist in the committal of a fraud or an illegal act, which is why most forms of LOI including Forms A and AA are subject to English law and the jurisdiction of the English court.

\textsuperscript{33} See the article entitled “The missing Bill of Lading” in Gard News 152 at: http://www.gard.no/ikbViewer/go/target/52588/
\textsuperscript{34} For more detailed commentary see Chapter 20 of the Gard Guidance on Maritime Claims and Insurance.
\textsuperscript{35} See Gard Circulars 9/98 (December 1998) and 2/2001 (February 2001.)
...except where cargo has been carried on the Ship 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... (Rule 34.1 proviso i)

The Guidance to this provision of the Rules should be read in conjunction with the commentary in (L) below.

Non-negotiable bills of lading, waybills and other non-negotiable sea transport documents are often used when there is no intention to sell the cargo in transit. They are often used in coastal and short sea trades where the duration of carriage is short and the use of negotiable documents would be likely to cause delay to the delivery of the cargo. They are also frequently used in trades where the shipper and consignee are associated or affiliated companies, or otherwise closely connected, e.g. an offshore oil production company (shipper) and a refinery (receiver) which are both subsidiaries of the same oil major. Finally, non-negotiable sea transport documents are often used in relation to cargoes carried on feeder vessels, which perform only one leg of a multi-modal or through transport arrangement for which a negotiable Bill of Lading has been issued.

Non-negotiable sea transport documents are receipts for the cargo shipped on board and also represent evidence of a contract of carriage for a particular cargo on a particular ship. However, unlike negotiable Bills of Lading, they are not negotiable documents of title and, therefore, the carrier does not need to demand that the consignee should surrender the original document in order to obtain the delivery of the cargo. On the contrary, proper delivery can be made without presentation and surrender of the original non-negotiable document to the named consignee. Indeed, most standard form sea waybills expressly provide that delivery can be made without production of an original waybill but on production of proof of identity. Alternatively, if the shipper has, after issuance of the non-negotiable sea transport document, nominated a recipient which is different from the consignee originally named in the document and has informed the carrier of the change, the carrier is entitled to deliver the cargo to that newly identified recipient unless delivery has already been requested by a properly authorised representative of the consignee originally named in the document, in which case the carrier is obliged to seek further clarification from the shipper. Most standard form sea waybills are made subject to the Uniform Rules for Sea Waybills of the Comite Maritime International (CMI), which include an option for the shipper to transfer the right of control to the consignee through a statement on the face of the waybill. However, to ensure that delivery has been made to the
proper person, the person claiming delivery should be asked to submit adequate proof of identity and authorisation from the named consignee or any other person nominated by the shipper.

The requirements of US law need special consideration. Under US law, the obligations of a carrier to deliver cargo that is carried under a non-negotiable bill of lading depends on whether the bill has been issued in or outside the USA. Bills that have been issued in the USA are compulsorily subject to the Federal Bills of Lading Act (the Pomorene Act) whilst bills that have been issued outside the USA are subject to the general maritime law of the USA. The Pomorene Act stipulates that if a bill of lading is to be treated as a non-negotiable bill it must be marked as such. If it is so marked, there is no obligation to deliver the cargo against production of the bill but it is, nevertheless, highly recommended that this is done. However, if the bill provides expressly that delivery should be given only against surrender of such a bill, then this must be done. For non-negotiable bills that have been issued outside the USA, the general maritime law of the USA provides that cargo shall be delivered in accordance with the requirements of whatever law that is to govern the bill.

The risk of wrongful delivery under a non-negotiable sea transport document is generally much less than that of wrongful delivery under a negotiable Bill of Lading, particularly if the carriage to which the document applies is not part of a through transport operation, because possession of the document does not by itself give any right to claim delivery of the cargo. However, if cargo carried under a non-negotiable sea transport document is delivered to the wrong party despite the fact that the carrier has taken all reasonable measures to deliver the cargo as required by that document, and the carrier nevertheless incurs a legal liability for wrongful delivery, cover is available in respect of such liability subject to any other relevant restrictions on cover.

(K) ...notwithstanding that the Member may be liable under the terms of a negotiable Bill of Lading issued by or on behalf of a party other than the Member providing for carriage in part upon the Ship and in part by another mode of transport...

If the carrier of cargo carried under a non-negotiable sea transport document has performed part of a through transport operation, and is held liable for wrongful delivery under a negotiable through transport Bill of Lading issued by another party, e.g. a non-vessel operating common carrier (NVOCC), cover is available in respect of

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36 It is very important to note that the question of what constitutes proper (or wrongful) delivery, as well as the question of what constitutes a ‘negotiable Bill of Lading’ as opposed to any other type of sea transport document may differ from country to country. The distinction may also depend on the description used in the document itself, as well as the particular trade context. Further guidance can be found in the Gard Guidance on Bills of Lading and Gard Guidance to Masters on www.gard.no

37 For example, making use of all available means of information to verify that the identity of the consignee is correct and consistent with the consignee named in the document.
such liability provided that the carrier can demonstrate that he delivered the cargo properly as required by the non-negotiable sea transport document. For example, a freight forwarder, being a typical NVOCC, will often issue his own bill of lading to a cargo interest for door to door carriage. However, the Member may only be responsible for performing the sea leg and may, therefore, issue a non-negotiable document to the freight forwarder for that leg, in which document the freight forwarder has requested delivery to be made to a specifically identified consignee. Provided that the Member properly delivers the cargo to that consignee (who may not be the party entitled to delivery of the cargo under the freight forwarder’s own bill of lading), cover will be available even if the Member faces liability for wrongful delivery under the freight forwarder’s bill.

Cover is also available for an owner of a feeder vessel who has issued a non-negotiable bill of lading or waybill to, for example, a liner operator, in respect of liabilities incurred by the owner of the feeder vessel for the improper delivery of cargo under the liner operator’s negotiable bill of lading. Provided that the Member can demonstrate that he delivered the cargo properly as required by the non-negotiable sea transport document, cover is available even if no other stage of the combined transport involves sea carriage. Should a Member enter into a contact to carry cargo with a party that is not in fact the party that has a proprietary interest in the cargo, exposure to misdelivery claims can best be controlled by not naming the agents of the freight forwarder or liner operator as the shippers and consignees at the respective load and discharge ports.

(L) …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 member is required by any other law to which the Member is subject, to deliver, or relinquish custody or control of, the cargo, without production of such document. (Rule 34.1 proviso ii)

The Guidance to this provision of the Rules should be read in conjunction with the commentary in (J) above.

Proviso ii to Rule 34.1 was included in the Pooling Agreement and the Rules in the light of a succession of court decisions relating to the nature of straight bills of lading and the duties of carriers in relation to the delivery of cargo carried under such documents.

38 However, cover is available only if the terms of the non-negotiable sea transport contract under which the Member has contracted to carry the cargo have been approved by the Association – See the Guidance to Rule 57.2.

39 Further commentary see the article entitled “Are your feeder bills of lading being properly issued?” in Gard News 140 at: http://www.gard.no/kkbViewer/go/target/52163/
A straight bill of lading is one which is not made out ‘to the order of’ someone (e.g. ‘to the order of X’), but simply made out to a named party (e.g. ‘to X’). Under the laws of some countries such a bill of lading cannot be transferred or negotiated by X in favour of any other party in the same way as the traditional negotiable ‘to order’ Bill of Lading. Accordingly, it was believed for many years that a straight bill of lading should be considered as a form of non-negotiable sea transport document of the type discussed in (J) above and that the same principles should apply to it. In particular, it was considered that, so long as the master was provided with satisfactory evidence that the party demanding delivery of the cargo was the party identified in the straight bill of lading as the party to whom delivery was to be given, i.e. evidence that such party was indeed X, it was not necessary for that party to also produce the original straight bill of lading in order to obtain delivery of the cargo from the ship. However, in a series of cases the courts of some common law countries have concluded that a straight bill of lading should not be equated with the non-negotiable sea transport documents described in (J) and that it is necessary for the straight bill of lading to be surrendered to the ship before the master can safely give delivery of the cargo. In other words, it was held that for the purposes of the delivery of cargo, a straight bill of lading is no different from a negotiable ‘to order’ Bill of Lading.

Many standard forms of non-negotiable bills of lading include words such as: “in witness whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading indicated below all of this tenor and date, any one of which being accomplished the others shall be void.” Therefore, where the document itself provides in such a way that it must be surrendered to the ship before delivery of the cargo can be given, or where the law which governs the contract of carriage provides that this must be done even if these words were not there, proviso ii to Rule 34.1 states that cover is not available for liabilities, costs and expenses which arise if cargo is delivered without production of such document contrary to such requirements unless the Member is, nevertheless, obliged under other applicable rules of law, e.g. pursuant to the local law at the port of discharge, to deliver the cargo without production of such a document.

For the position under US law see the commentary in (J) above.

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40 See for example the decision of the English House of Lords in the RAFAELA S (2005) 1 Lloyd’s Law Reports 347.
41 The proviso applies not only to straight Bills of Lading, but to any form of non-negotiable Bill of Lading or waybill which has to be produced in order to obtain delivery of the cargo from the ship.
42 Subject to the discretion of the Association to the contrary. However, see in this regard, footnote 15 above.
(M) ...the cargo had been or could have been carried on terms no less favourable to the Member than those laid down under the Hague or Hague-Visby Rules... (Rule 34.1 proviso iii)

It is important in the context of mutual insurance that Members should share only those liabilities to which the membership as a whole is put at risk and not liabilities which arise purely as a result of a particular contract or arrangement concluded by any individual Member. Members are expected and required to protect themselves against liability to the maximum extent permitted by the applicable law and proviso iii to Rule 34.1 is intended to implement this principle. The Hague and Hague-Visby Rules represent a natural ‘benchmark’ for liability in that they are widespread international conventions promoting uniformity of law.43

Consequently, cover is available only to the extent of the liability that a carrier would incur for a particular claim under the Hague or Hague-Visby Rules. For example, the Member may have agreed to carry new cars from Japan to Europe under a long term contract in which he has waived the right which is given to carriers under the Hague-Visby Rules to exempt their liability for cargo loss or damage caused by negligent navigation and/or the right to limit their liability according to the weight of each car. Alternatively, the carrier may have guaranteed that hatch covers will remain watertight throughout the voyage. In such circumstances, cover is not available in respect of any liability that is incurred as a result of the waiver of such rights or an increase of the carrier’s responsibilities, i.e. any liability that would have been avoided under the Hague-Visby Rules had the rights not been waived. However, cover is available for all liabilities that would have been incurred under the Hague-Visby Rules. This means that cover is available only for liabilities which are not exempted by the Hague-Visby Rules defences and only for the amount to which the carrier could have limited his liability pursuant to the Hague-Visby Rules, i.e. the package or weight limit. Any liability in excess of that limit is excluded from cover.44

Notwithstanding the above, cover is not excluded under proviso iii to Rule 34.1 for liability which would not have arisen under the Hague or Hague-Visby Rules if such liability cannot be avoided since it has arisen under other compulsorily applicable rules of law which govern such liability. For example, the Hamburg Rules apply compulsorily to all contracts of carriage by sea between two different countries if the port of loading or the port of discharge, as provided for in the contract of carriage, is located in a country which gives effect to the Hamburg Rules. Under the Hamburg

43 See footnote 4. The Rotterdam Rules are not yet in force and consequently, the Member’s right to cover for liabilities arising under the Rotterdam Rules if incorporated into a contract of carriage by agreement is restricted to liabilities that would have arisen under the Hague or Hague-Visby Rules had such Rules been applicable.

44 The Association has developed additional covers (the Extended Cargo Cover and Comprehensive Carriers’ Cover) which is available to Members who need protection for, inter alia, liabilities which are greater than those imposed by the Hague or Hague-Visby Rules. Further information is available on www.gard.no
Rules, the carrier is liable if the occurrence which causes the loss or damage to the goods or the delay in their delivery has taken place whilst the goods are in the custody of the carrier. The carrier can avoid liability only if he proves that he and all his servants and agents took all measures that could be reasonably required to avoid the occurrence and its consequences. Consequently, many of the specific exceptions or defences in favour of the carrier in the Hague and Hague-Visby Rules, such as the ‘negligent navigation or management of the ship’ defence, are not available to carriers under contracts of carriage which are subject to the Hamburg Rules. The Rules do not prevent Members trading to and from countries which give effect to the Hamburg Rules, and where, as a result of their doing so, the Hamburg Rules apply by operation of law, cover is available for cargo liability incurred under such Rules. However, cover is not available for liabilities which arise by virtue of the fact that the Member has accepted liabilities greater than those which apply under the Hague or Hague-Visby Rules by voluntarily agreeing to the incorporation of the Hamburg Rules into the contract of carriage in circumstances when those Rules would not otherwise apply compulsorily by operation of law. This may occur, for example, when a charterparty provides expressly that the Hamburg Rules are to apply to claims between owners and charterers under the charter, or where Bills of Lading incorporating the Hamburg Rules are issued in circumstances where the voyage otherwise has no connection with any country that has implemented the Hamburg Rules, or where the Member voluntarily accepts a jurisdiction clause under which disputes are to be referred to the courts of a country which gives effect to the Hamburg Rules. However, even if the carrier has incurred liability under the Hamburg Rules, cover is nonetheless available to the extent that the Member would have been liable under the Hague or Hague-Visby Rules regardless of the fact that his liability has in fact been assessed in accordance with the Hamburg Rules.

The same principles apply if more onerous liability than that which is imposed by the Hague-Visby Rules arises under any other compulsorily applicable rules of national law. For example, under Norwegian law, more onerous rules concerning liability, as well as higher limits of liability, apply in relation to domestic cargo voyages.

Finally, it is possible that the carrier is entitled in certain jurisdictions to rely on rights which are more favourable to him than those that are found in the Hague or Hague-Visby Rules. For example, the US Carriage of Goods by Sea Act 1936 (US COGSA) provides for a package limit of USD 500 per package or, if goods are not packaged, USD 500 per customary freight unit, which may, in some cases, be lower than the package limit that would otherwise have applied under the Hague or Hague-Visby Rules. Therefore, since cover is made available on the premise that the Member is

45 The carrier may be either the contractual carrier under a contract of carriage concluded with the cargo interests or the actual carrier to whom the contractual carrier has delegated the actual carriage of the cargo.

46 The negligent navigation or management defence has also been excluded from the Rotterdam Rules.
given protection only against legal liabilities that cannot reasonably be avoided, Members are encouraged to draft their contracts of carriage in such a way that the Hague or Hague-Visby Rules apply to the maximum extent permitted, whilst at the same time enabling the carrier to rely on more beneficial terms to the extent that this is possible. However, the Association appreciates that it may be difficult to achieve this balance in all circumstances. Therefore, provided that reasonable efforts have been made to try to achieve this result, cover will not be denied if the Member incurs liabilities under the Hague or Hague-Visby Rules by virtue of the terms of the contract of carriage when less stringent liability would otherwise have been imposed under the local law.

**Live animals and deck cargo**
The Hague and Hague-Visby Rules do not apply to the carriage of live animals or to cargo which is both carried on deck and stated to be so carried on the Bill of Lading. In other words, the Hague or Hague-Visby Rules do not apply compulsorily only if both provisos are satisfied. Therefore, if goods are carried on deck but this is not recorded on the Bill of Lading, the Rules do apply. However, if both provisos are satisfied, then the principle of freedom of contract applies and Members are able to contract, and are encouraged to contract, on terms that exclude liability and make the merchant solely responsible for the risks of such carriage. This is particularly important in the case of heavy lift cargoes which are frequently carried on deck. However, in some trades this is simply not practicable. For example, containers on a purpose built containership may be carried on or under deck depending on cargo volumes and port rotations etc. Therefore, for example, the Bimco Heavyliftvoybill form is designed to apply the Rules when the cargo is carried under deck whilst excluding liability when goods are carried on deck. However, courts have a tendency to scrutinise the wording of deck cargo liberty clauses and exclusions closely and, in the event that the words are not clear, to construe them against the interests of the carrier. For example, the absence of an express reference to unseaworthiness in such an exclusion clause may mean that the clause is not deemed to be wide enough to exclude liability for unseaworthiness. Similarly, if the Bill of Lading does not state expressly which goods, or how much of the goods that have been shipped on board, have been stowed on deck, then such a statement may not be considered sufficient to exclude the applicability of the Hague or Hague-Visby Rules.

If cargo is carried on deck without the authority of the cargo interests, such carriage may constitute deviation under the contract of carriage, cover for liability arising as a result of which is excluded under Rule 34.1.xi (See (T) below). However, unless the carriage on deck is unauthorised, cover is normally available for liabilities that arise in relation to the carriage of deck cargo including heavy lift cargoes unless, in

47 See the article entitled “Heavy lift cargoes – Contractual issues and risk allocation” in Gard News 203 at: http://www.gard.no/ikbViewer/go/target/18100519/
the latter case, liability arises in relation to a Ship which is a semi-submersible heavy lift vessel or a Ship which has been designed exclusively for the carriage of heavy lift cargo, in which cases, cover is not available pursuant to Rule 60.2 unless “the carriage is undertaken on contractual terms approved by the Association”. Cover is also available for liability arising in relation to the carriage of live animals. However, since the Hague and Hague-Visby Rules do not apply to the carriage of live animals with the result that the freedom of contract principle applies, the Association recommends that a clause similar to that below is inserted into the bills of lading:

“The carriage of live animals is at the sole risk of the merchant. The carrier and/or ship owner or ship shall be under no liability whatsoever for any injury, illness, death, delay or destruction to such live animals, howsoever arising. Should the Master in his sole discretion consider that any live animal is likely to be injurious to any other live animal or any person or property on board, or to cause the vessel to be delayed or impeded in the prosecution of its voyage, such live animal may be destroyed and properly disposed of without any liability attaching to the carrier and/or ship owner or ship. The merchant shall indemnify the carrier and/or shipowner or ship against all or any extra cost incurred for any reason whatsoever in connection with the carriage of any live animal. Notwithstanding the above, in the event that any court or tribunal determines that the carrier and/or ship owner or ship cannot exclude or limit its liability in the manner described above, the Hague-Visby Rules shall be deemed to apply to this carriage notwithstanding the definition of ‘goods’ set out in those Rules.”

Since the Member is expected to act as a prudent uninsured a failure to comply with such a recommendation may prejudice cover.

**In-transit loss and Remaining on Board (ROB) clauses**

Tanker voyage charters will often include clauses which make owners responsible for any difference between the vessel’s net standard cargo volumes as measured immediately after loading and before discharge (often 0.5 per cent as determined by a jointly appointed surveyor), and allow the charterers to deduct the value of such cargo from the freight. Such clauses are problematic for shipowners since the charterers do not need to prove for the purposes of the deduction from freight that the loss (if there really is one) has been caused by a breach of contract on the part of the shipowner. Furthermore, if there is a loss which can be attributed to a breach by the shipowner of a Bill of Lading that is held by a third party receiver, the shipowner may also be liable to pay damages to such receiver. This does not mean that there is a double recovery of damages since the amount that is deducted from the freight is not a deduction of damages – it is simply the result of the parties’ agreement

48 See the Guidance to Rule 60.2.
49 For further commentary see Chapter 4.5.1.2.1.2 of the Gard Guidance on Maritime Claims and Insurance.
that, in specified circumstances, less freight is payable. Therefore, the shipowner suffers a possible double jeopardy – he may face a claim in damages and also lose a proportion of the freight. Whilst cover is available for the Member’s liability to pay damages for cargo claims, cover is not available for deductions from freight.50 The Association recommends that shipowner Members should avoid such clauses wherever possible. However, should shipowners consider that they must agree to such clauses for commercial reasons, the Association recommends that shipowners should only agree to clauses that firstly, specify exactly the amount of in-transit loss for which owners are not responsible (e.g. up to 0.3 per cent) and secondly, that such clauses do not permit the charterer to deduct from freight a specified value of cargo which the vessel has been unable to remove from the vessel at the discharge port since, for example, it is unpumpable and/or beyond the reach of the vessel’s pumps. The Association also recommends that shipowner Members should use wherever possible clauses such as that which has been drafted by Intertanko which has more favourable wording and that ROB claims are accurately quantified and that samples are taken for possible analysis. It is also in the shipowner Members’ interests to monitor the fate of any alleged ROB quantity. For example, in many cases, the next cargo is simply loaded on top with the result that the next receiver obtains a windfall in that he receives more cargo than that for which he has paid. Therefore, the Member should try to insist that credit is given for the value of the ROB. Alternatively, it may be possible to sell the ROB and hold the proceeds against a claim.51

(N) …discharge of cargo at a port or place other than that stipulated in the contract of carriage… (Rule 34.1 proviso iv)

Under the contract of carriage, the carrier is obliged to discharge the cargo at one or more named discharge ports, or sometimes one or more ports within a geographical range. Should the contract provide for a range of possible discharge ports the cargo interests will be obliged in due course to nominate a specific port or ports out of the range, following which the contract is thereafter to be read as though it had always referred simply to that port or ports, and the cargo interests are not entitled (unless the contract provides otherwise) to change their minds and nominate another port or ports within the range.

Discharge of cargo at a port or place other than at a discharge port stipulated in the contract of carriage or one that has been nominated out of a range of discharge ports will, prima facie, constitute a breach of contract which may amount to an unreasonable deviation under the applicable law.52 However, other provisions of the contract of carriage may give the carrier the right to discharge the cargo at

50 See the Guidance to Rules 55 and 63.1.d.
51 For further commentary see the article entitled “Four dips in each tank, please!” in Gard News 161 at: http://www.gard.no/ikbViewer/web/updates/content/53547/four-dips-in-each-tank,-please!
52 See (T) below for a further discussion of the effect of deviation for the availability of cover.
another port or place. For example, various ‘liberty’ or ‘Caspiana’ clauses may give the carrier such right if it becomes impossible or dangerous for the vessel to reach or stay at the contemplated port due to circumstances such as war, ice etc. In such circumstances, the ship is often entitled, pursuant to the terms of the contract, to discharge the cargo ‘or so near thereunto (i.e. to the named port) as she can safely get’ and the carrier is not in breach of contract if this is done.

The relevant contract of carriage for the purposes of this exclusion is the governing contract of carriage at the time that the cargo is discharged. Therefore, if the original set of Bills of Lading are switched during the voyage (i.e. surrendered to the carrier in exchange for substitute Bills of Lading which provide for discharge at a different port or place), which may occur if it becomes necessary for the cargo to be sold to someone other than the originally intended buyer, it is the substitute Bills that are relevant for these purposes. However, if new replacement Bills of Lading are not issued, but the Member enters into a side agreement with the holder of the original Bills to discharge at another place (which might happen, for example, if damaged cargo were to be taken elsewhere for salvage sale/disposal), any liability that the Member might incur as a result of that damage and salvage sale would not be liability that arose directly as a result of discharge at another port or place. The Member should, however, ensure that the on-carriage to the place of salvage sale/disposal is on terms that are no less favourable to the Member than those that are applicable under the Hague or Hague-Visby Rules (see L above) which can usually be achieved by agreeing to on-carry on the same terms as the existing Bill of Lading (assuming also subject to Hague or Hague-Visby Rules).

However, if the carrier agrees to discharge cargo at another port in circumstances other than those allowed by the contract, possibly in response to a request made by the charterers under a charterparty, then he runs the risk that such discharge is a breach of contract and that the voyage to the alternative port may constitute a deviation under the Bill of Lading, which may deprive the carrier of most or all of the Hague and Hague-Visby Rules defences or any other defences that apply to the Bill. In circumstances where no deviation risk exists, for example, where a bill of lading holder agrees to discharge at a different port or place, the exclusion still applies. This is because the agreement may not be in the interests of mutuality. For example, it may be convenient to discharge elsewhere because of port congestion, meaning that the cargo interests gets their cargo sooner and the vessel is free to perform other employment sooner. If, by virtue of such an arrangement, the carrier bears the cost of transporting the cargo, say by land, between the actual and contractual places of discharge, cover does not respond to that cost.

53 http://www.gard.no/lkbViewer/go/target/53547/
The exclusion also applies where cargo is discharged at another ‘place’ even if this is not a port. For example, if a Ship were to suffer a grounding incident and the Member were to decide to terminate the contract of carriage as he was of the opinion that he could no longer perform it, cover is not available for liability incurred by him to the owners of cargo that has been unloaded from the Ship onto barges and who have been requested to collect it ‘as is, where is’ against payment of earned freight if it is subsequently found that the Member was not entitled to terminate the voyage. In the latter event, the carrier is under a continuing obligation to carry the cargo to the intended destination and a failure by him to do so may well constitute a deviation under the contract of carriage. However, there may be many circumstances, other than a casualty, which necessitate discharge of cargo at a port or place other than that stipulated in the contract of carriage. In all such circumstances, cover is excluded for liabilities, costs and expenses arising from discharge at the other port or place subject to the Directors’ right to exercise their discretion to allow cover. Such a discretionary right is necessary to enable the Association to draw a distinction between situations that are influenced by the Member’s purely commercial interests and those that are more attuned to the mutual interests of the Membership as a whole. For example, there is an obvious difference between a ship that is deliberately discharged at a port other than the one nominated in the bill of lading in order to enable the vessel to meet a cancellation date under her next charter (in which case cover may be excluded pursuant to Rule 8) and a Ship that is discharged at such a port because of the Crew’s failure to properly understand and comply with the charterers’ employment instructions.

However, this exclusion is intended to apply when cargo is knowingly discharged at a port or place other than that stipulated in the contract of carriage and does not apply to liabilities arising from the accidental over-landing of cargo at another port or place which is one out of a number of ports/places where cargo is intended to be discharged on a given voyage. For example, this could occur if bulk cargoes are commingled in one hold/tank for receivers at different ports. In such circumstances, liability does not arise as a result of the discharge of cargo at a port or place other than that stipulated in the contract of carriage but arises as a result of the failure to properly deliver the contracted cargo quantity at the correct contract destination. Similarly, liability arising as a result of the accidental discharge of a containerised cargo at an intermediate port and which cannot, for some reason (e.g. customs regulations), be on-forwarded on a following service, would not fall foul of this exclusion.

A carrier who is requested to knowingly proceed to discharge cargo at a port other than that named in the Bill of Lading contrary to the terms of the Bill of Lading may be persuaded to do so provided that he is given a letter of indemnity from the charterer, cargo receiver or another third party, containing a promise to hold him harmless in respect of any liability that he may incur by so doing. However, it should be clearly understood that where cargo is delivered at a port other than
that stipulated in the contract of carriage against such a letter of indemnity, cover is excluded even if the letter of indemnity is in a form which has been recommended by the Association. The Association and the other P&I clubs that are members of the International Group of P&I Clubs have jointly produced draft forms of LOI (Forms B and BB) which Members may consider using in such situations. However, the suggestion of any particular form is made by the Association purely as a service to the Member and it must be clearly understood that the acceptance of a letter of indemnity is a commercial decision for the individual Member in the particular circumstances. The letter of indemnity is intended to be alternative protection for the Member in view of the fact that P&I cover has been excluded. When considering whether to accept such a letter, the Member should carefully assess the risks involved, e.g. the risk that the provider of the letter may not be able or willing to honour it, and if not honoured, the risk that it may not be enforceable.54

(O) …the failure to arrive or late arrival of the Ship at port of loading or the failure to load any particular cargo or cargoes in the Ship, other than liabilities, costs and expenses arising under a Bill of Lading already issued… (Rule 34.1 proviso v)

If the carrier has agreed to present the Ship for the loading of a particular cargo by a specified date the late arrival (or non-arrival) of the Ship at the port or place of loading may cause delay in the carriage of the cargo, cancellation of the contract of carriage as well as damage to the cargo if there is no way to properly preserve it in good condition at the port or place of loading. The late arrival or non-arrival of the Ship will usually be caused by circumstances occurring during the prior engagement(s) of the Ship.

It is not considered to be within the spirit of mutuality that the membership as a whole should share such liability.55 Therefore, unless the Association decides otherwise by the exercise of its discretion, cover is excluded for liabilities arising as a result of the late arrival (or non-arrival) of the Ship at the port or place of loading. The exclusion applies even if the liability arises under compulsory provisions of the applicable law.

Liability for a failure to load cargo arises most frequently where too much cargo has been booked for the Ship with the result that some cargo has to be shut out, or where there is insufficient time to load all the cargo due to ice, tides or other restrictions affecting the loading. In such situations, the carrier may face claims from the owners of the cargo that has not been loaded. The Ship may also be unable to load some or all of her contracted cargo because of a defect in the

54 For further commentary on switch bills see chapter 20.2.4 of the Gard Guidance on Maritime Claims and Insurance.

55 Proviso v to Rule 34.1 should be read together with Rule 63.h which excludes cover for claims against the Member for delay to the Ship.
Ship’s inert gas plant, cranes or other equipment. Consequently, rather than wait for the defects to be repaired, the charterers or cargo interests, who may be under pressure to proceed without further delay because of a potential shut-down of a manufacturing plant, or other demands from the cargo buyers, may decide to load what they can and instruct the vessel to sail under protest without having loaded the full contemplated cargo quantity and/or charter in a substitute vessel and/or divert cargo to another vessel. Claims are often made against the Ship in such circumstances and may include losses suffered by charterers who have been deprived of freight revenue. In all such cases, cover is excluded subject to the exercise of discretion to the contrary by the Directors of the Association.

The exclusion applies to “the failure to load any particular cargo or cargoes”. Therefore, if the vessel has loaded one cargo at one port and arrives late at a second port of loading, the charterers/cargo interests may claim for the costs that they have been obliged to incur as a result of making contingent arrangements for both the cargo that has already been loaded and for that which has yet to be loaded. Such liability is excluded under Rule 34.1 proviso v.

Cover is excluded for liabilities etc., incurred by the Member as a result of the failure to load cargo even if the circumstances that caused the failure were beyond the control of the Member, e.g. because the cargo is deemed to be unsafe. In such circumstances, the Member would normally have a defence to any claims that might be brought against him by charterers and cargo interests for failure to load the cargo and the costs of defending such a claim would typically be covered under the Defence cover. However, the Directors of the Association have a discretion to allow cover in appropriate circumstances and can do so even if the master’s decision to reject the cargo is subsequently proved to be wrong provided that the decision to do so is considered to have been reasonable in all the circumstances. This flexibility enables the Association to draw a distinction between situations that are influenced by the Member’s purely commercial interests and those that are more attuned to the mutual interests of the Membership as a whole.

(P) ...liability arising out of carriage under an ad valorem Bill of Lading...
 RULE 34.1 PROVO VI

The carrier is normally entitled to limit his liability under contracts of carriage governed by the Hague or Hague-Visby Rules and also the Hamburg Rules to a certain amount per package, unit or gross kilo of weight of cargo which has been damaged or lost, irrespective of the value of the cargo.

However, a shipper of valuable cargo may not wish to restrict his right of recovery to a sum which is less than the value of the cargo in the event of its loss or damage. In such circumstances, the shipper, with the agreement of the carrier, is entitled to avoid the package, unit or weight limitation by declaring the nature and value of
the cargo before shipment and inserting it in the Bill of Lading. Such a Bill of Lading is known as an ‘ad valorem’ Bill of Lading and usually commands a higher rate of freight.

Consequently, the issue of an ‘ad valorem’ Bill of Lading increases the carrier’s potential legal liability above that prescribed by the Hague, Hague-Visby Rules and Hamburg Rules.\(^{56}\) The voluntary acceptance by the carrier of increased liability is not considered to be a mutual risk and cover is, accordingly, limited to the sum of USD 2,500, or the equivalent in other currencies, per unit, piece or package. The question of what is the relevant unit, piece or package for these purposes may not be straightforward and the Association should be consulted in case of doubt.

Shippers often require references to a letter of credit or invoice to be recorded on the face of the Bill of Lading in order to link the Bill to the other cargo documents that may be required under the cargo sale contract. The carrier is not obliged to do so and may incur a risk if he agrees to do so since such references may be deemed in some jurisdictions to be the equivalent of a declaration of value with the result that the Bill of Lading may be treated as though it were an ad valorem bill. The Association discourages the Members from allowing such references. However, should the member nevertheless agree to allow such references, the Association recommends that Members should include an appropriate remark on the face of the Bill such as the following:

“the reference to the letter of credit and/or the import license and/or invoice in this contract of carriage is included solely at the request of the merchant for his convenience and to meet his commercial requirements. The carrier does not warrant the accuracy of this information, which is not a declaration of value and in no way affects the carrier’s liability under this contract of carriage. The merchant acknowledges that the value of the goods is unknown to the carrier.”

(Q) …carriage of specie…bonds or other negotiable instruments… (Rule 34.1 proviso vii)

Article VI of the Hague and Hague-Visby Rules allow parties who wish to enter into a contract for the carriage of certain particularly valuable items that are not carried as ordinary commercial shipments in the usual course of trade to do so under a non-negotiable receipt on such terms as may be agreed. Therefore, it is open to the parties to either decrease or increase the liability of the carrier in respect of such shipments.

\(^{56}\) See (L). Whilst the Association has a discretionary right to cover liabilities that are not covered by virtue of this exclusion it may be sensible for Members who regularly issue ad valorem Bills of Lading to consider purchasing Gard’s Extended Cargo Cover as extra protection.
In view of the value of such special shipments and the potentially high degree of liability which may arise in the event that claims are made in respect of them, cover is available in respect of liabilities etc., arising in respect of such cargo, regardless of whether the value has been declared or not, only if the Association has been notified of the carriage prior to the carriage and the carrier has complied with any directions which have been made by the Association. Such directions may relate to the terms and conditions of the special agreement under which the cargo is shipped, the documentation to be used and the security measures to be taken to protect the cargo. Such matters must be negotiated with the shipper before the cargo is booked and the carrier becomes committed to carry it.

Such cargoes are more often than not carried in containers and, if the Association is to approve such carriage for the purposes of Rule 34.1 proviso vii, it is likely to require the Member to comply with the conditions such as the following:

1. Provision of evidence that the cargo is fully insured by a first class insurer with waiver of subrogation against owners, carrier, their managers, agents, servants, sub-contractors, and insurers;
2. The cargo is carried under a non-negotiable port to port receipt (waybill), with no declared value, along with a remark on its face along the lines “excluding any and all liability for the cargo whatsoever and howsoever arising, whether from negligence, unseaworthiness or otherwise, and notwithstanding this any liability on the carrier is limited to USD 500 per container”;
3. The cargo is stowed and secured underdeck within a stack where container doors cannot be accessed (assuming this accords with the IMDG Code);
4. The employment of security guards;
5. A proper record is kept of joint inspections of the containers and seals whenever possible at loading and discharging places and/or ports and that a container weight check is also made;
6. Whatever extra precautions that are necessary and appropriate to ensure proper delivery.

(R) …shortage arising from failure to discharge all cargo on board unless the Member can show that all reasonable and applicable discharge methods were attempted… (Rule 34.1 proviso viii)

The carrier is obliged to discharge and deliver the quantity of cargo which has been loaded. For the reasons discussed in (C) above this may or may not be the quantity recorded on the Bill of Lading. However, whatever be the quantity loaded, it may be difficult to discharge all of it. This is a particular problem in the case of some oil cargoes, which, due to their inherent characteristics, tend to stick to the ship’s tanks and lines despite the best endeavours of the crew to pump off all remaining residues.57

57 See also the commentary in (M) above in relation to ROB clauses.
Cover is not available for liabilities etc., arising as a result of the short delivery of cargo remaining on board (ROB quantities), unless the Member can demonstrate that all reasonable and applicable discharge methods have been attempted. Where a cargo cannot be discharged due to a breakdown of the Ship’s own pumps or other cargo gear, cover is not available unless the Member is able to prove that the Ship’s equipment could not have been repaired and that portable or shoreside discharging equipment could not have discharged the ROB quantities.

Similarly, cover is not available if discharge operations are ended for the benefit of the Member’s commercial interests, e.g. to enable the Ship to sail for her next employment, before all reasonable and applicable methods to discharge the ROB quantities have been attempted.

(S) ...the issue of an ante-dated or post-dated Bill of Lading, waybill or other document containing or evidencing the contract of carriage... (Rule 34.1 proviso ix)

The Bill of Lading date is important in the context of contracts for the sale of the cargo as it will either establish whether the goods have been shipped within the agreed shipping period or it may establish the price which is to be paid for the goods. The relevant date should be the date on which the total quantity of cargo specified on the Bill of Lading has been loaded on the Ship (in the case of a shipped on board Bill) and the date on which it has been received by the carrier for shipment (in the case of a received for shipment Bill). In the case of multiple Bills evidencing the shipment or receipt for shipment of different parcels of cargo, each individual Bill should bear the date on which the particular parcel of Cargo identified on the Bill has been shipped or received as the case may be and not the date on which the last parcel was shipped or received at the port in question. The reason for this is that each Bill of Lading is a separate contract of carriage which requires the date of shipment or receipt of each parcel to be accurately recorded. Carriers will often come under pressure from charterers or shippers to agree that the relevant date is that when cargo hoses are disconnected or when hatch covers finally closed or that local practice provides that Bills of Lading should be dated the previous day if loading is completed before 0600 hours. However, the relevant dating principles are clear and, if Members wish to ensure that the Association is able to provide cover, they must ensure that Bills of Lading are accurately dated.

The shipment date or the received for shipment date may differ from the date on which the Bill was signed (i.e. issued). Therefore, to avoid confusion, some Bill of Lading forms such as the Congenbill 2007 provide for both the shipment date and the date of issuance of the bill to be recorded on the Bill.

A carrier may be liable in tort for any loss or damage arising as a result of the issue of a Bill of Lading which incorrectly records the date of loading, shipment or receipt for shipment. Furthermore, the issue of a falsely dated Bill of Lading also constitutes
a fraud upon the person relying upon the date if the issuer of the Bill of Lading knew that the date was incorrect or was reckless in not ensuring that the correct date was recorded. For example, in one case, bills of lading were dated the 19 January, when a good proportion (but not all) of a crude cargo had been loaded. However, the court found that the bills should have been dated the 20 January when loading of the total cargo had been completed. The price of cargo sold under bills of lading dated the 19 January was USD 250,000 less than the value of the cargo had it been sold under bills dated the 20 January and the carriers were liable in damages for the difference in price. An ante-dated bill of lading indicates that the cargo has been loaded on board the ship at an earlier date than the true date of loading, e.g. on the 30 July instead of the true date, the 2 August. A post-dated bill of lading indicates that the cargo has been loaded on board the ship at a later date than the true date of loading, e.g. on the 31 August instead of the true date, the 25 August. Post-dated bills of lading are less common than ante-dated bills of lading, but, in either case, cover is not available for liability for loss arising out of the issue of such bills of lading. Furthermore, cover is excluded even if the incorrectly dated bill of lading has been issued by the Member's agent without the Member's knowledge.

Dating problems may also arise when cargoes are commingled or blended on board a Ship. After the commingling/blending has taken place the Bills of Lading for the cargo which had been loaded at a prior port are sometimes switched for, i.e. replaced by, new Bills of Lading which are intended to govern the carriage of the total cargo that has been loaded at the prior port and subsequently commingled/blended with other cargo at the subsequent port. There is a tendency to insert on such Bills of Lading the date on which the commingling/blending took place. However, unless the new replacement Bills of Lading also record the date on which the original cargo had been loaded at the prior port, the new Bills of Lading may be considered to be post-dated Bills of Lading since they will give a misleading shipment date. If it is to be an accurate record of events, the Bill of Lading that is issued for the total commingled/blended cargo should record the fact that (x) m/t of cargo has been shipped on date (y) at place (z) in the same tank/hold as (a) m/t which was previously shipped on board on date (b) at place (c). If this is not done, cover may be prejudiced if it is considered that the Bill of Lading is post-dated. In order to avoid the insertion of such remarks charterers may offer a LOI holding the shipowner harmless if they agree not to do so. However, Members should be aware that such LOI may be unenforceable if a court or tribunal comes to the conclusion that they were given in order to try to persuade the shipowner to help the charterer or shipper to cheat or mislead a buyer of the commingled/blended cargo.

58 See also the article entitled “The date of the bill of lading” in Gard News 151 at: http://www.gard.no/ikbViewer/go/target/51869/
59 For further commentary on the problems caused by commingling please see LOIs for commingling or blending cargo on board in Gard News No. 171.
60 For more detailed commentary see Chapter 20 of the Gard Guidance on Maritime Claims and Insurance.
(T) …the issue of a Bill of Lading, waybill or other document…known by the Member or the master to contain an incorrect description of the cargo or its quantity or its condition… (Rule 34.1 proviso x)

**Introductory remarks**

The carrier is obliged, upon the demand of the shipper, to issue a Bill of Lading stating, inter alia, the number of packages or the quantity or the weight of the goods together with its apparent order and condition.

Once issued, the Bill of Lading is, subject to any valid qualifying statements recording in the Bill of Lading itself,  prima facie evidence of the receipt by the carrier of the goods of the description, quantity or weight and apparent order and condition recorded on the Bill, but, once negotiated, i.e. endorsed, by the shipper in favour of some other third party, it will in most cases amount to conclusive evidence in the hands of a third party acting in good faith. It follows that the carrier must inspect the goods diligently upon receiving them for shipment by tallying the number of packages, conducting tank filling measurements for liquid cargoes or ship draft measurements for bulk cargoes and making a careful visual inspection of their condition. Following such inspection, any discrepancies or deficiencies should be appropriately recorded in the mate’s receipts and, subsequently, on the Bills of Lading.

The proviso to Article III Rule 2 of the Hague and Hague-Visby Rules emphasises that neither the carrier nor his agent nor the master is obliged to issue a Bill of Lading recording, inter alia, a quantity, weight or condition of the goods which they had reasonable grounds for suspecting not accurately to reflect the quantity, weight or condition actually received, or which they had no reasonable means of checking. Furthermore, the person inspecting the cargo on behalf of the carrier must exercise his own judgement when deciding whether the cargo is in apparent good order and condition on shipment. However, that person is required to record merely the visible condition of the cargo and not its internal, non-visible, condition. The master is not required to have expert knowledge of the various cargoes carried on his Ship, but where the cargo presented for loading is not in ‘apparent (i.e. visible) good order and condition’ he should inform the shipper that clauses reflecting the true apparent condition of the cargo must be inserted in the Bills of Lading, unless the shipper can provide other (replacement) cargo which justifies the issue of Bills of Lading recording the shipment of cargo in ‘apparent good order and condition’.

61 Such as ‘weight unknown’ or ‘quantity unknown’ or ‘STC (said to contain)’ clauses.
62 Further Guidance on these aspects can be found in the Gard publications Guidance on Bills of Lading and Guidance to Masters. See www.gard.no.
It is important to remember that the international sale of goods is effectively a sale of documents in the sense that payment is made against the presentation by the seller of documents that comply with the provisions of the contract of sale and letter of credit (if payment is to be made by letter of credit). One of the important documents for these purposes is the Bill of Lading and, therefore, it is understandable that the shipper will require a Bill that complies with the provisions of the underlying contract of sale and letter of credit. Most contracts of sale and letters of credit provide that payment is to be made only against presentation of a ‘clean’ Bill of Lading which is defined in Article 27 of the Uniform Customs and Practise for Documentary Credits 600 (UCP 600) which regulates letters of credit as a document “bearing no clause or notation declaring a defective condition of the goods or their packaging”. Therefore, the insertion of a clause on a Bill of Lading which states that the goods are not in apparent good order and condition will often deprive the Bill of Lading of its ‘clean’ nature, which will in turn make it difficult for the seller of the goods to obtain payment for the goods under the cargo sale contract or letter of credit.

Whilst in strict terms, a Bill of Lading which misdescribes the quantity (as opposed to the apparent order and condition) of cargo is still technically a clean bill, the carrier, nevertheless, has the same duty of care to third parties to ensure that, insofar as can possibly be verified by the Ship, the cargo quantity stated on the Bill of Lading is correct since this is the quantity for which the buyer will normally be obliged to pay. Shippers will often insist on the insertion in the Bill of quantities that are higher than the quantities that have actually been shipped particularly when a shipper is selling on CIF terms where the sales contract is based on the bill of lading figure.

Despite the problems that this may give to the shipper, if the cargo is seen by whoever is inspecting the cargo before shipment on behalf of the Ship to be damaged, the carrier is under a duty to clause the Bill to that effect. Similarly, if the loaded quantity measured by or on behalf of the Ship clearly indicates that the cargo quantity which the shipper wishes to insert on the Bill is not correct, the carrier has a duty either to refuse to sign the Bill of Lading or to record the Ship’s own figures on it. The reason for this is that the carrier has a duty of care to third parties who may be buying the cargo in reliance on the truth of the data recorded on the Bill. This issue is discussed further under ...incorrect description of the cargo... quantity below.

Because it may be so important for the shipper to obtain a clean Bill, the carriers may, therefore, be pressed by charterers or shippers to accept letters of indemnity or similar undertakings in return for issuing Bills of Lading with descriptions of the

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63 For more detailed commentary on these issues see chapter 3.5 of the Gard Guidance on Maritime Claims and Insurance.
cargo, or of its quantity and condition which are known to be incorrect. Such letters of indemnity are usually intended to enable the cargo seller to deceive the cargo buyer and are generally unenforceable.64

Cover is not available for liabilities, costs and expenses arising as a result of the incorrect description of the cargo or of its quantity or condition in the document evidencing the contract, which includes not only Bills of Lading, but also waybills and non-negotiable receipts, which is known to the master or the Member to be incorrect. However, the wording of proviso (x) recognises the reality that there may be circumstances where it cannot be stated with certainty that the data which the shipper wishes to be inserted on the Bill of Lading is incorrect. Therefore, the exclusion applies only where the master knows with a reasonable degree of certainty that the data is incorrect. Further commentary on this issue can be found under ...known by the Member or the master... below. However, the exclusion also applies if the master knew that the description in the Bill of Lading was incorrect, even if the Member was not personally aware of any inaccuracy.

...description of the cargo or its quantity or its condition...

‘Description of the cargo’ essentially means its general type, e.g. corn or soyabean, and the general type of packing, e.g. polythene bags or jute bags. It also means marks which identify pieces of cargo. The “...description of the cargo or its quantity or its condition...” is usually one that reflects the reasonable judgment of a reasonably competent and observant master, who is not expected to be an expert.65 The difficulties caused by the commingling and blending of cargoes on board has already been discussed above in (S) above in relation to the dating of the Bills of Lading and in the opening commentary to this Rule. However, commingling/blending can also cause other difficulties, since the description of the cargo on the switched (replacement) Bills of Lading may be that of the commingled/blended cargo and not the true description of the cargo actually shipped at the commingling port before it has subsequently been commingled/blended.66 Consequently, cover may not be available in such circumstances.67

...incorrect description of the cargo...quantity

The most common scenario in which a Bill of Lading contains an incorrect description of the cargo quantity is when it is issued for an amount of cargo that is in excess of that actually shipped. The situation is usually fairly clear where the quantity

64 For more detailed commentary on letters of indemnity (LOI) see chapter 20 of the Gard Guidance on Maritime Claims and Insurance.
65 See the article entitled “Clausing bills of lading correctly – Standard of reasonable care affirmed” in Gard News 168 at: http://www.gard.no/ikkViewer/go/target/52671/
66 For more detailed commentary on these issues see chapter 3.5 of the Gard Guidance on Maritime Claims and Insurance.
67 For more detailed commentary on these issues see chapter 20.2.5 of the Gard Guidance on Maritime Claims and Insurance.
in dispute can readily be determined, e.g. by tally of the number of packages. Therefore, if, for example, a Member were to face liability for a cargo shortage of five packages because he issued a Bill of Lading for 20 packages, whereas the master knew that, in fact, only 15 packages were shipped, the Member’s cover for liability, cost and expenses in respect of the five packages short would be excluded. However, a more complicated situation arises in the case of bulk cargoes since discrepancies between means of measurement (especially between ship and shore) are commonplace. The most common discrepancy occurs when a Bill of Lading contains a shipped figure according to a shore scale, which far exceeds the figure received on board according to the Ship’s means of measurement (e.g. draft survey). This is commonly called ‘shore over ship’. The less common discrepancy occurs when a Bill of Lading contains a shipped figure according to the ship’s means of measurement which is known by the Member or the master to far exceed the loaded figure according to the shore scale (‘ship over shore’). The key issue is the magnitude of the discrepancy.

*What is a normal and customary difference?*

This depends on the circumstances and the means of measurement used to determine the ship’s figures, e.g. a properly executed draft survey is said to have an accuracy of +/- 0.5 per cent. Therefore, if the shipper’s figures exceed the draft survey figure by more than 0.5 per cent, the bill of lading should normally be claused. However, a smaller percentage may be relevant depending on the circumstances. For example, the accuracy of tanker tank calibrations, measuring methods and equipment will need to be considered in relation to the prevailing circumstances and conditions. In very general terms, if the shipper’s (terminal) figure exceeds the ship’s figure by more than 0.25 per cent, the bill of lading should normally be claused. However, a smaller percentage may be relevant, and in this regard reference should be made to the Vessel Experience Factor (VEF).

As a general ‘rule of thumb’, P&I cover may be prejudiced when the bill of lading discrepancy for solid bulk cargoes is 0.5 per cent or more (commonly accepted to be the accuracy of a well-conducted draught survey) and for liquid bulk cargoes is 0.25 per cent or more (regardless of the VEF as that is unlikely to be known by a third party bill of lading holder). Each case is to be decided on its own merits as there are many factors involved which may lend towards application of a different percentage.

In the above examples, the shortage claim exceeds the bill of lading discrepancy, which is not uncommon since quantity differences may also arise in-transit and at discharge if shore received figures are claimed or if there is an ROB. In such circumstances, cover may be determined on a proportional basis.

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68 See the article entitled “The importance of draft surveys in the defence of claims for shortage of bulk cargoes” in Gard News 153 at: http://www.gard.no/ikbViewer/go/target/51574/
69 For more detailed commentary on this issue see the Gard Guidance on Bills of Lading.
...incorrect description of the cargo...condition
The most common scenario in which a Bill of Lading contains an incorrect description of the cargo condition is when it is issued for cargo in apparent good order and condition in circumstances where the cargo is not in good order and condition but is in fact defective at the time of shipment and such defect is or should be reasonably apparent to the master. The situation is usually fairly clear where the cargo is obviously damaged. If, for example, a Member were to face liability for wet cargo because a clean Bill of Lading was issued in circumstances where the master knew that the cargo was wet at the time of shipment, the Member’s cover in respect of claims for wetting could be excluded. A more complicated situation arises when it is debatable whether the damage recorded at the time of shipment is the same as that claimed, or when the quantification of the damage recorded at the time of shipment does not exactly match that claimed (it may be the case that different and/or more damage was caused during the carriage). For example, the claim may be for salt water wetting when the wetting recorded at the time of shipment does not refer to the type of wetting and which may have been fresh water. If the claus ing is correct, but does not sufficiently describe the damage or identify it to specific goods, cover would not be excluded. As a general rule of thumb, P&I cover may be prejudiced when it is clear that the Bill of Lading contains an incorrect description of the cargo condition. P&I cover may also be prejudiced if the Bill has been claus ed but was not clau sed appropriately such as, for example, when the master’s claus ing exaggerated or under-stated the actual damage. Each case must be decided on its own merits.

...known by the Member or the master...
The exclusion under Rule 34.1.x applies if the master knew that the description in the Bill of Lading was incorrect, even if the Member was not personally aware of any inaccuracy. The assessment of what the Member or master knew is based on the particular facts of the case and the Association may take a different view to the findings of any legal proceedings. For example, if a Member incurred liability because a court decided that a certain description of the cargo was reasonably apparent to the master, when in the Association’s view, it was not, (or, perhaps, was more properly a description of cargo quality for which the master should not be responsible), the Association may decide that the liability arises more as a result of an unfair legal position/decision rather than as a result of an actual incorrect description, and that, consequently, to apply the exclusion on cover would be unduly harsh on the Member. On the other hand, the quality of a court’s analysis may well sway the Association to take a similar view. Similarly, if there is a dispute at the time of shipment and the Member faces a court order as to how the goods are to be described in the Bill of Lading, the Association may decide that it would be unfair not to cover the Member for liability arising from compliance with such an order, unless the Association felt it reasonable that the order could and should have been challenged because it would result in the issue of a Bill of Lading that would obviously be incorrect.
Charterers or agents sometimes act contrary to owners’ authorisation to issue bills of lading only in strict conformity with claused mate's receipts and/or a surveyor's recommended claus ing. In such circumstances, the issue of Bills containing an incorrect description of the cargo or its quantity or its condition without the Member's or master's knowledge does not implement the exclusion in Rule 34.1.x. However, all available facts need to be considered. If, for example, the Member instructed the master to give an unconditional authorisation to charterers to sign Bills on his behalf, in the knowledge that authorisation to only issue Bills in strict conformity with claused mate's receipts had previously caused problems for an important charterer, cover may be excluded. Liability arising under an incorrect Bill issued by an employee, other than the master, with or without authority to issue Bills, would need to be considered on a case by case basis. An employee of a Member’s wholly owned liner agency, who has authority to signs Bills of lading instead of the master, would be considered the master for the purposes of this Rule.

When exercising its discretion in relation to this exclusion, the Association may consider what steps, if any, a Member took following receiving knowledge that incorrect Bills had been issued. For example, it may be possible to make all relevant parties to the Bill of Lading aware of the inaccuracy before the Bills are transferred to another party who will be relying on the Bills in good faith. It may also be possible to apply to the Court to rectify (i.e. correct) the Bills.

**Switch bills of lading**

Members will often receive requests from cargo interests and charterers to make changes to Bills of Lading that have already been issued, i.e. to switch (surrender) new Bills for old Bills. Unless a genuine mistake has been made in the description of the cargo or its quantity or its condition, those descriptions should not be changed in the new Bills as otherwise the Member may be liable for misrepresentation and cover may be prejudiced.

(U) …deviation or departure from the contractually agreed voyage… (Rule 34.1 proviso xi)

Unless the charterparty or Bill of Lading or the trade in which the Ship is engaged provides for a specific route by which the Ship must perform the laden voyage, the laden voyage must follow the usual and customary route for a ship that is engaged in that type of trade. In the absence of special circumstances, the usual or customary voyage route is presumed to be the shortest geographical route subject to navigational contingencies. Therefore, the usual route may be varied in order to avoid bad weather or draft restrictions which affect a particular Ship. However, the usual or customary route may be different depending on the trade in which the Ship

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70 For more detailed commentary see Chapter 20.2.4 of the *Gard Guidance on Maritime Claims and Insurance*. 

is engaged. For example, whilst the usual or customary route for a bulk carrier may be the direct geographical route, the usual or customary route for a liner vessel may be via the advertised ports of call.

The carrier is guilty of a deviation when he intentionally deviates from the usual and customary route for the laden voyage without justification. There is no deviation if the carrier is forced to deviate from the usual and customary route even if this is caused by the unseaworthiness of the Ship or when he negligently, but unintentionally, follows a different route. Similarly, the carrier may be justified in deviating from the usual or customary route where this is necessary for the safety of the Ship or cargo or to ensure the safe prosecution of a voyage, e.g. to avoid capture of the Ship or cargo, to save life,71 or to repair the Ship in order to enable her to proceed in safety, or to take on bunkers at a common bunker port for ships in general, or for the ships in the line or trade. However, the deviation must be reasonable and prudent for the joint benefit of those involved in the adventure and must not be for the sole benefit of the shipowners. The following statement encapsulates the required factors:

“What departure from the contract voyage might a prudent person controlling the voyage at the time and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and interests of all parties concerned, without obligation to consider the interest of any one as conclusive.”

The concept of ‘deviation’ is not necessarily restricted to the geography of the voyage, but also extends, by the laws of certain countries, to other aspects of the contractually agreed adventure. For example, intentional delay in performing the laden contractual voyage (i.e. a failure to perform the voyage with reasonable dispatch) may amount to deviation if the delay is such as to substitute an entirely different voyage for that originally contemplated by the contract of carriage. Similarly, there may be deviation in the event of transhipment or substitution of the carrying Ship or storage ashore or afloat which is not otherwise permissible under the contract of carriage. However, the most common example of a deviation, other than that relating to the geographical voyage, is the carriage of cargo on deck. The carrier is normally under an implied obligation to stow the goods under deck unless otherwise authorised by custom, convention or agreement, e.g. it is generally accepted that containers may be carried on the deck of purpose-built container ships and lumber on the deck of purpose-built log and forest product carriers. However, unauthorised deck carriage may amount to deviation.

Cover will ordinarily be available for cargo carried in containers stowed on deck provided that:

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71 Cover is available for extra costs incurred by the Member in so doing. See the Guidance to Rule 31.
a The containerised cargo is carried on purpose built container vessels under a contract of carriage which is subject to the Hague/Hague-Visby Rules and which permits carriage on deck (usually in the form of a liberty clause) and the Association considers that the cargo and container are suitable for deck carriage in all the circumstances; or

b Where the containerised cargo is carried on vessels that are not specifically built or fitted for deck carriage of containers, the contract of carriage contains a liberty clause and either:

i states that the cargo is carried on deck and excludes all liability for loss or damage to such cargo; or

ii the contract of carriage is subject to the Hague/Hague-Visby Rules and the Association reasonably considers that the vessel, cargo and container are suitable for deck carriage in all the circumstances.

The carrier is often granted contractual liberty to depart from the usual route, mode of shipment and stowage location by clauses generally known as ‘liberty’ or ‘Caspiana’ clauses. A departure from the agreed mode of carriage which is allowed by such clauses does not amount to a deviation. However, such clauses are construed restrictively against the carrier and must be considered carefully. Some liberty clauses allow bunkering but others expressly exclude bunkering from the liberty to deviate. The BIMCO Liberty and Deviation Clause authorises a number of deviations for bunkers, spares, stores and supplies, crew changes, landing stowaways etc., but the use of this clause does not necessarily mean that all deviations are reasonable. Importantly, the BIMCO Deviation Clause provides that it is also to be incorporated in bills of lading issued under the charterparty, which is important because a carrier under a Bill of Lading is under a completely separate duty to Bill of Lading holders not to commit an unjustified deviation under the Bill.

The question of whether or not there has been a deviation is important since, traditionally, the effect of a deviation has been to deprive the carrier of the benefit of any contractual defences and also, possibly, any rights to limit liability. Consequently, since deviation can give rise to substantial liabilities against which the carrier may have no protection, it is considered that in the interests of mutuality, cover should not be readily available in such circumstances. Deviation is a complex issue that is treated differently depending on the applicable law.72

However, cover is not automatically excluded under Rule 34.1 if there has been a deviation from the contract of carriage. Enquiry will be made in each case as to the defences or rights or limitation (if any) which would have been available to the Member if he had not deviated from the contract, and cover will be excluded only if and to the extent that the deviation has deprived the carrier of a defence

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72 For more detailed commentary see Chapter 20.2.2 of the Gard Guidance on Maritime Claims and Insurance.
or a right to limit liability that would otherwise have been available to him. If the deviation has not increased the Member’s liability, cover is available. In the event of deviation the Association can arrange alternative cover on terms to be agreed (See Appendix 1.4.) This has traditionally been known as Ship Owners’ Liability (SOL) insurance and is usually taken out where there is considered to be a risk of a finding that an unjustified deviation has occurred which may therefore deprive the Member of defences and limits for cargo loss or damage occurring during the deviation. SOL cover extends to the additional liabilities that the Member has assumed by deviating. It does not, however, cover the effect of delay on the condition of the cargo. If the cargo is perishable, SOL cover will not cover any additional loss from the cargo perishing. SOL premiums are usually calculated as a percentage of the value of the cargo.

Examples of circumstances where SOL is most likely to be necessary include:

- A vessel calling at a port or place for the purposes of major repairs, dry-docking or major surveys which are not necessary for the contracted voyage;
- A vessel slow 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;
- A vessel departs either geographically or otherwise from the contracted voyage such that there is a greater advantage to owners and a correspondingly greater disadvantage or risk to others;
- Slow steaming, eco-steaming etc., in order to conserve fuel (where the contract of carriage does not contain an express liberty clause permitting it to do so).73

(V) ...the association shall cover liability pursuant to compulsorily applicable rules of law for loss caused by delay in the carriage of cargo... (Rule 34.2)

Delay occurs when the goods have not been delivered at the port or place of discharge or delivery agreed in the contract of carriage within the time expressly agreed in the contract of carriage or, in the absence of such express agreement, within the time which it would be reasonable to expect of a diligent carrier having regard to the circumstances of the case. In such circumstances, a carrier of goods may be found liable for losses caused by the delay in completing the voyage, which losses would include a reduction in value of the cargo caused by a loss of market. However, the availability of cover for such liability will depend on the reason for the delay and on whether the carrier is liable for such losses pursuant to the compulsory provisions of the applicable law.

If the delay has been caused by the intentional acts or omissions of the Member then the Member may be guilty of deviation and is not entitled to cover under Rule 34.1 proviso xi unless the Directors exercise their discretion to extend cover.

73 For further commentary see the article entitled “Slow Steaming and Virtual Arrival” in Gard News 209 at: http://www.gard.no/ikbViewer/go/target/20734104/
However, the Member may also incur liability for delay in some circumstances under the law of some countries even if the delay was not caused by the Member’s intentional acts or omissions. If it is considered that such liability accords with the spirit of mutuality, cover may be available for such liability under Rule 34.2 without the need for the Directors to exercise discretion unless delay is the result of either the non-arrival or the late arrival of the Ship at the port of loading. In the latter circumstances, cover is not available unless the Directors exercise their discretion to extend cover pursuant to Rule 34.1 proviso v.

Cover is available under Rule 34.2 only where the liability arises under compulsorily applicable rules of law which the Member cannot avoid by the inclusion of exemption provisions in the contract of carriage or charterparty. Therefore, cover is not available if the liability for loss caused by delay in the delivery of the cargo arises by virtue of a provision in a contract of carriage or charterparty and would not have arisen but for such a provision. For example, if liability for delay arises under a contract of affreightment by virtue of the fact that it includes express provisions for a specific voyage duration or for specific discharge/delivery dates/periods, or under a bill of lading incorporating the terms of such a contract (whether or not the Member authorised such incorporation), cover is not available.

However, if liability arises because of the compulsory provisions of the applicable law then, subject to the restrictions described above, cover is available. The Hague Rules have no provisions relating to delay, liability for which can be (and often is) excluded by suitably drafted clauses in bills of lading. Likewise, the Hague-Visby Rules only allow such damages as are recoverable by reference to the value of the goods and do not, in any event, exceed the package, unit or weight limitation. Therefore, if delay has been caused by the negligent navigation of the Ship, cover is not available since the Member ought to be able to avoid liability for delay pursuant to the negligent navigation defence in Article IV Rule 2 (a). However, if the delay arose as a result of the Member’s failure to exercise due diligence to make the Ship seaworthy before and at the beginning of the voyage, cover would be available. An example of such a case would be where a vessel failed to have documents at the commencement of the voyage (or at the very least a system in place to procure such documents during the voyage) to allow entry and discharge of the cargo at her destination without undue delay.

By contrast, the Hamburg Rules specifically provide for delay in delivery when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case. Consequently, cover is available where the contract of carriage is compulsorily subject to the incorporation by operation of law of the Hamburg Rules. The Hamburg Rules do not deal specifically with the recovery of economic or consequential losses in the event that
the cargo is delayed, but liability is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage. National variants of the Hague/Hague Visby Rules may also provide for liability for delay. For example, the Australian Carriage of Goods by Sea Act deals specifically with liability for delay. In general terms, the carrier is liable under Article 4A for loss caused by unreasonable delay unless the carrier can prove that the delay was excusable by one of eight permissible excuses and that it took all reasonable measures to avoid the delay, one of which is ‘circumstances beyond the reasonable control of carrier or its servants or agents’.

Finally, even if international conventions such as the Hamburg Rules do not apply compulsorily to the particular voyage, an obligation to proceed with due despatch is, nevertheless, an implied obligation in most contracts of carriage under the national laws of many countries.

Rule 34.2 is applicable only where liability is caused directly by delay. However, if the delay is itself attributable to some other cause, Rule 34.2 may not be applicable. For example, if the Member is held liable for damage to a perishable cargo by virtue of the fact that it has been delayed, that would not be a liability arising directly as a result of the delay, but as a result of damage caused by the delay and Rule 34.1 would be applicable. Rule 34.2, on the other hand, is designed to cover claims for pure economic loss arising from delay and would, for example, apply to claims where there is no damage and the cargo interest has suffered a loss as a result of a decrease in the market value of the cargo.
Rule 35 Extra handling costs

The Association shall cover extra costs and expenses, in excess of the costs and expenses which would otherwise have been incurred:

a in handling and discharging cargo where the extra costs and expenses are necessarily consequent upon damage to the cargo or damage to the Ship which would have been covered by the Hull Policies had the Ship been fully insured on standard terms without deductible;

b in discharging or disposing, including storing, of cargo which has been rejected, by the person entitled to delivery, provided that there shall be no recovery under this Rule 35 of extra costs and expenses which:

i the Member is able to recover from any other party; or

ii are excepted from cover under Rule 46(a), or

iii form part of the daily running costs and expenses of the Ship.

Guidance

Cover is available under Rule 35 for extra costs and expenses incurred by the Member himself in handling, discharging or disposing of cargo in certain circumstances. In many cases, the same incident that gives rise to liabilities which are recoverable under Rule 34 will also give rise to extra costs and expenses which are recoverable under Rule 35. However, Rule 34 applies when the extra costs and expenses are incurred in the first place by a third party claimant who then seeks an indemnity from the Member whereas Rule 35 applies when the expenditure is incurred by the Member himself, i.e. the Member pays himself for the discharge, disposal etc., of the cargo. Rule 35 may also apply even if the Member does not face liability for cargo loss, damage, shortage or delay, e.g. because an incident has caused damage to the Ship that necessitates the handling and/or discharging of sound cargo to facilitate Ship inspection and repairs. Furthermore, it should also be noted that there is no reference in this Rule to there being cover for ‘losses’, e.g. for a Member’s lost freight, hire or demurrage, arising as a result of incidents that have occasioned extra handling costs. Such losses are excluded in accordance with the provisions of Rule 63.1.

(A) ...extra costs and expenses... (Rule 35)

Cover is available only for costs and expenses which are ‘extra’, i.e. in excess of the costs and expenses that would have been incurred in order to handle and discharge the cargo had there been no damage to the cargo or the Ship. Therefore, when making a claim against the Association, the Member must provide written evidence of the amount of extra costs and expenses incurred, and provide written evidence of the costs and expenses that would have been incurred in any event but for the damage to the cargo and/or Ship. The Association is entitled to deduct such ‘normal’ or ‘usual’ costs and expenses from the claim if the Member has not already done so when presenting the claim.
The words ‘necessarily consequent upon’ in Rule 35 mean that the additional costs and expenses must have been directly caused by the damage to the cargo and/or damage to the Ship and must have been necessary as a consequence. For example, if a heavy newsprint machine stowed on a tweendeck is dropped onto the deck during the course of discharge, thereby causing the tweendeck to collapse and the newsprint machine to fall down into the lower hold, cover is available for the additional costs and expenses incurred in subsequently discharging the newsprint machine safely by the use of a bigger and more expensive shoreside crane including any extra labour costs that may be necessary in order to do so. Cover is also available for extra costs and expenses incurred in handling or discharging sound cargo in circumstances where such costs and expenses are necessarily incurred in handling and discharging damaged parts or parcels of cargo. For example, if salt water ingress were to cause damage to a cargo of grain in the forward part of a hold, cover is available for the extra costs and expenses incurred in segregating sound cargo from damaged cargo in that hold, as well as for the extra costs and expenses (if any) that may be necessarily incurred in handling and discharging the wet damaged grain.

The extra costs and expenses must have been incurred by the Member in order to entitle the Member to recover under Rule 35. However, in some instances, a third party that has incurred such costs, e.g. a charterer who is the carrier of the cargo under the Bill of Lading, may simply deduct such costs from the hire, demurrage etc., that is due to the shipowner Member. If the Association is satisfied that the Member is ultimately responsible to bear such costs, the Association may consider that the costs so deducted from hire, demurrage etc., are in effect costs that have been incurred by the Member. In other words, rather than obliging the Member to incur the costs of pursuing the charterer for a wrongful deduction from the hire, demurrage etc., the Association may be content to cover the Member under Rule 35 for costs that otherwise qualify for cover under the Rule.

Alternatively, if another party, such as the charterer or receiver, is contractually obliged to meet extra handling costs in the first instance but refuses to do so, the Member may think it preferable to incur such costs himself rather than continue to dispute the other party’s refusal to do so since such action might merely aggravate the situation and result in further damage and costs. However, whether such action will be considered by the Association to be “necessarily consequent upon the damage to the cargo etc.” will depend upon the facts of each particular case. For example, if it can be shown that the Member would ultimately be liable under the contract to meet such costs, i.e. obliged to reimburse the other party if that party had incurred the costs in the first instance, the Association may consider the Member’s decision to be logical and reasonable, especially since they would thereby be able to control the level of costs. However, consideration should also be given to any rights that the Member may have to limit his liability particularly if the Member would not be able to credit his own costs against package or global limitation.
(B) ...necessarily consequent upon damage to the cargo... (Rule 35.a)

The phrase ‘damage to the cargo’ is to be given a wide meaning. Therefore, provided that the discharge or handling of the cargo has been made more difficult or expensive, cargo can be considered to be ‘damaged’ for the purpose of Rule 35.a, e.g. if it is congealed, hardened, wetted or mixed with other cargo with the result that it requires additional heating, breaking up, drying or segregation. For example, a liquid cargo that has been contaminated is considered ‘damaged’ for the purposes of Rule 35.a even if the damage can be rectified, e.g. by filtering out the contaminant. Furthermore, so long as the cargo is damaged in the sense just described then, subject to the provisos of Rule 35, it does not matter what has caused the damage. For example, cover is available for moisture damage caused by hatch leakage or bad ventilation but, because of proviso ii (and the provisions of Rule 46.a),¹ it is not available if the damage was caused by incorrect stowage of the cargo. Nevertheless, the nature and extent of the damage may be relevant in assessing the extent of the extra handling that has been undertaken, i.e. was it a necessary consequence of the damage?

Even if there has been a change in the physical character of the cargo because of the inherent vice of the cargo, the cargo may, nevertheless be considered to be ‘damaged’ for the purposes of Rule 35.a if the residual value of the cargo has been affected. For example, a cargo of iron ore fines that has liquefied during the carriage because the cargo was in fact unsafe on loading as a result of its excessive moisture content may result in additional discharging costs. However, if the cargo, once discharged and allowed to dry, has more or less the same residual value as a cargo that was not unsafe on loading, the cargo cannot be considered to be ‘damaged’ for the purposes of Rule 35.a.

Cover is available only when such extra costs and expenses have been incurred as a result of damage to the cargo or the Ship. Consequently, cover is not available if the extra handling costs and expenses have been incurred before the cargo and/or the Ship have been damaged and in order to prevent such damage. For example, cover is not available for extra costs and expenses that have been incurred in order to re-stow and secure timber carried on deck that has broken loose during the voyage as a result of heavy weather, and which could consequently damage the Ship’s railings and be lost overboard.² Even if it can be said that there has been some minor or nominal damage, the extra handling costs are not in reality the necessary consequence of that damage but expenditure that has been incurred in order to avoid possible future damage/loss of greater significance.

¹ See (D) of the Guidance to Rule 46.
² Furthermore, cover is not available for such costs under the heading of ‘measures to minimise loss’ in Rule 46.a since such costs are likely to be considered to be costs, resulting from measures that either have been or could have been accomplished by the Crew or by reasonable use of the Ship or its equipment’. See Rule 46.a.iii.
(C) ...necessarily consequent upon damage to...the Ship which would have been covered by the Hull Policies had the Ship been fully insured on standard terms without deductible; (Rule 35.a)

‘Damage to the Ship’ means damage to the hull, machinery, equipment or such other similar items of the Ship that would give the Member a right of recovery under the Ship’s Hull Policy provided that the Hull Policy had been concluded on standard terms and would cover, for example, physical damage accidentally caused by a marine peril such as fire, collision, striking or grounding. Provided that the damage is of that nature, cover is available even though the Member cannot recover in fact under the Hull Policy because the hull damage is within the deductible. However, cover is not available if the damage to the Ship does not give rise to a right of recovery under a standard Hull Policy, e.g. because the damage is attributable to a construction defect, wear and tear, lack of maintenance or to a war peril.

Nevertheless, it should be understood that the cover that is available under Rule 35 is subject to the general exclusion of cover in Rule 71 which provides that cover is not available for “costs or expenses which are covered by the Hull Policies” or would have been covered if the Hull Policies had been on specified terms. Therefore, cover is available under Rule 35 only if:

a the extra costs and expenses are by their nature those that are necessarily consequent upon the kind of damage to the cargo or damage to the Ship that would have been covered by the Hull Policies had the Ship been fully insured on standard terms without deductible;

b are costs and expenses that are not in fact recoverable under Hull Policies of the kind specified in Rule 71.

For example, the extra costs and expenses that are incurred in handling or moving cargo in order to obtain access to a part of the Ship that requires repair may be recoverable under the Hull Policies as a necessary repair expense, in which case, cover would not be available for such costs and expenses under Rule 35.

Where there is damage to the Ship, it is not also necessary, for the purposes of a claim under this Rule, that the cargo should also have been damaged. For example, if the Ship’s cranes have become damaged as a result of an accident, and it is necessary to incur extra costs and expenses to hire shore or floating cranes in order to discharge the cargo, cover is available.

3 The P&I cover is designed to supplement the Hull Policies. If the damage to the Ship is recoverable under the Hull Policies, the hull insurers will pay for the repair of the Ship, including replacement parts and any necessary towage costs to a suitable yard. The hull insurers will not necessarily cover the costs of handling and discharging of cargo even if such steps are necessary to facilitate the repair of the Ship. However, if such costs are recoverable under the Hull Policy, cover is not available under Rule 35 (See the Guidance to Rule 71).
A container does not fall within the definition of Ship for the purposes of the Rules. Therefore cover is not available for the cost of de-stuffing and re-stuffing the contents of a damaged container (perhaps in another container).  

(D) ...in handling and discharging cargo... (Rule 35.a)
The word ‘discharging’ includes all operational activities that are necessary to move the cargo from its stowed position in or on the Ship to shore in order to perform the contract of carriage. The nature of the activities will differ depending on the type of cargo, type of Ship, how the Ship is equipped, and the layout of the port, berth or terminal.

The word ‘handling’ must be read in conjunction with ‘discharging’ and encompasses cargo operations other than discharging that have become necessary as a result of the damage to the cargo or the Ship. This can include the shifting of cargo on board, whether within one hold, between holds, from hold to deck or vice versa, or to and from a working barge, or from Ship to shore as a temporary measure. It can also include work that is needed in order to remove damaged cargo from the holds, e.g. water-damaged cement or other solidified cargoes, or in segregating sound from damaged cargo in order to avoid (further) contamination, and any necessary reloading and re-stowage on board of cargo that it has been necessary to move as a result of damage to the cargo or the Ship.

Although the words ‘handling’ and ‘discharging’ can be considered separately they also form part of one phrase, i.e. ‘handling and discharging’ and are therefore, intended to apply to a variety of circumstances in which it is necessary for the Ship to deal with cargo in an unexpected and unanticipated way as a result of damage to the cargo and/or Ship. Consequently, the phrase is given a broad construction and is deemed to incorporate a variety of extra costs and expenses provided that they are reasonably and necessarily incurred in ‘handling and discharging’ cargo as a result of damage to the cargo or Ship. In most cases, the necessary operations can be carried out at the planned locations where the Ship is to load or discharge. However, that may not always be possible and it may be necessary for the Ship to shift to another berth or other location and even, in some, cases, to shift to another port. Similarly, if the necessary operation cannot be carried out unless the Ship is provided with additional fuel, stores, equipment etc., and these cannot be provided at the location where the operation is to be carried out and cannot be delivered to the Ship at that location, the Ship may have to proceed to another location to take delivery of such fuel, stores etc. In such situations, cover may be available under Rule 35 for the extra costs and expenses that are incurred by the Member in shifting or diverting the Ship. However, in all such cases, the Member will need to satisfy the Association that such costs and expenses were reasonably and necessarily incurred. Furthermore, the phrase ‘costs and expenses’ refers to expenditure that is incurred by the Member to

4 See also the guidance to Rule 63.1.b.
other parties whilst performing the “handling and discharging” operations and does not include the Member’s own ‘internal’ administrative costs\(^5\) or loss of time\(^6\) unless cover is otherwise available under Rule 46.

Furthermore, costs that the Member has incurred in connection with handling the cargo after it has been discharged from the Ship, such as storage, shifting, sorting, re-arranging, forwarding and disposal costs, are not covered under Rule 35.a but cover may be available for such costs under Rule 46.

\((E)\) \(...\) in discharging or disposing, including storing, of cargo which has been rejected, by the person entitled to delivery (Rule 35.b)\)

...\textit{cargo which has been rejected, by the person entitled to delivery}\n
Cover is available under Rule 35.b only if the cargo is rejected by the person that is entitled to take delivery of it, e.g. the lawful holder of a negotiable bill of lading, and the Member, consequently, is obliged to incur extra costs and expenses in order to discharge or dispose of it. However, there is deemed to be rejection for the purposes of Rule 35.2 only if it gives the carrier the right (which may sometimes amount to an obligation) to dispose of the cargo.\(^7\) Provided that the cargo is rejected by the person entitled to take delivery of it, cover is available, subject to provisos i-iii and any other restrictions which apply under the Rules, regardless of the reason for the rejection.

A cargo may be rejected for many reasons, e.g. because it is damaged or does not comply with the description contained in the contract of sale or Bills of Lading.\(^8\) Furthermore, even if the person that is entitled to take delivery of the cargo is obliged to take delivery of the cargo in its damaged condition under the law that governs the contract of carriage, local law and practice may entitle, or even oblige, that person to refuse to do so. Alternatively, the cargo may be rejected by that person for reasons which are totally unconnected with its quantity, condition or time of delivery. For example, it may be rejected as a result of a dispute between the seller and the buyer or their banks under the cargo sale contract or because the consignee has been prevented from taking delivery by the local authorities (see further below).

\(^5\) See the Guidance to Rule 77.
\(^6\) See the Guidance to Rule 63.2.
\(^7\) Whilst this will normally be the case the Member may need to obtain legal advice to ascertain his rights and obligations in such circumstances. Such advice may be necessary to establish his rights and obligations under the law of the country where the cargo is intended to be discharged and delivered, as well as under the law which governs the contract of carriage. In certain circumstances, the Member may need to obtain a court order or some other form of permit from a competent body in order to have the authority to dispose of the cargo.
\(^8\) Cover is not available under Rule 34.i.ix if the description of the cargo or of its quantity or condition contained in the Bill of Lading is incorrect, and this was known to the Member or the master at the time of issue. See Rule 34.1.ix.
Cover is available under Rule 35.b only in the event of a rejection of the cargo by the person entitled to take delivery of it. Therefore, if the cargo has not been rejected by that person in the manner described below, cover is not available. Cargo can be deemed to be rejected by the person entitled to take delivery of it either as a result of a positive statement or act (express rejection), or as a result of a continuing failure on his part to take delivery of the cargo at and/or after the time that he is obliged to take delivery of it under the terms of the contract of carriage (de facto rejection). However, cover is not available under Rule 35.2 if the failure to take delivery of the cargo is caused by the insolvency of the person that is entitled to take delivery of it. Cover is excluded in such circumstances pursuant to Rule 77.

Cover is available under Rule 35.b only for those extra costs which are incurred by the Member after the time that the person that is entitled to take delivery of the cargo is deemed to have rejected it. However, the Rule does not apply merely when the cargo is rejected after arrival at the contemplated port of discharge. The rejection of the cargo may occur at any stage during the carriage. For example, the person that is entitled to take delivery of it may decide, following a casualty that has occurred during the laden voyage, that the damaged cargo is not worth forwarding and may decide to reject it whilst the Ship is at a place of refuge.

Even if the Member is obliged to incur costs before rejection, which will often be the case because of a continuing duty to care for the cargo, cover is not available for those costs under Rule 35 but cover may be available pursuant to Rule 46, and a carrier may wish in any event to consider exercising a lien on the cargo in order to recover such costs. For example, the discovery of impurities in samples taken from a cargo of foodstuffs prior to discharge may cause the relevant local food and health authority to refuse to grant a discharge permit, which may make it impossible for the person that is entitled to take delivery of the cargo to take delivery of it in accordance with the terms of the contract of carriage. Consequently, that person may consider that he has no other option but to reject it. Cover is available in such circumstances only for those extra costs and expenses that are incurred by the Member in discharging or disposing of the cargo after the time that such a person is deemed to have rejected the cargo, and not from the time (if earlier) when the local authorities intervened, or the time when any other circumstance which prevented the discharge of the cargo occurred.

The determination of exactly when a cargo has been de-facto rejected, i.e. as a result of a continuing failure to take delivery, may not be an easy exercise. The carrier’s contract of carriage may contain relevant provisions but it cannot be guaranteed that these provisions will be enforceable in the place where the cargo is to be delivered and there may be no provisions of the local law that specify exactly when a carrier is entitled to dispose of uncollected cargo. If there is no guidance from the local law, or failing that, from the terms of the contract of carriage, the cargo is normally deemed to have been rejected if despite the fact that the
Member has given the consignee notice that he has failed to take delivery and that consequently, the Member intends to dispose of the cargo, the consignee has failed to respond to such notice within a time that would suggest to a reasonable person that the consignee does not intend to take delivery.

In some cases, the identity of the person that is entitled to take delivery of the cargo may be in doubt. For example, the intended person may fail to take delivery of the cargo as a result of a dispute under the cargo sale contract with the result that the Bills of Lading have either not been transferred to him or have been withheld by, or returned to, the shipper. The crucial question is whether the cargo has been rejected by the party entitled to take custody of it, regardless of whether this is the party named as consignee in the contract of carriage. Provided that the cargo has been rejected by this party, cover is available under Rule 35 for the extra costs and expenses that have been consequently incurred, subject to any other restrictions that apply under the Rules and the contract of insurance. For example, if rejection arises as a result of the fact that the cargo is unlawful or subject to a sanctions regime, then cover may well be excluded pursuant to the provisions of Rule 74.9

Because cover is subject to such restrictions, each case must be considered on its merits, and it is important to ascertain exactly why the cargo has been rejected. In some circumstances, the person that it is believed to be entitled to take delivery of the cargo may state quite clearly that he will not take delivery of it and also give the reasons for such rejection, whereas, in other circumstances, he may not do so. In any event, when cargo is expressly rejected, the Member should always require the person doing so to explain his position in writing since it may be possible to persuade that person either not to reject the cargo or to challenge the legal validity of the rejection. If a cargo is damaged, the person that is entitled to take delivery of it may have a valid right to reject it if it is no longer suitable for trading. However, a Member should always try to ensure before taking steps to dispose of rejected cargo to obtain written confirmation from the relevant cargo interests that they abandon all interest in the cargo and that they agree to the Member disposing of it as the Member deems fit. Such confirmation is important in order to avoid any later allegation of conversion on the part of the Member since P&I cover is not available for claims and liabilities that arise as a result of cargo being disposed of unlawfully.10 Consequently, the Member should contact the Association for advice regarding the remedies available to, and the legal obligations of, the carrier under the applicable law before taking any steps to discharge, dispose or store the cargo ashore.

9 See the Guidance to Rule 74.
10 See also the Guidance to Rule 72.
...in discharging or disposing, including storing, of cargo which has been rejected...

Cover is available under Rule 35.b not only in respect of extra discharging costs (which include the activities described in (D) above) but also in respect of post discharge costs that are inevitable or necessary in order to dispose of the cargo. The word ‘disposing’ is not defined but may encompass a salvage sale or destruction of the cargo and may also include costs incurred in order to comply with any applicable environmental requirements. The exclusion in Rule 62 for waste incineration, disposal operations and landfills would not apply in these circumstances since the exclusion does not apply in the case of operations that are carried out as an incidental part of other commercial activities. However, if disposal involves the sale of the cargo, perhaps for salvage, the net proceeds of sale must be deducted from any compensation that is payable pursuant to Rule 35.2 in amount corresponding to the benefit obtained in accordance with the provisions of Rule 54.11

Cover is also available for extra costs and expenses that are incurred in storing the cargo. If cargo is rejected it will often be necessary to incur storage costs of some sort before a cargo can be disposed of properly since it may take some time to identify the best/most cost effective means of disposal. The cargo may need to be sorted, re-arranged and transported so that it can be disposed of, and cover is available for such costs provided that they are reasonably incurred. However, storage costs that have needlessly been incurred before a cargo is disposed of as a result of the culpable inaction of the Member are not deemed to be ‘extra costs and expenses’ for the purposes of Rule 35.2 to the extent that they exceed the extra costs that would otherwise have been incurred had the cargo been disposed of in a timely fashion.

(F) …the Member is able to recover from any other party... (Rule 35 proviso i)

Firstly, it is important to note that the exclusion in Rule 35 proviso i applies even if cover would otherwise have been available under Rule 35.a or b.

In some circumstances, it may be possible for the Member to recover the extra costs and expenses that he has incurred from a third party such as a consignee or a charterer and, therefore, proviso i makes it clear that if the Member is able to recover such costs and expenses from any other party, cover is not available under Rule 35. However, in order for the proviso to be applicable, it must be proved that the Member has the legal right to make such a recovery pursuant to the applicable law and has the legal means to enforce that right. In such circumstances, the Member is deemed to be “able to recover from any other party” and cover is not available. However, cover is available if the Member has no legal rights of recourse or is not able to enforce recovery from the relevant party as a result of the bankruptcy or insolvency of that party, or as a result of other difficulties in tracing and/or attaching

11 See the Guidance to Rule 54.
sufficient assets belonging to that party against which recovery can be enforced. When considering whether the Member is able to recover from any other party the Association will consider all relevant facts and will wish to be satisfied that the Member has taken all reasonable measures to pursue his legal rights. Therefore, if the Association is of the view that, in all the circumstances, a recourse claim is so plagued with complication and the uncertainty of the relevant legal process that to pursue it will only result in the incurring of disproportionate costs and risks, it may well conclude that cover should be made available rather than oblige the Member to pursue such an uncertain process.

(G) ...are excepted from cover under Rule 46.a... (Rule 35 proviso ii)
Cover is available under Rule 46.a for ‘extraordinary costs and expenses reasonably incurred’ by a Member in order to avert or minimise any liability on the Association, but excludes certain costs and expenses from recovery. The same exclusions apply to the cover which is available under Rule 35.12

For example, cover is not available if the extra handling and discharging costs have been, or could have been, minimised by reasonable use of the Ship’s Crew and equipment. If it would have been reasonably possible for the Ship’s Crew to re-stow and secure the cargo en route following damage to the cargo, the Association may not be able to reimburse the Member for extra costs arising as a result of a deviation to a nearby port in order to carry out such re-stowing and securing since all Members have a duty to take reasonable measures to minimise costs and expenses which they may wish to claim from the Association.13 Similarly, cover is not available under Rule 35 for extra handling costs and expenses incurred for the purpose of making the Ship seaworthy for the reception of cargo.14

Rule 46 also excludes cover for “costs and expenses relating to the Ship being overloaded or the cargo being incorrectly stowed”. If the Member was responsible for the overloading or the incorrect stowage, cover is not available for the reasons given in the guidance to Rule 46. However, cargo may not be considered to be improperly stowed if the reason why the cargo shifted during the voyage was the result of unforeseen or unexpected circumstances (such as weather/seas) that occurred during the voyage. If the stowage was the responsibility of another party, e.g. a charterer, the shipowner Member may be able to bring a recourse action to recover the extra costs and expenses from such other party. Nevertheless, even if the Member is not able to recover from another party for the reasons discussed in (F) above, cover is still excluded pursuant to proviso ii for costs and expenses relating to “the Ship being overloaded or the cargo being incorrectly stowed”.

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12 See the Guidance to Rule 46.
13 See the Guidance to Rule 46.a.iii.
14 See the Guidance to Rule 46.a.iv.
Rule 46 also excludes cover for “costs and expenses claimable in general average”. If it becomes necessary to discharge and temporarily store the cargo at a place of refuge so that the ship can be repaired and cargo re-loaded for on-carriage, then the costs of those cargo operations will usually be allowed in general average (GA).\textsuperscript{15} The costs of transhipping the cargo can also usually be allowed in GA as a substitute expense if they are less than what it would otherwise have cost to store the cargo during repairs. If the cost of forwarding is not allowed in GA and the Member is obliged to bear the cost himself then Rule 46 would determine whether any cover can be made available. However, if the cargo interest or charterer incurs the cost in the first place and then seeks to recover that cost from the Member, cover may be available under Rule 34.

\textit{(H) ...form part of the daily running costs and expenses of the Ship.} (Rule 35 proviso iii)

Cover is not available for costs and expenses which form part of the daily running costs and expenses of the Ship, as these are considered to be normal or usual operational expenses which are for the Member’s own account and not costs and expenses to which the membership as a whole should contribute. Such costs and expenses may be extra port charges incurred as a result of a prolonged stay in port to handle and discharge cargo, or wages payable to the Crew although they may not be involved in the handling and discharging of the cargo.

\textsuperscript{15} See the Guidance to Rule 46.a.i.
Rule 36 Collision with other ships

1 The Association shall cover liability to pay damages to any other person incurred as a result of a collision with another ship, if and to the extent that such liability is not covered under the Hull Policies on the Ship, including:

   a i one fourth of the liability incurred by the Member; or
   ii four fourths of such liability; or
   iii such other fraction of such liability as may be applicable and has been agreed with the Association;

   b that part of the Member's liability which exceeds the sum recoverable under the Hull Policies solely by reason of the fact that the liability exceeds the sums insured under those policies, provided that:
   i the Member shall not be entitled to recover from the Association any deductible borne by him under the Hull Policies; and
   ii the cover under this Rule shall exclude liability in respect of persons or property on board the Ship.

2 Unless otherwise agreed between the Member and the Association as a term of the Ship’s entry in the Association, if both ships are to blame, then where the liability of either or both of the ships in collision becomes limited by law, claims under Rule 36.1 shall be settled upon the principle of single liability, but in all other cases claims under this Rule shall be settled upon the principle of cross-liabilities, as if the owner of each ship had been compelled to pay the owner of the other ship such proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Member in consequence of the collision.

Guidance

For more detailed commentary on issues relating to collision claims see Chapter 6 of the Gard Guidance on Maritime Claims and Insurance.

(A) …liability…incurred as a result of a collision… (Rule 36.1)

Cover is available under Rule 36 for liabilities arising where a Ship that is entered with the Association is involved in a collision with another ship unless cover for such liability is available to the Member under the Ship's Hull Policies. Therefore, the Rule operates where two or more ships are involved in a collision, but not where a collision occurs between a Ship and a fixed or floating object.

1 See “P&I cover for collision liability” below and the Guidance to Rule 71.
2 Different countries may apply different criteria for what constitutes a ‘collision’. In the narrow sense a collision is the direct physical contact of the hulls of two or more ships in circumstances where one or both ships are moving. However, there may also be deemed to be a collision if there is physical contact between the equipment of one ship and the hull of another, or where a ship is damaged as a result of an emergency manoeuvre which is taken in order to avoid collision with another ship.
3 See the Guidance to Rule 37 in this regard.
**Collision liability**

Liability in respect of ship collisions is usually founded on principles of negligence and breach of the duty of care. However, several countries give effect to the rules for the apportionment of liability set out in the Brussels Collision Convention of 1910, which convention has been enacted by the majority of maritime countries, although not by the United States. The Convention determines that where a collision is caused by the fault of one or more ships, the owners of those ships shall each pay damages to the other corresponding to the proportion of blame which each ship is to bear for the collision, but the owners of both ships are jointly and severally liable to third parties in respect of claims for death or personal injury. Consequently, personal injury claimants may sue the owners of either or both ships for the entirety of their damages, which liability is then brought back into the collision adjustment between the two ships together with other claims which have arisen as a result of the collision.

However, where damage is caused to property belonging to third parties, e.g. to cargo owners, the owner of each ship is liable to such third parties only to the degree that it is at fault for the collision. Whilst the owners of cargo can also sue both ships, the owners of the cargo carrying ship will in most circumstances be exonerated from liability by virtue of the negligent navigation defence in the Hague and Hague-Visby Rules. However, no such defence exists under the Hamburg Rules, which operate on the basis of ‘presumed fault’ on the part of the carrier. In similar fashion, the Rotterdam Rules, although not yet in force, contain no such defence.

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4 The International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, signed at Brussels, 3 September 1910.

5 The general rule under US law is that, if a collision occurs in non-US territorial waters, or if both ships involved in a collision in international waters have the same flag, or if their separate flag states apply the same law, liability and damages are determined according to the relevant non-US law. Consequently, if the collision has occurred outside US territorial waters and the flag states of the ships involved have ratified the Brussels Convention 1910, the US courts are likely to apply the rules of that Convention instead of US domestic rules of law concerning apportionment of liability.

6 If the vessel is bareboat or demise chartered, any liability is likely to rest with the bareboat (demise) charterer rather than the registered owner of the Ship, since the bareboat charterer is responsible for operation of the Ship, including navigation.

7 The Convention determines that each shipowner shall bear his own loss in circumstances where neither ship is considered to be at fault for the collision, e.g. two ships collide as a result of breaking their moorings or dragging their anchors following a sudden, unexpected and irresistible natural phenomenon such as a tsunami. The same principle applies in circumstances where it is impossible to establish who is to blame, e.g. two ships colliding in open sea with the loss of all hands and with no other witnesses or information.

8 Under US law the owners of both ships are also jointly and severally liable in respect of damage to property, including damage to cargo on each ship. In order to avoid certain difficulties which arise in such circumstances the Association has recommended that, even though this clause is probably not enforceable in the US in relation to public contracts of carriage, the ‘Both to Blame Collision Clause’ is included in Bills of Lading and charterparties and a failure so to do may prejudice cover. See the Guidance to Rule 55.b and Appendix VII. More information on this subject can be found in the Gard Handbook on P&I Insurance, 5th Ed., Arendal (2002).

9 See Article IV Rule 2 of the Hague-Visby Rules.
The shipowner is liable for the negligent acts, defaults and omissions of all persons for whom he is legally responsible, i.e. the officers and Crew, and also for pilots\textsuperscript{10} and tug operators. The question of whether or not there has been a failure to exercise due care in the navigation of a ship is generally assessed by reference to the International Regulations for Preventing Collisions at Sea 1972, as amended\textsuperscript{11} (COLREGS), which set out the rules of navigation that all ships registered in countries that have accepted the COLREGS are bound to follow. However, local rules of navigation may also apply in certain ports, harbours, estuaries or tidal rivers and these may take precedence over the COLREGS or, at least, may be taken into consideration by the court when assessing the conduct of each party and the question of fault.

A failure to exercise a duty of care in the navigation of a ship may also give rise to other liabilities, such as civil or criminal fines or other penalties for breach of safety regulations imposed, e.g. on the shipowner, master and/or other Crew. However, cover is not available under Rule 36 in respect of such fines or penalties but, depending on the circumstances, it may be available under Rule 47.1. If none of the four categories of fines that are covered as of right under Rule 47.1 are applicable, then the issue will fall to be determined in accordance with the Association’s discretion, as described in Rule 47.2.

The owner of a ship who incurs liability as a result of a collision may be entitled to limit his liability under the applicable law for claims that are made against him by the owner of the other ship, e.g. pursuant to the provisions of the London Convention for the Limitation of Maritime Claims, 1976, or the 1996 Protocol to that Convention, or pursuant to domestic rules of law. Furthermore, the owners of such ships may also have a right to limit the liability that they may have to third parties for claims that are made against them by such third parties as a result of the collision, e.g. for loss of life or personal injury, or for loss of or damage to cargo or other property. However, the owners of neither of the ships are normally entitled to include in their (inter-ship) claim against the owners of the other ship any third party liability which exceeds the sum to which they are entitled to limit their liability in respect of such third party claim. Therefore, the claims that are made between the colliding ships inter se will be adjusted on the basis that any rights which are available to either ship to limit its liability for the claims brought against it by third parties will already have been taken into account.

\textsuperscript{10} Pilots are professional navigation advisors and do not take over the command of the ship from the master while on board. However, there is an exception in the case of pilots in the Panama Canal who, according to local regulations, assume full command of the ship while in transit through the Canal.

\textsuperscript{11} The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS).
**P&I cover for collision liability**

Rule 36 is intended to be a supplement to, and not a substitute for, the cover that is available to the Member under the Member’s Hull Policies for collision liability. Therefore, subject to any other relevant restrictions in the Rules, cover is available under Rule 36 to indemnify the Member for damages which the Member is legally liable to pay (and does pay) to other parties affected by the collision but only to the extent that such liability is not covered under his Hull Policies. Relevant other parties include those parties that have an interest in the other ship, or its cargo or any other property or persons on board the other ship.\(^{12}\) However, cover is not available under Rule 36 for the Member’s liability in respect of property or persons on board the entered Ship although cover may be available under other Rules.\(^{13}\)

\(^{(B)}\) ...damages... (Rule 36.1)

The amount which is payable by way of damages may differ depending upon the law which governs the dispute between the parties. The governing law may be the law of the country where the collision occurred, or the law of the flag of each ship. Alternatively, the governing law and jurisdiction may be determined by an agreement entered into by the parties after the collision.

The injured party is normally entitled to recover only that loss or damage which is the direct and foreseeable consequence of the collision. Furthermore, if the injured party has failed to take reasonable steps to avoid or minimise his loss or damage, i.e. he has failed to mitigate his losses, he will normally be entitled to be compensated only for that loss or damage for which he would have been entitled to receive compensation had he acted reasonably.

The damages which are normally recoverable by one party from the other party include:

i. The reasonable cost of both temporary and permanent repairs to the damaged ship or, where it is beyond economic repair, its insured value, market value or replacement cost;
ii. The value of lost bunkers or equipment that was on board the damaged ship, or the cost of their replacement or repair if damaged;
iii. Loss of earnings;
iv. Liabilities to third parties caused by the collision, e.g. liability in respect of lost or damaged cargo, or personal injury to, or death of, persons that are on board the damaged ship;
v. Costs and expenses reasonably incurred as a result of the collision, e.g. salvage and general average charges and agents’ and surveyors’ fees;

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\(^{12}\) Liability for loss of life or personal injury caused to persons on board the other ship involved in the collision would be covered under Rule 36.

\(^{13}\) See Rules 27, 28 and 29 concerning, respectively, liability in respect of Crew, passengers and other persons carried on board the Ship, Rule 30 concerning liability for persons not carried on board the Ship, as well as Rule 34 concerning liability in respect of cargo on board the Ship.
vi Liability to reimburse costs and expenses incurred in respect of any necessary measures that are taken to chart, mark, light, raise, remove or destroy the wreck of the (other) ship which has been lost as result of the collision.

(C) …another ship… (Rule 36.1)
Rule 36 applies only to collisions between ships. The test of what is a ‘ship’ is one of fact based upon a number of factors, e.g. was it intended for, or capable of, navigation or the transportation of persons and/or cargo by water? Consequently, cover would normally be available under Rule 36 for liabilities resulting from a collision between a Ship and a barge or a non-powered craft, whereas cover would not be available for a collision between a Ship and a landing stage or a buoy.14

(D) …such liability is not covered under the Hull Policies on the Ship… (Rule 36.1)
Cover is available under Rule 36 for collision liability incurred by the Member only to the extent that such liability is not covered by his Hull Policies. This exclusion is based on the expectation and understanding that the Member will follow normal prudent practise and ensure that the Ship is fully insured for hull and machinery risks on ‘standard terms’ for not less than the market value of the Ship.

The Association considers the Hull Policies which provide cover for hull and machinery risks on English, Scandinavian, American, German, Japanese or French terms and conditions to be on ‘standard terms’. Therefore, if the Ship is insured for hull and machinery risks on other terms and conditions, the Association will need to consider and evaluate such terms and conditions in order to determine whether they constitute ‘standard terms’ for the purposes of this Rule.15

Provided that the Association is satisfied that the Ship has been insured on ‘standard terms,’ cover is available notwithstanding the fact that such ‘standard terms’ do not all provide exactly the same scope of cover for collision liability.16 The degree and

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14 A borderline case may be where a ship comes into contact with a stationary floating offshore vessel on the field, e.g. a shuttle tanker comes into contact with a floating storage and off-taking vessel (FSO). An FSO is stationary so long as it operating on the field, but may have propulsion and the ability to transport oil as cargo off the field.

15 The Association is entitled to request full details of the Member’s Hull Policies either before entry of the Ship or at any time thereafter for the purpose of assessing the premium rating, which may vary considerably due to various factors, e.g. the definition of ‘collision’ in the Hull Policies and whether the hull insurer covers only three-fourths’ collision liability. Under the terms of Rule 7 the Member must notify the Association of any changes in the Ship’s Hull Policies during the period of the P&I entry that can affect the liability exposure of the Association.

16 For example, for there to be a ‘collision’ under the English ITC Hull conditions, there must be physical contact between the hulls of the ships and/or their appurtenances, e.g. an anchor or cargo handling gear. By contrast, under the Norwegian Marine Insurance Plan (NMIP), there may be a ‘collision’ in circumstances where a ship causes another ship to run aground as a result of taking avoiding action, without there being physical contact between the hulls of the ships. Furthermore, under the ITC Hulls, the hull insurers cover three-fourths of the assured’s collision liability whereas under the NMIP the hull insurers cover the collision liability in full, albeit limited to the insured value of the insured ship.
extent of the cover that is provided varies and a rough comparison can be found at the end of the Guidance to this Rule.

(E) …including…one-fourth…or…four-fourths…or…such other fraction… (Rule 36.1.a)
When the Ship’s Hull Policies cover only three-fourths of the Ship’s collision liability,17 cover is available under Rule 36 for the remaining one-fourth of that liability. However, like most other P&I clubs, Gard also offers its Members the option of placing four-fourths’ collision liability cover with the Association.18

The Association may also agree to offer collision liability cover for a proportion other than one-fourth if the proportion of collision liability excluded under the Member’s Hull Policies is not one-fourth. However, such arrangements are unusual.

(F) …that part of the Member’s liability which exceeds the sum recoverable under the Hull Policies solely by reason of the fact that the liability exceeds the sums insured under those policies… (Rule 36.b)
A standard Hull Policy will usually limit the cover for collision liability to the proportion of liability insured19 multiplied by the insured value of the ship.

Where the Member’s collision liability exceeds the sum recoverable under the Hull Policies solely by reason of such a limit on the sum insured, cover is available from the Association for the amount by which the collision liability exceeds that limit. This may occur, e.g. if the Ship has a relatively low value, but has to bear the major proportion of liability for a collision with another ship that has a very high value and is unable to limit that liability under the applicable law. Alternatively, the excess liability cover that is available from the Association under Rule 36 might be required if there was a large claim against the Ship as a result of the salvage or wreck removal of the other ship.

It would be contrary to the concept and spirit of mutuality if a Member who fails to insure his Ship for its full market value and who, thereby, runs the risk that there will be a shortfall in the collision liability cover provided by the Hull Policies, could be allowed to remedy this in full by making a claim for the shortfall under his P&I insurance. Therefore, if the Ship is insured under the Hull Policies for a value that is lower than its true market value, i.e. under-insured, cover is available under Rule 36 only for the excess liability which would not have been recoverable under the Hull Policies.

17 This is usually the case when the Ship is insured under English terms and conditions
18 Some Members find it beneficial to place full cover with the Association due to the following factors: the collision liability deductible is generally lower than that required by the hull underwriters; the prospect of paying one instead of two deductibles for collision liability; and access to the Association’s letters of undertaking that are widely accepted.
19 The relevant proportion may be e.g. three-fourths of the liability as is the case under ITC Hulls. See footnote 16 above.
Policies had the Ship been insured for its true market value.\footnote{The true market value is estimated after consultation with Sale and Purchase brokers who have experience of the type of ship in question.} Such under-insurance can occur, e.g. if the market value of the ship increases over time, and the shipowner fails to declare a higher value to his hull insurers, or when the owner decides not to declare a higher value, but to increase the share of insurance placed under his hull interest (IV) policy.

For example:
Ship A collides with ship B and ship A is held 100 per cent to blame for the collision. Ship B suffers losses of USD 15 million which is less than the sum to which ship A can limit its liability. Consequently, ship A is liable to pay ship B its full claim of USD 15 million. However, the hull and machinery (H&M) policy of ship A is subject to the Nordic Plan 2013 which includes standard 4/4ths collision liability cover with an insured value of USD 12 million. Therefore, since the cover for collision liability under the H&M policy for ship A is limited to USD 12 million, i.e. the sum insured, ship A’s liability to pay the balance of USD 3 million is not covered by the H&M policy with the result that cover for that balance is available under Rule 36.

The cover for collision liability is usually additional to the cover for loss of, or damage to, the insured ship. Therefore, the hull insurers may be liable for double the sum insured if the insured ship becomes an actual or constructive total loss as a result of the collision and the liability of that ship to the other ship(s) equals or exceeds the sum insured. Similarly, if the Hull Policies cover three-fourths of the collision liability, the maximum recovery would be three-fourths of the insured value of the ship.

Finally, cover is not available under Rule 36 in circumstances where, although the Member has the right of recovery under the Hull Policies, he fails to make the recovery for some reason, e.g. due to the insolvency of one or more hull insurers. The reason for this is that the Association is not privy to, and has no control over, the manner in which the Member chooses to place his Hull Policies. Therefore, it would be contrary to the concept and spirit of mutuality to require other Members to bear the cost of the Member’s decision to place his Hull Policies on an unsatisfactory basis.

\((G)\) …the Member shall not be entitled to recover from the Association any deductible… (Rule 36.1.b proviso i)
A Member may decide for many reasons to agree to accept a high or low deductible under the Hull Policies. This is a personal decision for the Member and the Association is not privy to that decision which is a matter that affects the Member’s private business arrangements and not something that should prejudice the interests of the other Members in the context of mutuality. Therefore, cover is not available under Rule 36 for any collision liability that falls within the deductible borne by the
Member under the Hull Policies, but cover for the costs incurred in pursuing or defending a claim that falls within the deductible borne by the Member under the Hull Policies may be available under Defence cover, if such cover has been taken out with the Association.\(^{21}\)

\((\text{H})\) …exclude liability in respect of persons or property on board the Ship…

\((\text{Rule 36.1.b proviso ii})\)

Cover for the Member’s liability to persons or property on board the Ship is not available under Rule 36, but may be available under Rules 27, 28 or 29, 34 or 50.\(^{22}\)

\((\text{I})\) …if both ships are to blame… (Rule 36.2)

Where both ships are damaged as a result of a collision caused by the fault of both ships, each ship is liable for the damage caused by it to the other. The starting point in most cases is that such liability is ascertained on the principle of cross liability.

\(\text{For example:}\)

If ship A is 60 per cent to blame for the collision and suffers damage of USD 20 million whilst ship B is 40 per cent to blame and suffers damage of USD 15 million, the ‘cross liability’ is calculated as follows:\(^{23}\)

- Ship A is liable to B for USD 9 million (i.e. 60 per cent of the damage to Ship B)
- Ship B is liable to A for USD 8 million (i.e. 40 per cent of the damage to Ship A)

However, where either or both ships can limit their liability by law, the claims are resolved in accordance with the principle of single liability. This means that the claims will be set off against each other to produce a balance which is payable by one ship to the other.

Liability arising as a result of a collision can be even more complicated. For example, if a collision were to occur between ship A and ship B, caused partly as a result of the unseaworthy state of ship A and partly as a result of the negligent navigation of ship B, the following claims might arise:

1. Hull damage to ship A – USD 1 million
2. Damage to cargo on ship A – USD 900,000
3. Hull damage to ship B – USD 4 million
4. Injury to passengers on ship B – USD 3 million

Assuming that, pursuant to the Hague-Visby Rules, ship A is entitled to limit its liability for the damage to the cargo that is carried on ship A to the sum of USD 300,000 whilst, pursuant to the Athens Convention, ship B is entitled to limit its liability by law, the claims will be set off against each other to produce a balance which is payable by one ship to the other.

\(^{21}\) See the Guidance to Rules in Part IV Defence Cover.
\(^{22}\) See the Guidance to these Rules.
\(^{23}\) The court will usually also award interest up to the date of judgment. For example, the English courts allow interest on both claims and the single liability is established by subtracting the lower claim plus interest from the higher claim plus interest to produce a net figure.
liability for injury to passengers carried on ship B to USD 1 million, the claim which ship A will make against ship B is USD 1.3 million and the cross claim which ship B will make against ship A is USD 5 million.

If ships A and B are each 50 per cent to blame for the incident, the claims will be adjusted as follows:
- Ship A recovers 50 per cent of USD 1.3 million, i.e. USD 650,000 from ship B
- Ship B recovers 50 per cent of USD 5 million, i.e. USD 2.5 million from ship A

Therefore, ship A is liable to ship B for USD 1.85 million

Depending on the tonnage of ship A, ship A may then be able to limit its liability by law (for example under the 1976 Limitation Convention) for the claim brought against it by ship B to a sum lower than USD 1.85 million.

However, this principle may not produce a fair result when claims are allocated between the shipowner, his hull underwriters and his P&I club. Consequently, for the purpose of ‘internal settlement’ between the assured and his different insurers, the claim is assessed as if each ship had actually made payment to the other ship of its full share of the other ship’s damages, i.e. on the ‘cross liability’ principle. But, where both ships are damaged as a result of a collision caused by the fault of both ships and one or both of them is/are able to limit its/their liability, the cover that is available from the Association for the Member’s claim is governed by the principle of single liability and not cross liability.\(^{24}\) The reason for this exception is that, under the laws of most jurisdictions, an owner may limit only his net liability, as calculated under the single liability principle, and not his gross liability, as calculated under the cross liability principle.

\(^{24}\) Unless otherwise agreed between the Member and the Association as a term of the Ship’s entry.
Liabilities covered by Hull Policies – collision with other ships

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<td>Damage to other vessel and cargo on board the other vessel</td>
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<td>Loss or damage resulting from entanglement of anchors (no contact between the hulls of the two vessels)</td>
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<td>Loss or damage to property (other than cargo) on board other vessel</td>
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<td>Delay or loss of use of other vessel</td>
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<td>Collision with another vessel which causes collision between that vessel and another ship</td>
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<td>Removal of wreck of other vessel or property on same (as consequence of collision)</td>
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Rule 37 Damage to fixed or floating objects
The Association shall cover:

a. liability for loss of or damage to any fixed or floating object by reason of contact between the Ship and such object, when not covered under the Hull Policies;

b. that part of the Member’s liability which exceeds the amount recoverable under the Hull Policies solely by reason of the fact that the liability exceeds the sums insured under those policies,

provided that there shall be no recovery under this Rule 37 in respect of any deductible borne by the Member under the Hull Policies.

Guidance
For more detailed commentary see Chapter 9 of the Gard Guidance on Maritime Claims and Insurance.

(A) …any fixed or floating object… (Rule 37.a)
Cover is available under Rule 37 for liability for contact between a Ship and fixed or floating objects unless cover for such liability is available to the Member under the Ship’s Hull Policies.1

A ‘fixed object’ is a structure that does not float and, therefore, is not designed to move or be moved on water, e.g. a harbour, quay, dock, pier, jetty, crane or bridge or a fixed offshore platform, subsea pipeline or power or telecommunication cable. A ‘floating object’ is a structure other than a ship2 that is designed to have buoyancy, e.g. a buoy or a semi-submersible drilling rig, and that may be designed to move on water, e.g. a floating storage and off-loading vessel.

Fixed and floating objects include both:

i. Man-made structures that are erected or installed in areas exposed to maritime risks; and

ii. Natural habitat resources with direct or derived economic value which can be damaged by physical contact with ships, e.g. coral reefs, and which may result in a claim for restoration costs and natural resource damages.

1 See (E) below and the Guidance to Rule 71.
2 There is no universal definition of a ‘ship’. One common definition is that used in Paragraph 12 of Part II to Schedule 7 of Section 185 (1) of the Merchant Shipping Act 1995 of the United Kingdom, i.e., “any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship.”
Cover is available for liability to both types of object but the distinction between ‘fixed’ and ‘floating’ objects may be important in relation to the liability of the Member. Similarly, whilst the distinction between a ship and a floating object other than a ship is an important one, it is often difficult to draw.

(B) …by reason of contact between the Ship and such object… (Rule 37.a)

Cover is available under Rule 37 only where there has been physical contact between the Ship and the fixed or floating object and liability for such damage is not covered under the Ship’s H&M policy (see section (E) for further commentary on this point).

The Association regards The Nordic Marine Insurance Plan 2013 (Nordic Plan 2013) hull and machinery (H&M) conditions as one of the ‘standard terms’ for the application and interpretation of Rule 37. The commentary to H&M cover under the Nordic Plan (Chapter 13-1) makes it clear that liability for contact damage (striking) involves physical contact between the Ship and another object as a consequence of a movement which results in pressure, e.g. where the ship causes damage by bumping against a jetty. Contact ‘striking’ may also be the result of ‘pulling’ or ‘sucking’, e.g. where the ship sucks or draws an object towards itself. The act of the Ship ‘pulling’ the object and thereby causing a ‘striking’ (i.e. physical contact) falls within the scope of contact damage under the Nordic Plan 2013 H&M cover, but ‘pulling’ without ‘striking’ does not, and is, therefore, not the subject of cover under Rule 37 but under Rule 39. A typical example is damage caused by waves or backwash (so called wash damage) which cannot be described as contact ‘striking’ damage and is therefore the subject of cover under Rule 39.

For there to be cover under Rule 37 there must be contact between the Ship and the other object. However, for these purposes, the word ‘Ship’ is construed broadly and includes not merely the hull, but any part of the Ship’s fixed structure, e.g. accommodation, bridge wings, as well as equipment such as cranes, booms, deck equipment, gangways, anchors, chains, mooring ropes, towing lines etc and also appurtenances that are used regularly by the Ship for its intended purpose, such as a fishing trawl attached to a trawler vessel or sonar ‘streamers’ applied to a seismic vessel.

3 See (C) below.
4 Depending on the circumstances, contact between the Ship and a floating offshore installation may be considered to be a collision between ships, cover for which is available under Rule 36 not Rule 37.
5 See (D) in the Guidance to Rule 36 for a further discussion of what constitute ‘standard terms’ in this regard.
7 See the Guidance to Rule 39.
Cover for liability for contact (striking) damage caused by the ship’s equipment, e.g. cranes, booms, gangways, anchors, chains, mooring ropes, towing lines and other similar equipment, is available under Rule 37 only in situations where contact (striking) damage has been caused by the ship’s movement being transmitted through the medium of such equipment. For example, if a lifeboat, derrick or deck cargo that protrudes out over the ship’s side whilst the ship is maneuvering to go alongside makes contact with, and causes damage to, a shore installation, cover is available for the liability that the Member may have for the contact damage to the shore installation under Rule 37. Similarly, if a gangway which has been hoisted up and fastened makes contact with, and causes damage to, the jetty whilst the Ship is still manœuvreving, cover for such liability for contact damage to the jetty is available under Rule 37.

In contrast, cover is not available under Rule 37 if the contact (striking) damage has been caused by movements of the Ship’s equipment such as cranes, booms, gangways, anchors, chains, mooring ropes, towing lines and other similar equipment, that have not been caused by the movement of the Ship but merely as a result of the separate and independent use of such equipment. For example, should the Ship’s cranes be negligently operated whilst the Ship is safely secured at a berth so that damage is caused to shore equipment, cover is not available under Rule 37 since such damage has not been caused by any movement of the Ship but as a result of the separate and independent use of the Ship’s cranes. However, cover might be available under Rule 39.

Similarly, if the Ship is alongside and the Ship’s Crew incorrectly (i.e. excessively) tighten the ship’s mooring ropes by using the Ship’s winches with the result that a bollard is torn loose and the jetty is damaged, cover is not available under Rule 37 but possibly under Rule 39. However, by way of contrast, if the Ship is still moving and a fastened mooring rope were to pull loose a bollard and thereby cause damage to the jetty, cover is available under Rule 37 since the contact damage has been caused by the movements of the Ship being transmitted via the mooring ropes.

Cover is not available under Rule 37 where there has been no physical contact between the Ship, or any part of it, or equipment used by it, and the damaged object, e.g. as a result of contamination by oil, chemicals or other substances which have been discharged from, or which have escaped from, the Ship,\(^8\) or where damage has been caused by waves, wakes or swirls caused by the Ship’s movement or by the use of its propellers.\(^9\)

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\(^8\) Cover for such liability would rather be covered under Rule 38 – Pollution.

\(^9\) This is commonly denoted ‘wash damage’ and cover for such liability is available under Rule 39 unless covered under the Hull Policy.
(C) Liability for loss or damage to... (Rule 37.a)

A shipowner’s liability for damage to a fixed or floating object arises most often in tort but may also arise under contract\(^\text{10}\) or under statute or other regulations.

In the case of liability in tort, a shipowner has, both personally and through his servants and agents, a duty to exercise care to ensure that his Ship does not cause damage to others. Therefore, it is found that a sufficient degree of care has not been exercised, and that this has caused the Ship to strike a fixed or floating object, it is likely that the Member will be held liable to compensate the owner of that object for losses sustained as a result.

Where a Ship that is in motion makes contact with an object that is stationary, particularly where the object is fixed or, if floating, incapable of moving to avoid contact, there will usually be a presumption that the Ship is to blame for having caused the contact. For example, where a Ship makes contact with a fixed oil platform, it is likely that the shipowner will be held liable for the consequent damage caused to the platform. However, it is possible that liability can be avoided or reduced in some circumstances if the Member is able to prove that the contact was not caused by any fault or negligence on the part of the Ship, e.g. because it lost power for reasons that were beyond the Crew’s control and drifted onto the platform as a ‘dead ship’\(^\text{11}\).

Furthermore, the fact that an object is stationary on or in the water does not necessarily mean that some contributory blame cannot be attributed to its owner in the event of contact with a Ship. The owner or operator of that object is obliged to comply with rules that govern the adequate charting, marking, lighting of, and/or emission of signals from, such objects, and if it is considered likely that contact with the Ship would not have occurred had the owner or operator of the object complied with such rules, this may affect the apportionment of liability for the incident.

Liability for loss of, or damage to, fixed and floating objects may also arise under contract. For example, it can be a pre-condition for the Ship’s use of a dock, port, berth, terminal or similar facility that the Member must agree to standard ‘terms of use’ before being allowed to use the facility. Alternatively, such ‘terms of use’ may be considered to be binding on the shipowner under the applicable law even though he does not sign a contract before using the dock, port etc., if he has in fact

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10 For example, a contract between the operator of an oil platform and the owner of an anchor handling vessel providing services to the platform.

11 However, depending on the applicable law, the Member may not be able to escape liability even if it can be proved that the contact and damage was not caused by his fault since some rules of law provide for strict liability. For example, under English law, a shipowner may be held liable for damage caused by his ship to a harbour, dock or pier, or any quay or associated works, even if neither he nor his ship is at fault. Under Norwegian law the shipowner is strictly liable for FFO damage caused by a technical failure of the ship’s reversing mechanism. Another example of strict liability is found in the Norwegian Seawater Fishing Act of 1983, section 42, concerning damage to fishing gear.
used the facility on previous occasions subject to similar contractual terms, i.e. as a result of a prior course of dealing. Alternatively, the ‘terms of use’ may take the form of local, legally binding regulations which provide that the use of the facility constitutes an implied acceptance of the terms, provided that the Member has been made aware of them, or it can be shown that the Ship has in fact used the facility on previous occasions subject to similar terms.

In practice, there is a variety of such ‘terms of use’ which can differ substantially both in relation to the basis of liability and in relation to the degree of liability that is imposed on the ‘user’. It is usual for ‘terms of use’ to impose strict liability for any damage caused by the ‘user’ and to give the owner or operator of the facility a right to be indemnified in respect of any resulting loss or damage. Indeed, liability may be imposed even in circumstances where the owner or operator of the facility is solely to blame for the incident, e.g. due to the negligence of harbour tugs and/or the mooring master during berthing operations. However, should the Member incur liabilities solely by virtue of the applicability of ‘terms of use’, cover is available only to the extent that the Association has given prior approval to those terms.12

(D) …loss of or damage to any fixed or floating object… (Rule 37.a)
The damages that may be claimed after an incident which has caused the loss of, or damage to, a fixed or floating object include:
i  The reasonable cost of both temporary and permanent repairs to the object and ancillary equipment or, where the object has become damaged beyond economic repair, its insured value, or market value, or replacement cost;
ii Compensation for the loss of use of the object, i.e. the loss of revenue suffered by its owner or operator by reason of the fact that the object is out of (normal) use as a result of the damage caused by the Ship;
iii Third party liabilities, whether arising under contract, statute or in tort, which are incurred by the owner or operator of the object as a result of the contact damages. For example, a terminal operator may be liable under contract to pay compensation to other users of the terminal as a result of the inoperability of loading and discharging equipment caused by the contact incident;
iv Various costs and expenses reasonably incurred by the owner or operator of the object as a result of the damage caused, e.g. survey and inspection fees and costs.

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12 See the Guidance to Rule 55. The Pooling Agreement contains Guidelines which clarify the extent to which liabilities arising as a result of the use of such terms and conditions will be poolable. For example, liabilities arising solely as a result of the fact that the ‘user’ has agreed to indemnify the owner or operator of the port or terminal for loss or damage caused by the intentional acts or the gross negligence of the owner or operator, or his servants or agents, will not be poolable. The same applies to contractual provisions which have the effect of depriving the ‘user’ of a right to limit liability that would otherwise apply under the applicable law.
If the object is lost as a result of the contact with the Ship, e.g. it sinks to the seabed, it is possible that the owner or operator of the object may be ordered to chart, mark, raise and/or remove it, and may, therefore, claim reimbursement of the resulting removal costs and expenses from the Member.

However, cover is available for such liability only to the extent that it is not covered under Hull Policies that are on ‘standard terms.’ (See (E) below).

The Member, master and/or Crew may not only incur liability to compensate the owner of a fixed or floating object for the financial loss sustained as a result of damage, but may also become liable to pay fines and penalties. However, cover is not available for such fines and penalties under Rule 37 but, depending on the circumstances, it may be available under Rule 47.1. If none of the four categories of fines that are covered as of right under Rule 47.1 are applicable, then the issue will fall to be determined in accordance with the Association’s discretion, as described in Rule 47.2.

(E) …when not covered under the Hull Policies... (Rule 37.a)
Cover is available for the legal liability that a Member has incurred as a result of physical contact between the Ship and a fixed or floating object provided that such liability is not covered under the Ship’s H&M policies. Therefore, cover is available in such circumstances under Rule 37 subject to the following exceptions:

i damages which are covered under the Hull Policies or which would have been covered under the Hull Policies had the Ship been insured for hull and machinery risks on ‘standard terms’; and

ii damages which fall within the deductible actually borne by the Member under his Hull Policies.

These exceptions reflect the fact that this cover, like the cover which is available under Rule 36 for collision liability, is a supplement to, and not a substitute for, the Member’s Hull Policies.

There are significant differences between Hull Policy terms and conditions in this regard. The standard Nordic, German or French terms all include cover for such liability to a varying degree, whereas the English, American and Japanese terms do not do so. Therefore, please see the comparison table which can be found at the end of the Guidance to this Rule.

13 See the Guidance to Rule 36.
14 See, for example, Chapter 13 of The Nordic Marine Insurance Plan 2013.
15 See, for example, ITC Hulls 1983 with amendments.
If the actual Hull Policy that the Member has for the Ship provides more limited cover for liability to fixed and floating objects than is the case under other Hull Polices which are considered to be on ‘standard terms’, cover is not available for liability that would have been covered under a Hull Policy which is on such ‘standard terms’. However, in view of the fact that the available cover for such liability under differing Hull Policies is less standardised, the Association will wish to review the applicable Hull Policy terms and conditions in the light of their governing law and market practice in order to determine whether cover is available.

(F) ...liability which exceeds the amount recoverable under the Hull Policies...  
(Rule 37.b)

Standard Hull Policies normally limit the insurer’s liability cover to the insured value of the ship. Therefore, should the Member’s liability for loss of or damage to fixed and floating objects exceed the sum recoverable under the Hull Policies solely by reason of such a limit P&I cover is available under Rule 37 for the amount by which the liability exceeds the maximum sum recoverable under the Hull Policies. This may occur, for example, if the Ship has a relatively low value and causes major damage to, or even the total loss of, an object or installation with a high value, and is unable to limit its liability for such a claim under the applicable law.

It would be contrary to the concept and spirit of mutuality if a Member who has failed to insure his Ship for its full market value and who, thereby, runs a risk that there will be a shortfall in the cover available under the Hull Policies for liability for loss of damage to fixed and floating objects, could be allowed to remedy this in full by making a claim for the shortfall under his P&I insurance. Therefore, if the Ship is insured under the Hull Policies for a value that is lower than its true market value, i.e. under-insured, cover is available under Rule 37 only for the excess liability which would not have been recoverable from the hull insurers had the Ship been insured for its true market value. Such under-insurance can occur where the market value of the ship increases over time, and the shipowner fails to declare a higher value to his hull insurers, or when an owner decides not to declare a higher value, but to increase the share of insurance placed under his hull interest (IV) policy.

Finally, cover is not available under Rule 37 in circumstances where, although the Member has the right of recovery under the Hull Policies, he fails to make the recovery for some reason, e.g. due to the insolvency of one or more hull insurers. The reason for this is that the Association is not privy to, and has no control over, the manner in which the Member chooses to place his Hull Policies. Therefore,

16 See (F) in the Guidance to Rule 36.
17 The true market value is estimated after consultation with Sale and Purchase brokers who have experience of the type of ship in question.
it would be contrary to the concept and spirit of mutuality to require other Members to bear the cost of the Member’s decision to place his Hull Policies on an unsatisfactory basis.

(G) …there shall be no recovery under this Rule 37 in respect of any deductible borne by the Member under the Hull Policies… (Rule 37.b)

A Member may decide for many reasons to agree to accept a high or low deductible under the Hull Policies. This is a personal decision for the Member and the Association is not privy to that decision which is a matter that affects the Member’s private business arrangements and not something that should prejudice the interests of the other Members in the context of mutuality. Therefore, cover is not available under Rule 37 in respect of any liability that falls within the deductible borne by the Member under the Hull Policies.

**FFO liabilities and Hull Policy Cover**

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<td>Damage to a fixed or floating object (FFO) (as a consequence of striking by the Ship)</td>
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<td>Loss of use of FFO (as a consequence of striking by the Ship)</td>
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<td>Removal of wreck of FFO (as a consequence of striking by the Ship)</td>
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**Rule 38 Pollution**

1. The Association shall cover:
   a. liabilities, costs and expenses (excluding fines) arising in consequence of the discharge or escape from the Ship of oil or any other substance or the threat of such discharge or escape;
   b. liabilities, costs and expenses incurred by the Member pursuant to any agreement approved by the Association for the purpose of this Rule.

2. A Member insured in respect of a Ship which is a ‘relevant ship’ as defined in the Small Tanker Oil Pollution Indemnification Agreement, including any addendum to, or variation or replacement of such agreement (STOPIA) shall, unless the Association otherwise agrees in writing, be a party to STOPIA for the period of entry of the Ship in the Association. Unless the Association has agreed in writing or unless the Association in its discretion otherwise determines, there shall be no cover under this Rule 38 in respect of such a Ship so long as the Member is not a party to STOPIA.

3. A Member insured in respect of a Ship which is eligible for entry in the Tanker Oil Pollution Indemnification Agreement (TOPIA) shall, unless the Association otherwise agrees in writing, be a party to TOPIA for the period of entry of the Ship in the Association. Unless the Association has agreed in writing or unless the Association in its discretion otherwise determines, there shall be no cover under this Rule 38 in respect of such a Ship so long as the Member is not a party to TOPIA.

**Guidance**


(A) Explanatory remarks

Over the past four decades major marine pollution incidents have affected the regulatory environment of the shipping sector on a steadily increasing scale. Historically, most marine pollution cases have involved ship-source spills of oil products. Consequently, international conventions, such as MARPOL, have been developed to protect the environment from such pollution. Additionally, other international conventions, such as the CLC, have been developed in order to regulate shipowner liability as well as to ensure the prompt and efficient payment of compensation to those that have been affected by such pollution. Over the years, the scope of international regulation has been significantly broadened to encompass ship-source spills of substances other than oil carried as cargo, such as bunker oil.

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from all types of ship,\(^3\) as well as hazardous and noxious substances which may threaten human life and the environment.\(^4\) Furthermore, conventions have been periodically reviewed and amended, as a result of which the limits of liability that apply in respect of pollution damages have been substantially increased.

Therefore, liabilities in respect of pollution have become one of the most important areas of P&I cover, both in terms of the amounts paid and the coverage needed. The provisions of Rule 38 reflect the position taken by the P&I clubs that the scope of the cover that is available for liabilities, costs and expenses arising as a result of ship-source pollution incidents ought to be broad, because the majority of such incidents are accidental and Members need adequate protection against the, sometimes, severe financial consequences that are applicable.

Whilst the Association is normally obliged to indemnify the Member only where he has firstly paid or otherwise discharged his third party liability,\(^5\) this is frequently not so in the case of pollution liability. The CLC and Bunker\(^6\) Conventions both require the shipowner to arrange and provide evidence of insurance or other financial security for his potential liability, and for his flag state to approve and attest to such insurance or other financial security. The Association will certify that such insurance is in place\(^7\) and by doing so, the Association will thereby incur direct liability to third party claimants\(^8\) for the pollution damage for which the shipowner is liable under those conventions. It is also increasingly the case that, irrespective of whether or not a pollution incident requires a clean-up operation, the local authorities may impose a fine on the shipowner/ operator, or the master, or sometimes both. This issue is covered more fully in the guidance to Rule 47.

**B) Pre-conditions for cover under Rule 38**

The following pre-conditions for cover apply:

- the pollution liability must have occurred in direct connection with the operation of the entered Ship.\(^9\) For example, if there is an oil spill from the Ship during loading at the Member’s own terminal, cover is available for the resulting

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5. See Rule 87.1, which is sometimes referred to as the ‘pay-to-be-paid’ principle.
6. The Association, along with the other P&I clubs who are members of the International Group of P&I Clubs, provide similar evidence of insurance to flag states in respect of liabilities arising under the Bunker Convention, as that which has been provided for many years in relation to liabilities arising under the CLC.
8. See Article VII 8 of the CLC 92.
9. See Rule 2.4.a.
liabilities. On the other hand, cover would not normally be available for liabilities that arise as a result of a spillage from a terminal pipeline rupture since there would not, in such circumstances, have been discharge ‘from the Ship’. However, if the Ship is adjudged to be liable for the terminal pipeline rupture due to over-pressure emanating from the Ship’s pumps, cover is available for such liability. Similarly, cover will not be available in circumstances where the oil or other substance is no longer in the possession of the Ship and subsequently causes pollution, e.g. where oil or chemical waste delivered by the Ship to a shore reception facility escapes from that facility;

ii the pollution liability must have arisen in respect of the Member’s interest in the entered Ship. For example, if pollution liability is imposed on the charterer of the Ship (who has effected a Charterer’s Entry for the Ship in the Association) in his capacity as owner of the oil cargo that has caused the pollution damage, cover is not available for such liability because it resulted from the Member’s interest in the cargo and not in the Ship;

iii the pollution liability must have arisen as a result of an event that occurred during the period of entry of the Ship. For example, if the Ship has sunk or becomes stranded with ‘oil or any other substance’ on board and is accepted by her hull underwriters as a Constructive Total Loss (CTL), the P&I cover that the Member has in respect of the Ship will automatically cease on the occurrence of that event. In such circumstances, cover is available for liabilities that arise as a result of incidents that occur prior to such termination even if the consequences of the incident are not experienced until after the termination, but cover is not available for liabilities that arise as a result of incidents that post-date such termination. Therefore, cover is available for liabilities incurred by the Member for pollution from the stranded or sunken ship due to seepage from damaged cargo or bunker tanks since such liabilities are considered to flow from the casualty or incident that caused the total loss of the Ship. However, although the Association has no liability for incidents that arise after termination of the entry, the authorities in some countries are entitled by law to hold the shipowner liable for pollution

10 This does not apply to liability for contamination or other damage to the Member’s own property. See Rule 50, which does not include pollution liability.
11 Whilst the shipowner who delivered the waste may be the target for claims in respect of such pollution under the applicable law (e.g. under the US Comprehensive Environmental Response, Compensation and Liability Act 1980 (CERCLA)), cover is not available in respect of such liability unless the Association’s Board of Directors exercises its discretion in favour of the Member pursuant to Rule 62.2. The reason for this is that such liability has not occurred in direct connection with the operation of the Ship as required by Rule 2.4.a and possibly not during the period of entry of the Ship in the Association as required by Rule 2.4.c.
12 See Rule 2.4.b.
13 The Association provides special insurance cover for charterers where the option exists to include cover for liability incurred as owner of cargo on a chartered ship. For more information, see www.gard.no.
14 See Rule 2.4.c.
15 See the Guidance to Rule 25.2.c.
16 See Rule 25.6.
17 See Rule 26.2.
emanating from a wreck, even though the owner may have sold the wreck to a third party prior to the occurrence of the pollution. Therefore, although the owner may have a right of recourse against the third party under the contract of sale of the wreck, the owner will almost certainly have to respond to the authorities’ demands. Consequently, cover will normally remain available for liabilities that are incurred by the Member pursuant to such demands by the authorities;

iv the Member is always required to make use of whatever rights that are available to him to limit his liability under any applicable rule of law, e.g. pursuant to the CLC, and to take diligent and proper steps to defend himself against unfounded and exaggerated claims;

v in order to qualify for cover under Rule 38.1, the Member whose Ship is either a ‘relevant ship’ as defined in STOPIA, and/or is eligible for entry in TOPIA, must be a party to STOPIA and/or TOPIA for the period of entry of the Ship in the Association. The Association will automatically enter all relevant Ships in STOPIA and/or TOPIA on behalf of the relevant Members but cover is not available under Rule 38.1.a or Rule 38.1.b if the Member decides not to be a party to STOPIA and/or TOPIA unless the Association agrees in writing that cover is, nonetheless, available or, in the absence of such written agreement, exercises its discretion in exceptional cases to determine that cover shall be available. Further guidance relating to STOPIA and TOPIA is given in paragraphs (I), (J) and (K) below;

vi the cover that is available under Rule 38 for oil pollution is subject to the important limitation provisions that are set out in Rules 53.1 and 53.2, as well as in Appendix III that is referred to therein. The overall limit of cover is USD 1 billion for owners’ entries and USD 350 million for a charterer that is a co-assured under an owner’s entry;

vii where the Member has cover for the relevant liability under any other insurance, the P&I cover will be subsidiary to that (or those) insurance(s).

18 See Rule 51.
19 See Rule 82.
20 STOPIA is an acronym for Small Tanker Oil Pollution Indemnification Agreement. The latest version was agreed in 2006 and is referred to as STOPIA 2006.
21 TOPIA is an acronym for Tanker Oil Pollution Indemnification Agreement. The latest version was agreed in 2006 and is referred to as TOPIA 2006.
22 Such discretion must be exercised by the Board of Directors.
23 The limits specified in Rules 53.1 and 53.2, and Appendix III do not apply to pollution caused by substances other than oil.
24 Oil companies can operate oil platforms and tankers, and may arrange for comprehensive, integrated insurances that cover, inter alia, third party liability resulting from their operations. Otherwise, see the Guidance to Rule 71 concerning ‘double insurance’.
(C) The scope of cover under Rule 38

Cover is available under Rule 38 for liabilities that the Member incurs pursuant to international convention, national statute or common law principles. However, cover is not available for liabilities that arise solely by virtue of the terms of a contract or agreement unless those terms have been approved by the Association.

There is no uniform regime which regulates pollution liability in all countries of the world. However, many countries have ratified the CLC 92 which regulates liability and compensation for pollution emanating from tank ships, and many countries have also ratified the Bunker Convention. Other countries merely enforce local legislation with the result that the Member’s liability exposure can be significantly different depending on where claims for pollution damage are made against him.

Shipowners and charterers may also have no choice but to accept for commercial reasons contractual terms relating to pollution liability that are more onerous than those which would otherwise apply under any applicable law. See further Guidance to Rule 38.1.b under (I) in this regard.

Moreover, in order to preserve the intended cost allocation between the shipping and oil industries under the CLC and Fund Conventions, shipowners, with the support of their P&I clubs, have agreed to indemnify the International Oil Pollution Compensation Fund and Supplementary Fund, for certain liabilities that would otherwise have been borne by those Funds. See further Guidance to Rule 38.2 (STOPIA) and Rule 38.3 (TOPIA) under (J) and (K) below in this regard.

(D) ...shall cover...liabilities, costs and expenses (excluding fines)... (Rule 38.1)

Rule 38.1 makes cover available for liabilities, costs and expenses that arise as a result of the actual or threatened discharge or escape of oil or any other substance from the Ship. Whilst the word ‘pollution’ is not expressly used in the Rule, cover is available if:

- oil or some other substance has been discharged or has escaped from the Ship, or there is a threat of such discharge or escape; and

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25 See Rule 38.1.a.
26 See Rule 38.1.b.
27 For detailed Guidance as to the regimes which apply globally and the various voluntary agreements see the Gard Handbook on Protection of the Marine Environment, 3rd Edition 2006, Part IV, Chapter 15.
28 For details of the countries that have ratified these conventions, please consult the IMO register of signatories that can be found on the IMO website www.imo.org.
29 For example, the United States is not a party to the international conventions which regulate oil pollution but has enacted statutes such as the Federal Water Pollution Control Act (FWPCA), the Comprehensive Environmental Response, Compensation and Liability Act 1980 (CERCLA) and the Oil Pollution Act 1990 (OPA 90).
30 The International Oil Pollution Compensation Supplementary Fund 2003 (Supplementary Fund) is separate and distinct from the International Oil Pollution Compensation Fund 1992 (1992 Fund), although it shares the same secretariat. 21 countries were members of the Supplementary Fund in March 2008.
b as a result of (a), the Member or the Association incurs a legal liability to pay compensation or damages to third parties that have been affected by the incident, and/or incurs liability for costs or expenses which have been incurred in order to prevent and/or clean-up the pollution and/or to restore the polluted areas.

Cover is available for e.g.:

i Costs and expenses that are incurred by the Member in order to prevent pollution damage following a spill, or to clean up and restore polluted areas and property in circumstances where the Member has a legal liability to incur such costs and expenses;

ii Costs and expenses to which reference is made in (i) that are incurred by third parties in the first instance, but in circumstances where the Member is legally obliged to indemnify those third parties, e.g. public authorities in the country or state affected by the spill which have undertaken pollution prevention, clean-up, restoration and monitoring measures;

iii Third party loss or damage caused by physical contamination of property, e.g. the soiling of recreational boats or fishing nets, or the clogging of water intakes to a production facility, or economic losses incurred as a result of such events regardless of whether or not the claimants have been directly affected by contamination, e.g. fishery and tourism losses, as well as damage or losses caused by clean-up and restoration activities;\(^{31}\)

iv Damage to natural resources, e.g. beaches, mangroves, marshlands, coral reefs and their wildlife flora and fauna habitats, for which the Member is liable under the applicable law to incur restoration costs and/or pay damages\(^{32}\) in respect thereof to authorities, trustees or other parties.

The cover that is provided under Rule 38.1.a expressly excludes fines. However, cover in respect of fines and penalties may be available under Rule 47.1.c.

As noted above, the Association may have a direct liability to pay compensation, costs and expenses for pollution liability that has been incurred by the Member pursuant to the CLC or other similar conventions by virtue of the fact that it has provided certificates evidencing the insurance of such liability. Pursuant to the terms of such certificates and the CLC, the Association will be liable to third parties to the same extent that the shipowner would have been liable had the claim been made against

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31 For example, it may prove necessary to cause damage to land areas in order to gain access for any heavy equipment which may be needed to clean an affected coastline or beach. Another source of such liability can be a new incident caused by a party operating under an ‘oil spill response contract’ where the Member has assumed responsibility for such incidents (and the Association has accepted the contract terms).

32 The law of the United States allows compensation to be paid to private or public parties for non-economic losses resulting from damage to natural resources. For more details, please see the Gard Handbook on the Protection of the Marine Environment, 3rd Edition, 2006, Chapter 9 (pp. 337 – 394).
him. However, although the Association is entitled to invoke the same defences and limitation rights that would have been available to the shipowner pursuant to the CLC, it cannot use as a defence against third party claims the fact that the Member is in breach of the terms of entry, e.g. with regard to his duty of disclosure under Rule 6, except where the liability or loss has been caused by the wilful misconduct of the Member. The certificates that the Association provides pursuant to the CLC to evidence insurance cover are wider in scope in certain respects than the scope of cover that is otherwise available under the Rules. For example, notwithstanding the provisions of Rule 58, the certificates oblige the Association to pay compensation for pollution claims that have arisen as a result of terrorism.

(E) ...arising in consequence of the discharge or escape... (Rule 38.1.a)
The majority of recoverable claims that are made against a Member involve clean-up costs and/or damage to the property of third parties caused by the discharge or escape from the Ship of oil carried as cargo or as bunker fuel.

The term ‘discharge’ includes not only incidents that occur during the course of planned discharge operations but also unplanned and accidental discharges that occur (usually as a result of negligence) during normal discharging operations or other operational activities on board. For example, liability may occur if an oil spill is caused by the inadvertent detachment of a hose at the Ship’s manifold during the course of pumping ashore. Depending on the circumstances, such a ‘discharge’ may also be considered to be an ‘escape’ of oil, i.e. the unintentional release of oil or another substance from the Ship. However, an ‘escape’ could also occur following a breach of the crude oil cargo tanks as the result of a grounding incident, or a spill of heavy or other fuel following the breach of bunker tanks as a result of a collision. Cover is available for liabilities that arise as a result of both such incidents.

(F) ...from the Ship... (Rule 38.1.a)
The oil or other substance must have been discharged or escaped from the Ship. If the Ship receives bunker oil in port from a tank barge and oil is spilled from the barge, there is no escape of oil from the Ship and, therefore, cover is not available under Rule 38.1.a. Nonetheless, the owner may still be liable for the mishap under contract and, if so, cover may be available under Rule 38.1.b. (See (I) below)

Cover is not available where liability is incurred as a result of pollution caused by the presence, discharge or escape of oil or other substance that was either (a) previously, but is no longer, in the possession of the Ship or (b) from a source other than the Ship. Such other source could be, for example, a land based dumpsite, storage or

33 See, for example, Article III, 2 of the CLC 92.
34 See Article VII, 8 of the CLC 92. See also the Guidance to Rule 72.
35 See the Guidance to Rule 58.
disposal facility that has received waste oil or other substances from the Ship.36 The reason why cover is not available in such circumstances is that the liability has not arisen directly in connection with the operation of the Ship, which is an overriding pre-requisite for cover pursuant to Rule 2.4.a. Furthermore, the liability may not have arisen during the period of entry of the Ship, which is a requirement pursuant to Rule 2.4.c. If the Member, nonetheless, incurs liability in respect of the presence of, or the subsequent discharge or escape of oil or other substance from a landfill site, the Association may make cover available by the exercise of discretion37 pursuant to Rule 62.2.

For the purposes of Rule 38, the substance giving rise to liability must have escaped from the Ship. Therefore, cover is not available under Rule 38 if the polluting substance is the Ship itself or any part of it, e.g. if the wreck38 of the Ship is considered pollution under the applicable law. However, cover is available if toxic or other polluting chemical cargoes, or other cargo that is deemed to be a pollutant and carried in containers on deck, are lost overboard.

(G) ...of oil or any other substance... (Rule 38.1.a)
The term ‘oil’ includes persistent and non-persistent types of oil. However, for the purpose of Rule 38, the term ‘oil’ is less important, because cover also applies to the discharge or escape of ‘any other substance’, which is a term that is much wider in scope. The intention is to provide broad cover for pollution liabilities arising from ship-source spills, and includes, inter alia, cargo carried, hazardous and noxious substances (HNS),39 garbage, sewage, oily bilge water, waste, debris as well as soot emitted through the ship’s funnel. However, the cover that is available for liabilities arising as a result of the carriage of nuclear substances is substantially restricted in scope.40

Cover is available although the substance giving rise to liability may not be classified as a pollutant or as a hazardous or noxious substance. It is sufficient that the discharge or escape of the substance has given rise to a legal liability for pollution under the law of the jurisdiction(s) where the incident and/or damage occurred.

(H) ...or the threat of such discharge or escape... (Rule 38.1.a)
Cover is also available for liabilities, costs and expenses that arise as a result of the ‘threat’ of a discharge or escape. Such a ‘threat’ will be deemed to exist when pollution damage is likely to occur if no measures are taken to reduce the risk of

36 See footnote 11 above concerning CERCLA liabilities.
37 Discretion in this regard must be exercised by the Board of Directors, because it is intended to make cover available for liabilities etc., in respect of which cover is not available under the Rules.
38 See Rule 40 as concerns cover for wreck removal.
40 See the Guidance to Rule 73 concerning nuclear perils.
damage. However, cover is also available where the Member is liable under the applicable law to reimburse local authorities or other parties for preventive measures that they have taken in order to avoid or reduce the risk of pollution, whether or not, objectively, a threat of pollution existed. For example, the Ship may suffer a grounding incident in close proximity to a busy port. Although it is not clear that cargo and/or bunker tanks have been, or will be, breached, the port authorities may decide to place booms around the Ship and to mobilise oil recovery vessels to stand by. If the authorities make a claim for reimbursement of these costs and expenses from the Member, and the Member is liable to pay such reimbursement under local law, cover is available under Rule 38.

Cover is also available where the Member, in similar circumstances, is requested by local authorities to take preventive measures and is at risk of incurring liability, including that of penalties that may be imposed by the authorities, if he does not comply with such request. However, before confirming that cover is available in such circumstances, the Association will assess whether the costs and expenses incurred by the Member were reasonable, taking into account the nature of the request and the consequences of any non-compliance.

The above situations must be distinguished from those where the Member, independently and voluntarily, takes preventive action and thereby incurs costs and expenses. In such circumstances, the Association will then assess whether the actions that were taken were taken against a threat of pollution that was real. The Association will also consider whether the costs and expenses that were incurred were reasonably and necessarily incurred because of that threat and not for any other purpose, such as the protection of the Member’s reputation, or the protection of his general business interests, since, in such circumstances, the Member would not be able to satisfy the overriding condition for cover in Rule 2.4. Therefore, Members are encouraged, where time permits, to consult the Association prior to incurring costs and expenses for which they intend to seek recovery from the Association.

Finally, there are situations where, regardless of whether or not action has been taken by the Member in response to a request to do so from the authorities, it cannot be said that there was, or is, a threat of pollution from the Ship. For example, the fouling of a cargo hold inside the Ship as a result of a leakage from a bunker tank through a crack in the tank top is unlikely to cause pollution damage outside the Ship if the external structure of the Ship is intact. Similarly, cover is not normally available where oil is spilt on deck and has to be cleaned up by the Crew before the vessel is allowed to leave port. This is because, again, such a spill does not normally create a risk of an escape of oil from the Ship. Each case is assessed on its own facts, but generally speaking, cover for costs incurred in order to clean the hold, or the deck or dispose of oily waste is not normally available under Rule 38.1.a in such circumstances.
The location of pollution damage
Cover is available for pollution damage to both the marine and the non-marine environments. Typical marine environments are coastal shorelines, tidal zones, estuaries, riverbanks, ports, inland waterways, as well as resources in the water column and on the seabed. The non-marine environment includes not only property and resources that is/are located inland[^41] but also the atmosphere, which can be damaged, e.g. by the release of air pollutants, such as chemical cargo vapours or soot exhaust.

It should be noted that pollution damage may affect more than one country, and that, therefore, the law of more than one country may apply when determining liability and damages. However, this does not affect the scope of cover.[^42]

Pollution and hull insurance
Certain liabilities, costs and expenses arising as a result of incidents that cause pollution may be covered under the Ship’s Hull Policies, and if so, P&I cover will not be available for such liabilities, costs etc.[^43] For example, the removal from the Ship after a collision incident of oil or other substances originating from the other ship may be considered a necessary measure to facilitate repairs to the Ship. Another example would be costs incurred in cleaning the hull of the other ship after a collision.[^44]

The duty to exercise due diligence to avoid pollution
A Member has a general duty to exercise due diligence to take the steps that are necessary in order to avoid liability arising as a result of known conditions that affect the Ship, which duty includes the duty to minimise pollution risks.[^45] For example, if a harbour tug were to collide with the Ship in port and cause a crack in the hull near to one of the bunker fuel tanks which could deteriorate and cause the escape of bunker fuel if not repaired prior to departure from the port, the Member should repair the damage immediately pursuant to the duty that is imposed on him generally to act as a prudent uninsured and also under Rule 82.1.b and cannot recover the cost of doing so under the P&I insurance as a sue and labour expense.

[^41]: The BRAER incident in 1995 is one example. The BRAER, which was loaded with North Sea crude oil grounded off the coast of Shetland in adverse weather and spilled oil. The owner and P&I club received claims from farmers living relatively far away from the casualty site because sea spray containing crude oil had been carried with the wind and soiled property, fields and animals.
[^42]: The CLC gives the owner a right to establish a compensation fund. If he has done so, all claimants whose property and resources located in CLC states have been damaged, are entitled to enforce their claims only against that fund. See Articles V and VI of the CLC 92.
[^43]: See Rule 71.1.a.
[^44]: Please see the schedule to Rule 36 comparing the cover provided by various hull terms and conditions.
[^45]: See Rules 82.1.b and 82.2.
(I) …liabilities, costs and expenses incurred by the Member pursuant to any agreement approved by the Association… (Rule 38.1.b)

Shipowners may be parties to many different types of contracts or agreements which regulate liability for damage to the environment inter se, e.g. charterparties, contracts for the use of terminals, bunker supply contracts, salvage agreements, certain standing agreements with oil spill response organisations and agreements that provide for the payment of voluntary compensation in excess of, or in addition to, that which is imposed by international conventions.

Subject to certain important conditions, cover is available under Rule 38.1.b for such liabilities. As a general rule, such contractual liabilities are covered only if the terms have been previously approved by the Association. The Association does not need to review all such terms in advance, but Members are encouraged to seek clarification from the Association when in doubt about the scope of cover. This is so even if the terms appear in a standard form charterparty, but this is particularly relevant in the case of agreements with oil spill response organisations, whose terms and conditions vary widely, and may place onerous duties on the Member. For example, reference is made to Gard Circulars Nos. 12 and 16/2012 commenting on difficulties that had been experienced in China resulting in the production by the International Group of P&I Clubs of an amended recommended spill response contract.

Bunker supply contracts and ‘terms of use’ for terminals

From time to time Members may be requested to accept onerous contractual terms and indemnities that are difficult to avoid. For example, a supplier of bunker fuel in a port may require the receivers of the bunker fuel to bear most, if not all, of the risks that are connected with the bunkering operation, including the risk of pollution caused by the sole negligence of the bunker supplier, his servants or agents. Similar onerous terms may be encountered at certain terminals or offshore facilities where permission to load or discharge will not be given unless the shipowner, in his capacity as ‘user’ of the facility, agrees to assume risks that would otherwise be borne by the owner or operator of the facility.

Cover is available for liabilities that arise solely by virtue of such contractual terms only if the terms have been previously approved by the Association. This does not mean that the Club must approve, for example, all bunker supply terms in advance, as this is impractical. However, guidance is provided by the Association concerning risks that should not be assumed without prior consultation. For example, the transfer to a shipowner from his contractual partner of liabilities that may result from

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46 See (J) and (K) below concerning STOPIA and TOPIA.
47 See Rule 55.
49 This is done in several ways: through Member Circulars, Insight articles, Loss Prevention alerts and circulars and in direct communications between the Member and/or P&I broker and the Association’s underwriters.
the wilful or intentional misconduct or gross negligence of the contractor’s personnel is not acceptable. Neither is the agreement on the part of the shipowner to waive limitation rights that would otherwise apply.\(^5^0\)

**Oil spill response agreements**

Cover is available under Rule 38.1.b in circumstances where Members are legally obliged under the applicable law to enter into contracts for pollution response measures prior to the occurrence of any incident which may cause pollution. In many coastal countries, the relevant local and/or national authorities will take charge of, and draw up contingency plans relating to, ship-source pollution incidents. The same authorities will also usually organise and control clean-up operations following such incidents.

However, in certain countries, such as the USA, measures must be undertaken by the designated Responsible Party, which is usually the shipowner. The US Oil Pollution Act requires shipowners to have a Vessel Response Plan in place for each ship trading to the USA, as well as contracts with a Qualified Individual and an Oil Spill Response Organisation, to enable them to fulfil their obligations in the event of a pollution incident. Cover is available under Rule 38.1.b for the liabilities, costs and expenses that Members incur pursuant to such agreements provided that the relevant liability provisions have been approved by the Association.\(^5^1\)

**Salvage and wreck removal contracts**

Salvage and wreck removal agreements usually contain provisions which allocate the risks for pollution damage that may arise during the course of their operations between the shipowner and the salvage company. Cover is available for liabilities that arise under the unamended terms of Lloyd’s Open Form and the BIMCO Form wreck removal contracts but Members who intend to conclude contracts on other terms are advised to consult the Association before doing so.

**Charterparties**

The risk of liability for environmental damage is usually borne by the owners and operators of ships. However, in recent years, charterers have been obliged to bear criminal fines and civil penalties that have been imposed on them by local

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\(^5^0\) This is to ensure that the right to retain Pool cover for large claims is preserved. However, additional cover in respect of liability resulting from onerous contract terms is available under the ‘Comprehensive Carrier’s Cover’ provided by the Association. See www.gard.no for further details.

\(^5^1\) The International Group of P&I Clubs has developed guidelines for the review of oil spill response agreements. Members trading to countries that require such agreements should consult the Association so that the Association may ensure that the terms and conditions comply with the guidelines. If they do not, cover may not be available.
authorities as a result of oil spills from the vessels that they have chartered. Consequently, charterparties may now include clauses that are designed to regulate the liability of shipowners and charterers inter se for pollution liability and charterers may incur liability by virtue of such clauses. Therefore, cover is also available under Rule 38.1.b for Members who are charterers but, unless the terms that impose liability on the charterers for pollution damage are considered to be ‘standard’ terms, there is cover only to the extent that the Association has given its prior approval to the relevant charterparty terms.

**STOPIA**

See paragraph (v) in (B) above as well as (J) below.

STOPIA is a voluntary agreement that is entered into by owners of oil tankers and the 1992 IOPC Fund (the Fund). The purpose of STOPIA is to increase the minimum limit of liability of shipowners for pollution damage caused by the spill of oil from tankers of 29,548 gross tons or less from whichever tonnage-based limit of liability that would otherwise have applied pursuant to the CLC 92 up to SDR 20 million.

**TOPIA**

See paragraph (v) in (B) above as well as (K) below.

TOPIA is an agreement between the Supplementary Fund and the owners of oil tankers, whether smaller or larger than 29,548 gross tons, which are ‘eligible for entry’ in TOPIA. It determines, in rough terms, that the owner of the oil tanker, and in practice, his P&I club, shall indemnify the Supplementary Fund for 50 per cent of the compensation provided by the Fund for admissible claims etc., made against it. The Fund will pay compensation for admissible claims resulting from pollution damage in countries that are members of the Fund, where such claims exceed the limit of the 1992 Fund. The combined limit of the Supplementary Fund and the CLC/1992 Fund is SDR 750 million.

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52 See, for example, Gard circular No.2/2013 entitled “Australian Pollution Law – Oil Pollution Indemnity Clause for Penalties and Fines” at: http://www.gard.no/ikbViewer/Content/20734835/Member%20Circular%20%20Australian%20pollution%20law%20%20Indemnity%20clause%20for%20penalties%20and%20fines.pdf


54 In June 2015, SDR 20 million was the equivalent of USD 28 million.

55 TOPIA does not apply to tankers that are larger than 29,548 gross tons, because that is the ship size at which the shipowner’s limit of liability under the CLC 92 reaches SDR 20 million.


57 In June 2015, SDR 750 million was the equivalent of USD 1.05 billion.
Rule 38.2 emphasises that although STOPIA does not oblige a shipowner to be a member of the agreement, it is a condition of cover for pollution liabilities etc., under Rule 38 that a Member who has entered one or more Ships in the Association that are ‘relevant ships’ for the purpose of STOPIA, (i.e. ships to which STOPIA is designed to apply), shall be a party to STOPIA for the period of entry of such Ship or Ships in the Association. If the Member is not a party to STOPIA at the time of the pollution incident, cover is not available from the Association for any pollution liability that would otherwise have been available pursuant to Rule 38, i.e. not just for the particular liability that arises pursuant to STOPIA.

The Association may agree in writing to waive this condition (i.e. that cover under Rule 38 is available although the Member shall not be a party to STOPIA) in order to enable it to take into account any special circumstances that may apply to, e.g. to small tankers in purely domestic trade. The Board of Directors of the Association may also exercise its discretion to waive the condition in particular cases where no such written agreement has been made.

Rule 38.3 is similar in effect to Rule 38.2 except that it applies to Members that are insured in respect of Ships that are eligible for entry in TOPIA, as opposed to STOPIA. Such Ships will be all oil tankers to which the CLC 92 applies without an upper size limit. Subject to this distinction, the comments that are made above under (J) apply equally in the context of TOPIA.

Rules 38.2 and 38.3 reflect the fact that the Association has, together with all the other member clubs of the International Group of P&I Clubs, agreed to cover liabilities that arise pursuant to STOPIA and TOPIA and is prepared to indemnify, respectively, the 1992 Fund and Supplementary Fund directly for such liabilities in order to contribute to the efficient implementation and operation of the indemnification mechanisms in STOPIA and TOPIA. This can be achieved only if all Members who have entered Ships which qualify for STOPIA and TOPIA in the Association are required and considered to be parties to STOPIA and TOPIA (whichever applies to the particular Ship) in relation to those Ships. By so doing, shipowners and their P&I Clubs have volunteered to cover a larger proportion of total ship-source pollution liabilities in order to preserve the balance of contributions between the shipping and oil industries that was originally envisaged in the CLC and Fund Conventions.

A Memorandum of Understanding has been entered into in this regard between the International Group of P&I Clubs on the one part and, collectively, the International Oil Pollution Compensation Fund 1992 and the International Oil Pollution Compensation Supplementary Fund 2003 on the other.
Rule 39 Loss of or damage to property

The Association shall cover liability for loss of or damage to property not specified elsewhere in Part II of these Rules.

Guidance

In most circumstances, cover for the Member’s liability for loss of, or damage to, property is available elsewhere in Part II of the Rules, i.e. liability to cargo under Rule 34, liability for collisions with other ships under Rule 36, liability for damage to fixed and floating objects under Rule 37 and liability for pollution damage under Rule 38. In the case of Rules 36 and 37, the scope of P&I cover is largely affected by the extent to which the Member’s liability is covered under the Member’s Hull Policies. However, the intention of Rule 39 is to make cover available for the Member’s liability for loss of or damage to property occurring in circumstances where cover is not available under either the Hull Policies or any other P&I Rule.

(A) …liability for loss of or damage to property… (Rule 39)

liability for loss of or damage to...

Cover is available for the Member’s legal liability for loss of, or damage to, the property whether the Member’s liability arises in tort, contract, statute or in any other way. The form of liability will normally be determined by the law of the place where the loss or damage occurred.

There is ‘loss’ of property for the purposes of Rule 39 when it is either damaged beyond the possibility of repair or when it cannot be traced or recovered, e.g. when it has been lost in deep waters or totally consumed by fire. There is ‘damage’ to property for the purposes of Rule 39 when the ability to use it as intended and/or its economic value has been impaired.

Rule 39 does not state expressly that cover is available for the Member’s liability for consequential loss arising as a result of the loss of or damage to property, e.g. liability for the loss of use of shore equipment until it has been repaired or replaced. However, Rule 39 is intended to afford the same degree of cover as that which is available under Rules 36 and 37. Consequently, cover is available for the Member’s legal liability to compensate the property owner for economic loss which he has incurred as a consequence of the loss of, or damage to, property, e.g. the loss of profit on a planned on-sale as a result of the damage to the property, and also for the Member’s legal liability to compensate a claimant who is not the owner of the lost or damaged property, but who has suffered economic loss as a result of such loss or damage.
**property**

In the majority of cases, the property that has been lost or damaged will be owned by a third party. However, even if the property that has been lost or damaged is owned wholly or in part by the Member, Rule 50 makes it clear that cover is available under Rule 39 to the same extent as if the property had belonged to a third party and, that if this had been the case, the Member would have been liable for the loss of, or damage to, such property.

Cover is available under Rule 39 not only in respect of ‘property’ which is privately owned, but also in respect of property which is owned by public sector entities, trustees and other organisations. However, cover is not available for loss or damage to natural resources or habitats that cannot be considered as to be ‘property’ in the sense discussed above. In most instances this issue will depend on the view that is taken under the applicable law.

However, cover is not available under Rule 39 for loss of or damage to the Ship. Such loss or damage would normally be covered under the Hull Policies and is, in any event, excluded from P&I cover by virtue of Rule 63. Such exclusion applies irrespective of whether the Ship is owned by the Member. For example, cover is not available for the liability of a charterer Member for damage to the Ship.\(^1\) Similarly, the loss of or damage to equipment, containers, lashings, stores or fuel on the Ship is excluded from cover where this is owned or leased by the Member or by any company associated with, or under the same management as, the Member.\(^2\)

Finally, cover is clearly not available under Rule 39 in respect of liability for loss of life or personal injury.

There is often a close connection between incidents for which cover is available under Rule 39 and those for which cover is available under Rules 34, 36, 37 and 38. Therefore, reference should be made to the guidance to these other Rules when considering the ambit of the cover that is otherwise available under Rule 39. With that warning in mind, it can be said that cover may typically be available under Rule 39 for the Member’s liability for:

- Non-contact damage caused by the negligent manoeuvring of the Ship. Even if there is no contact between them, the Ship may cause another ship to run aground or to collide with a third ship and, depending upon the terms of the Hull Policies, such policies may not provide cover for the Member’s liability;
- ‘Wash damage’ caused by the movement of the Ship through the water or the turbulent effect of her propeller which causes damage to other moored crafts, their moorings, waterfront property, quays or jetties;

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\(^1\) The Association has for more than 25 years offered additional cover on special terms and conditions to charterers that includes cover for their liability concerning damage to the chartered ship.

\(^2\) See Rule 63.1.b.
• Damage caused to subsea cables or pipelines by the Ship’s anchor or mooring lines, or to shore based property such as cranes, rails, conveyor belts etc by the Ship’s cranes, gangway, other equipment or deck cargo when such damage is caused otherwise than as a result of the Ship’s movement being transmitted through the medium of such equipment. For example, cover is available under Rule 39 for the Member’s liability for damage that may be caused to a truck on the quay as a result of the fact that cargo has been dropped from the Ship’s cranes during the course of discharge.

• Damage caused to another ship by the Ship’s cranes, gangway, other equipment or deck cargo when such damage is caused otherwise than as a result of the Ship’s movement being transmitted through the medium of such equipment.

(B) …not specified elsewhere in Part II of these Rules. (Rule 39)
As emphasised above, the purpose of Rule 39 is to make cover available where a Member’s liability in respect of property loss or damage is not covered elsewhere in the Rules or by the Hull Policies. Examples of such situations have been given in (A) above. It follows that cover is not available under Rule 39 for liabilities for which cover is available under another Rule or under the Hull Policies for the Ship.

Since the cover that is available under Rule 39 applies only when cover is not afforded by the other Rules and the Hull Policies, the Association will need to review both the terms and conditions of the Hull Policies in the light of their governing law and market practice, as well as the possible applicability of other P&I Rules before confirming that cover is available under Rule 39.

3 For more detailed commentary see (B) of the Guidance to Rule 37.
4 See the preceding footnote.
Rule 40 Liability for obstruction and wreck removal

The Association shall cover:

a costs and expenses relating to the raising, removal, destruction, lighting and marking of the Ship or of the wreck of the Ship or parts thereof or of its cargo lost as a result of a casualty, when such raising, removal, destruction, lighting and marking is compulsory by law or the costs or expenses thereof are legally recoverable from the Member;

b liability incurred by reason of the Ship or the wreck of the Ship or parts thereof as a result of a casualty causing an obstruction, provided that:

i recovery from the Association under this Rule shall be conditional upon the Member not having transferred his interest in the wreck otherwise than by abandonment; and

ii the realised value of the wreck and other property saved shall be credited to the Association.

Guidance

For more detailed commentary see Chapter 16 of the Gard Guidance on Maritime Claims and Insurance.

Introduction

Casualties and other incidents may cause a ship to become a total loss or at least inoperable pending salvage, towage and repairs. Over the past few decades, the increased focus on the protection of the marine environment has caused coastal states to implement regulations to ensure as far as possible that hazards posed by shipwrecks, or by ships that are otherwise inoperable, or by their cargoes or other pollutants that may be on board, are removed.

Until recently states have had to rely on a patchwork of different legislation in order to deal with the problem and this has created legal uncertainty and a lack of transparency for all the parties that are involved. Many states have had to rely on their own legal framework in order to deal with the removal of wrecks within their territorial waters, and whilst the Intervention Conventions have empowered coastal states to intervene on the high seas, i.e. outside their territorial waters, in order to prevent and mitigate threats of marine pollution to the relevant state, states have had only limited powers to claim costs incurred by them in relation to wreck removal in such waters. However, on 14 April 2015, the Nairobi International Convention on the Removal of Wrecks (the Nairobi Convention) came into force and introduced

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1 The full titles of the conventions are the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, as amended in 1973, and the Protocol relating to Intervention on the High Seas in Cases of pollution by Substances other than Oil.
for the first time a set of uniform rules for the prompt and efficient removal of wrecks that are located outside the territorial sea of the states that are parties to the convention.

The Nairobi Convention governs wreck removal operations within the Exclusive Economic Zone (EEZ) of the state that is a party to the convention but the convention also enables contracting states to declare when adopting the convention that they are extending the application of the convention to their territorial seas. Therefore, if a Ship becomes a wreck within the territorial seas of a country, it will be necessary not only to ascertain whether that state is a contracting state to the Nairobi Convention but also to ascertain whether that state has opted to extend the application of the convention to its territorial seas.

The Nairobi Convention imposes virtually strict liability on the registered owners of the ship that has become a wreck subject only to the very limited defences that are found in the CLC and other similar IMO liability and compensation conventions. ² Whilst the Convention itself does not provide for any right to limit, it nevertheless provides that the registered owners are entitled to exercise whatever limitation rights they may have under general limitation conventions such as the 1976 or 1996 Limitation Conventions. Finally, the Convention requires a ship that is either registered in a contracting state or trading to a contracting state to maintain insurance to cover its liability under the convention and to carry an insurance certificate to evidence such insurance similar to the ‘blue cards’ that are also obligatory under the CLC, Bunkers and Athens Conventions.

Cover is available under Rule 40 for liabilities, costs and expenses that the Member may incur in relation to wreck removal whether such liability arises under local law or international convention. Such liabilities etc., can be very substantial³ because of the technical complexity of wreck removal (particularly when done in harsh weather and difficult sea conditions in offshore marine environments) and the high cost of the advanced equipment and technology that is frequently used. It is also relevant to remember that the Member may either not be entitled to limit his liability for such claims, or, alternatively, be subject to high limits.

Cover is available under Rule 40 even if the wreck removal of the Ship has arisen as a result of specialist operations.⁴ However, special rules apply in such circumstances (See (F) below).

² For more detailed commentary see Chapter 12.4.1.1.1.3 of the Gard Guidance on Maritime Claims and Insurance and the Gard Insight article of 7 May 2014 entitled “Wreck Removal Convention will enter into force on 14 April 2015”.

³ For example, in the 2006 Policy Year, several claims were made under the International Group Pooling Agreement concerning, inter alia, wreck removal costs. Some claims exceeded the combined Pool retention of USD 50 million.

⁴ See (H) in the Guidance to Rule 59.
(A) ...costs and expenses relating to the raising, removal, destruction, lighting and marking of the Ship or of the wreck of the ship or parts thereof or of its cargo lost as a result of a casualty... (Rule 40.a)

Cover is available under Rule 40.a for costs and expenses that are incurred in relation to the raising, removal etc., of the Ship, the wreck of the Ship or parts thereof, or its cargo. The Ship is the vessel that is entered in the Association for P&I risks and the wreck of the Ship means the Ship after it has been accepted under the Hull Policies as a total loss, whether an actual or constructive total loss.5

The phrase ‘or parts thereof’ is given a broad construction to include, not only the Ship’s hull, machinery and other equipment, but also the ‘apparel’ of the Ship such as, for example, navigational equipment, lifeboats and tackle. ‘Cargo’ is also given a broad construction so as to include, for example, not only the cargo that is stowed inside containers, but the containers themselves. Cover is available for liabilities, costs and expenses relating to the Ship’s cargo whether the cargo is still on board the Ship or the wreck, or has become separated from the Ship as a result of the casualty.

Cover is available for costs and expenses that are incurred in relation to expressly itemised measures to eliminate or minimise the risks that are associated with the Ship or wreck etc., i.e. the marking, lighting, raising, removal or destruction of it. The precise type of measure that will be necessary in any particular case depends on the risks that the Ship, wreck or cargo represents and the orders that may be given by the governing authorities, and can, therefore, differ substantially from case to case. A grounded Ship may only require additional lights, whereas a Ship that is temporarily submerged may need to be marked with buoys. However, some Ships that are grounded or submerged may have to be removed in whole or in part,6 or, in extreme cases, they may have to be destroyed. Similar measures may be necessary where a Ship’s cargo causes an obstruction, e.g. where a large prefabricated construction carried on deck falls overboard and blocks a berth or channel, or where a ship loses a cargo that is deemed to be ‘dangerous’ or a pollutant overboard.

The terms ‘lighting’ or ‘marking’ refer to measures that are taken to alert other ships and craft of the presence and position of the Ship, wreck and/or cargo and may include the attachment of lights, buoys, radar beacons or other appliances to the wreck, or on the water surface above and/or around a submerged object. Cover is also available for costs and expenses that are incurred in taking reasonable measures to locate the wreck, or parts thereof, or lost cargo in order to ensure proper lighting or marking. The term ‘raising’ refers to the activities that are undertaken in order

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5 For more details on the definitions of these terms and how they are applied in different hull conditions, please see Gard Handbook on P&I Insurance, 5th Edition (2002), Chapter 2, paragraph 2.4.1.

6 For example, parts of a submerged wreck, e.g. the accommodation and funnel, may be cut and disposed of under water in order to ensure sufficient under keel clearance for other ships to pass over the wreck.
to bring a sunken Ship, wreck and/or cargo to the surface whilst the term ‘removal’ refers to measures that need to be taken in order to move the Ship, wreck and/or cargo, whether or not in one piece, from its current position to a designated place of disposal. Finally, the term ‘destruction’ means the demolition of the Ship, wreck and/or cargo, whether at the casualty site or elsewhere, following removal.

However, cover is available for such costs and expenses only where they have been incurred as a result of a ‘casualty’. In this context, a casualty is an event that is caused by a maritime accident such as a grounding, fire, collision or contact with a fixed or floating object. Therefore, cover is not available in the case of Ships that have become wrecks as a result of other non-accidental events such as a prolonged lay-up or a lack of maintenance or as a result of abandonment by the Member. However, depending on the circumstances, the Association may be prepared to cover costs and expenses that have been incurred by the Member in order to comply with an order to locate and recover a lost anchor or some such similar item even though the circumstances that have caused the loss may not be considered to amount to a ‘casualty’ in the strict sense discussed above.

Finally, cover is not available where the removal of the Ship is ordered because it is unlawfully anchored in a busy waterway and is, thereby, jeopardising navigational safety.

(B) ...when such raising, removal, destruction, lighting and marking is compulsory by law or the costs or expenses thereof are legally recoverable from the Member... (Rule 40.a)

Cover is available if the Member is legally obliged to bear the relevant costs and expenses, i.e. where the raising, removal, destruction, lighting and marking is compulsory by law and the Member is ordered\(^7\) to take such measures. However, cover is available only for those costs and expenses that are necessarily and reasonably incurred in order to comply with the relevant order. Therefore, if the Member wishes to retain control of the wreck removal, if this is possible, in order to ensure that whatever value is left in the wreck and/or cargo is preserved, the Member is required to keep in close contact with, and to consult, the Association since the Association may well wish to take an active role in the planning and preparation of the operation by, for example, nominating suitable contractors and negotiating the terms of the wreck removal contract\(^8\) in order to minimise the cost of the removal and to maximise the residual value to which the Association is entitled pursuant to proviso ii (see (E) below). In all cases, the Association should be kept closely involved in order to ensure that the Member’s legal rights in relation to the wreck removal order, including any right to limit liability in relation to wreck removal,

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\(^7\) The Member is obliged to ascertain whether a wreck removal order is legally valid under the applicable law.

\(^8\) See the Guidance to Rule 82.
are fully protected. If the Member incurs wreck removal costs in excess of the applicable limitation amount and the member is entitled to limit his liability, cover may not be available for liabilities that exceed such limit.

However, in some instances, the governing authorities may incur the relevant costs and expenses themselves in the first instance and then claim reimbursement for them from the Member. Alternatively, if the Association has provided the Ship with a ‘blue card’ pursuant to the requirements of the Nairobi Convention, the authorities will have the right to claim such costs and expenses directly from the Association. Cover is also available in such circumstances to the extent that the costs and expenses are legally recoverable from the Member under the applicable law even if the Member would not have been obliged to take such measures himself.

A Member may be obliged to comply with an order to mark, raise, remove or destroy a Ship, wreck or cargo pursuant to the provisions of an international convention or local statute or local laws that regulate navigation in, and the use of, ports, channels, canals, locks and waterways. The order that is made by the governing authority is normally prompted by the fact that the Ship, wreck or cargo is considered to represent a hazard to marine safety, or to the environment, or an obstruction to navigation or to other commercial interests. In some instances, a country may have the legal right to order the destruction or the removal of the Ship or the wreck of the Ship, even though it does not in fact pose such a hazard or obstruction. Nevertheless, if the Member is legally liable in such instances, cover is available under Rule 40 unless the destruction or removal is considered to have been caused by a war risk.9

The Member may also incur liability for such costs and expenses by virtue of the terms of a contract that he has concluded for the use of a terminal, berth or offshore site.10 However, cover is available for liability that arises solely as a result of such contract terms only if the Association has given its prior approval to those (or materially similar) terms.11

(C) ...liability incurred by reason of the Ship or the wreck of the Ship causing an obstruction... (Rule 40.b)

There may be circumstances in which the Ship, or the wreck or parts thereof, and/or its cargo is deemed to be causing an ‘obstruction’ and, therefore, needs to be removed. Such an occurrence can also mean that the Member becomes liable to pay damages to third parties who have suffered financial losses as a result of the obstruction. In most cases, the obstruction will merely affect the safe navigation of

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9 See the Guidance to Rule 58.
10 See the Guidance to Rules 37 and 38.
11 See the Guidance to Rule 55.
other ships, but it may also affect other commercial or public interests, e.g. a subsea pipeline, a power or telecommunications cable, a seawater inlet to a waterfront industrial site, an aquaculture site etc.\textsuperscript{12}

Cover is available in such circumstances if the authorities that have jurisdiction in the area have deemed the Ship or wreck to be an obstruction and a hazard to safe navigation, and have, therefore, forbidden other ships to pass in the immediate vicinity of it even though safe passage may in fact be possible.

Cover is available for legal liabilities of all kinds that are incurred by the Member as a consequence of the fact that the Ship, or wreck or parts thereof, and/or its cargo is deemed to be causing an obstruction. This includes liability for costs and expenses that are incurred in order to comply with an order to remove the Ship etc., and also liabilities to third parties that arise, for example, as a result of a collision or other contact with the Ship or wreck,\textsuperscript{13} or for purely financial losses that may be suffered by third parties, e.g. demurrage and delay costs caused by the inaccessibility of the port or berth. However, as in the case of Rule 40.a, cover is available only if the obstruction has been caused by a casualty in the sense discussed in (A) above.

When a Ship becomes a wreck within the territorial waters of a particular country as a result of a casualty, the governing authorities of that country will invariably make use of their legal powers to order removal of the wreck if it is considered to be causing an obstruction and/or if it is considered to be a hazard to the environment. If so, the Member can, in consultation with the Association, decide whether to undertake the wreck removal operation or allow the authorities to undertake that task.\textsuperscript{14} However, even if a wreck is deemed to be causing an obstruction or to be a hazard to the environment outside territorial waters, or such other waters as are claimed by the littoral state, the owner may, nevertheless, still owe a duty of care to ensure that the wreck does not cause loss or damage to third parties, including other mariners and operators of sub-sea platforms, pipes and cables. Should the problem arise within the Exclusive Economic Zone of the littoral state, the law of that state may oblige the shipowner to remove the wreck. Furthermore, this obligation is explicitly imposed by the Nairobi Convention and several of the states that are parties to this convention have extended its application to their territorial waters as well.

\textsuperscript{12} In one case, a Ship that was entered in Gard grounded near to an airport and was alleged to be blocking the safe arrival of airplanes approaching from the direction of the sea. As a result, all incoming air traffic had to be re-routed so as to approach from another direction, which allegedly reduced the landing frequency and caused the airport to lose landing fees.

\textsuperscript{13} When the Ship becomes a wreck cover will cease pursuant to Rule 25. However, despite Rule 26.2, cover is available under Rule 25.6 for liabilities, losses, costs and expenses that flow from the casualty which gave rise to the total loss or constructive total loss of the Ship.

\textsuperscript{14} See Rule 82.c.
In all cases, the Association should be kept closely involved in order to ensure that the Member’s legal rights in relation to the wreck removal order, including any right to limit its liability in such circumstances, are fully protected. If the Member incurs wreck removal costs in excess of the applicable limitation amount and the member is entitled to limit his liability, cover may not be available for liabilities that exceed such limit.\(15\)

(D) ...recovery...shall be conditional upon the Member not having transferred his interest in the wreck otherwise than by abandonment... (Rule 40.b proviso i)

The Ship is considered to be a wreck when its hull insurers have accepted that it is a total loss. This means that the owner of the Ship is then entitled to claim the sums insured under his Hull Policies.\(16\) Upon payment of the sums insured to the owner, the hull insurers have the right to assume title to the wreck, in which case the owner will be required to abandon, i.e. relinquish, his interest in the wreck. If the hull insurers assume title to the wreck, they will concurrently assume the liabilities that are, or may become, ‘attached’ to the wreck, e.g. the liability to raise, remove and/or destroy the wreck or any parts thereof, e.g. oil trapped inside the wreck, as ordered by the governing authorities.

Cover is not available from the Association for wreck liabilities in such circumstances since such liabilities will be the responsibility of the hull insurers and not those of the Member. However, in practise, the hull insurers will rarely assume ownership of the wreck. The normal practise is that the hull insurers will abandon their interest in the wreck concurrently with the payment of the sums insured, which means that whatever liabilities that have arisen, or that may arise, in respect of the wreck, will remain those of the shipowner.

For similar reasons cover is not available for wreck liabilities, costs and expenses that may arise after the Member has transferred his interest in the wreck to a third party, e.g. by selling the wreck on an ‘as is – where is’ basis to a salvage company. However, local authorities may still hold the party that was the owner of the Ship at the time of the casualty liable for wreck removal costs to the extent the new owner of the wreck fails to remove it or to otherwise deal appropriately with the hazard that the wreck is perceived to represent. In such circumstances, cover is still available provided that such liability flows from the casualty which caused the Ship to become an actual total loss or a constructive total loss.

\(15\) See the Guidance to Rule 51.

\(16\) This will usually be the sum insured under the Hull Policy as well as the sum insured under the hull interest (IV) Policy.
(E) ...the realised value of the wreck and other property saved shall be credited to the Association. (Rule 40.b proviso ii)

In the event that cover is made available for the costs and expenses that are incurred in removing the wreck or parts thereof or cargo which has been lost as a result of a casualty, the Member is obliged to credit the Association with the proceeds of the sale of the wreck and/or any other property that has been saved in order to enable the Association to minimise its overall liability for the wreck removal. The ‘realised value of the wreck’ is deemed to be the best price that can be obtained for the wreck in the market less the cost of the sale and any other realisation costs such as the costs of towing it to the place where it is agreed that title shall pass to the third party buyer. The Member is obliged to use his best endeavours to afford all necessary assistance to the Association and to provide any information that may be necessary in order to maximise the realised value of the wreck.\(^1\)

(F) Specialist operations

Vessels that are engaged in the offshore industry are often involved in operations that are classified as ‘Specialist operations’ for the purposes of Rule 59.

Rule 59 draws a distinction between “liabilities, losses, costs and expenses incurred by the Member during the course of performing specialist operations” (which are excluded from cover) and “liabilities losses, costs and expenses incurred by the Member in respect of the wreck removal of the Ship” (which are not excluded from cover). This distinction reflects the fact that a Ship, whether specialist or otherwise, may be operating as a normal cargo or equipment carrier whilst transporting equipment to the specialist operations site and may then be operating as a vessel that is engaged in specialist operations once it has reached the specialist operations site and is engaged in performing such specialist operations. For example, a specialist offshore Ship that carries specialist drilling equipment to the exploration site or a more traditional vessel that is carrying pipes or cables to the site can be considered to be operating as normal cargo carrying vessels whilst carrying the drilling equipment, pipes, cables etc., to the exploration site but may then be considered to be engaged in specialist operations once they have reached the exploration site and have started to deploy the equipment, pipes, cables etc., pursuant to the instructions of the organisation that is in control of the exploration activity.

Should the Ship become a wreck whilst engaged as a normal cargo or equipment carrier on a voyage to the specialist operations site, cover is available for the removal of the wreck of the Ship or any parts thereof, or its cargo pursuant to, but subject to the restrictions that are imposed by, Rule 40. However, once the Ship reaches the specialist operations site and commences work, a distinction is drawn between the wreck removal of the Ship (for which cover remains available

\(^1\) See the Guidance to Rule 82.
under Rule 40 pursuant to proviso ii of Rule 59) and the recovery of any parts of
the Ship or the cargo that are lost overboard from the Ship whilst performing such
work (for which cover is excluded under Rule 59). The rationale for this distinction
lies in the fact that once the Ship has commenced to be engaged in the specialist
operations, the Member is vulnerable to additional risks that are different from those
that have traditionally been considered by the mutual Members of a P&I club to
be risks that they are prepared to share inter se. The wreck removal of the Ship is
considered to be more of a normal marine risk that is traditionally covered by the
P&I Rules whereas the loss of parts of the Ship or the cargo is normally the result
of the specialist operations in which the Ship is engaged at the time. Therefore,
whilst the mutual Members are prepared to share the risk of the wreck removal of
the Ship, they are not prepared to share risks that arise purely and simply because
of the specialist nature of the activity in which the ship is engaged after she has
commenced work at the specialist operations.

A Member that is engaged in special operations may also be covered for wreck
removal liabilities, costs etc., whether arising during the transportation to the
contract works site or whilst engaged at the site by the terms of a separate insurance
such as a Constructions All Risks policy that is applicable to the whole of the
construction project. In such circumstances, cover is not available under Rule 40
pursuant to the provisions of Rule 71.b.

Finally, cover may not be available pursuant to Rule 55 if the liability that is incurred
by the Member for the wreck removal of the Ship whether arising during the
transportation to the contract works site or whilst engaged at the site arises purely
because of the terms of a contract that the Member has concluded with a third party
and which would not have been incurred but for the terms of that contract, unless
such terms have been approved by the Association or the Association exercises its
discretion to reimburse the Member.
Rule 41 General average

The Association shall cover:

a the proportion of general average, special charges or salvage which a Member may be entitled to claim from cargo or from any other party to the marine adventure and which is not legally recoverable solely by reason of a breach of the contract of carriage. Where contributing cargo or any other contributing asset belongs to the Member, the Member shall be entitled to recover from the Association as if that contributing asset had belonged to a third party;

b the Ship’s proportion of general average, special charges or salvage not recoverable under the Hull Policies solely by reason of the value of the Ship being assessed for contribution to general average or salvage at a value in excess of the sums insured under the Hull Policies, provided that cover shall only be available under this Rule 41.b in any particular case if the Association shall in its absolute discretion so determine.

Guidance

For more detailed commentary see Chapter 10 of the Gard Guidance on Maritime Claims and Insurance.

General average

General average is a long-standing feature of shipping law which provides that sacrifices and expenses that are intentionally and reasonably made and incurred in order to save the ship, cargo, and other property1 on board the ship, and any freight which is at risk from a common peril, are to be shared by those interests in proportion to their respective values at the end of the voyage. However, such sacrifices and expenses must be ‘extraordinary’ and made for the ‘common benefit’ of the interests concerned, since ‘ordinary’ costs and expenses are borne solely by the shipowner.2

Rights and obligations in general average are usually based on the terms of the contract of carriage of the cargo or the charterparty which will, in the majority of cases, incorporate the York-Antwerp Rules (YAR), that apply the long-standing general average principles that have been agreed between the shipping and cargo industries.3 The YAR were first introduced in 1864 and have been, and continue to be, subject to periodic revisions that are currently administered by the Comite Maritime International (CMI).

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1 For example, bunkers, containers and cargo securing material owned by the time charterer of the Ship.
2 The assessment of sacrifices and expenses to be accounted for in the general average, as well as the contributions payable by each contributing party, will usually be set out in a general average adjustment prepared by a professional average adjuster appointed by the shipowner.
3 Some countries also apply the YAR by force of law: see for example, Article 461 of the Norwegian Maritime Act of 1994. However, there are many different versions of the YAR and regardless of whether such Rules apply by force of law, Rule 63.1.i emphasises that cover is not available for «liabilities, losses, costs and expenses which would have been recoverable in General Average if the York Antwerp Rules 1994 had been incorporated into the charter party or the contract of carriage». See the Guidance to Rule 63.1.i.
Salvage expenditure that is incurred by a Member, whether pursuant to a salvage contract or otherwise, is recoverable in general average provided that the salvage operations were carried out in order to preserve the property that is jointly at risk in the common maritime adventure, i.e. the ship, cargo, containers, bunkers etc. In most cases, that share of the salvor's remuneration that is to be borne by the cargo interests is paid directly by the cargo interests to the salvors, who are entitled under the salvage contract (such as Lloyds Open Form) to exercise a lien on the cargo before it is delivered unless security for the claim is provided voluntarily by the cargo interests. However, in some instances, the shipowner may be either legally obliged to secure and pay cargo's proportion of the salvor's remuneration as well as the Ship's own proportion, or he may choose to do so for commercial reasons, e.g. a shipowner who is a container liner operator and who may not wish to delay delivery of his customers’ cargo, in which case, the shipowner may seek to recover cargo interests’ proportion from the cargo interests through the medium of general average. If, however, in the more typical scenario, the cargo interests pay their proportion of the salvage remuneration directly to the salvor, they will either have to bear that proportion themselves or seek an indemnity for it from the shipowner if it is proved that the incident that necessitated the salvage operation was caused by the shipowners' breach of the contract of carriage. In the latter case, cover for such liability is available under the ‘other responsibility’ provision of Rule 34.

**Special charges**

Whilst general average applies only in circumstances in which expenditure or sacrifice is incurred for the common benefit of all the property that is at risk in the common maritime adventure, special charges are expenses that are incurred merely for the benefit of only one of the interests that is at risk in that common adventure. Special charges are usually incurred for the benefit of a cargo owner when cargo is being preserved by a carrier pursuant to a contractual or other legal obligation in circumstances where the common danger to the maritime adventure no longer exists but where the danger of loss or damage to the cargo still remains, e.g. costs which are incurred in storing cargo safely and securely ashore or on board ship until such time as it is on-carried or collected by the consignee. In such circumstances, the Member normally has the right under most systems of law to claim such special charges from the owners of the cargo or other property that has been saved, e.g. containers, bunkers etc., without the need to declare general average, and to recover such costs by the exercise of a lien over the cargo or other property. However, in most cases, claims for special charges are normally administered by an average adjuster as an integral part of the general average adjustment since claims for general average and special charges often arise as a result of the same incident.
**General average adjustment**

When a shipowner declares general average and/or claims special charges, he will usually take steps to obtain security for the future payment of the general average or special charges contributions that are payable by the owners of the other property that is at risk through the medium of an average adjuster that he will appoint. Such steps are taken prior to the discharge of the cargo or other property by demanding, as a pre-condition for the delivery of the cargo,\(^4\) general average bonds\(^5\) from the relevant cargo receivers together with guarantees ‘if applicable’ from their cargo insurers or, in the case of other property, a similar form of security from the owners of that property. By providing such security documents the guarantors promise to pay general average and/or special charges contributions when subsequently adjusted and found due by the general average adjusters. It is important that Members should make sure that the adjuster has obtained satisfactory security before the cargo or other property is released, since as explained below, cover is not available for a failure to recover that proportion of general average contribution that is due from the other parties that are at risk because of inadequate or insufficient security.\(^6\) Furthermore, cover is not available if the guarantor becomes insolvent and it is proved that, but for such insolvency, the Member would have been able to recover contributions from the other parties that are at risk. Furthermore, cover is not available if contributions are not recoverable solely because the guarantee or other security that has been provided is unenforceable. Therefore, Members should pay close attention to the law and jurisdiction to which the general average bonds and guarantees are subject since the insertion of suitable clauses (typically those providing for English law and for the jurisdiction of the English court) will often be key to the satisfactory enforcement of such securities.

The decision whether or not to declare general average is normally taken by the shipowner, although other parties to the venture can, and may, decide to do so themselves. However, the Member has a continuing duty under Rule 82 to take such steps as are may be reasonable and necessary to minimise the liability of the Association. Consequently, it is common practice for shipowners to discuss this question with their insurers because such a decision has an impact on both their Hull Policies and P&I cover. For example, if the Member does not declare general average, the amount that the Association may be asked to pay, i.e. for sacrificial damage to cargo, may be greater than that which they would be obliged to contribute if general average had been declared and the hull insurers and other parties to the venture had, consequently, been obliged to make contributions thereto (see also (F) below).

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4 The carrier has security for future payments of general average contributions by way of a possessory lien on cargo in his custody that is owned by parties liable to contribute to the general average.

5 Cash security may be required if a general average bond cannot be legally enforced in the relevant jurisdiction.

6 See the Gard Insight article entitled “When it’s gone, it’s gone – The importance of including a law and jurisdiction provision in general average guarantees”.
(A) The Association shall cover...the proportion of general average, special charges or salvage...which a Member may be entitled to claim...(Rule 41.a)

The cover that is available under this Rule is not for the liability that the Member has to other interests to contribute Ship's proportion of general average, special charges or salvage but is for the amounts that the Member wishes to recover from such other parties by way of general average, special charges or salvage but which are not recoverable by him for the reasons outlined in (B) below.

In order to recover from the Association, the Member must, firstly, prove that the claim is one which he is entitled in principle to recover from the other contributing interests (which is normally achieved in the case of general average by establishing that the claim falls within the scope of the York Antwerp Rules (YAR)), and by satisfactorily proving the sacrifices and expenses that form the basis of the claim for contribution. However, although the Member is also normally entitled to claim interest on the amounts that he is entitled to receive from the other contributory interests, the cover that is available for interest under Rule 41 is limited to that which is allowed in the adjustment according to the relevant YAR, but which is not recoverable from other parties for the reasons outlined in (B) below. Therefore, cover is not available for the interest that may be claimable by the Member because those parties have failed to pay their adjusted contribution when it became due since that type of interest cannot be considered to be a “proportion of general average etc.” for the purposes of the Rule.7

Furthermore, cover is not available for general average sacrifices or expenses that the Member has recovered (or for which he has a prima facie right to recover) under his Hull Policies or any other insurance,8 e.g. for damage that has been caused to the Ship as a result of a general average sacrifice such as the jettison of cargo, or the over-working of the main engine in order to re-float the grounded Ship. Therefore, if the hull underwriters compensate the Member in full under the terms of the hull insurance for losses that have been caused by Ship sacrifices, but subsequently fail to recover contributions from other parties to the adventure due to the fact that the shipowner/assured are in breach of the contract of carriage, they are not entitled to receive compensation under the assured’s (i.e. shipowner’s) P&I insurance. Although the hull underwriters may have acquired a right to claim by way of subrogation, cover is not available to the shipowner under Rule 41 for losses that are covered under the Hull Policies with the result that cover cannot be made available for the hull insurers’ claim in subrogation. Rule 71.1.a makes it clear that P&I cover is not available for liabilities, losses, costs and expenses that are covered by the Hull Policies.

7 See Also the Guidance to Rule 83.3.
8 See the Guidance to Rule 71.
(B) ...not legally recoverable...by reason of a breach of the contract of carriage...(Rule 41.a)

Cover is available under Rule 41.a for claims that the Member has for contributions to general average, special charges or salvage that would be recoverable by the Member from the cargo interest or any other party to the marine adventure but for the fact that the incident has been caused by the actionable fault of the Member, i.e. by a breach of the contract of carriage by the Member as carrier.\(^9\) In many cases, the relevant breach is a breach of the Member’s duty as carrier under the Hague, Hague-Visby or Hamburg Rules to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage, or to properly load, stow, care for etc., cargo during the voyage.

Therefore, if the cause of the incident is one for which the carrier is exempted from liability under the terms of the contract of carriage or the applicable law, there is no ‘actionable fault’ which entitles the contributing interests to refuse to make such contributions and, consequently, cover is not available under Rule 41.a. However, since it is often difficult to establish clearly whether or not there has been actionable fault on the part of the Member, the legal costs that the Member may incur in pursuing a claim against the cargo interests for contributions are normally recoverable under Rule 44. A classic example is when the general average incident has been caused by a ship collision or grounding due to the negligent navigation or management of the ship which entitles the carrier to a defence under Article IV Rule 2 (a) of the Hague or Hague-Visby Rules.\(^10\) However, where the contract of carriage is a charterparty or some other agreement to which the Hague or Hague-Visby Rules do not apply compulsorily, the carrier may be entitled to rely on other defences. In such cases, cover is not available under Rule 41.a unless the Member is found liable despite the fact that he has sought to avail himself of all available exemptions and limitations to the maximum extent permitted by the applicable law. Similarly, cover is not available under Rule 41.a if the Member has waived exemptions or other rights of protection in the contract of carriage which are designed to protect him against liability with the result that the cargo and other interests have the right to refuse to contribute in general average unless the Association has previously approved the relevant terms or similar terms.\(^11\)

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9 Rule D of the York-Antwerp Rules preserves the rights of the parties against whom contribution is claimed to refuse to contribute if ‘actionable fault’ is proved on the part of the party claiming contribution (usually the shipowner). A test of ‘actionable fault’ is whether the person claiming contribution would have been legally liable for damage which may have occurred to the property of the person from whom the contribution is claimed if the general average act had not been performed.

10 However, if the carrier cannot rely on such exemption under applicable law, e.g. under the Hamburg Rules, contributions to general average may be recoverable.

11 See Rule 55. One example is the so-called Exxon GA Clause regularly imposed by ExxonMobil as time charterer of oil tankers, which serves to shift more of the general average risk onto the shipowner than would follow from the YAR 1994.
Appendix VII of the Rules recommends that the New Jason Clause is inserted in all charterparties, bills of lading, waybills and other contracts containing or evidencing the contract of carriage used in international trade. This is required to preserve owners’ entitlement to claim general average contributions from cargo interests, who would otherwise under US law be able to avoid contributing where there has been faulty navigation or management of the ship. Rule 55 makes it clear that cover is not available for losses that result from the fact that the Member has omitted to use such recommended terms. Therefore, should Members have any doubt about the effect of contractual terms they are strongly advised to consult the Association before agreeing such terms.

Cover is not available for liabilities, losses, costs or expenses that the Member cannot recover from other parties to the marine adventure in general average but which would have been recoverable if the York Antwerp Rules 1994 had been incorporated into the charterparty or the contract of carriage. The 1994 version of the YAR is the one which is found most commonly in contracts of carriage and is considered by the shipping industry to strike a fair balance between the rights and obligations of the parties to the common adventure. Other versions of the YAR are more favourable to cargo and other interests and it is not considered to be in the interests of the membership as a whole to make cover available in such circumstances.

In recent years, some major charterers have tried to introduce clauses into their charterparties that prevent a shipowner from apportioning in general average the cost of preventative measures that are taken (usually by the shipowner) to avoid or minimise pollution despite the fact that the YAR 1994 permit such costs to be so apportioned in certain circumstances, with the result that the full cost of such measures will be borne by the shipowner. Cover is not available under Rule 41.a in such circumstances and, consequently, it is strongly recommended that Members do not accept such clauses. However, should Members, nevertheless, consider that they have no alternative for commercial reasons but to accept such clauses, alternative cover for such liability may be available on payment of additional premium under the Association’s Comprehensive Carrier’s Liability Cover.

Since the Member must satisfy the Association before cover can be made available under Rule 41.a that the cargo and/or other interests are entitled to refuse to contribute by reason of the Member’s breach of the contract of carriage, and that

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13 A new set of YAR was published in 2004, but is so far not in widespread use. See the article entitled “York-Antwerp Rules 2004” in Gard News 176, 2004 at: http://www.gard.no/ikbViewer/web/updates/content/53071/york-antwerp-rules-2004
14 See http://www.gard.no/ikbViewer/Content/67474/Comprehensive%20carriers%20liability%20cover%202013.pdf.
the Member has taken all reasonable endeavours to try to obtain payment of the contributions, Members are strongly advised not to take any steps that could result in a waiver of their right to claim general average contribution or any such potentially prejudicial steps without having first consulted the Association since the Association and other insurers will usually wish to work closely with the general average adjuster.\footnote{See the Guidance to Rule 82.1.}

Once the general average adjustment has been published, the adjuster will call on the various interested parties to pay their contributions. However, if the cargo interests, or those that have an interest in any other property, refuse to pay on the basis that the event that caused the need for the adjustment has arisen as a result of a breach of contract on the part of the Member, the Association will normally assist the Member to enforce payment and cover is available under Rule 44 for any legal or other costs that may be incurred in doing so. However, should the other interests refuse to pay for other reasons then cover for the legal and other costs that may be incurred in dealing with such other disputes is not available under Rule 44 since the failure to pay has not arisen “solely by reason of a breach of the contract of carriage”. Examples of such disputes would be situations in which the other interests dispute the inclusion of a particular item in the adjustment, or where the dispute concerns the enforcement of the security that has been provided by, or on behalf of, the other interests. However, cover for legal or other costs that have been incurred by the Member in such situations may be available under Part IV (Defence Cover).

It is not the function of the adjuster to comment on whether or not the adjustment has been necessitated by a breach of contract on the part of the Member, However, the adjuster will need, when drawing up the adjustment, to have documents such as survey reports that explain what has happened, and such documents may be included in the adjustment, or details from them may be included as part of the adjuster’s narrative. Since such information will thereby become available to the other interested parties, it is important that the Member should consult the Association before deciding what documentation should be provided to the adjuster and that the adjuster should be asked to provide the Member with a draft final adjustment before it is formally published.

\textbf{(C) …solely by reason of a breach of the contract of carriage... \textit{(Rule 41.a)}}

If the Member is unable to recover contributions to general average, special charges or salvage for reasons other than as a result of a breach of the contract of carriage, cover is not available under Rule 41.a. Therefore, for example, cover would not be available when contributions are irrecoverable for the following circumstances: i a failure by the Member to obtain adequate security, e.g. cash deposits or general average bonds and guarantees from cargo owners/insurers prior to relinquishing possession of the cargo;
ii a failure by the Member to protect his legal rights to lien the cargo under the applicable law;

iii a failure by the Member to protect any relevant time limit which may be applicable to his claim for contributions;

iv the insolvency of the cargo owner and/or cargo insurer;

v the failure of an agent or bank to whom contributions have been paid to account to the Member for such monies; and

vi the diminution or loss of the value of the contributions as a result of currency devaluations or exchange regulations.

Although the 1994 version of the YAR imposes procedural time limits for the notification of claims and the provision of supporting evidence, these time limits are often disregarded and it can take many years to prepare and complete a general average adjustment. Furthermore, the process of collecting contributions can be further delayed by litigation if the adjuster’s conclusions are challenged by one or more of the interested parties. Therefore, if, three months after the issue of the final general average adjustment, the Association is satisfied that the Member is actively pursuing his right to recover contributions from cargo and/or other interests, but that such efforts are unlikely to be successful without considerable delay, the Association may, upon receipt of an application from the Member, exercise its discretion to advance funds to him by way of a loan as an interim measure. However, it must be understood that if the Association does so, it does so purely in order to alleviate any cash flow difficulties that the Member may be experiencing pending the final determination of the Member’s right to claim a recovery under the Rules and does not represent any acceptance by the Association at that stage of the Member’s right to recover under the Rules. Therefore, if it is determined in due course that the Member either has no right to recover from the Association, or that such right is for an amount that is less than the amount that has been advanced, the Member is obliged to repay that proportion of the loan that is in excess of the amount that is recoverable from the Association under Rule 41.a and the terms of entry. In normal circumstances, the Association will not grant a loan for a sum that is in excess of 80 per cent (net of ship’s sacrifices) of the sum that the cargo and/or other interests are required to contribute less any contributions that have already been paid to the Member and any contributions for which cover is denied or disputed because they fall outside the scope of cover, such as those stated in C (i) – (vi) above.

Should the Association decide to exercise its discretion to grant such a loan it can do so subject to such terms and conditions that it considers to be appropriate including, for example, the execution of a loan agreement in a prescribed form, the provision of adequate counter-security covering any future obligation of the Member to repay all or any part of the loan, or a legal assignment to the Association of any subsequent recovery of contributions from cargo and/or other interests.
(D) …special charges or salvage… (Rule 41.a)
Special charges and salvage charges should normally be payable by the owners and/or insurers of the cargo or other property that is at risk. However, shipowners are sometimes compelled, for various reasons, to pay such charges and to subsequently claim reimbursement from such other interests. However, if the cargo or other property interests are entitled to refuse reimbursement for the reasons discussed in (C), cover is available for the Member under Rule 41.

Cover is available under Rule 42 for the special compensation that is paid by a Member as shipowner to a salvor under the Special Compensation P&I Clause (SCOPIC), in circumstances where the salvage services are unsuccessful but there is a threat to the environment.

(E) …Where…any…contributing asset belongs to the Member… (Rule 41.a)
For the purposes of Rule 41.a, cargo, bunkers or other property that is owned by the Member, or freight that is at the risk of the Member, is treated as if it was owned by, or at the risk of, a third party. Therefore, in order to obtain reimbursement from the Association, the Member must prove that, had his cargo or other contributing asset been owned by a third party, he would not have been able to recover a contribution from that third party solely by reason of his (i.e. the Member’s) breach of contract.

(F) …Ship’s proportion of general average, special charges or salvage not recoverable under the Hull Policies by reason of the Ship being assessed…at a value in excess of the sums insured under the Hull Policies, provided that cover shall only be available under this Rule 41.b in any particular case if the Association shall in its absolute discretion so determine (Rule 41.b)
Normally, the Ship’s proportion of general average is payable by the hull insurers under the Hull Policy and the Member is required to keep the Ship fully insured on standard terms for whatever the Ship’s market value may be from time to time. Therefore, losses that the Member incurs as a result of his failure to do so are normally not considered to be losses that should be shared by the other mutual Members particularly since, all other factors being equal, the Member would normally benefit in such circumstances from a reduction in the premium that he would pay under the Hull Policy. However, it may not be possible for the Member to ensure in all circumstances that the Ship is insured for its true market value e.g. if market values increase rapidly. Consequently, the Board of Directors of the Association is given a discretion under Rule 41.b to reimburse the Member for any shortfall in the amount that he is entitled to recover under the Hull Policies for the Ship’s proportion of general average, special charges and salvage as a result of the fact that the Ship’s actual value is higher than the sum insured in the Hull Policies. However, when exercising its discretion, the Board is likely to want to closely examine whether the Member has acted prudently in keeping the market value of the Ship under review, and, when necessary, increasing the sum insured. The Member will usually be asked to explain which procedures he has (or had) in place in order to monitor the Ship’s market value and to make any necessary value
adjustments. The Board is unlikely to exercise its discretion in the Member’s favour if it is not satisfied that the Member has been vigilant in his value adjustment procedures, e.g. he has not adjusted the value since the last hull renewal even though he ought to have known that the market value had increased substantially in the interim period and there had been ample time since the renewal to adjust the insurance value.

As stated in (C) above, the general average adjustment and contribution process can be complex, time-consuming and commercially sensitive and the Member may be out of pocket for a substantial period of time pending completion of the adjustment and any subsequent attempts to recover contributions. This may be an unattractive prospect if the cost and time of proceeding in this manner are disproportionate to the sums that are at stake. Consequently, it has become common for some shipowners to include a general average absorption clause in the Hull Policies, the purpose of which is to give the owner a right to recover all general average sacrifices and expenditure up to the amount agreed without the need for a general average adjustment. If such clause is invoked, the Member does not have the right to make a claim under Rule 41.

Finally, some Hull Policies give the assured the right to recover from the hull insurers that part of the contributions that cannot be recovered from the cargo or other interests due to a breach by the assured of the contract of carriage. Such right can be for an agreed sum and/or limited to ship sacrifices forming part of the general average or some other factors. Since P&I cover is subsidiary to any other insurance that covers the same risk or loss, cover is not available under Rule 41.b to the extent that cover is available under the Hull Policy16 and the Member has a duty to inform the Association about any other insurance relating to the Ship that may affect his right of recovery under the P&I insurance.17

Appendix VII of the Rules recommends that the New Jason Clause is inserted in all charterparties, bills of lading, waybills and other contracts containing or evidencing the contract of carriage used in international trade. This is required to preserve owners’ entitlement to claim general average contributions from cargo interests, who would otherwise under US law be able to avoid contributing where there has been faulty navigation or management of the ship.

16 See the Guidance to Rule 71.
17 The Member has a duty to inform the Association about any other insurance in respect of the Ship that may affect his right of recovery under the P&I insurance. See further Guidance to Rule 82 below.
Rule 42 Salvage

The Association shall cover liability for special compensation awarded to a salvor,

a pursuant to Article 14 of the International Convention on Salvage 1989; or

b pursuant to Article 14 of the International Convention on Salvage 1989, as incorporated into Lloyd’s Open Form of Salvage Agreement (1980, 1990, 1995, 2000 or 2011), or into any other salvage contract approved by the Association; or

c pursuant to Special Compensation P&I Clubs Clause (SCOPIC) as incorporated into Lloyd’s Open Form of Salvage Agreement or any other ‘No cure – No pay’ salvage contract approved by the Association.

Guidance

For further commentary see Chapter 14.3 of the Gard Guidance on Maritime Claims and Insurance.

(A) ...liability...to a salvor... (Rule 42)

Traditionally, a person who voluntarily saves the property of others at sea is entitled at law to claim a salvage award from the owners of that property. The salvage award is based, inter alia, on the post-salvage value of the property saved, (which normally includes the ship, cargo, containers, bunkers and freight at risk), the degree of danger involved, the degree of skill applied and a number of other factors. The salvage award is payable by the owners and/or the insurers of the salved property in accordance with the proportion that the value of the particular property bears to the total value saved. The Ship’s proportion of such salvage award is insured under the Ship’s Hull Policy but the Association also has an active interest in relation to life salvage1 and liability claims that include a salvage element, e.g. claims that may be brought by cargo interests against the Member for reimbursement of their contribution to a salvage award,2 or to situations where the Ship is unable to recover cargo interests’ proportion of the salvage payment or award because of a breach by the Ship of the contract of carriage.3 Finally, the Association has been increasingly involved with salvage operations ever since the entry into force of the 1989 Salvage Convention which introduced the concept of environmental salvage (Art. 14) and the introduction of SCOPIC in 1999.

Salvage has historically been based on the principle of ‘no cure-no pay’ and the salvor has been required to bear in full the economic risk that is involved in rendering the salvage services. If the salvor failed to save any property, or if the property saved had no residual value, he received no compensation for the costs and losses that had been incurred by him in making the attempt. However, in the late 1970’s4 it was recognised that salvors ought to be encouraged if the

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1 See Rule 33.
2 See Rule 34.1.a.
3 See Rule 41.
4 This was highlighted in the case of the oil tanker AMOCO CADIZ off the coast of Brittany, France in 1978.
prospects of an award based on the value of property salved were small or non-existent, to, nevertheless, undertake salvage services in order to prevent or reduce environmental damage. Therefore, provisions were incorporated into the Lloyd’s Open Form Salvage Agreement of 1980 that were intended to compensate the salvor for costs and expenses incurred by him in such circumstances, and this principle was subsequently developed in the 1989 Salvage Convention, article 14 of which introduced the concept of the ‘special compensation’. Such special compensation is payable only if, and to the extent that, it exceeds the traditional salvage award based on the salved value of the property saved that is payable by the owners/insurers of the salved property.

The method by which such special compensation was assessed proved in some cases to be very expensive and time-consuming, and one such case was taken all the way up to the highest court in England. Furthermore, hull and other property underwriters argued that it was more logical and natural for such liability to be covered under P&I insurance since the liability for environmental damage caused by the escape of oil or any other substance from the ship that had not been prevented or minimised by such salvage services would normally be covered by P&I insurers. Consequently, hull, property and P&I insurers developed the concept of the Special Compensation P&I Club Clause (SCOPIC) as an alternative method of calculating the compensation that was payable to salvors in such circumstances. SCOPIC may be included in the LOF or any other form of salvage agreement and can be invoked by the salvor at any time during the salvage services. However, unlike the ‘special compensation’ which is payable under Article 14 of the 1989 Salvage Convention, SCOPIC provides for a tariff-based assessment and remuneration of the costs and expenses that are incurred by the salvor when undertaking the salvage operation.

Whilst the concept of the special compensation and SCOPIC has done much to encourage salvors to take prompt action to protect the environment, the fundamental principle remains that salvage awards are still based primarily on the post-casualty values of the salved property and are payable by the owners/insurers of such property. However, much of the risk of failure that had been borne by salvors in relation to such traditional salvage operations has now been transferred to shipowners and their P&I insurers. Therefore, Rule 42 is intended to make P&I cover available for claims that are made by salvors against shipowner Members for ‘special compensation’. Rule 42.a provides cover for ‘special compensation’ claims that are made pursuant to Article 14 of the Salvage Convention 1989, Rule 42.b for such claims when made pursuant to article 14 of the Convention as incorporated into a salvage contract, and Rule 42.c for such claims when made pursuant to the SCOPIC clause.

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5 The NAGASAKI SPIRIT collision with the OCEAN BLESSING (1997) 1 Lloyd’s Reports 323.
6 See the Guidance to Rule 38 concerning cover for pollution liability.
Article 14 of the International Convention on Salvage 1989 entitles a salvor to special compensation, irrespective of whether the ship, bunkers or cargo are salved, where it can be demonstrated that the salvor intentionally "carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment".7 An environmental threat in this context is defined as a threat of "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents".8

The 'special compensation' is intended to compensate the salvor for the out of pocket 'expenses' that he has incurred in rendering the services, e.g. the cost of hiring personnel, vessels and equipment, and to allow him to recover a 'fair rate' for his own vessels, men and equipment that have been reasonably used. If the salvor can demonstrate that the services that he has rendered did prevent or minimise damage to the environment, he may, at the discretion of the tribunal that is determining the salvage award,9 receive an additional award of up to 30 per cent of his expenses, which may also, in exceptional circumstances, be increased up to 100 per cent of those expenses. The factors that are taken into account when assessing the level of special compensation include the potential risk of damage to the environment that existed when the salvage services were being rendered, the degree of success, the skill with which the services were carried out, and the risks that were undertaken by the salvor.

However, if the salvors have succeeded in salving property that has a residual value, they are then entitled to receive a salvage award that is calculated with reference to the salved value of such property. That award is payable by the owners of the ship and cargo and any other salved property in accordance with the proportion that the value of the particular property bears to the total of the value saved, and payment will normally be made (subject to any deductible) by the insurers of the hull and cargo. In such circumstances, special compensation, and consequently, P&I cover under Rule 42, is available only for the difference, if any, between the amount of any such salvage award and the total amount assessed as special compensation.

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7 Article 14.1 of the Convention.
8 Article 1 (d) of the Convention.
9 This is usually an arbitrator appointed pursuant to Lloyd's Open Form.
(C) Lloyd’s Standard Form of Salvage Agreement...or any other salvage contract approved by the Association... (Rule 42.b)

Cover is available under Rule 42.b where the International Convention on Salvage 1989 does not apply by force of law, but is adopted by agreement into a salvage contract, e.g. in a Lloyd’s Open Form of Salvage Agreement (LOF).  

Cover is also available where Article 14 of the 1989 Convention is incorporated into salvage contracts other than LOF provided that the terms of such a contract, or similar terms, have been approved by the Association.

(D) the Special Compensation P&I Club Clause (SCOPIC)... (Rule 42.c)

The Special Compensation P&I Club Clause (SCOPIC) was introduced in 1999 and is intended to be used in conjunction with LOF salvage contracts. However, the clause was developed, drafted and agreed in response to the specific concern that was expressed by salvors when engaged in salvage operations and, therefore, it is not suitable for use in the context of other response activities, such as pollution clean-up. The clause has subsequently been revised in 2000 (SCOPIC 2000), 2007 (SCOPIC 2007), 2011 (SCOPIC 2011) and 2014 (SCOPIC 2014) mainly to take account of increased tariff rates. Parties need to consider when concluding a LOF salvage agreement, whether or not to include the SCOPIC clause since, if it is included, the salvor is entitled to invoke it unilaterally at any time during the salvage operation and regardless of the circumstances.

SCOPIC provides a fixed tariff for the use that is made by the salvor of his salvage vessel’s equipment and his manpower as from the time that SCOPIC is invoked. Furthermore, the salvor is entitled to an increased tariff of 25 per cent for most types of expenses. In this way, SCOPIC provides the salvor with a financial ‘safety net’ and the encouragement to render services although the prospect of earning a traditional salvage award is low or non-existent.

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10 Recent editions of LOF incorporate the International Convention on Salvage 1989 and provide that disputes between salvors and owners of salvaged property are to be resolved pursuant to English law and London arbitration. The recent LOF 2011 does not make any fundamental changes to the existing LOF regime but provides that all agreements to use the LOF form are to be reported to Lloyd’s and that details of LOF awards are now to be made publicly available on the Lloyd’s website. The accompanying Lloyd’s Standard Salvage and Arbitration Clauses (LSSA) firstly, enables the salvor to claim security not only for the amount of the award itself but also for the arbitrator’s fees and costs and secondly, in the case of container ships, to give notice of the salvage operation to the cargo insurers rather than to the cargo owners themselves, thereby minimising the need for multiple individual notices. The terms of LOF 1980, 1990, 1995, 2000 and 2011 are approved by the Association and therefore, these contracts do not need to be submitted to the Association for approval.

11 Pursuant to SCOPIC 2007 the tariff rates have been increased for LOF Agreements entered into after 1 July 2007. Rates for tugs and other craft have increased by 25 per cent, rates for salvor’s own portable salvage equipment by 15 per cent, and rates for personnel have increased by 5 per cent (following an earlier increase of 10 per cent introduced with effect from 1 January 2006).
However, the invocation of SCOPIC does not rule out the prospect of earning a traditional salvage award under Article 13 of the 1989 Convention. There is an important linkage between the traditional form of salvage award and the remuneration that is payable under SCOPIC, which may have a fundamental bearing on the Association’s liability pursuant to Rule 42.c:

- If the salvor has invoked SCOPIC, but the Article 13 award nevertheless exceeds the assessed SCOPIC remuneration (including the 25 per cent mark-up), the shipowner Member has no liability to pay SCOPIC remuneration and, consequently, the Association has no liability to reimburse him pursuant to Rule 42.c. Furthermore, the Article 13 award that is payable by the insurers of the property that has been salved in such circumstances will be discounted by 25 per cent of the difference between that award and the amount of SCOPIC remuneration that would have been earned by the salvor had he invoked SCOPIC on the first day of the salvage operation. This is intended to discourage salvors from invoking SCOPIC in circumstances where it is inapplicable.

- If the salvor has invoked SCOPIC and the Article 13 award is less than the assessed SCOPIC remuneration (including the 25 per cent mark-up), cover is available under Rule 42.c for the amount by which the SCOPIC remuneration exceeds the Article 13 award. In other words, cover is available under Rule 42.c for the full SCOPIC remuneration only in circumstances where there is no Article 13 award, i.e. there are no salved property values on which a traditional salvage award can be based.

Therefore, the Association faces its biggest exposure when, in the case of complex and dangerous salvage operations that require significant pollution prevention or mitigation measures to be taken, the salvor has invoked SCOPIC on the first day and committed very expensive resources for a long period of time, and the salvage operation fails in the sense that no property is salved and no traditional salvage award can be made.\(^\text{12}\)

The shipowner is obliged, pursuant to SCOPIC, to provide security to the salvor within two working days after the salvor has invoked the SCOPIC clause. The amount of security is initially USD 3 million, inclusive of interest and costs but can be subsequently increased or reduced upon the request of either party. Pursuant to the Code of Practice that has been agreed between the International Group of P&I Clubs and the International Salvage Union, salvors have agreed to accept such security in the form of a letter of undertaking from the P&I club in which the vessel is entered, which club will not refuse to provide such security except in cases where the member concerned is in breach of the club’s rules.

\(^\text{12}\) Where the Ship has no residual value, it is likely to be accepted by the hull underwriters as a constructive total loss and, as such, will become a wreck. In such a case, and where the Member has a legal liability to mark, secure, raise and/or remove the wreck, cover is available under Rule 40 for such liability, as well as for any ensuing costs and expenses related thereto.
Finally, SCOPIC entitles the owners of the property to which salvage services are being rendered to appoint a Special Casualty Representative (SCR) to monitor the measures that are being taken by the salvor and the resources that are being utilised in the operation. The SCR also has the important responsibility to monitor the expenses that are being claimed by the salvor pursuant to SCOPIC and to assess whether they were reasonably incurred having regard to the nature and dangers of the operation.
Rule 43 Towage

1 The Association shall cover liabilities, costs and expenses arising out of the towage of the Ship, or out of the towage of a vessel by the Ship, provided that such liabilities, costs and expenses are:
   a within the cover available under any other Rule; and
   b not excluded by Rules 43.2 or 43.3.

2 The Association shall not cover liabilities, losses, costs or expenses incurred under or pursuant to the terms of a contract for the towage of the Ship 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; or
   b a contract entered into in the ordinary course of trading for the towage of such ships as are habitually towed from place to place; or
   c a contract which has been approved by the Association.

3 The Association shall not cover liability for loss of or damage to or wreck removal of a vessel or other floating structure towed by the Ship or the cargo or other property on such tow (together with costs and expenses associated therewith), save insofar as:
   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 Ship is entered as a tug or otherwise on the basis that it will engage in towing in the ordinary course of business, and the tow is undertaken on contractual terms approved by the Association (whether or not the Member is a party to the contract); or

Notes:
1 The following standard terms of contracts are approved by the Association, provided they are not materially amended:
   a UK, Netherlands or Scandinavian standard towage conditions;
   b Towcon or Towhire;
   c Lloyd’s Standard Form of Salvage Agreements.
2 The Association will otherwise expect the contract to incorporate a term under which each Party is responsible for any loss or damage to its own property or equipment and for loss of life or personal injury to its own personnel, without any recourse against the other.

   c cover has been agreed with the Association prior to the commencement of the towage.

Guidance

(A) ...liabilities, costs and expenses arising out of the towage of the Ship, or out of the towage of a vessel by the Ship... (Rule 43.1)

Cover is available from the Association for liabilities, costs and expenses that arise as a result of towage operations that involve the entered Ship, whether that is the towing ship or the ship that is being towed.
The risks of liabilities, costs and expenses that are associated with towage operations, whether the entered Ship is the tow or the towing ship, are far greater than those that are normally associated with normal everyday shipping operations. For example, the towing ship may be damaged by a collision with the tow or pulled down into the sea by a sudden tightening of the hawser.

Consequently, cover for towage operations is available only when the liabilities, costs and expenses (a) fall within the cover that is provided by one of the other P&I Rules, and (b), are not excluded by Rules 43.2 or 43.3. In general terms, Rules 43.2 and 43.3 exclude risks imposed by towage operations that would not ordinarily be experienced by the entered Ship when engaged in normal trading and which are, therefore, considered to be risks that are additional to, or greater than, those that are normally faced by the membership as a whole. They include liabilities arising under towage contracts other than those that are concluded in the ordinary course of trading. If a claim falls within these exclusions, cover is not available even though cover would otherwise have been available under another P&I Rule.

(B) ...liabilities, costs and expenses... (Rule 43.1)

Towage liabilities may be incurred by a Member in tort or in contract. Liability in tort can arise even when there is no contractual relationship, since all persons owe a duty of care not to harm the person or the property of any other person that could foreseeably be harmed by their conduct. Consequently, a Member has a duty to ensure that he and all his servants and agents exercise due care to ensure that his Ship does not cause loss or damage to others. Should the Member or his servants or agents fail to exercise that degree of care, the Member may be liable to pay damages to third parties that suffer loss or damage as a result.

In the absence of a contract, the normal rule is that the ship which is at fault is liable, whether that ship is the towing ship or the tow. Should both ships be to blame, liability is apportioned between them according to their respective proportion of blame. However, since the towing ship is usually in control of the tow, it is normally the towing ship that is considered to be liable. Nevertheless, in some countries, the towing ship is considered to be the servant of the tow with the result that the tow may be held liable even for the fault of the towing ship.

In most cases, the towing ship will require the master of the tow to enter into an express towage contract before agreeing to carry out the towage operations. However, even if no formal contract is agreed or signed, the existence of a contract may be implied as a result of the parties’ conduct, and a previous course of dealing between the parties may be relevant in establishing the form and terms of such a contract. If such a contractual relationship, whether express or implied, is found to exist, liability will normally be governed by the terms of that contract as construed by its governing law, rather than by the principles of tort described above. Most towage contracts either place liability for the towage operations on the tow,
regardless of fault, or allocate liability between the tow and the towing ship on a ‘knock-for-knock’ basis. Nevertheless, such contractual terms may be superseded by, or supplemented by, statute or by the local laws of the country where the claim is brought.

(C) ...within the cover available under any other Rule... (Rule 43.1.a)  
Cover is available only if the towage liabilities, costs and expenses fall within the cover that is available under any other Rule and/or any special terms of entry. Therefore, it is necessary in each case to examine the relevant Rule(s) and/or special terms of entry (if any) that may govern the risk. For example, in the case of collision liability arising as a result of towage operations, cover is usually available for that proportion of the collision liability that is not covered by the Hull Policies. However, cover is not available if the Member has failed to take out hull insurance on standard terms or if, pursuant to special terms of entry, the collision liability of the entered Ship is covered in full by the Hull Policies.

(D) ...not excluded by Rules 43.2 or 43.3... (Rule 43.1.b)  
However, whilst cover is available in principle for liabilities, costs and expenses that arise as a result of towage operations if they fall within the usual scope of the P&I cover, the provisions of Rules 43.2 and 43.3 establish important exclusions to this general rule.

NB! Rule 43.2 regulates the cover that is available when it is the entered Ship that is being towed whereas Rule 43.3 regulates the cover that is available when the entered Ship is the towing ship.

(E) The Association shall not cover liabilities, losses, costs or expenses incurred under or pursuant to the terms of a contract for the towage of the Ship...  (Rule 43.2)  
Cover is not available for liabilities, losses etc., that arise when the Ship is being towed pursuant to a contract. However, cover is nevertheless, available for liabilities, costs and expenses that arise as a result of such operations if they arise under the terms of a contract that was entered into in the ordinary course of the Ship’s trading or, in other circumstances, if the contract terms have been approved by the Association.

The Association requires towage contracts to be approved primarily because most towage contracts seek to transfer some, if not all, liabilities, costs and expenses from the towing ship to the tow. Consequently, this greatly increases the Member’s

1 See (N) and (P) below.
2 See the Guidance to Rule 36.
exposure to liability when his Ship is being towed. The Member is therefore urged to consult the Association before agreeing to such contracts in order to ensure that the terms of the contract are reasonable, and that cover is available.

(F) …other than a contract entered into for the purpose of entering or leaving port, or manoeuvring within the port, during the ordinary course of trading... (Rule 43.2.a)

Ships often need assistance to enter or leave port, to dock or undock, and to manoeuvre within ports, and it is usual for such assistance to be rendered pursuant to contractual terms or local regulations that are onerous for the Ship and the Member. However, since such liability exposure is regularly faced by the majority of Members in the ordinary course of trading, this is considered to be a mutual risk and, therefore, cover is available for liabilities, costs and expenses that arise as a result of harbour towage that is carried out in the ordinary course of the Ship’s trading, and the Member is not required to obtain the prior approval of the Association to the terms of a contract for such services.

(G) …contract entered into in the ordinary course of trading for the towage of such ships as are habitually towed from place to place... (Rule 43.2.b)

Cover is also available for liabilities, costs and expenses that arise as a result of the towage of an entered Ship that is customarily towed in the ordinary course of its trading, e.g. a barge that has no motive power of its own. However, unlike Rule 43.2.a, no geographical restriction is placed on this type of towage. Therefore, cover is available in the event of ocean-going, as well as port, towage, provided that such towage is customarily undertaken in the ordinary course of the Ship’s trading.

(H) …a contract which has been approved by the Association... (Rule 43.2.c)

Where liabilities, costs or expenses do not arise as a result of an activity that falls within the scope of Rules 43.2.a or b, cover is not available unless they arise pursuant to the terms of a contract that has been approved by the Association. Normally, the Association will approve either the Towcon or the Towhire contracts,3 but will not approve the use of the UK, Netherlands or Scandinavian standard conditions for towage of an entered Ship, since such conditions seek to place all liability on the ship that is being towed.

(I) The Association shall not cover liability for loss of or damage to or wreck removal of a vessel or other floating structure towed by the Ship or the cargo or other property on such tow... (Rule 43.3)

Whereas Rule 43.2 regulates the cover that is available when the Ship is the towed vessel, Rule 43.3 regulates the cover that is available when the entered Ship is the towing ship.

3 See (N) below.
Rule 43.3 provides that cover is not, subject to certain exceptions, available where the entered Ship acts as the tug or towing ship regardless of whether such towage takes place pursuant to a contract.

Towage requires specialist skills and often requires specialised equipment. A ship that is not a fully fitted tug is unlikely to have either the equipment or the crew that will be necessary in order to conduct safe towage operations, and errors of judgment, or failures of equipment, can lead to the loss of the tow and her cargo, and expose the Member to large claims, not only from the owners of the tug and tow, but also from authorities that require removal of the wreckage. Such liabilities are not considered to be liabilities that should be shared by the membership as a whole in the context of mutuality. Consequently, cover is not available for liability, costs and expenses that the Member may incur as a result of the loss of, or damage to, a vessel or other floating structure that is being towed by the entered Ship, or for cargo or other property that is on such vessel or floating structure, or for the wreck removal of such vessel or floating structure, or of cargo or other property that is on such vessel or floating structure, except in the two specific instances that are described in Rules 43.3.a and b.

(J) …saving or attempting to save life or property at sea… (Rule 43.3.a)
Notwithstanding the general exclusion of cover outlined in Rule 43.3 for certain liabilities, costs and expenses, cover is available for such liabilities etc., that are incurred by the Member in circumstances where the Ship renders towage services (even if unsuccessful) in order to save or to attempt to save a ship that is in distress, or any other property or persons that are in danger at sea. The availability of such cover reflects the basic humanitarian and moral principles that should, and do, apply in such circumstances.4

(K) …towing in the ordinary course of business, and…on contractual terms approved by the Association… (Rule 43.3.b)
Notwithstanding the general exclusion of cover that is outlined in Rule 43.3 for certain liabilities, costs and expenses, cover is, nevertheless, available for such liabilities etc., that are incurred by the Member, where the Ship is entered as a tug or similar type of ship that renders towage services as part of its ordinary business, provided that such towage operations are governed by contractual terms that have been approved by the Association.

Although, in principle, the terms of each contract must be approved by the Association before the commencement of the towage, the Association has acknowledged that the standard conditions that are itemised in the Notes to Rule

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4 There may also be a legal duty to assist persons in distress. See Article 10 of the International Convention on Salvage 1989 and the Guidance to Rule 31.
43.3 are terms that have been approved by the Association for the purposes of cover provided that such terms are not materially amended. These standard terms are the following:

(L) …UK…standard towage conditions… (Rule 43.3.b Note 1.a)  
The UK Standard Towage Conditions (the UK Conditions) were first introduced in 1934, although they have undergone certain revisions since then, and were the terms that were most commonly used for ocean towage before the introduction of the Towcon and Towhire contracts in 1985. The UK Conditions place the risk of liability or loss arising as a result of towage operations on the tow, and the tow is obliged to indemnify the towing ship for any loss or damage that may be caused to the towing ship, or to cargo or other property that may be on board, or for any liability that is incurred by the towing ship to any third party. The tow is also prevented from bringing any claim against the towing ship, e.g. for damage that is caused to the tow by the towing ship or by anything that is on board the towing ship.

(M) …Netherlands or Scandinavian standard towage conditions… (Rule 43.3.b Note 1.a)  
These conditions are similar to, but not identical with, the UK Conditions. For example, the Netherlands Towage Conditions 1951 provide the tow with defences to claims that may be brought against it by the towing ship for damage that has been caused to the towing ship by the fault of the towing ship, and also for damage that may be caused to property that is owned by a third-party as a result of a collision with the towing ship, provided that this has not been caused either in full or in part by the tow. Like the UK Conditions, the Netherlands and Scandinavian Conditions have also become less popular since the introduction of the Towcon and Towhire contracts. However, the Netherlands Towage Conditions apply by force of law to towage within Dutch territorial waters if the towage is carried out by a Dutch tug owner.

(N) …Towcon…or…Towhire… (Rule 43.3.b Note 1.b)  
The Towcon and Towhire contracts were introduced by BIMCO in 1985 and are now more widely used than the UK Conditions or any other conditions. The main difference between the Towcon and the Towhire contracts is that, pursuant to the Towcon contract, the towing ship is paid for the towage services on a lump sum basis as in the case of a voyage charter, whereas under the Towhire contract, the towing ship is paid on a daily hire basis as in the case of a time charter.

Whereas the UK, Netherlands and Scandinavian Conditions place the risk of the towage operation on the tow, the Towcon and Towhire contracts allocate the risk between the towing ship and the tow so that each ship is responsible for its own loss or damage, including injury to, or death of, its own servants or agents,
or for any claims that may be brought by third parties for damage or loss that they have incurred, e.g. by obstruction. This principle is known as the ‘knock-for-knock’ principle.\textsuperscript{5}

\textbf{(O)} \ldots\textit{Lloyd’s Standard Form of Salvage Agreements}... (Rule 43.3.b Note 1.c) Salvage operations often involve the towage of a ship that is, or has been, caught in the grip of a peril. Cover is available for liabilities etc., that are incurred by the Member when the Ship renders towage services under the terms of the Lloyd’s Standard Form of Salvage Agreement, more commonly known as the Lloyd’s Open Form or LOF.\textsuperscript{6}

\textbf{(P)} \ldots\textit{a term under which each Party is responsible for any loss or damage to its own property or equipment}... (Rule 43.3.b Note 2) If the towage services are not rendered pursuant to any of the standard terms itemised above, cover is available only if the contract incorporates a ‘knock-for-knock’ type of risk allocation clause that is similar to that which is found in the Towcon and Towhire contracts, and only if such terms are agreed not only between the Member and the owners of the tow, but also between the Member and the owners of any cargo or other property that is on board the tow.

\textbf{(Q)} \ldots\textit{cover has been agreed with the Association prior to the commencement of the towage}. (Rule 43.3.c) Should the Ship render salvage services in situations other than those that are described in, Rules 43.3.a and 43.3.b, cover is available for liabilities etc., that are incurred by the Member only if the Member has obtained confirmation of cover from the Association before the commencement of the towage operation.

Similarly, if the towing Ship and the towed Ship are both entered in the Association, the Association will wish to approve the towage contract prior to the commencement of the towage.

\textsuperscript{5} See the Guidance to Rule 78.5.

\textsuperscript{6} See the Guidance to Rule 42.
Rule 44 Legal costs

The Association shall cover legal costs and expenses relating to any liability, loss, cost or expense which, in the opinion of the Association, is (or, apart from any applicable deductible, would be) likely to result in a claim on the Association, but only to the extent that such legal costs and expenses have been incurred with the agreement of the Association.

Guidance

It is necessary to distinguish between, on the one hand, Defence cover¹ which provides insurance for legal and other costs that are necessarily incurred in establishing or defending claims in which the Association has no proprietary interest and, on the other hand, the cover that is made available under Rule 44 in relation to P&I cover. In the case of P&I cover, the Association has a proprietary interest in the liability, loss, costs or expense that have been incurred by the Member since it provides insurance against such matters. The pursuit or defence of such claims against, or by, the Member will result in cost and expense which can be substantial depending on the size and complexity of the underlying claim or claims. Consequently, cover is also made available under Rule 44 for legal costs and expenses that are incurred in order to resist or pursue such claims.

(A) …legal costs and expenses… (Rule 44)

Cover is available for legal costs and expenses that are incurred by the Member in order to ascertain and protect the Member’s legal rights in relation to a claim for which cover is available under the P&I entry for the Ship. Cover is available not only for the legal costs and expenses that may be incurred by the Member in order to resist or pursue recoverable claims but also for any liability that the Member may have to compensate a third party for the legal costs and expenses that the third party has incurred when pursuing his claim against the Member. The legal costs and expenses incurred by each party can be substantial depending on the size and complexity of the underlying claim or claims.

The phrase ‘legal costs and expenses’ includes the cost of advisory services that are provided by external lawyers, barristers, associates, paralegals etc., at any stage of the case, as well as the cost of legal representation in arbitration or before a court or other tribunal. Furthermore, whilst it is not expressly stated, cover is also available for costs and expenses that are incurred for services that are provided by persons who do not have legal qualifications, e.g. P&I correspondents, surveyors, consultants or experts.

The phrase ‘legal costs and expenses’ also includes costs that are incurred in relation to the provision of financial security, such as bank guarantee commissions, and the service fees and disbursements that are charged by service providers, including

¹ See Part IV of Chapter 1 and the Guidance to Rules 65-70.
those charged by sub-contractors or appointees of a service provider, and charged
to that provider in the first instance, e.g. a local surveyor appointed and paid firstly
by the P&I correspondent. However, cover is not available for the Member’s internal
administrative costs and expenses, such as the wages of those employees that are
deputed to deal with the case, or any extra costs that are incurred by the Member as
a result of their absence from normal duties.²

(B) …relating to any liability, loss, cost or expense which…is… (or, apart from
any applicable deductible, would be) likely to result in a claim on the
Association… (Rule 44)
Cover is available for costs and expenses only where they are incurred in connection
with any liability, loss, cost or expense which, in the opinion of the Association, is
likely to result in a claim for which cover is available under the Rules or any other
special terms that may apply to the P&I entry of the Ship. If the underlying liability
etc is recoverable in principle under the Rules it does not matter that the particular
claim is within the deductible that has been agreed in the terms of entry and will,
therefore, be retained by the Member in whole or in part. Cover is available for legal
costs and expenses that relate to a liability etc., that would have been recoverable
from the Association but for the agreed deductible.

If the legal and other costs that the Member has incurred relate to liability etc., that
is not likely to be recoverable from the Association under the P&I entry for the Ship,
they may nevertheless be recoverable from the Association if the Ship has been
entered for Defence risks, subject to the Defence Rules³ and any special terms of
Defence Entry.

If lawyers or other service providers are instructed to act partly in relation to a matter
that is likely to result in, or has resulted in, a claim on the Association, and partly in
relation to another matter, it is important that a distinction is made between the two
matters, since the cover that is available under Rule 44 will be available for one of
them, but not for the other.

The Association may agree to allow a Ship to be entered on terms which provide
that the legal costs and expenses that are recoverable pursuant to Rule 44 are not to
be subject to any deductible and are consequently, compensated in full. However,
the usual rule is that the legal costs and expenses that may be incurred shall be
added to the relevant liability, loss, cost or expense for the purpose of calculating
the applicable deductible for that liability etc.⁴

² See the Guidance to Rules 77 and 82.4.
³ See the Guidance to Rules 65 and 70.
⁴ See Appendix V, paragraph 2.b.
C) …only to the extent that such legal costs and expenses have been incurred with the agreement of the Association. (Rule 44)
Cover is not available for legal costs and expenses that have been incurred without the Association’s agreement. This provision should be read in conjunction with the obligations that the Member has under Rule 82 in relation to incidents that may result in claims against the Association. In particular, the Association has the right to control legal costs and expenses similar to that which it has in relation to the conduct of Defence claims. Accordingly, the Association has the right, if it so decides, to control or direct the conduct of any claim or legal or other proceedings and to instruct lawyers and other advisers and experts on the Member’s behalf.5

Since the Association has considerable knowledge of the experience, expertise and cost of lawyers worldwide it will normally be able to recommend suitable legal representation for the particular claim or dispute.

5 See the Guidance to Rule 82.3.
Rule 45 Enquiry expenses

The Association shall cover costs and expenses incurred by a Member in defending himself or in protecting his interests before a formal enquiry into the loss of or casualty involving the Ship, in cases in which, in the opinion of the Association, a claim upon the Association is likely to arise, but only to the extent that such costs and expenses have been incurred with the agreement of the Association.

Guidance

Many of the issues that arise under Rule 45 have been considered in the Guidance to Rule 44. Therefore, the following Guidance should be read in conjunction with that Guidance.

(A) ...a formal enquiry into the loss of or casualty of the Ship... (Rule 45)

The authorities in most countries have the legal power to order a formal enquiry into any marine casualty that occurs within their territorial waters or which involves a ship that flies their flag. Such enquiries are usually ordered if the casualty has resulted in serious consequences, e.g. the loss of life, pollution or other environmental damage, and the purpose of the enquiry is normally to establish the cause of the casualty.

The Member is obliged to notify1 the Association promptly of any formal enquiry into a loss or casualty which involves a Ship that is entered in the Association. Whilst the formal enquiry may not necessarily have the power to determine liability issues, or to administer punishment for wrongful acts or omissions, its findings and conclusions may, nevertheless, have a profound impact on subsequent administrative or court proceedings that relate to third party claims, and may, therefore, affect the Member’s exposure to liabilities for which cover is available under the Rules. Therefore, it is in the interests of the Association that the Member should be properly represented at any such formal enquiry, which is why cover is made available for costs and expenses that are reasonably and necessarily incurred in this regard.

(B) ...shall cover costs and expenses incurred... (Rule 45)

The costs and expenses that are normally recoverable are the fees of external lawyers and technical experts that are appointed by the Member and the reasonable travel and hotel expenses that are incurred by such service providers. Cover is also available for costs and expenses that are incurred by the Member for the attendance at the enquiry of any witnesses that are employed by the Member and who are summoned by the administrators of the enquiry to present evidence, or for the attendance of any other person that the Member, in consultation with the Association,2 considers should be present. However, cover is not available for the

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1 See the Guidance to Rule 82.1.a.
2 See (D) below and Rule 82.1.c.
Member's internal administrative costs and expenses, such as the wages of those that attend the enquiry, or any extra costs that are incurred by the Member as a result of their absence from normal duties.3

Cover is available only for those costs and expenses that are incurred in order to protect the interests of the Member in relation to issues that affect the Association. Consequently, cover is not available for costs and expenses that are incurred for other reasons, e.g. in order to protect the master or members of the Crew, unless this is considered to be necessary in order to protect the joint interests of the Member and the Association.

(C) …in cases in which, in the opinion of the Association, a claim upon the Association is likely to arise… (Rule 45)

Cover is available only if the loss of the Ship, or a casualty involving the Ship, is likely, in the Association’s opinion, to result in a successful claim being made by the Member against the Association under the terms of entry of the Ship. This will normally be the case, but will not, necessarily, always be so. For example, if a Ship that is in ballast is lost at sea, but all hands are saved, and there is no risk of pollution, nor any indication that any authority will be issuing a lawful order for removal of the wreck, the Association may take the view that a formal enquiry is unlikely to affect its exposure under the Rules. In such a case, cover is not available for costs and expenses that are incurred by the Member in relation to such an enquiry.

(D) …but only to the extent that such costs and expenses have been incurred with the agreement of the Association. (Rule 45)

Cover is not available for costs and expenses that have been incurred by the Member in relation to a formal enquiry without the agreement of the Association. The scope of an enquiry may be very broad and may encompass issues that do not concern the Association. Nevertheless, the Member should be aware of the obligations that he has pursuant to Rule 82 to notify and consult the Association should the Member intend to make a claim against the Association for costs and expenses that may be incurred in relation to the enquiry.4 A failure to do so may give the Association the right to reject a claim or to reduce the compensation that is payable.

3 See Rules 77.a and 82.4.
4 See the Guidance to Rule 82.1.
Rule 46  Measures to avert or minimise loss

The Association shall cover:

a  extraordinary costs and expenses reasonably incurred on or after the occurrence of a casualty or event for the purpose of avoiding or minimising any liability on the Association, other than:
   i  costs and expenses claimable in general average;
   ii  costs and expenses relating to the Ship being overloaded or the cargo being incorrectly stowed;
   iii  costs and expenses resulting from measures that have been or could have been accomplished by the Crew or by reasonable use of the Ship or its equipment;
   iv  costs and expenses resulting from making the Ship seaworthy for receiving cargo;

b  losses, costs and expenses incurred at the direction of the Association.

Guidance

Members share liabilities on a mutual basis through the medium of the Association on the presumption that each Member will seek to operate his Ships prudently and, thereby, avoid, to the best of his ability, casualties or other events that may result in claims being made on the Association.¹ However, a Member is also expected to act prudently as and when such casualties and other events arise, which means that he must take, and continue to take, all such steps as may be reasonably required to avert or minimise any liability, loss, cost or expense in respect of which he is insured by the Association.²

Rule 46 determines the basis upon which the Member will be compensated in such circumstances. The Rule is a reflection of the principles that underpin the concept of mutuality in that, a Member who, on or after the occurrence of a casualty or event, has incurred extraordinary costs and expenses for the purpose of avoiding or minimising liabilities, losses, costs and expenses that would otherwise have been recoverable from the Association, ought to be compensated in that regard by the Association. This is a fundamental principle of marine insurance,³ but is even more important in the context of mutual insurance. Consequently, since the provisions of Rule 46 are similar in nature to those that are normally found in other marine insurance policies, Rule 46 is sometimes referred to as the ‘sue and labour’ provision.

Rule 46 should be read in the light of Rule 63 (Excluded losses) which provides that cover is not available for claims that relate to the various liabilities, losses or costs that are itemised in that Rule ‘except where, and to the extent that, they form part of a claim for expenses under Rule 46’. Therefore, claims that appear to be excluded

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¹ See the Guidance to Rules 72 and 74.
² See Rule 82.1.b.
³ See, for example, section 78 (1) of the Marine Insurance Act of 1906 of the United Kingdom.
under Rule 63 may, nevertheless, qualify for cover under Rule 46, provided that the relevant cost or expense has been incurred in order to minimise or avoid a liability that is otherwise covered under the Rules.

It is important to note that Rule 46 does not purport to make cover generally available for extra costs and expenses that a Member may incur in connection with the operation of the Ship, even if such extra costs and expenses are necessitated by unusual and/or unforeseeable circumstances. Cover is available if, and to the extent that, the costs and expenses that are incurred by the Member are ‘extraordinary’, are ‘reasonably incurred,’ and are incurred as a direct result of measures that are taken by the Member in order to avoid or minimise the liability of the Association. Therefore, cover is available only if all three inter-linking requirements are satisfied.

(A) …extraordinary costs and expenses reasonably incurred… (Rule 46.a)

Cover is available only if the costs and expenses are ‘extraordinary’ costs and expenses that have been ‘reasonably incurred’ by the Member and not by a third party. The question of whether such costs and expenses are ‘extraordinary’ and ‘reasonably incurred’ depends on the facts of each particular case.

In order to determine whether ‘extraordinary’ costs or expenses have been ‘reasonably incurred’ in order to avoid or minimise the liability of the Association, a comparison needs to be made, between, on the one hand, the nature of the measures that are taken and the quantum of the ‘extraordinary’ costs and expenses, and, on the other hand, the potential liability of the Association that the Member has tried to avoid or minimise. In making the comparison, due regard must be given to the circumstances as they appeared to the Member at the time that the relevant decisions were taken and carried out by him, and the information that was available to him at that time. Whilst it may subsequently transpire, with the benefit of hindsight, that better or more cost-effective measures could have been taken, this does not mean that ‘extraordinary’ costs and expenses were not ‘reasonably incurred’ at the time in question.

For example, if a container vessel were to suffer a failure of the generators that provide power to reefer containers containing perishable cargo, cover is not available for a claim for damage to the Ship or to any part of its equipment since such a claim is recoverable under a standard Hull Policy and is excluded under Rules 63.1.a and b and/or Rule 71.a. Furthermore, cover is not available under Rule 46 for the cost of repairing the generators or the procurement of replacement parts, since such cost is not an ‘extraordinary’ cost. However, if there is an urgent need to avoid incurring a liability for cargo deterioration, and/or delay in the delivery of the perishable cargo, but replacement parts cannot be procured without considerable delay, cover may be available under Rule 46 for the cost of hiring a portable power plant to supply temporary power, for the cost of delivering the required parts to the Ship by air, and for the cost of any extra repairers and overtime that may be
needed in order to minimise the damage. Cover is likely to be available in such circumstances since such costs and expenses would not have been incurred but for the need to minimise the risk of cargo damage, and can, consequently, be considered to be ‘extraordinary costs and expenses’ that have been ‘reasonably incurred’ to the extent that the estimated quantum of such extra costs is less than the estimated quantum of the claims for cargo damage that would otherwise have been recoverable from the Association if such costs had not been incurred.

Alternatively, if the Member had decided that, in all the circumstances, it was better to tranship all the cargo on board (including non-reefer containers) onto another container vessel in the same fleet that happened to be conveniently close by, the costs of discharging, handling and re-loading the containers that contained perishable cargo might well be considered to be measures that were reasonably taken in order to avert or minimise potential liability for cargo damage and, therefore, to qualify for cover under Rule 46. However, the same cannot necessarily be said in relation to the costs that were incurred for the transhipment of the non-reefer containers since the lack of generator power is not likely to cause damage to the contents of such containers. In such circumstances, the Association would face exposure only if it could be said that the Member faced other potential liability to the cargo owners, such as liability for delay in the delivery of such containers if they were not transhipped. Such a potential liability would depend to a large extent on the terms of the contract of carriage under which the non-reefer containers were being carried. If such contracts were subject to the Hague or Hague-Visby Rules (which have no provisions that expressly govern claims for delay) and clauses that excluded liability for delay then, it is unlikely that the Member would incur liability for delayed delivery with the result that cover would not be available for the transhipment costs under Rule 46. However, if the contract of carriage were subject to the Hamburg Rules which do impose liability on the carrier for delay in the carriage of the cargo, the situation might be different. In order to decide whether cover is available, the Association would need to consider all relevant factors including the potential length of delay and any legal advice that may have been obtained for, or on behalf of, the Member.

(B) …on or after the occurrence of a casualty or event… (Rule 46.a)

Cover is available under Rule 46 only if the extraordinary costs and expenses have been incurred as a result of a casualty or other event. For the purposes of Rule 46.a, a ‘casualty’ is an incident that has been caused by a marine peril, such as a collision, stranding, explosion, fire or other cause that renders the ship incapable of navigation to its intended destination.4 The term ‘event’ is not defined, but need not be as serious as a casualty and can include other unexpected and accidental

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4 See Rule 28.iv.
incidents that affect the Ship and/or its Crew and which may cause the Association to incur a liability to the Member. Therefore, the event must be ‘insurable’ in the sense that it is a fortuitous event that is outside the control of the Member.

For example, cover is not available for costs and expenses that have been incurred by the Member in order to comply with his contractual obligation to carry cargo to the agreed destination, even if such costs and expenses are much higher than had originally been anticipated at the time that the contract of carriage was concluded. However, if, as a result of a casualty or other event, the Ship cannot continue to carry the cargo to the agreed destination, but, due to the nature of the cargo, the Member risks incurring liability for cargo damage caused by the delay in the delivery of the cargo, cover is available for ‘extraordinary,’ i.e. additional transhipment and on-carriage costs, that are reasonably incurred by the Member in order to ensure that the cargo is delivered to the agreed destination without deterioration to its condition. However, cover is not available for any costs and expenses that would have been incurred in any event had the on-carriage been performed by the Ship as originally contemplated.

Cover is available for extraordinary costs and expenses that are reasonably incurred either at the time of the casualty or event or after it has occurred. Cover does not cease to be available at any specific time after the casualty or event, but, for cover to be available, the Member must be able to demonstrate that the relevant costs and expenses were incurred in direct connection with the casualty or event and for the purpose of avoiding any liability on the Association. In this regard, measures that are taken promptly at the time of, or shortly after, the casualty or incident in order to avoid or minimise liability, are likely to be considered to be more effective than measures that are taken later in time. However, the question will ultimately depend on the facts of the particular case.

For example, if a Ship is stranded, there may initially be no time pressure for delivering the cargo to its destination. However, if the Member is subsequently informed that the on-sale market price of the cargo is expected to fall significantly if the cargo is not delivered promptly and that the Member may consequently be exposed to liability for claims for delay, this may increase the liability exposure of the Member and the Association if the cargo is not delivered promptly. Cover is available for extraordinary costs and expenses that are incurred by the Member at that stage in order to minimise the potential liability of the Association for loss or damage caused by further delay in the delivery of the cargo.

5 If the Member would be entitled to declare general average following the casualty or other event, cover is not available for any costs and expenses claimable in general average. See the Guidance to Rule 46.a.i under (D) below.
6 See the Guidance to Rule 54. Furthermore, cover is not available for claims for loss of freight due to interruption of the cargo voyage. See Rule 63.1.d.
(C) ...for the purpose of avoiding or minimising any liability on the Association...
(Rule 46.a)
The occurrence of a casualty or other event may cause the Member to incur extraordinary costs and expenses for various reasons. However, cover is available pursuant to Rule 46 only where those costs and expenses are incurred for the purpose of avoiding or minimising the liability of the Association. Therefore, cover is not available for ‘extraordinary’ costs and expenses that are incurred by the Member for reasons that do not serve this purpose, e.g. in order to comply with orders that are given by local, national or flag state authorities otherwise than as a result of a casualty or other event.

Cover is made available in the circumstances outlined in Rule 46 since such costs and expenses are considered by the Association to be an ‘investment’ that is made in order to avoid or minimise liabilities, losses, costs and expenses that would otherwise be incurred by the membership as a whole. By way of contrast, costs and expenses that are incurred for other reasons do not benefit the membership as a whole even if it can be said that they have been reasonably incurred in order to protect the Member’s private interests.

For example, if a Ship were to drift as a result of the malfunctioning of its engine, and there is a risk that it may come into contact with an oil platform, cover is available for extraordinary costs and expenses that are incurred by the Member in order to tow the Ship away from the platform if the terms of entry for the Ship include liability for damage to fixed and floating objects, since such action will have served to avoid or minimise the liability of the Association. However, if the Member’s liability to fixed and floating objects is insured under the Hull Policies,7 cover is not available for the cost of the towage since such action has not avoided or minimised the liability of the Association. In such circumstances, the Member’s remedy is to seek recovery of the costs from the hull underwriters. For similar reasons, cover is not available if the liability that is avoided or minimised is excluded under the Rules. For example, if a charterer were to become insolvent during the course of a cargo carrying voyage and the shipowner Member was, consequently, legally obliged to pay for the bunkers and other voyage expenses that were necessary to complete the voyage and thereby fulfil the Member’s obligations to a third party bill of lading holder, it can be truthfully said that the costs and expenses that are thereby incurred are extraordinary and serve the purpose of avoiding or minimising the Member’s liability. However, since cover for liability that arises out of the insolvency of the charterers is excluded under Rule 77, cover is not available for such costs and expenses under Rule 46.

7 See the Guidance to Rule 37, which includes a comparison of different Hull Policy conditions provide cover for liability for damage to fixed and floating objects.
The phrase ‘…for the purpose of…’ indicates that the measures that cause the Member to incur the extraordinary costs and expenses need not be successful in achieving the aim of avoiding or minimising the liability of the Association. It suffices if the Member can demonstrate that such costs and expenses were incurred for that purpose, even if they did not in fact achieve the desired result. For example, if the Ship to which reference is made in the last example is insured by the Association against liability for damage to fixed and floating objects, cover is available for the cost of the towage even if, during the course of the towage, the towline were to break and the Ship were to come into contact with, and cause damage to, the oil platform.

Cover is available even if the Member has not intentionally or consciously incurred the ‘extraordinary’ costs and expenses in order to avoid or minimise the liability of the Association. It suffices if the Member can demonstrate that such costs and expenses did in fact serve that purpose even if that was not the original aim of the Member. For example, if, before the engineers that are employed on board the ship to which reference is made in the last example are able to resolve the engine problem, the master is ordered by the local authorities to employ towage vessels in order to avoid the risk that the Ship may come into contact with the oil platform, cover is available in principle for the cost of the towage provided that the Member can demonstrate that such action did in fact avoid or minimise the liability of the Association. However, before confirming cover, the Association would need to take account of all the relevant factors including the availability or otherwise of any other relevant insurances including, in particular, the Member’s hull and machinery cover. In many cases, the relevant costs and expenses may be apportioned between those insurers that have benefited as a result of the fact that the casualty or event has been avoided. However, if the liability that has been minimised or avoided is a liability that clearly falls outside the Rules, cover is not normally available under Rule 46.

(D) …other than… (Rule 46.a.i – iv)
The cover for ‘extraordinary’ costs and expenses is not available in certain circumstances. The precise circumstances are itemised in provisos i to iv of Rule 46.a. but they can be categorised as follows:

- where the Member should seek recovery of the ‘extraordinary costs and expenses in general average [proviso i];
- where the Member has caused or contributed to the casualty or event that has necessitated the incurring of ‘extraordinary’ costs and expenses, by acts or omissions that should not have been done (or not done) by a reasonably prudent Member who should, therefore, bear those costs and expenses himself [provisos ii and iv];
- where extraordinary costs and expenses have been incurred as a result of measures that a prudent Member would be expected to take without the benefit of reimbursement from the Association [proviso iii].
...costs and expenses claimable in general average (Rule 46.a.i)
The Member may have the right on the occurrence of a casualty or other event to declare general average,\(^8\) and to claim contributions from the other parties to the adventure for costs and expenses that he has incurred for the common safety and/or common benefit of those other parties. The Member has the obligation to take, and to continue to take, such steps as may reasonably be necessary in order to avert or minimise any claim that may be made on the Association, including the obligation to preserve rights of recourse against third parties\(^9\) including those from whom he may be entitled to receive contributions in general average, or the hull underwriters who insure him against general average sacrifices and expenditure under the Hull Policy. Consequently, cover is not available under Rule 46 for ‘extraordinary’ costs and expenses that the Member is entitled to recover from such other parties. In particular, cover is not available if the costs and expenses that would have been recoverable from other parties under the York-Antwerp Rules 1994 had they been incorporated into the charterparty or contract of carriage, even if they were not in fact incorporated.\(^10\)

...costs and expenses relating to the Ship being overloaded or the cargo being incorrectly stowed... (Rule 46.a.ii)
The overloading of a Ship, i.e. loading more than the maximum permitted weight of cargo, is a very serious matter. This may cause severe damage to the structure of the Ship whether it is underway or in port and may, therefore, jeopardise the safety of the Ship and its Crew. Consequently, cover is not available for costs and expenses that are incurred by the Member as a result of such conduct, e.g. the cost of lightening excess cargo, or of storing it ashore, or the cost of on-carriage by another vessel.\(^11\)

For the purposes of this Rule, the Association considers a Ship to be overloaded in circumstances where more cargo has been taken on board than it would be safe to carry on the contemplated voyage, e.g. where the Ship has been loaded to its summer draft for a North Atlantic winter voyage, or where the Ship is loaded with more cargo than that which would allow it to perform the contract of carriage as intended. For example, a Ship that has loaded cargo in Western Canada for European ports under a contract of carriage that requires the Ship to proceed through the Panama Canal is considered to be overloaded if the Ship has loaded more cargo than that which makes it possible for the Ship to transit the Panama Canal, or to call at one or more of the ports specified in the contract of carriage, because its draft exceeds the maximum permitted draft at the Canal or the port(s) in question.

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8 See the Guidance to Rule 41. Cover is not available under Rule 41.a for general average contributions that are not legally recoverable by the Member solely by reason of a breach of the contract of carriage.
9 See the Guidance to Rule 82.1.b.
10 See the Guidance to Rules 41 and 63.1.i.
11 Cover may also be denied in circumstances pursuant to Rule 74 on the basis that such voyage is unsafe.
The incorrect stowage of cargo may cause cargo to shift in the holds or on deck during the voyage, which may in turn cause damage to, or the loss of, cargo and/or jeopardise the safety of the Ship and its Crew. Cover is available under Rule 34 for any liability that the Member may have to third parties for such damage or loss but cover is not available under Rule 46 for costs and expenses that are incurred by the Member in handling cargo as a result of such incorrect stowage.

It is necessary in this connection to explain the correlation between Rule 46.a.ii and Rule 35 (Extra handling costs). Rule 35 makes cover available for ‘extra handling costs’ but emphasises that there ‘…shall be no recovery…of extra costs and expenses which…are excepted from cover under Rule 46.a’. Rule 46.a.ii excludes cover for extra costs and expenses that are incurred by the Member specifically as a result of the incorrect stowage of the cargo. Therefore, cover is available under Rule 35 for extra costs and expenses that are necessarily incurred by the Member in handling cargo as a result of damage to that cargo, but not necessarily simply in order to avoid or minimise the liability of the Association, e.g. costs that are incurred in removing the burned residues of a cargo from the Ship’s holds. However, cover is not available under Rule 46.a.ii for costs and expenses that are incurred by the Member in order to restow and/or relash cargo that was originally improperly stowed, and has subsequently broken loose, in order to avoid or minimise a loss of, or damage to, that cargo and the consequent exposure of the Association for such loss/damage. However, if unforeseen or unexpected events such as exceptionally bad weather or heavy seas were to arise during the voyage and cause the cargo to shift, the cargo may not be considered to have been incorrectly stowed, in which case, cover may be available either under Rule 35 or otherwise under Rule 46. Therefore, if neither the cargo nor the Ship is damaged (which would be necessary if Rule 35 were to be applicable) and it is necessary to restow and/or relash cargo which, if not restowed or relashed, may give rise to e.g. pollution or wreck removal liabilities that are covered by the Association under the Rules, cover is available under Rule 46 for the costs and expenses that may be reasonably incurred by the Member in carrying out those operations.

Cover is not available under Rule 46.a.ii regardless of whether the stowage has been effected by the shipowner or by a charterer pursuant to FIOS terms, and regardless of whether the claim is made by the shipowner or the charterer. Therefore, cover may not be available to the shipowner for ‘extraordinary’ costs and expenses that are incurred by him as a result of improper stowage that has been effected by the charterer. In such circumstances, the shipowner’s remedy is to claim an indemnity from the charterers for such costs and expenses, and cover may be available to him under the Defence cover (if he has defence cover) for legal and other costs that are incurred by him in this regard.
The explanation for the exclusion in Rule 46.a.ii is that all ship operators are expected to be diligent and should, therefore, ensure, by, inter alia, employing a competent master and Crew, and by using proper procedures, that overloading or incorrect stowage does not occur prior to the commencement of the voyage.

...costs and expenses resulting from measures that have been or could have been accomplished by the Crew or by reasonable use of the Ship or its equipment... (Rule 46.a.iii)

This provision reflects the Member’s duty to take, and to continue to take, all such steps that may be reasonably necessary in order to avert or minimise, inter alia, the incurring of costs and expenses for which he may be insured by the Association.12

For reasons that are similar to those that make it desirable for a Member to retain an interest in a claim by bearing a deductible,13 it is desirable that a Member should be required to take his own active steps to avoid or minimise the liability of the membership as a whole. Consequently, cover is not available for ‘extraordinary’ costs and expenses that are incurred by a Member after a casualty or other event in circumstances where the necessary measures can be taken by the Crew or by the reasonable use of the Ship or its equipment.

For example, if the casualty or event makes it necessary to lighten the Ship by discharging cargo into barges, and this can performed in a safe and satisfactory manner by use of the Ship’s own cranes or other equipment, cover is not available for ‘extraordinary’ costs and expenses that the Member chooses to incur by bringing a crane barge alongside to perform the operation. Similarly, cover is not available when ‘extraordinary’ costs and expenses are incurred as a result of employing shore labour to segregate wet and dry bulk cargo when the segregation work can be accomplished by reasonable efforts on the part of the Crew.

...costs and expenses resulting from making the Ship seaworthy for receiving cargo (Rule 46.a.iv)

The Member has an obligation under the law of most countries, and/or pursuant to the Hague, Hague- Visby and Hamburg Rules, to exercise due diligence before and at the commencement of the voyage to make the Ship seaworthy, including the duty to make the holds, refrigerating and cool chambers and other parts of the Ship that are used for the carriage of cargo, fit and safe to receive cargo. Therefore, costs and expenses that are incurred by the Member in order to comply with these obligations are considered to be usual and normal operational costs for the account of the individual Member and not costs that should be shared by the membership as a whole. Therefore, cover is not available for such costs and expenses, even if the Member is able to prove that, in one sense, they are extra costs. For example, cover is not available if a grain cargo is contaminated by the remnants of a prior

12 See the Guidance to Rule 82.1.b.
13 See the Guidance to Rule 76.
dirty bulk cargo, and increased costs and expenses are incurred by the Member after the discharge of the grain cargo in order to thoroughly clean and, subsequently, inspect the holds, in order to ensure that the next cargo, which is sensitive to such contamination, is not contaminated.

(E) ...losses, costs and expenses incurred at the direction of the Association.

(Rule 46.b)
There may be situations in which the Association considers it beneficial to the membership as a whole that the Member should comply with directions that are given by the Association, even if such directions cause financial loss or other inconvenience to the Member. The Association has no legal right to force a Member to comply with its directions,14 but Rule 46.b makes it clear that, if the Member does so, cover is available for losses, costs and expenses that are incurred by him as a result of doing so. However, cover is available only if the Association directs the Member clearly and unequivocally to follow a particular course of conduct. The Association will not do so lightly, since it must take the interests of the membership as a whole into account before doing so. Therefore, such directions will be given only in rare circumstances, and the Member should ensure, before committing himself to any particular course of conduct that may subsequently lead him to make a claim against the Association for losses, costs and expenses incurred as a result of doing so, that the Association has given such directions clearly and in writing. The mere suggestion of a particular course of conduct will not suffice for these purposes as this may simply be an informal view that is offered by the Association as to one out of many possible courses of conduct that may assist the Member.

For example, if the Member’s Ship is arrested by a third party claimant that is seeking security for a claim for which cover is available from the Association, the Association may, or may not, exercise its discretion to provide security15 to ensure the release of the Ship from arrest. It may decide not to do so if the claimant demands an exorbitant amount of security that is significantly higher than a virtually unbreakable limit of liability that is applicable, and/or demands security terms that are unacceptable in that they do not adequately protect the Ship or the Member’s other Ships against future arrest for the same claim. Alternatively, the Association may decide not to offer security if the claimant is not prepared to accept security otherwise than in a form that constitutes an unacceptable risk, e.g. a cash deposit that may be collected by the claimant even before the matter has been heard by a court or tribunal, or which is payable against a judgement of a court of first instance before appeal to a higher court.

14 Whereas Rule 82.3 gives the Association the right to control or direct the conduct of any claim or legal or other proceedings etc., as well as the right to refuse to cover liabilities etc., in whole or in part if the Member fails to comply with the directions given, this does not go as far as to empower the Association to legally force the Member to make certain decisions or take specific actions in relation to the Ship or Crew.

15 See the Guidance to Rule 88.2.
If the Association does not provide security the Ship may remain under arrest for a prolonged period of time, and this may cause financial loss to the Member, e.g. if charterers are not obliged to pay hire whilst the Ship remains under arrest. In such circumstances, the Member may decide to offer security himself in a manner that is acceptable to the claimant in order to obtain the release of the Ship from arrest. However, if the Association considers that the provision of security by the Member himself could potentially harm the wider interests of the Association, it may, therefore, consider that it would be justifiable, in the interests of the membership as a whole, to direct the Member clearly and unequivocally not to do so. In such circumstances, cover is available under Rule 46.b for losses, costs and expenses that are incurred by the Member as a consequence. In this context ‘losses’ means both financial losses, such as the loss of hire that would have been payable by the charterers had the Ship been able to resume trading, and losses that arise as a result of any deterioration in the condition of the Ship that may have been caused by the arrest.

Cover may also be available under Rule 46.b if a Ship were to get into difficulty as a result of a technical problem on board that cannot be rectified immediately and, therefore, threatens to cause damage to nearby property such as an oil or gas platform and/or the environment by running aground and spilling oil. If the shipowner Member were to choose to try and rectify the problem by use of his own on-board resources rather than by obtaining external assistance in the form of a tug or tugs, the Association might take the view that external assistance is required and might direct the Member to obtain it. In such circumstances cover for the costs that would be incurred by the Member in order to obtain such assistance is available under Rule 46.b, regardless of whether the action that is taken is or is not successful.

It is important that the Member should, to the best of his ability, provide the Association with as much relevant information as is possible in relation to the impact whether financial or otherwise that he may suffer if the Association were to direct him to act or to refrain from acting in a certain way, in order to enable the Association to make an informed decision as to whether it is beneficial from the Association’s point of view to give directions, and to compensate the Member for his losses pursuant to Rule 46.b.

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16 Since the Association does not have any obligation to the Member to provide security cover is not available from the Association for such loss pursuant to this Rule and/or Rule 63.2.
17 However, depending on the circumstances, the Association may seek to recover some or all of such costs from other insurers.
Rule 47 Fines

1 The Association shall cover fines or other penalties imposed upon a Member (or, imposed upon a third party whom the Member is legally obliged to reimburse or whom the Member reimburses with the Agreement of the Association) in respect of the Ship by any court, tribunal or other authority of competent jurisdiction for or in respect of any of the following:
   a short- or over-delivery of cargo, or failure to comply with regulations concerning the declaration of goods, or documentation of cargo, provided that the Member is insured by the Association for cargo liability under Rule 34;
   b breach of any immigration law or regulations;
   c the accidental escape or discharge of oil or any other substance or threat thereof, provided that the Member is insured for pollution liability by the Association under Rule 38, and subject to the applicable limit of liability under the P&I entry in respect of oil pollution risk;
   d smuggling or any infringement of any custom law or regulation other than in relation to cargo carried on the Ship.

2 The Association may, in its sole discretion, cover in whole or in part a fine or penalty other than those listed in Rule 47.1 above imposed upon the Member (or imposed upon a third party whom the Member is legally obliged to reimburse), provided the Member has satisfied the Association that he took such steps as appear to the Association to be reasonable to avoid the event giving rise to the fine or penalty.

3 The Association shall be under no obligation to give reason for its decision pursuant to Rule 47.2 above.

Guidance

For further commentary see Chapter 8 of the Gard Guidance on Maritime Claims and Insurance.

Every Member of the Association is expected to operate his Ships in compliance with the laws and regulations that apply where his Ships are trading. He is expected to have, or to obtain knowledge about, all such laws and regulations, and to ensure to the best of his ability that he complies with them.

A distinction is drawn in the Rules between conduct that may result in the cesser of cover and conduct that, whilst not resulting in cesser of cover, will, nevertheless, deprive the Member of cover for liabilities, losses, costs and expenses that arise as a result of certain conduct. Secondly, a distinction is drawn between serious offences or violations of regulations that are committed with or without the knowledge of the Member, and less serious offences or violations of regulations that are caused by the acts or omissions of the master or Crew in the course of their duties and employment but without the knowledge of the Member. For example:
Under Rule 25.2.j the Member shall cease to be covered by the Association on the occurrence of an event in which the Ship is, with the consent and knowledge of the Member, being used for the furtherance of illegal purposes.

Under Rule 74, the Association does not cover liabilities, losses, costs or expenses arising out of or consequent upon the Ship carrying contraband, blockade running or being employed in or on an unlawful trade or voyage even if the Member was unaware that the Ship was being employed in this manner.

Under Rule 72, the Association does not cover liabilities, losses, costs or expenses arising or incurred in circumstances where there has been wilful misconduct on the part of the Member.

However, subject to such restrictions, cover is available as of right under Rule 47 for fines or other penalties that may be imposed either directly or indirectly on the Member for certain prescribed offences whilst, in the case of other offences, cover may be available only if the Board of Directors of the Association decide to exercise their discretion to extend cover. Rule 47.1 itemises the categories of fines and penalties for which cover is available, whereas Rule 47.2 gives the Association the discretionary right to cover fines and penalties in circumstances other than those itemised in Rule 47.1. However, it is important to note that cover is available only in respect of fines and penalties that have been incurred in direct connection with the operation of the Ship, and in respect of the Member’s interest in the Ship, and as a result of events that have occurred during the period of entry of the Ship in the Association.¹

(A) …fines or other penalties… (Rule 47.1)
The cover that is available as of right pursuant to Rule 47.1 for fines or other penalties that are imposed on the Member is specifically restricted to the categories of fines or other penalties that are itemised in sub-paragraphs a, b, c and d of that Rule and is based on a ‘model Rule’ that was agreed between the P&I clubs that are parties to the Pooling Agreement many years ago. This ‘model Rule’ was designed to strike a balance between, on the one hand, accidental or non-deliberate law infringements that are considered difficult to avoid given the trading environment in which ships normally operate, and which are, consequently, considered to be mutual risks that should be shared by the membership and, on the other hand, those infringements that a Member should have taken steps to avoid and which are not considered to be mutual risks but risks that should be for the Member’s own account.

Rule 47.1 does not define the terms ‘fines’ or ‘other penalties’. However, for the purposes of Rule 47.1, a ‘fine’ is considered to be a monetary punishment that is imposed by a public authority that is empowered under the applicable law to

¹ See the Guidance to Rule 2.4.
impose such a punishment for a violation or infringement of any applicable laws or regulations, and which has the legal means to enforce it in the country, port or place in question.

Similarly, for the purposes of Rule 47.1, the term ‘other penalties’ is considered to include any other form of monetary punishment that is not considered to be a fine by the imposing authorities, e.g. a penalty imposed by a customs authority for the alleged shortlanding of a cargo.

However, in reality a ‘penalty’ is in many cases merely a ‘fine’ under another name and therefore, the phrase ‘fines or other penalties’ encompasses most types of monetary punishment, but does not extend to the confiscation by authorities of the Ship or the Member’s other assets.

(B) …imposed upon a Member… (Rule 47.1)
Cover is available under Rule 47.1 for the fines or other penalties that are itemised in sub-paragraphs a – d of the Rule when they are imposed upon the Member by a court, tribunal or other authority of competent jurisdiction. In this context, the Member also means any Joint Member or Co-assured, as well as any Affiliate to whom the Association may exercise its discretion to extend cover.2

Whilst the laws of some countries permit enforcement action to be taken against the Ship in rem, with the consequent risk that the Ship may be arrested, attached, detained and, ultimately, auctioned, cover is not available under Rule 47.1 in such circumstances unless the fines or other penalties in respect of which action has been taken against the Ship, have also been imposed on the Member. Therefore, cover is not available for fines or other penalties that are imposed not on the Member but simply on the Ship and which relate to violations or infringements that occurred at a time when the Ship was owned by someone other than the Member.

(C) …imposed upon a third party whom the Member is legally obliged to reimburse or whom the Member reimburses with the Agreement of the Association… (Rule 47.1)
Whilst cover is not directly available for fines or other penalties that are imposed, not on the Member, but on other individuals who may be employed, engaged or appointed by the Member, cover is, nevertheless, available if the Member is legally obliged to indemnify that person in respect of such fines or other penalties. Such individuals normally include the master and Crew members of the Ship on the basis that the Member usually has a legal obligation pursuant to the terms of

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2 The cover is available for the confiscation of the Ship is subject to the special provisions set out in Rule 49.
3 See Rule 1.1 for a definition of Member and the Guidance to Rules 78.1 and 78.7 which describes the basis on which cover can be extended to an Affiliate.
their employment to indemnify them for, or to hold them harmless against, any fines or other penalties that are imposed upon them personally as a result of acts or omissions that are committed by them within the scope of their duties and employment on board.

Similarly, cover is available for any legal liability that the Member may have to indemnify independent contractors such as a firm of engineers that has been contracted by the Member to conduct main engine repair works while the Ship is in port, or for the legal liability that a charterer Member may have to indemnify the owner of the Ship as a result of the charterer’s failure to provide cargo manifest information that is compulsorily required by the relevant authorities pursuant to port security regulations. However, in both cases, cover is available only if the Association has previously approved the terms of the contract or indemnity that imposes the duty to indemnify the Member.4

In some circumstances, the Member may wish to reimburse a third party in respect of a fine or other penalty that has been imposed upon that party even though the Member does not have a legal obligation to do so. For example, the Member may wish to indemnify a master in respect of a fine that has been imposed personally on him even if there is no obligation to do so under the contract of employment. Although the Association has no obligation to make cover available in such circumstances, cover may be extended if the Member obtains the agreement of the Association to indemnify the master. However, the Member should always endeavour to obtain such agreement before entering into any commitment to indemnify the third party in question.

(D) …in respect of the Ship… (Rule 47.1)
The fine or penalty that is imposed on the Member must have been incurred by him in his capacity as the owner and/or operator of the Ship. For example, if the Member is an owner of an oil tanker that is entered in the Association, but is also the operator of an oil terminal, cover would not be available for fines or other penalties that the Member has incurred in his capacity as operator of the terminal.5 Similarly, cover is not available for fines and penalties that a Member that is also the owner of the cargo that is carried on the Ship (e.g. a Member who is a charterer) has incurred in his capacity as owner of the cargo.

(E) …by any court, tribunal or other authority of competent jurisdiction…
(Rule 47.1)
Cover is available under Rule 47.1 only if the Member can demonstrate that the fine or penalty has been imposed by a court, tribunal or another authority of ‘competent jurisdiction’, i.e. an authority that is empowered under the applicable law to impose

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4 See the Guidance to Rule 55.
5 See also the Guidance to Rule 2.4.a and b.
such punishment, e.g. the customs authorities, the coast guard or an environmental protection agency. The Member is required to investigate and verify the applicability of the law or regulation based upon which the fine or penalty is being imposed, and the legal competence of the authority that is purporting to impose the fine or penalty. This is usually done by taking advice from local P&I correspondents or legal counsel.

Most countries have a system of law that enables a person upon whom a fine or penalty has been imposed by administrative public authorities to appeal to a court or a higher authority. Whilst it is not a pre-requisite of cover that the Member must have requested appellate review of any fine that has been imposed upon him, the Member is obliged to take, and to continue to take, such steps as may be reasonably necessary in order to minimise the liability of the Association, and to consult the Association in this regard. The question of whether the Member should simply pay the fine when first imposed, or seek appeal to a court or higher authority is an issue that must be determined on a case by case basis in the light of the particular facts, the applicable law or regulations and the likelihood of obtaining a fair hearing in the country in question.

Comment is made in (F) – (L) on the specific types of fines or other penalties for which cover is available whereas comment is made in (M) and (N) on the other circumstances in which the Association has a discretion to extend cover.

(F) ...short or over-delivery of cargo, or failure to comply with regulations concerning the declaration of goods, or documentation of cargo...

(Rule 47.1.a)

Cover is available under Rule 47.1.a if the Member has failed to comply with regulations that govern ‘cargo’ documentation and the declaration of ‘goods.’ However, whilst the Rule refers to both terms, no distinction is intended and, for the purposes of Rule 47.1.a, the terms ‘cargo’ and ‘goods’ are intended to be interchangeable.

The customs laws and regulations of many countries empower the local customs authorities to impose a fine or some other similar penalty on a carrier of cargo in the event that there is a discrepancy between, on the one hand, the marks, number, quantity or weight of cargo that is described in the Bill of Lading, waybill or some other transport document such as cargo manifest and, on the other hand, the actual marks, number, quantity or weight of cargo as ascertained by those authorities after discharge of the cargo from the Ship. The customs authorities of some countries are particularly strict in carrying out their duties in this regard and may impose fines or penalties.

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6 See the Guidance to Rule 82.1.
7 Cover is available under Rule 47.1.d for fines or other penalties imposed on the Member for infringements of customs laws or regulations in relation to other issues than cargo. See (L) below.
other penalties even when the discrepancies are either very small or unavoidable given the nature of the cargo, e.g. where a dry bulk cargo loses weight during the course of transit as a result of evaporation caused by the inherent moisture content of the cargo on loading.

Fines and penalties are often imposed as a result of the failure of the carrier to present a cargo manifest on time and/or to make accurate cargo declarations in the manifest, and/or for short-delivery of cargo, i.e. when less cargo has (allegedly) been delivered than that which is recorded in the Bill of Lading etc., and/or for over-delivery of cargo, i.e. when more cargo has (allegedly) been delivered than that which is recorded in the Bill of Lading etc. Cover is available in all these circumstances.

Whilst cover is not restricted to fines and penalties that have been imposed by customs authorities, cover is called upon most usually in such circumstances. However, cover is also available for fines and penalties that have been imposed on the Member as a result of the failure to provide an accurate cargo manifest by authorities that have the responsibility for port security. Nevertheless, the Member is considered to have failed to comply with regulations that apply to ‘documentation of cargo’ notwithstanding the fact that the regulations are designed primarily to protect the port against terrorist attacks.\(^8\)

(G) \(\ldots\) provided that the Member is insured by the Association for cargo liability under Rule 34... (Rule 47.1.a)\)

This proviso means that cover is not available under Rule 47.1.a for fines etc., that are imposed in relation to cargo where the Member, as a result of special terms of entry, has excluded cargo liability as provided by Rule 34 from the scope of the Ship’s P&I cover. However, if the Ship is covered for such cargo liability, the fact that the particular form of liability for which a fine or penalty has been imposed is excluded from the scope of cover by virtue of the special exclusions in Rule 34.1.i to xi does not in itself deprive the Member of the right to recovery under Rule 47.1.a. The Member is still deemed to be insured for cargo liability for the purposes of Rule 47.1.a.

(H) \(\ldots\) breach of any immigration law or regulations... (Rule 47.1.b)\)

The immigration laws and regulations of a country govern the extent to which any person that is not a citizen of that country may enter and reside in that particular country. Such laws and regulations will usually require persons who are not citizens of that country to show, on arrival at that country’s border, such evidence of permission to enter that country that is required from the citizens of the country where the person that is seeking entry is domiciled, e.g. a passport, visa or other similar documentation. A person who violates the relevant immigration laws or regulations

\(^8\) See the Guidance to Rule 58.
may not only be arrested, held in custody or deported, but may also be made liable to pay fines or other penalties, including any costs that may be incurred by the relevant authorities in this regard. Common examples of violations occur when Crew members cross a border without permission, or stay in a country for longer than is permitted by the conditions of the relevant visa.

Cover is available under Rule 47.1.b where a fine is imposed on the Member as a result of a breach by him, or by a person whom the Member is obliged by law to reimburse, of any such immigration law or regulations. For example, cover is available if the Member is held responsible by the authorities as a result of the desertion of Crew members from the Ship, or if stowaways that are held in custody on board the Ship escape ashore while the Ship is in port and are subsequently apprehended by the local authorities. Cover is also available if an operator of a passenger Ship or ferry is held responsible by the local authorities when passengers enter the country at the Ship’s port of call without a proper visa.

Immigration laws or regulations may also require the repatriation of Crew members or passengers if the Ship is detained or arrested in port in circumstances where there is no prospect that the Ship will be able to resume trading in the immediate future. Cover for costs and expenses that are incurred by a Member in relation to such repatriation is not available under Rule 47.1.b, but may be recoverable under Rules 27 or 28.9

(I) ...accidental escape or discharge of oil or any other substance or threat thereof... (Rule 47.1.c)
Cover is available for fines or penalties that are imposed on the Member as a result of the accidental discharge or escape of oil or any other substance from the Ship, or as a result of a threat thereof. The term ‘other substances’ is widely construed and includes, inter alia, garbage and water that is used to wash a hold or deck. A further increasingly common example is where a fine is imposed on a Ship that breaches air pollution rules, usually because the Ship has entered an area where only low sulphur fuel can be used, and the Ship does not have such fuel on board or fails to use it correctly so as to breach local air pollution regulations. However, cover is available under Rule 47.1.c only if the discharge or escape is ‘accidental.’

An escape or discharge would normally be considered to be accidental if caused, for example, by:
• a casualty involving the Ship, such as a collision, grounding or foundering; or
• the discharge or other release from the Ship of a polluting substance in circumstances where the master or Crew had no intention to discharge or release that substance, e.g. when caused by a leak, tank overflow or any other inadvertent act or omission; or

9 See the Guidance to Rule 27.2.
any inadvertent act or omission that has resulted in the contamination on board of a clean substance by another polluting substance, and where such contaminated substance is subsequently intentionally discharged or released from the ship, but without knowledge on the part of the master or Crew that contamination has occurred.

However, an escape or discharge would not be considered to be accidental when, for example:

- oil or any other pollutant has been intentionally discharged or allowed to escape from the Ship even if this was thought to be justifiable in the circumstances, e.g. the jettison of crude oil for safety purposes after a casualty; or
- a substance that the master or Crew knew was (or contained) a pollutant is intentionally discharged from the Ship; or
- a substance that the master or Crew believed to be a non-pollutant, but which was considered to be a pollutant according to local regulations, is intentionally discharged from the Ship.

(J) ...provided that the Member is insured for pollution liability by the Association under Rule 38... (Rule 47.1.c)

Rule 38 outlines the scope of cover that is available for liabilities, costs and expenses that arise in consequence of the discharge or escape from the Ship of oil or any other substance, or as a result of the threat of such discharge or escape.\(^{10}\) Cover for pollution-related fines is expressly excluded under Rule 38 since cover for such fines is made available under Rule 47. However, if a Member is not insured by the Association for pollution liability pursuant to Rule 38, the cover that would otherwise have been available for fines and penalties under Rule 47.1.c is not available. Furthermore, it is unlikely that the Association would exercise its discretion to extend cover to the Member pursuant to Rule 47.2 in such circumstances, in view of the fact that the Member has chosen to exclude pollution liability cover under his terms of entry for the Ship.

(K) ...and subject to the applicable limit of liability under the P&I entry in respect of pollution risk... (Rule 47.1.c)

The liability that the Association has for claims for oil pollution is subject to special limits depending on whether the Ship is entered on behalf of an owner or a charterer. Furthermore, the Member and the Association may have agreed special terms of entry for the Ship, as a result of which, a special limit may apply for pollution liability. Rule 47.1.c stipulates that whatever the applicable limit may be, it shall apply to the sum total of the cover that is available for the liabilities etc., under Rule 38 and for fines and penalties under Rule 47.1.c.

\(^{10}\) See the Guidance to Rule 38 in this regard.
(L) ...smuggling or any infringement of any custom law or regulation other than in relation to cargo carried on board the Ship... (Rule 47.1.d)

**Smuggling**

‘Smuggling’ occurs for the purposes of Rule 47.1.d when items other than cargo or goods as defined for the purposes of Rule 47.1.a are brought into a country in a manner that is designed to avoid detection by the local authorities and in order to avoid any embargos that are imposed by the criminal laws of that country, e.g. laws prohibiting the importation of drugs, or in order to avoid or circumvent the importation laws and regulations of that country, e.g. import taxes, customs dues etc.

As emphasised in the preliminary paragraphs to the Guidance to Rule 47, if the Ship is used for illegal purposes with the consent or knowledge of the Member, cover for the Ship will cease automatically, and without notice to the Member, as from the time that the Ship is used in such manner. Furthermore, cover is not available for any liabilities, losses, costs or expenses that arise out of or consequent upon the Ship being employed in an unlawful trade or as a result of the wilful misconduct of the Member.

However, the Member may be held responsible for smuggling activities involving the Ship, even though the Member has not consented to, or had any knowledge of, such activities. For example, the Ship may have been used to carry illicit drugs without the consent or knowledge of anyone on board the Ship, since the drugs were attached to the hull under water whilst the Ship was in port, or since the drugs were brought on board the Ship in a sealed container in the guise of lawful merchandise. Cover is available under Rule 47.1.d if a fine or other penalty is imposed on the Member in such circumstances.

Cover is also available under Rule 47.1.d if a fine or other penalty is imposed upon the Member because the master or Crew were involved in, or had knowledge about, the smuggling activities, but in circumstances where the Member could not have been aware of such activities.

If a fine or other penalty has been imposed upon the master or a Crew member personally because of their smuggling activities, cover will be available only if the Member is legally obliged to reimburse the master or Crew member, or if he does so with the agreement of the Association. In normal circumstances, the Member is obliged to indemnify the master or Crew member only when they are acting within

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11 See the Guidance to Rule 25.2.j.
12 See the Guidance to Rule 74.
13 See the Guidance to Rule 72.
14 See (C) above.
the scope of their employment, and smuggling is not considered to be an activity that is within the scope of their employment. Accordingly, it would normally be contrary to the interests of the membership as a whole to make cover available in such circumstances. However, if the Association is satisfied that the Member has reasonably reimbursed the master or Crew member on the basis that the fine or penalty was wrongly imposed, i.e. on the basis that the master or Crew member had not in fact been involved in the smuggling activities, then cover might be made available. However, the Association will require strong evidence of the fact that the fine was wrongly imposed before agreeing to extend cover.

...or any infringement of any custom law or regulation other than in relation to cargo carried on board the Ship...

Cover is also available where there has been “an infringement of any custom law or regulation other than in relation to cargo carried on the Ship.” The term ‘customs law or regulation’ means any law or regulation that may be enforced by the customs authorities in the country in question.

This provision does not apply to the infringement of regulations that relate to cargo since such infringements are regulated by Rule 47.1.a. However, it applies to infringements of regulations that relate to other items that are on board the Ship and which the Member is obliged to declare under the applicable laws and regulations, e.g. stores or other provisions such as medical supplies, wine, tobacco or even food. Fines are often imposed by authorities who allege that there are discrepancies in a vessel’s manifest that relate to her stores, medicine chest, or bunkers on board. Such discrepancies may be real, in the sense that the vessel has, for example, 15 tins of paint and has declared that she has only 14 tins, or they may be merely apparent, in the sense that the difference between the bunkers declared and the bunkers as measured by the relevant customs officer is accounted for by a difference in the methods that are used to measure the bunkers. Whatever be the reason for, and regardless of the seriousness of, the offence, fines – sometimes for substantial amounts – are imposed in such cases. However, provided that such fines are imposed as a result of an “…infringement of any custom law or regulation other than in relation to cargo…”, cover is available under Rule 47.1.d.

(M) The Association may, its sole discretion, cover in whole or in part a fine or penalty other than those listed in Rule 47.1... (Rule 47.2)

The reason why cover is restricted in the case of the fines and penalties that are itemised in Rule 47.1 has been explained in (A) above. However, Rule 47.2 recognises the fact that restricting cover in this way may, in exceptional cases, cause hardship to the Member. Consequently, subject to the conditions that are imposed by Rule 47.2, the Association is given the discretion to cover in whole or in part...
a fine or penalty that has been imposed upon the Member, or upon a third party whom the Member is legally obliged to reimburse, in circumstances other than those described in Rule 47.1.

Discretion is exercised by the Board of Directors of the Association which will consider any application which the Member wishes to make under Rule 47.2 after the Member has paid the fine or penalty, and after the Member has provided a full and complete explanation of all the relevant circumstances that resulted in the imposition of the fine or penalty upon the Member. Whilst each case is considered on its own facts, the Board of Directors is under no obligation to give reasons for any decision that it reaches in relation to such application for cover.16

(N) …provided the Member has satisfied the Association that he took such steps as appear to the Association to be reasonable to avoid the event giving rise to the fine or penalty… (Rule 47.2)
Discretion cannot be exercised in favour of the Member under Rule 47.2 unless and until the Member has demonstrated to the satisfaction of the Association that he took steps that are considered to be reasonable in order to avoid the event that gave rise to the fine or penalty. The onus is on the Member to convince the Association in this regard and to provide all relevant information and documentation, and to give all the assistance that the Association may require in order to enable it to properly investigate the claim.17

However, even if the Member satisfies all such requirements, the Association is under no obligation to exercise its discretion in favour of the Member. The Association must consider the interests of the membership as a whole, and may conclude that the event that gave rise to the fine or penalty was of such a nature, or had such characteristics, that it would be contrary to the interests of the membership as a whole to make cover available for the claim even if the Member had taken all reasonable steps to avoid it.

For example, the Association might decide to exercise its discretion in favour of the Member in the case of a fine or penalty that has been imposed on the Member for the discharge or escape of oil from the Ship, if the Member convinces the Association that there has in fact been no such discharge or escape of oil, and that the fine or penalty has been wrongfully imposed on him as a result of an unjustifiable act by the relevant authorities.

Similarly, the Association might decide to exercise its discretion in favour of the Member in the case of a fine or penalty that has been imposed upon the Member for a breach of a regulation that was impossible to avoid since no information had

16 See the Guidance to Rule 47.3.
17 See the Guidance to Rules 82.2.d and e.
been made available to the Member about the circumstances that would result in
the breach, e.g. where the relevant authorities have prohibited the anchoring of
ships in certain coastal areas but have not released the relevant information into the
public domain, and the charts that are available for the areas do not indicate any
such restriction.

(O) The Association shall be under no obligation to give reasons for its decision
pursuant to Rule 47.2 above. (Rule 47.3)

Rule 47.2, like the ‘Omnibus Rules’ of other P&I clubs, empowers the designated
decision-making body of the Association, i.e. the Board of Directors, to consider and
determine whether, in the context of mutual insurance, and with due regard to the
interests of the membership as a whole, a claim that does not fall within the scope
of cover that is provided by the Rules should, nonetheless, be compensated by
the membership.

The decision of the Board of Directors is to be final in this regard and it need not
give any reasons for its decision. By agreeing to the Association’s Statutes and
Rules, Members have agreed and confirmed that claims made pursuant to Rule
47.2 are to be decided by the Board of Directors of the Association as the sole and
highest decision-making authority of the Association. The decision of the Board is
subject to judicial review only when it is alleged that the Directors have exceeded
their authority or have failed to apply the rules of natural justice.18 However, a
court will normally assume that the Directors have acted in good faith, and the
onus of proving otherwise, which is not easily discharged, is on the party making
the allegation.19

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18 See VAINQUEUR JOSE (1979) 1 Lloyds Rep 557. This is a decision of the English court, but other courts
and tribunals are likely to follow the same approach.

19 See Steven J. Hazlewood and David Semark P&I Clubs law and Practice, 4th Edition, London,
Informa 2010.
Rule 48 Disinfection and quarantine expenses

The Association shall cover costs and expenses, other than the Ship’s running costs and expenses, incurred by the Member in connection with quarantine orders or disinfection of the Ship or Crew on account of infectious diseases on board, except where the Ship has been ordered to a port where the Member knew or should have anticipated that she would be quarantined.

Guidance

Ships have always been subject to delays and extra expenditure that has been caused by the quarantine of the ship as a result of the presence on board of infectious diseases. In most instances, the shipowner is not able to avoid such difficulties, but in other instances, they can be attributed to a lack of care on the part of the shipowner or operator in allowing the ship to trade to ports or areas where the ship is likely to be quarantined. The cover that is available under Rule 48 is limited to those costs and expenses that are difficult to avoid and which are, therefore, considered to be a natural risk that should be shared by the membership of a mutual club. However, cover is not available for those costs and expenses that a prudent Member could, and should, have avoided.

(A) ...costs and expenses...incurred by the Member in connection with quarantine orders... (Rule 48)

Cover is available for costs and expenses that are incurred by the Member in connection with ‘quarantine orders’. A ‘quarantine order’ is an order that is given by local or national authorities in the country where the Ship finds itself at the time, which imposes restrictions on either the movement of the Ship and/or the Crew, passengers or other persons that are carried on board the Ship, or on the handling or discharging of cargo or other property that is on board the Ship.

The purpose and aim of a quarantine order is to ensure that proper measures are taken to investigate, eliminate or minimise the spread ashore of an infectious disease that is present on board the Ship. The infectious disease may either affect humans and be carried by the Crew, passengers or other persons that are on board the Ship; or it may affect flora or other natural resources and be present within the cargo or within foodstuffs or other provisions that are on board the Ship; or it may even be present within a part of the Ship itself.

A quarantine order is likely to be issued not only when the presence on board of an infectious disease has been established before the Ship calls at the port, but also when the authorities have a suspicion that an infectious disease is present on board. In exceptional circumstances, national health authorities may issue quarantine

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1 See further discussion of the term ‘infectious disease’ in (C) below.
orders that prevent all ships berthing at their ports before they are properly inspected in order to ensure that they do not carry a disease, e.g. in the event of a pandemic disease.

Since the discovery of the fungal disease Karnal Bunt\(^2\) in the United States in the mid-1990s, agricultural authorities in several countries have been vigilant in taking measures to ensure that such diseases do not spread to crops in those countries. Therefore, ships carrying fertiliser cargoes to such countries may be subject to thorough sampling and inspection and will be quarantined if such a disease is found on board. Furthermore, the discovery that such a disease is present on board is likely to cause the import permit to be revoked with the result that the Ship will not be allowed to discharge the cargo in that country and must dispose of it elsewhere.

Cover is available for costs and expenses that are incurred by the Member ‘in connection with’ quarantine orders. Therefore, subject to the issues discussed in (D) below, cover is available for costs and expenses that are incurred by the Member in bringing the Ship to anchor in the quarantine area; in carrying out the required inspections or expert analysis; in taking measures to eliminate the hazard in question by fumigation or other forms of treatment of the cargo on board; as well as for costs and expenses that may be incurred by the Member to unload and reload cargo if this is required in order to comply with the quarantine order.

A distinction must be drawn between costs and expenses that are incurred in connection with quarantine orders etc., and those that are incurred in order ensure that the Ship is in a seaworthy condition to load the next cargo because of the presence of pests or insects in the Ship’s holds. The Member has a duty to ensure that the Ship is seaworthy before and at the commencement of each voyage and this includes the duty to make the holds fit to receive the cargo that is to be carried by the Ship under the next contract of carriage. The costs of cleaning and treating the holds for such purposes are considered to be ordinary operational costs of the Ship, for which cover is not available from the Association.\(^3\)

(B) …costs and expenses incurred by the Member in connection with… disinfection of the Ship or Crew… (Rule 48)

Cover is also available under Rule 48 for costs and expenses that are incurred by the Member in connection with the disinfection of the Ship or Crew because of the presence on board of infectious diseases.

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\(^2\) Karnal Bunt, or partial bunt, is a fungal disease that affects wheat, durum wheat, rye, and triticale (a hybrid of wheat and rye). Over 20 countries currently list Karnal Bunt (KB) as a quarantine pest.

\(^3\) See also the Guidance to Rule 46.a.iii.
(C) ...on account of infectious diseases on board... (Rule 48)
An ‘infectious disease’ is a disease that will spread and cause infection to other human beings and/or animals and/or flora and/or other natural resources unless disinfection or other similar preventative measures are taken. Typical examples include cholera, plague, smallpox, typhus and more recent pandemic diseases such as avian influenza or ebola.

Depending on the type and nature of the disease it may be necessary to disinfect the Crew members and/or the cargo and/or any food or other provisions that are on board, or even the whole Ship, and cover is available in all these circumstances. Most of the costs and expenses that are incurred in this regard are incurred as a result of inspections and investigations that are required in order to trace and analyse the disease and its source, and also as a result of the disinfection process itself, which is usually carried out by specialised companies. Such costs and expenses can be substantial depending on the nature of the disease and the type, size and design of the Ship. For example, the disinfection of all parts of a modern, large cruise ship is likely to be a difficult and time-consuming exercise that could lead to the curtailment of the current cruise and the cancellation of scheduled future voyages. However, it should be noted in this regard that cover is not available for loss of time, loss of market or similar losses that result from delay.5

(D) ...other than the Ship’s running costs and expenses... (Rule 48)
It is a general principle of insurance that cover is available only for liabilities, losses, costs and expenses that have been incurred as a result of an insured peril or fortuitous event. The Ship’s running costs and expenses are costs and expenses that are incurred in connection with the ordinary operation of the Ship regardless of the quarantine order or the presence on board of an infectious disease, e.g. the costs of wages, stores, fuel, provisions and port charges. Consequently, cover is not available under Rule 48 for such costs and expenses. However, where such costs are incurred as a result of the issuance of quarantine orders or the disinfection of the Ship, but such costs are higher than those that would normally have been incurred but for the presence of the disease, cover is available for any additional costs and expenses that have been so incurred.6

4 This may be relevant in the case of a Ship carrying livestock as cargo.
5 See the Guidance to Rule 63.2.
6 Where the event has caused the Member to save costs or expenses that would have been incurred had the event not occurred, the Association may deduct from the compensation payable any such amounts that have been saved by the Member. See the Guidance to Rule 54.
(E) …except where the Ship has been ordered to a port where the Member knew or should have anticipated that she would be quarantined… (Rule 48) The Member is expected to know the conditions and regulations that will affect his Ship in the ports and other locations to which his Ship will be trading. For example, he is expected to be familiar with the food and health regulations of the country(ies) to which the cargo is to be carried.

If the Member knows in advance that the condition of the Ship, or of the Crew, is such that the relevant authorities at a port of call are likely to order the Ship to be quarantined, cover is not available under Rule 48 since the Member would not be acting prudently if he failed to take reasonable steps in such circumstances to avoid the risk.7 In this regard, it does not matter that the Ship is on charter and that the Member is acting in compliance with employment orders that are given by the charterer to proceed to such port.

Similarly, cover is not available even if the Member does not know for certain that his Ship will be quarantined, but should have anticipated that a quarantine order could be imposed. A Member cannot turn a ‘blind eye’ to the risk. He must act prudently and ascertain in advance whether a quarantine order is likely to be issued. The test that is normally applied by the Association in such cases is: what would a reasonable and prudent operator be expected to do in similar circumstances?

Whilst this proviso to Rule 48 applies expressly only when there is a risk that the Ship may be quarantined, and does not refer expressly to the fact that the Ship and/or Crew may need to be disinfected, the Association may, nevertheless, have a right to refuse cover in such circumstances under Rule 74, since cover is not available under Rule 74 for liabilities, losses, costs and expenses arising out of, or consequent upon, the Ship being employed in or on an unduly hazardous trade or voyage.8

7 Cover may also be unavailable pursuant to the provisions of Rule 74.
8 See the Guidance to Rule 74.
**Rule 49 Confiscation of the Ship**

The Association may, in its discretion, authorise payment, in whole or in part, of a Member’s claim for loss of the Ship following confiscation of the Ship by any legally empowered court, tribunal or authority by reason of the infringement of any customs law or customs regulations, or any fines involving such confiscation, provided that:

a. the amount recoverable from the Association shall under no circumstances exceed the market value of the Ship without commitment at the date of the confiscation;

b. the Member shall have satisfied the Association that he took such steps as appear to the Association to be reasonable to prevent the infringement of the customs law or regulation giving rise to the confiscation;

c. no such claim shall be considered by the Association until such time as the Member has been irrevocably deprived of his interest in the Ship;

d. the Association shall be under no obligation to give reasons for its decision.

**Guidance**

In exceptional circumstances, a Member may encounter a situation where the authorities of a country decide to enforce a claim against the Member for infringement of customs laws or regulations by taking the draconian measure of confiscating the Ship, or by imposing fines that are commensurate to such confiscation. In such circumstances, Rule 49 allows the Association to exercise its discretion to authorise payment of a Member’s claim for the loss of his Ship.

(A) The Association may, in its discretion, authorise payment, in whole or in part... (Rule 49)

The Member is not entitled as of right to receive compensation for loss of the Ship by confiscation. The loss of a Ship is an excluded loss pursuant to Rule 63.1.a ‘except to the extent that it forms part of a claim recoverable under Rule 49 (Confiscation of the Ship).’ Compensation is payable under Rule 49 only if and when the Association, which in this context means the Board of Directors, exercises its discretion to extend cover for such loss following the application of the Member. In exercising such discretion, the Board will have regard to the factors outlined in Rule 49.

It is unusual for a Member to make a claim on the Association for loss of a Ship since such loss is usually insured under the marine or war Hull Policies. If the loss is recoverable under the Hull Policies, cover is not available from the Association.  

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1 This Rule was initially introduced on 20 February 1988 in response to the US Anti-Drug Abuse Act 1986, that gave the US authorities the authority to confiscate a ship that was involved in drug smuggling. However, the scope of the Rule extends to confiscation for infringement of customs law or regulations other than that relating to drug smuggling.

2 See Article 6.2.h of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and Article 9.2.g of the Statutes of Assuranceforeningen Gard -gjensidig-.

3 See the Guidance to Rule 71.1.a.
However, the confiscation of a Ship as a result of the infringement of customs laws or regulations may not be an insured peril under standard marine Hull Policy terms and it is unlikely that the infringement of such laws or regulations will be considered to be a war peril for the purpose of a war Hull Policy. Therefore, if the loss of the Ship as a result of confiscation is uninsured under such policies, the Member may request the Association to make a discretionary payment under Rule 49. The Association has the discretion whether to compensate the Member in full or in part in such circumstances. When assessing the merits of the Member’s application, the Association will have regard to all the facts of the case, as well as the provisions of paragraphs a, b, c and d of Rule 49. The Association’s decision may also be influenced by whether the Member had knowledge of the circumstances that caused the infringement of the relevant customs laws or regulations, and by circumstances such as those that are outlined in Rule 74, i.e. has the Ship been employed on or in an unlawful, unsafe or unduly hazardous trade or voyage. In this regard, the Member is obliged to provide the Association with all relevant information and documentation and to render all assistance that may be required by the Association for the investigation of the claim.4

(B) …loss of the Ship following confiscation of the Ship…or any fines involving such confiscation… (Rule 49)
‘Confiscation’ occurs when private property is appropriated by, or forfeited to, the official (de jure) or unofficial (de facto) government of a country. The relevant authority may not initially confisicate the Ship, but may impose a fine that is either equivalent to the value of the Ship and/or subject to the condition that if the fine is not paid by a certain date, the Ship will be confiscated. Such fines are considered to be ‘fines involving…confiscation’ for which cover may be made available by the exercise by the Association of the discretion that it has pursuant to this Rule.

(C) …by reason of the infringement of any customs law or customs regulations… (Rule 49)
Cover is available under Rule 49 only if the reason for the confiscation of the Ship or, alternatively, for the imposition of fines that are equivalent to the value of the Ship, is the infringement of customs laws or regulations. The term ‘customs law or regulation’ means any law or regulation that may be enforced by the customs authorities in the country in question. If the Ship is confiscated, or such fines are imposed, for any other reason, e.g. for the non-payment of port dues or sheriff’s expenses (which constitute grounds for arrest in many jurisdictions) the Association is not entitled to exercise its discretion to provide cover for the loss of the Ship under Rule 49.

4 See the Guidance to Rules 82.1.d and e.
However, it is not a pre-requisite for the provision of cover under Rule 49 that the Ship that has been confiscated is the one that has committed, or has been involved with, the infringement of the customs laws or regulations that has caused the confiscation. The Ship that has been confiscated may have had no such involvement, but the relevant authorities may, nevertheless, confiscate it if it is deemed by them to be the property of the party who is responsible for the infringement in question. However, see (F) below.

(D) …confiscation…by any legally empowered court, tribunal or authority… (Rule 49)
Discretionary cover is available under Rule 49 only if the Ship has been confiscated, or the imposition of a fine that is equivalent to the value of the Ship, has been ordered by a legally empowered court, tribunal or other authority. In other words, the act must be one that is both official and legitimate under the laws of the particular country and not the illegitimate act of persons who merely purport to have authority to confiscate the Ship, such as a group of rebels that may wish to acquire the Ship for other reasons.

(E) …the amount recoverable from the Association shall under no circumstances exceed the market value of the Ship without commitment at the date of the confiscation… (Rule 49 proviso a)
Rule 49 permits the Association, in its discretion, to reimburse the Member for the loss of his Ship. Consequently, the Association is not entitled to pay more than the value of the Ship. The Ship’s value is assessed on the date that the confiscation occurs and the relevant value is the Ship’s market price assessed by reference to a ship of the same specifications, age and condition, but without taking into account its current and future employment.

(F) …the Member…took such steps as appear to the Association to be reasonable to prevent the infringement… (Rule 49 proviso b)
The Member is expected to be familiar with the customs laws and regulations that are usually enforced in most country(ies) to which the Ship will normally trade. However, the Member cannot be expected to be familiar at all times with the individual, and perhaps unusual, requirements of all countries. The laws and regulations of some countries may permit confiscation where prohibited or undeclared goods are found to be on board, regardless of whether the shipowner was aware of, or privy to, the offence. Therefore, whilst Rule 49 is designed to

\[5\] This is to be distinguished from the cover that is available under Rule 47.1.d which applies if the fine or penalty has been imposed upon the Member in respect of the Ship, i.e. the Ship entered in the Association.

\[6\] The Ship, being a mobile asset, is unlikely to have a market value that is particularly sensitive to the location of the market. Valuations are normally obtained from experienced sale and purchase brokers.
protect the Member in such circumstances, it does not do so in circumstances where the Association is of the opinion that the Member did not take reasonable steps to avoid the infringement of the relevant customs law or regulation.

When considering the exercise of its discretion to authorise payment, the Association will wish to be satisfied that the Member has taken all reasonable steps to prevent the infringement that has resulted in the confiscation. Such steps include:

a. the establishment and maintenance of an adequate system of supervision for the preparation of Bills of Lading, inward and outward cargo manifests and other shipping documents;
b. giving the master and Crew proper instruction and training as to how to prevent illicit goods, especially drugs, being brought on board;
c. putting out conspicuous notices warning the Crew etc., of the anti-smuggling or anti-drug laws that can be expected in forthcoming ports of call; and
d. the maintenance of an adequate number of guards on the Ship whilst in port.

(G) ...no such claim shall be considered by the Association until such time as the Member has been irrevocably deprived of his interest in the Ship... (Rule 49 proviso c)

The initial seizure of the Ship by the authorities is not considered to be ‘confiscation’ for the purposes of Rule 49. Such seizure may be temporary at that stage, and the Member may have the right to appeal against the decision or otherwise to have the seizure lifted. Discretion can be exercised under Rule 49 only when the confiscation has become final and the Member is, therefore, ‘irrevocably deprived of his interest in the Ship’. This is considered to have occurred when the Ship has become the property of the confiscating authority and the Member has no further right of appeal to avoid or revoke the confiscation. Therefore, it would be premature for the Member to make any application for compensation for the loss of the Ship pursuant to Rule 49 before the confiscation is final and the Ship has been irrevocably lost, or before a fine that is equivalent to the value of the Ship has been imposed and is no longer subject to appeal. Consequently, the Association will not normally consider an application for compensation before that time. Furthermore the Association will not normally provide bail or other security for the release of the Ship before making a final decision in relation to the confiscation.7

(H) ...the Association shall be under no obligation to give reasons for its decision. (Rule 49 proviso d)

The decision of the Board of Directors is final in this regard and it need not give any reasons for its decision. By agreeing to the Association’s Statutes and Rules, Members have agreed and confirmed that claims made pursuant to Rule 49 are to be decided by the Board of Directors of the Association as the sole and highest decision-making authority of the Association. The decision of the Board is subject

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7 The Association is, in any event, under no obligation to provide security. See the Guidance to Rule 88.
to judicial review only when it is alleged that the Directors have exceeded their authority or have failed to apply the rules of natural justice. A court will normally assume that the Directors have acted in good faith, and the onus of proving otherwise, which is not easily discharged, is on the party making the allegation.

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8 See the VAINQUEUR JOSE (1979) 1 Lloyds Rep 557. This is a decision of the English court but other courts and tribunals are likely to follow the same approach.

Rule 50 Damage to Member’s own property

Notwithstanding the terms of Rule 2.4.b:

a if the Ship causes damage to property, other than cargo, belonging wholly or in part to the Member, the Member shall be entitled to recover from the Association under Rules 36 (collision with other ships), 37 (damage to fixed or floating objects) or 39 (loss of or damage to property) or 40 b (liabilities for obstruction) as if the property belonged to a third party; and

b in the event that any cargo lost or damaged on board the Ship shall be the property of the Member, the Member shall be entitled to recover from the Association under Rule 34 (cargo liability) the same amount as would have been recoverable from him if the cargo had belonged to a third party and that third party had concluded a contract of carriage with the Member on terms incorporating the Hague-Visby Rules.

Guidance

Introduction

The purpose of the Association is to insure on a mutual basis liabilities, losses, costs and expenses that are incurred by Members in direct connection with the operation of Ships that are entered in the Association. The P&I cover that is afforded in Part II is principally insurance against third party liabilities that arise in direct connection with the operation of the Ship and in respect of the Member’s interest in the Ship. It is not designed to be insurance that covers the loss of, or damage to, the Ship etc., or the primary insurance that covers loss, damage or impairment of value that may be suffered by any other property that is owned by the Member. The Member is expected to arrange other suitable insurances for the protection of his own property and the Association will not cover any liability, loss, cost or expense that is recoverable under such insurances. For example, the Member is expected to arrange adequate hull and machinery insurance for his Ship and the Association is not liable for the loss of, or for damage to the Ship, and the Association does not cover liability etc., that either is, or would have been, covered by such Hull Policies had the Ship been fully insured on standard terms without deductible. Similarly, if the Member is the owner of other valuable property, the Member is likely to need to take out other insurances to protect him against any damage, liability, business interruption etc., that he may incur in relation to such property.

However, Rule 50 recognises the fact that the Member may not only be the owner, operator or charterer of the Ship, but may also be the owner of cargo carried on board the Ship and/or the owner of other property that is affected by the operation of the Ship. Therefore, cover is available for damage that is caused to property other

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1 See the Guidance to Rules 2.4.a and b.
2 See the Guidance to Rule 71.1.b.
3 See the Guidance to Rule 63.1.
4 See the Guidance to Rule 71.1.a.
than cargo, or for loss of, or damage to, cargo that is owned by the Member to the extent that the Member would have been covered by the Association in his capacity as owner, operator or charterer of the Ship had such loss or damage been caused to a third party.

It should be clearly understood that this form of cover is not intended to be, and should be distinguished from, property insurance. In the case of property insurance, the assured as owner of the property insures his interest in the property, and is entitled to recover from his insurers pursuant to the terms and conditions of that property insurance once he proves that his property has been damaged. However, the form of insurance that is provided by the Association is liability insurance pursuant to which the assured (the Member) is entitled to compensation from the Association as insurer only if he (the Member) proves that he, in his capacity as owner, operator etc., of the Ship, is legally liable to the owner of the property for the loss or for the damage that has been caused to that property by the Ship. However, in circumstances where the Member is also the owner of the property to which the Ship has caused loss or damage, the owner of that property is treated for the purposes of Rule 50 as though he were someone other than the Member, and cover is made available to the Member subject to the restrictions that are imposed by Rule 50 for any liability that he has for the damage or loss that is caused to such property to the same extent as if the property had been owned by a third party.

Rule 50 distinguishes between situations in which the property that has suffered the loss or damage is property other than cargo that is carried by the Ship and those in which the relevant property is cargo that is carried by the Ship. Rule 50.a is applicable when the property that has been damaged is not cargo that is being carried by the ship whilst Rule 50.b applies when the property that has been lost or damaged is cargo that is carried by the Ship.

Finally, the provisions of Rule 50 should be read subject to the provisions of Rule 71. Therefore, if the Member is entitled to be compensated under any other insurances in respect of the claims that he would otherwise have against the Association under Rule 50, the provisions of Rule 71 emphasise that the Association is not liable for such claims. Consequently, the Member will need to closely consider the terms of his Hull Policies and any other insurances that he may have taken out to protect his interests in relation to any other property that he owns before submitting a claim against the Association under Rule 50.

(A) …if the Ship causes damage to property, other than cargo, belonging wholly or in part to the Member… (Rule 50.a)

Rule 50.a makes it clear that the Member ‘shall be entitled to recover from the Association’ in circumstances where an event involving the Ship, and which is of the nature that is described in (B) below, causes damage to property (not being cargo) that is owned by the Member. Therefore, the purpose of Rule 50.a is to put the
Member in the same position that he would have been in had the property been owned by a third party and cover is available only if the Member is able to satisfy the Association that if the property had been owned by a third party, the Member would have been liable to the third party for that damage under the applicable law.

Rule 50.a must be read in connection with Rule 63.1.b which provides that cover is not available for the “loss of or damage to any equipment on board the Ship or to any containers, lashings, stores or fuel thereon, to the extent that that the same are owned or leased by the Member.” Consequently, the ‘property’ to which Rule 50.a refers is essentially property that is not carried on the Ship.

Bearing such distinction in mind ‘property’ means any type of property that is capable of being damaged, e.g. land, buildings, docks, piers, wharves, berths, cranes, port equipment, dolphins, buoys, pipelines, cables or another ship or barge. However, damage to the Ship itself or to the property that is itemised in Rule 63.1 is excluded from cover by virtue of that Rule. Furthermore, the cover that is available for liability etc., for the loss of, or for damage to, cargo that is carried on board the Ship and is the property of the Member, is subject to a special provision in Rule 50.b and is discussed further in (C) below.

Property will be deemed to ‘belong’ to the Member when he has, at the time of the relevant event, either the legal title to it, i.e. the ownership of it, or another sufficiently ascertainable legal interest in the property that entitles him to pursue a claim under the appropriate law for damage to it. Accordingly, a Member may be entitled in certain circumstances to recover under this Rule for damage to property that is leased or hired to him, e.g. containers carried on another ship that have been leased to him. Cover may also be available when the Member is a partner in a joint venture that is, collectively, the owner of the property, but not if that joint venture has a distinct legal identity that is separate from its owners. If the Member has only a part interest in the damaged property, he is only entitled to recover an amount that corresponds to his part interest.

For cover to be available under Rule 50.a the Ship must have ‘caused’ the damage to the Member’s property. Therefore, if the damage has not been caused by the Ship, but by a third party or by some other occurrence, cover is not available under Rule 50.a. Furthermore, if the damage has been caused by a third party, the Member is not entitled to Defence cover in order to pursue a claim against such third party since such claim would have to be made in the Member’s capacity as owner of the property and not in his capacity as operator of the Ship.

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5 See the Guidance to Rule 63.1.
6 For commentary on when an event is deemed to have occurred see the Guidance to Rule 80.
7 See the Guidance to Rules 2.4 and 65.
(B) …the Member shall be entitled to recover from the Association under Rules 36…37… 39…or 40(b)…as if the property belonged to a third party…

(Rule 50.a)

The Ship may cause damage to different types of property and in different ways, e.g. as a result of a collision\(^8\) between the Ship and another ship, or when the Ship comes into contact with a fixed or floating object,\(^9\) or where there is contamination by oil or other substance spilled from the Ship,\(^10\) or where the Ship’s anchor causes a subsea cable to drag.\(^11\) A ship that is owned or operated by the Member may also be prevented from entering or leaving a port, berth or terminal due to the fact that another Ship (or the wreck thereof) that is (or was) owned or operated by the Member is causing an obstruction. This may occur e.g. in the container liner trade where different ships in the same fleet call regularly at the same ports pursuant to a fixed schedule.

It is important to note that cover is available under Rule 50.a only to the extent that cover would have been available pursuant to either Rule 36, 37, 39 or 40(b) if the property had belonged to a third party. This provision has several implications:

- Since no reference is made in Rule 50.a to Rule 38, cover is not available for damage that is caused to the Member’s own property by the discharge or escape of oil or any other substance from the Ship. Such damage may occur when a tanker (the Ship) causes pollution damage at the Member’s own loading or discharge terminal. The rationale for the failure to make reference to Rule 38 in Rule 50.a is the need to protect the Association against the risk of having to make payment to its own Member under a certificate of financial security that is provided by the Association which would entitle third party claimants to bring a direct action against the Association for compensation for pollution damage.
- The Member may have chosen to insure his liability etc., for collision and/or damage to fixed and floating objects under the Hull Policies in full or in part. If the Member has insured the risk fully under the Hull Policies, cover is not available from the Association for damage to his own property.\(^12\) However, if the damages that the Member would have had to pay a third party owner of the property exceed the sum that is recoverable under the Hull Policies solely because they exceed the sums that are insured under such Policies,\(^13\) then cover is available to the same extent under Rule 50.a as it would have been available under Rule 36.1.b or Rule 37.1.b. In other words, if the Member’s Ship has caused damage totaling USD 10 million to a terminal, jetty and/or other equipment

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\(^8\) See the Guidance to Rule 36.
\(^9\) See the Guidance to Rule 37.
\(^10\) See the Guidance to Rule 38.
\(^11\) See the Guidance to Rule 39.
\(^12\) See the Guidance to Rule 71.a.
\(^13\) See the Guidance to Rules 36.1.b, 37.1.b and 71.1.a.
that is owned by the Member, and the sum insured under the Hull Policies is USD 8 million, cover is available from the Association under Rule 50.a for the excess of USD 2 million.

- If the Member is insured by the Association only in part for liability etc., arising as a result of collision and/or damage to fixed or floating objects, then the cover that is available from the Association under Rule 50.a is that which is the equivalent of that proportion of the risk that is insured by the Association.
- Cover is not available under Rule 50.a for any deductible that the Member has agreed to bear under his Hull Policies for liability for collision and/or damage to fixed and floating objects.\(^\text{14}\)

\((\text{C})\) …cargo lost or damaged on board the Ship… (Rule 50.b)

In the context of Rule 50.b ‘cargo’ means cargo that ‘is the property of the Member.’ Consequently, it does not include any other property that may be on board the Ship, e.g. stores, spares, bunkers, equipment or empty containers that are not being carried under a contract of carriage. For the meaning of the phrase ‘the property of the Member,’ see the Guidance in (A) above.

Cover is available under Rule 50.b in the event that the Member’s cargo is lost or damaged whilst on board the Ship. However, the term ‘on board’ includes not only cargo that has been loaded into the Ship’s holds or tanks, or onto the deck of the Ship at the time of the event that has caused the loss or damage, but also cargo that is attached at such time to the Ship’s equipment (or tackle) during the course of loading or discharge. On the other hand, cargo which is still on the quay awaiting loading or in a lighter owned by a third party that is alongside the Ship is not considered to be ‘on board’ the Ship for the purpose of this Rule.

If cargo that is owned by the Member is lost or damaged at a time when the cargo is not on board the Ship, cover is not available under Rule 50.b. For example, if a ship calls at a port to load a bulk cargo that is owned by the Member from a barge that is also owned by the Member and is damaged alongside the Ship as a result of the unseaworthiness of the Ship, cover is available for the liability of the Member for the damage to the barge under Rule 50.a, because the Member would have been liable to a third party for such loss had the barge been owned by a third party, and such liability would have been covered under Rule 36. However, it does not follow that cover is necessarily available for the damage to the cargo that was being carried by the barge at the time of the incident since Rule 50.a applies only if there is damage to property other than cargo whilst Rule 50.b does not provide cover for claims that are made for damage to cargo that is not ‘on board the Ship’ at the time of the incident. However, depending on the particular circumstances, the Association might take the view that the barge constituted part of the Ship’s loading tackle or equipment which would then enable cover to be made available under Rule 50.b

\(^{14}\) See the Guidance to Rules 36.i, 37.i and 71.1.a.
(D) ...the Member shall be entitled to recover from the Association under Rule 34 (cargo liability)...the same amount as would have been recoverable from him if...a contract of carriage...incorporating the Hague-Visby Rules...

(Rule 50.b)

This provision of Rule 50.b has the effect of putting the Member, whose own cargo is lost or damaged on board the Ship, in the same position that he would have been in if he had incurred liability as a carrier to a third party owner of the cargo under a contract of carriage that incorporated the provisions of the Hague-Visby Rules. Therefore, this provision should be viewed in conjunction with proviso iii to Rule 34.1.15

However, unlike proviso iii to Rule 34.1, Rule 50.b does not make express reference to the fact that the carrier’s liability may be greater than that which applies under the Hague-Visby Rules if the contract of carriage is subject to other terms that are of ‘mandatory application’, e.g. under the Hamburg Rules. Nevertheless, if the Hamburg Rules or other similar legislation were to apply compulsorily, then any provisions of the Hague-Visby Rules that gave the carrier greater protection than that which is allowed under the Hamburg Rules or such other legislation would be rendered null and void by the Hamburg Rules or such other legislation notwithstanding the fact that the contract of carriage had incorporated the Hague-Visby Rules.16

Therefore, cover is available under Rule 50.b if the Member, as carrier, incurs liability under the Hamburg Rules or other similar legislation when compulsorily applicable notwithstanding the fact that he would have had a defence to the claim for cargo loss or damage if the cargo had been owned by a third party and carried under a contract that gave effect to the Hague-Visby Rules. Similarly, cover is available in such circumstances under Rule 50.b up to the higher limits of liability that apply under the Hamburg Rules or other similar legislation. It may be useful to consider the effect of Rule 50.b from the perspective of a Member that regularly carries its own cargoes on board its own ships, e.g. a major oil company that is the owner, operator or charterer of ships, and which uses these ships to carry its own oil cargoes between its own loading terminals, which are fed by pipelines leading from its own crude oil production fields to its own discharge terminals, which then feed the oil through pipelines to its own refineries. The oil company may have no intention to sell or trade its own crude oil in these circumstances, and simply uses its ships to transport raw material from the production plant to the refinery plant. Therefore, the oil company may not see that there is any need for the shipper and/or receiver, both of whom are companies that are wholly owned by the oil company, to enter into a contract of carriage with the oil company, as carrier, on the terms of the Hague-Visby Rules, but finds it more natural that the cargo should be carried on terms

15 See the Guidance to Rule 34.1.iii.
16 See (M) to the Guidance to Rule 34.
that compensate the shipper and/or receiver in full for any cargo loss or damage that may occur during such transportation. Consequently, should the oil company’s cargo be damaged whilst on board its ship, the oil company would be fully liable to the shipper or receiver under the contract of carriage without having the benefit of any defences.

However, it would be contrary to the interests of the membership as a whole to compensate the oil company (the Member) for any loss that it has incurred for the loss of, or damage to, its own cargo that exceeds the liability that would have been incurred had the cargo been carried subject to the Hague-Visby Rules. To do so would have the effect of converting P&I insurance into cargo insurance. Therefore, Rule 50.b is designed to maintain the nature and purpose of the cover that is provided by the Association to the membership including the individual Member that chooses to carry his own cargo on his own Ships.
Chapter 2

Limitations etc. on P&I cover
Introduction

The limitations described in this Chapter apply to the P&I cover, but not to the Defence cover. The limitations that apply to both P&I and Defence covers are set out in Part V.

Rule 51 General limitation of liability

Where the Member or a Co-assured is entitled to limit his liability pursuant to any rule of law, the maximum recovery under a P&I entry is the amount to which the Member or the Co-assured may limit his liability.

Guidance

(A) Explanatory remarks

Shipowners have traditionally had the right to limit their liability for the legal consequences of their actions. This right has generally been regarded as essential in order to ensure the commercial viability of the shipping industry. Until the middle of the twentieth century the right to limit was normally restricted to the registered or beneficial owner of the ship. As a result, various attempts were made to circumvent the application of limitation of liability by bringing claims against parties other than the shipowner. Today, the right to limit liability is available in many circumstances to the owners, charterers, managers, operators and liability insurers of a ship, as well as to the master, Crew members or other servants when acting in the course of their employment.

The right to limit liability will often arise under international conventions that regulate liability for certain specific types of claim, e.g. the limitation of liability for cargo claims under the package limitation provisions of the Hague, Hague-Visby and Hamburg Rules and, if and when they come into force, the Rotterdam Rules, or the limitation of liability for personal injury and death claims brought by passengers under the Athens Convention. However, the right to limit liability may also arise under other international conventions that regulate the right to limit liability more broadly in relation to a wider spectrum of maritime claims, e.g. the 1976 London Convention on Limitation of Liability for Maritime Claims (the 1976 Limitation Convention) or as amended by the 1996 Protocol thereto.¹

It is in the interests of the membership as a whole that each Member should make full use of the right to limit his liability whenever possible in order to protect the Association and the membership funds against liability or loss that is otherwise avoidable. This also reflects the obligation that each Member has to take, and to continue to take, such steps as may be reasonably necessary for the purpose of averting or minimising any liability etc., for which he may be insured by the Association.² Furthermore, it should also be appreciated in this connection that if

¹ For more detailed commentary see Chapter 21 of the Gard Guidance on Maritime Claims and Insurance.
² See the Guidance to Rule 82.1.b.
the Association has incurred direct liability to claimants by the provision of the ‘blue cards’ as evidence of compulsory liability insurance that are required by international conventions\(^3\) or national or regional laws,\(^4\) the Association may be entitled to limit its liability to any claims that may be made directly against it by third party claimants pursuant to such ‘blue cards’ even if the Member would not be entitled to do so if the claim had been brought against the Member rather than the Association.\(^5\)

(B) Where the Member or a Co-assured is entitled to limit... (Rule 51)

Rule 51 makes it clear that, where a claim is brought by a third party against either the Member or a Co-assured\(^6\) each one of them is expected to make full use of any rights that he may have to limit his liability, and neither of them has the right to recover from the Association any sum that is in excess of the sum to which he is entitled to limit his liability. In the majority of cases, the Member, and any one or more Co-assured that may be severally and/or jointly liable to the third party together with the Member, will be able to limit liability under the same limitation rules in the same proceedings in the same country. In such circumstances, only one claim for compensation can be made against the Association for such liability and the compensation payment that is made by the Association to the Member or to the Co-assured will also be in satisfaction of any liability that the Association may have to the other for such claim.\(^7\)

However, it is possible that the third party may bring the same claims against the Member and one or more Co-assureds separately in different countries, e.g. against the owner of the Ship in country A and against the Ship manager in country B, and that those countries may apply different limitation rules. For example, country A may be subject to the 1976 Limitation Convention whereas country B may not give effect to that convention, but to particular domestic rules of law that govern limitation rights. If the owner of the Ship (the Member) and the Ship manager (the Co-assured) both incur liability as a result of such separate legal actions, cover is available for both parties so long as they have each sought to invoke any rights that may be available to them to limit their liability under the applicable law. The owner of the Ship and the Ship manager (who qualifies as a Co-assured pursuant to Rule 78.3

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3 Such as the CLC, Bunkers, and Wreck Removal Conventions and the 2002 Protocol to the Athens Convention. For further commentary, see Chapter 11.3.2.4 (People Claims), Chapter 12.4.1.1.1.5 (Pollution Claims) and Chapter 16.2.4.5 (Wreck Removal Claims) of the Gard Guidance on Maritime Claims and Insurance.

4 US law requires the owners and operators of cruise ships to provide evidence of such insurance in the form of a guarantee that is to be provided to the US Federal Maritime Commission (FMC) and the European Union requires a similar form of certification pursuant to the EU Passenger Liability Regulation (EC) No. 392/2009 (PLR).

5 For further commentary see (B) and (I) to the Guidance to Rule 28, (D) to the Guidance to Rule 38 and the Introduction to Rule 40.

6 See the Guidance to Rule 1.1 for the definition of the terms ‘Member’ and ‘Co-assured’, as well as the Guidance to Rules 78 and 79 for the rights and obligations of Co-assureds under the contract of insurance.

7 See the Guidance to Rule 79.2.
since he is carrying out operations and/or other activities that are customarily carried out by a shipowner) are both entitled to compensation from the Association for their respective liability.\(^8\)

Rule 51 makes no express reference to the limitation of the liability of an Affiliate but cover can be extended to Affiliates on a discretionary basis.\(^9\) However, if cover is extended in this way, the Affiliate is not entitled to recover more from the Association than would have been recoverable by the Member in the relevant circumstances.\(^10\) Therefore, the Association is also entitled in practise to invoke the limitation provisions of Rule 51 vis-à-vis Affiliates.

\[(C) \text{ ...his liability pursuant to any rule of law... (Rule 51)}\]

Rule 51 is applicable when the Member has the right to limit his liability pursuant to ‘any rule of law’ which, in this context, means a rule that is contained in, or can be derived from, any act, code, statute or other legislation of a country, or is the result of a firm and established rule of the common law.

It is possible that the Member’s right to limit his liability may arise only under a provision of the domestic law that is applied in, and by, the country where the third party has brought the claim against the Member.\(^11\) However, a right to limit liability will more frequently be based on an international convention the provisions of which have been enacted by the country where the third party claim is brought, or by the country where the Member seeks to invoke the rights that are conferred on him by the convention, e.g. by constituting a limitation fund as security for third party claims in the country where one of his ships has been arrested.

Some countries have laws that require a limitation fund to be constituted by paying the limitation amount into court before the right to limit liability can be pleaded in legal proceedings whereas, in other countries, a right to limit liability may be pleaded as a defence to a legal action without the need to constitute a limitation fund. Rule 51 does not distinguish between the two; it simply makes it clear that the maximum sum that the Member can recover from the Association will be the amount to which he may limit his liability, regardless of the procedure that must be followed in the relevant country in order to protect and enforce that right.

Most countries also require interest to be paid in addition to the limitation amounts that are specified by the applicable law. If a limitation fund must be constituted by payment into court, the sum so payable will usually include interest from the date

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8 That provision in Rule 78.8 which provides that the payment by the Association of indemnity to a Co-assured in respect of a claim will discharge the Association from any further liability in that regard, does not apply to Co-assureds in the categories referred to in Rules 78.3 and 78.4.
9 See the Guidance to Rules 1.1, 78.1 and 78.7.
10 See the Guidance to Rule 78.7.
11 For example, in the United States, pursuant to the Oil Pollution Act 1990.
of the occurrence of the event until the date that the limitation fund is constituted. Thereafter, the total sum so constituted will continue to earn interest until the limitation fund is distributed between claimants in due course. However, if limitation can be pleaded as a defence, the court will usually, when giving judgement on the third party claim, order that interest should be paid on the limitation amount from the date of the occurrence of the event until the date of judgement. In either case, cover is available under Rule 51 for any interest that has been paid by the Member in addition to the limitation amount.

In some instances, parties may agree the limit of liability that is to apply inter se. This occurs most frequently in the form of a specific provision of a contract of carriage. If that limit is higher than that which would otherwise be applicable under the relevant law, the Member that incurs liability under such a contract cannot recover from the Association any sum that exceeds the amount to which he would otherwise have been able to limit his liability under the applicable law.

(D) ...the maximum recovery under a P&I entry is the amount to which the Member or the Co-assured may limit his liability... (Rule 51)

If the Member or the Co-assured is entitled to limit his liability for a particular claim then the maximum sum that is recoverable from the Association in respect of such claim is the amount to which the Member or the Co-assured respectively is entitled to limit his liability.

The Association does not have the right to reduce the amount of compensation that is payable to a Member under Rule 51 unless the Association can demonstrate that the Member had the right to limit his liability for the third party claim to an amount that is lower than that which has in fact been paid by the Member to the third party. Therefore, the onus of proof is on the Association in this regard. The Association must demonstrate not only that the Member had the right in law to limit his liability, but also that it was possible to do so in fact in the country where the third party claim was being brought against him.

The Association must also demonstrate that the Member would not have lost the right to limit his liability for the claim in the particular circumstances. Most limitation conventions and national statutes provide that if the person who is seeking the right to limit his liability is guilty of a certain type of conduct, then that person will lose the right to limit. However, the severity of conduct that is required if the right to limit is to be lost can differ substantially under different laws and conventions. In the case of the 1957 Limitation Convention and the US Limitation of Liability Act,12 privity13 on the part of the higher management of the company is sufficient, whereas under

13 ‘Privity’ has been defined by the English court as ‘knowledge and consent’. See EURYSTHENES (1976) 2 Lloyd’s Law Rep. 171.
the 1976 Limitation Convention and its 1996 Protocol, and under CLC 92, a person will lose the right to limit only if “it is proved that the loss resulted from his personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.”

If it is proved that the Member has lost the right to limit his liability then the Association has no right under Rule 51 to reduce the amount of compensation that is payable to him. However, if the Member is guilty of the conduct that would deprive him of his right to limit under the 1976 Convention or its 1996 Protocol, or under CLC 92, or another similar international convention such as the Bunkers Convention, it is very unlikely that the Association would be liable to indemnify him since such conduct would in all probability constitute the type of conduct that would deprive the Member of cover pursuant to the provisions of Rule 72.14

In some instances, the Member may decide to discharge his liability for third party claims by paying more than the amount to which he is legally entitled to limit his liability since the prospects of convincing the court or tribunal seized of the case that he has such right are not good, and/or because such proceedings can be expected to be expensive and time consuming. However, the Member should consult the Association15 before doing so since, otherwise, there is a risk that the Association may reject or otherwise reduce the compensation that is payable to the Member.16

14 See the Guidance to Rule 72.
15 See the Guidance to Rules 82.1.c and 82.1.f.
16 See the Guidance to Rule 82.2.
Rule 51B Limitations - Limitation and payment of Overspill Claims

1. Without Prejudice to any other applicable limit, the Association’s liability under a P&I entry for an Overspill Claim shall be limited pursuant to terms and conditions as are set out in Appendix VI.

2. The Association’s obligation to pay a compensation in respect of an Overspill Claim shall be subject to such terms and conditions as are set out in Appendix VI.

Guidance

The provisions of Rule 51B should be read together with, and in the light of, Rule 18 and Appendix VI.

For more detailed commentary see the Guidance to Rule 18.
Rule 52 Limitations for charterers and Consortium Vessels

The Association’s liability under a P&I entry for any and all claims arising under Charterer’s Entries or in respect of insurance of charterers under Owner’s Entries or in respect of the Member’s liability for a Consortium Claim arising out of carriage of cargo on a Consortium Vessel shall be limited to such sum or sums and subject to such terms and conditions as are set out in Appendix II.

Guidance

The aim of Rule 52 is to incorporate into the Rules the terms and conditions of Appendix II, which sets out the limits of liability that apply to the cover that is available to charterers depending on the terms on which charterers are entered in the Association. However, Rule 52 applies only to mutual entries. Therefore, if a charterer has chosen to be covered on a fixed premium basis under Gard’s Comprehensive Charterers’ Liability Cover, such cover is regulated by the provisions of such Additional Cover rather than Rule 52 and are subject to separate limits of cover.

(A) ...insurance of charterers under Owner’s Entries... (Rule 52)

The limit of liability that is applicable to a charterer who is a Co-assured under an Owner’s Entry is either the ‘Limitation Amount’ or, if lesser, USD 350 million per incident or occurrence. The limit of USD 350 million is a combined single limit of USD 350 million that applies to both pollution and non-pollution claims.

The ‘Limitation Amount’ is the amount to which the registered owner of the Ship could have limited his liability for the particular claim or claims if the owner had sought, and had not been denied, the right to limit such liability. Therefore, the purpose of this provision is to ensure that the Association’s liability to a charterer who is a Co-assured under the Owner’s Entry is no greater than the exposure that the Association has to the shipowner Member.

For example, if the ‘Limitation Amount’ is USD 50 million, and the third party claim is brought against the charterer, then even if the Co-assured charterer is denied the right to limit his liability to USD 50 million, the Association’s liability to the Co-assured charterer is limited to USD 50 million since this sum is less than USD 350 million. On the other hand, if a very large claim is brought against the Co-assured charterer, then even if the charterer is entitled to limit his liability under the applicable law to a sum that is more than USD 350 million, the Co-assured charterer is not entitled to recover from the Association a sum that is greater than USD 350 million. Consequently, a charterer who is Co-assured under the Owner’s

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1 For further details see the Gard website, Products, Charterers and traders.
2 See the Guidance to Rule 78.4.
3 See the definition of ‘Owner’s Entry’ in Rule 1.
Entry runs the risk (except in the case of oil pollution) that the amount that he is entitled to recover from the Association will be less than the amount that he is obliged to pay to the third party claimant.

(B) …claims arising under Charterer’s Entries… (Rule 52)
However, if a charterer has effected a separate Charterer’s Entry (i.e. an entry that is separate and independent from the Owner’s Entry), the relevant limit of liability is USD 350 million per incident or occurrence except in the circumstances outlined in (C) below. There is no reason to link this limit to the ‘Limitation Amount’ as in the case of a charterer that is insured under an Owner’s Entry because the charterer is a separate Member and not a Co-assured under the Owner’s Entry. The limit applies to all liabilities, losses, costs and expenses that fall within Part II, Chapter 1 of the Rules and no distinction is drawn between oil pollution risks and the other risks that fall within Part II, Chapter 1 of the Rules.

(C) Subject to the provisions in Section 4 below… (Appendix II 3)
Special rules apply pursuant to section 4 of Appendix II for claims that are made against charterers for oil pollution. The relevant limit applies in each of the following scenarios:
a where a claim for oil pollution is made against a Member in relation to more than one Ship that he has entered in the Association under a Charterer’s Entry, and also against charterers that have entered ships under a charterer’s entry in another association that is a member of the Pooling Agreement, for salvage services that such vessels have rendered to another ship after a casualty;
b where a Ship is insured separately under more than one charterer’s entry in the Association, or alternatively, where it is insured both with the Association and another association that is a party to the Pooling Agreement. This may happen if the ship is chartered, and then sublet to another charterer who again sublets the ship.

In some countries, e.g. in certain states of the USA, oil pollution claims can be brought against one or more of the various charterers for pollution damage that has been caused by the spill of oil from the chartered vessel. Therefore, in order to ensure that the relevant associations do not have to pay the individual limits that would be applicable to each individual charterer’s entry, section 4.b of Appendix II provides that the maximum collective liability of all the affected associations in such circumstances is USD 350 million per incident or occurrence. The Association’s proportion of such liability is that proportion of USD 350 million that the claims that are made against the Association bears to the total of the claims that are made against the Association and all the other associations.
(D) …the Member’s liability for a Consortium Claim arising out of carriage of cargo on a Consortium Vessel… (Rule 52)

Special provisions also apply to the Association’s liability for Consortium Claims, which are defined in section 5 of Appendix II as liabilities that arise out of the carriage of cargo on a Consortium Vessel pursuant to a Consortium Agreement. A Consortium Agreement is an agreement pursuant to which two or more operators agree to share or exchange cargo space on each other’s ships.

A Consortium Vessel is operated in a different manner to the other Ships that are entered in the Association since (although the Vessel may not be owned by the Member) it is employed by the Member to carry cargo for the Member’s own customers under a Consortium Agreement that gives the Member the right to utilise the Vessel’s cargo space (normally only a proportion of the total cargo space) for the Member’s own purposes. For example, combined transport operators ‘A’ and ‘B’ may conclude a Consortium Agreement inter se that entitles ‘A’ to use 20 per cent of the carrying capacity of a vessel that is owned by ‘B’ for the carriage of ‘A’’s cargo and entitles ‘B’ the reciprocal right to use 20 per cent of the carrying capacity of a vessel that is owned by ‘A’ for the carriage of ‘B’’s cargo.

The term Consortium Vessel also includes a local feeder vessel that is used to carry cargo to or from the deepsea Consortium Vessel and, therefore, cover is available for Consortium Claims that arise as a result of an event that occurs whilst cargo is being carried on such a feeder vessel to the same extent as cover would have been available if the liability had arisen under the terms of a through or transhipment Bill of Lading.4

For the purpose of cover under Rule 52, a Consortium Vessel is deemed to be a Ship for which the Member has effected a Charterer’s Entry in the Association. Furthermore, a claim is treated as Consortium Claim for the purposes of Rule 52 and section 5.2 of Appendix II only if the Member can prove that at the time that the cover for Consortium Claims attaches the Member is then employing, pursuant to a Consortium Agreement, a Ship that is entered in the Association. In other words, if, at the time that the cover initially attaches, the Member is not employing under a reciprocal space sharing agreement a Ship that is entered in the Association, cover is not available pursuant to the special provisions in section 5 of Appendix II.

A claim that is made against a Member as a result of the carriage of cargo by a Consortium Vessel is treated as a Consortium Claim against the P&I entry of the Ship that is entered in the Association on behalf of the Member, even if the claim does not concern that particular Ship. Most Consortium Claims are made as a result of the loss of, damage to, or the delay of cargo that has been carried under a contract

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4 For further Guidance on this aspect, please see (G) of the Guidance to Rule 34, and (G) and (H) of the Guidance to Rule 57.
of carriage that has been issued by the Member for such cargo. However, cover is available for any claim that arises as a result of the carriage of such cargo so long the Member is legally liable for such claims, e.g. claims for loss of life, or for personal injury or for damage to the property of third parties, but cover is not available for claims for loss of, or damage to, the Consortium Vessel or any equipment that is on board such Vessel, since cover for such claims is excluded pursuant to Rule 63.1.a.5

The rules that regulate the allocation of Consortium Claims between Owner’s Entries and Charterer’s Entries, and the aggregation of risks under a Consortium Agreement for any participating Member, are set out in detail in paragraphs 5.3 and 5.4 of Appendix II and are not repeated here.

The cover that is available to a Member for Consortium Claims is limited to USD 350 million per incident or occurrence. However, Consortium Claims give rise to difficult aggregation and allocation of liability issues. Therefore, for the reasons that are given in (C) above in relation to Charterer’s Entries, the associations that are parties to the Pooling Agreement have agreed that all Consortium Claims that may be made as a result of the same occurrence or event against one or more of such associations shall be subject to one overall limit of USD 350 million per incident or occurrence. Therefore, for example, if one Consortium Vessel carries cargo on behalf of several of the parties to the Consortium Agreement, each of them will, for the purpose of their respective P&I entries in their respective associations, be treated as though they have effected a separate Charterer’s Entry for the Consortium Vessel. However, if the total aggregate sum of the liabilities of all those parties for all third party claims that arise as a result of the same event exceeds USD 350 million, then the maximum collective liability of all the associations for those claims is USD 350 million. Each association’s proportion of liability for such claims is that proportion of USD 350 million that the claims that are made against that particular association bears to the totality of the claims that are made against all the associations.

5 See the Guidance to Rule 63.1.a. a.
Rule 53 Limitations - oil pollution, passengers and seamen

1 The Association’s liability under an Owner’s Entry for any and all claims in respect of oil pollution (including claims resulting from attempts to reduce or prevent oil pollution) shall be limited to such sum or sums and be subject to such terms and conditions as are set out in Appendix III.

2 The Association’s liability under an Owner’s Entry for any and all claims which arise in respect of passengers and seamen shall be limited to such sum or sums as are set out in Appendix IV.

Guidance

For further commentary in relation to oil pollution claims see Chapter 12 of the Gard Guidance on Maritime Claims and Insurance and the Gard Handbook on Protection of the Marine Environment, and for further commentary on liabilities relating to passengers and seamen see Chapter 11 of the Gard Guidance on Maritime Claims and Insurance.

(A) Explanatory remarks

A unique feature of P&I insurance is that it has traditionally provided Members with unlimited cover for liabilities, losses, costs and expenses that are recoverable under the Rules. It was possible for the Association and the other associations that are parties to the Pooling Agreement to provide such unlimited cover in times when it was unlikely that any association could incur liability that was in excess of the limit of the Group Reinsurance Limit. However, if such a situation had, nevertheless, arisen, the members of those associations would have had unlimited liability to pay additional contributions to cover such a claim.

However, there has for some decades been an exception to unlimited cover in the case of oil pollution liability. The Association and the other clubs that are parties to the International Group of P&I Clubs have provided limited cover for such liability for decades as a result, inter alia, of the potentially huge liability exposure under US pollution legislation and the unavailability of viable reinsurance for catastrophic loss. The limit of cover for oil pollution liability has increased over the years, but it is still capped substantially below the Group Reinsurance Limit that applies to other liability.

Furthermore, changes in shipping practices and legislative developments have resulted in substantially increased liability exposure which has forced the clubs to reconsider the viability of providing unlimited cover for all claims. Therefore, the clubs that are members of the International Group have agreed that they can no

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1 Examples include claims arising as a result of the EXXON VALDEZ oil spill in Alaska in 1989 and of the DEEPWATER HORIZON spill in the Gulf of Mexico in April 2010.

2 The limit of cover for oil pollution liability in March 2008 is USD 1 billion following an increase from USD 500 million in the late 1990s and the Group Reinsurance Limit is USD 2.08 billion.
longer do so in certain situations, e.g. in the case of extraordinary large pollution or personal injury claims. Consequently, Rule 53 and the provisions of Appendices III and IV stipulate that special limits and/or exclusions of cover apply in the case of an Owner’s Entry in relation to some types of claim.  

Rule 53.1 and Appendix III outline the limit of cover that applies generally to oil pollution liability and Rule 53.3 and Appendix IV outline the special limits that apply to liabilities relating to passengers and seamen. All these provisions reflect restrictions and limitations that are contained in the Pooling Agreement.

Prior to 20 February 2015, the Association and all other clubs that are members of the International Group of P&I Clubs were able to provide cover for tankers that traded to the USA only if additional special conditions were satisfied. However, these requirements are no longer necessary or imposed after 20 February 2015.

(B) The Association’s liability…under an Owner’s Entry…for any and all claims in respect of oil pollution… (Rule 53.1)

Rule 53.1 stipulates that the Association’s liability for claims that are made under an Owner’s Entry for oil pollution is limited to the sum or sums set out in Appendix III and is not restricted to oil pollution from tankers but is applicable regardless of the type of ship. In this context, the phrase ‘claims in respect of oil pollution’ also includes claims that arise as a result of attempts that are made to reduce or prevent oil pollution.

Appendix III, section 2.c establishes that the limit of the Association’s liability for any and all claims for oil pollution is USD 1 billion for each incident or occurrence that arises under each Owner’s Entry. Therefore, if a similar incident or occurrence involves two Ships, the limit of insurance will apply to each of those Owner’s Entries, with the result that the Association’s total liability for claims that result from that incident or occurrence may exceed USD 1 billion.

However, Appendix III, section 2.c is subject to an important proviso which emphasises that the Association does not provide ‘top-up’ cover of USD 1 billion and that cover is not available for any liability that the Member may have in excess of USD 1 billion. Therefore, if the Member were to acquire cover on the open market up to a limit of USD 500 million and was to incur a liability of USD 1.5 billion, cover is not available from the Association for USD 1 billion in excess of the USD 500 million that has been provided by the market insurers. In such circumstances, the Member

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3 See the definition of ‘Owner’s Entry’ in Rule 1.
4 See the Guidance to Rule 28.
5 See the Guidance to Rule 27. However, please note that ‘Seamen’ as defined in Appendix IV includes persons who are on board other than Crew.
6 See the Guidance to Rule 52.
7 For example, a collision between two very large crude carriers.
would be required pursuant to Rule 71.b to recover USD 500 million from the market insurers and cover would be available from the Association only up to a further USD 500 million, i.e. up to a total liability of USD 1 billion.

Appendix III section 2.e goes on to provide that where the Member and any other party that has an interest in the Ship have effected separate Owner's Entries for that Ship either with the Association, or with the Association and any other association that is a party to the Pooling Agreement, the limit of USD 1 billion is to apply to the aggregate of all claims for oil pollution that are brought against the Association and any other association that has an Owner's Entry for that Ship. Separate Owner's Entries for one Ship may arise when a Ship is entered under each Entry for less than its full tonnage. The liability of the Association for such claims is that proportion of USD 1 billion which the claims recoverable from the Association bears to the aggregate of the claims that are recoverable from all the relevant associations.

However, the limit of insurance of USD 1 billion for oil pollution claims does not apply to a charterer that is a Co-assured under an Owner's Entry. The limit of insurance that is applicable to such a charterer is the ‘limitation amount’ or USD 350 million whichever is the lesser.

(C) ...(including claims resulting from attempts to reduce or prevent oil pollution)... (Rule 53.1)

The cover that is available from the Association is also limited in the case of claims for oil pollution that are brought against Ships that provide salvage or other assistance to another ship after a casualty. Such services are sometimes provided by more than one ship and Appendix III, section 2.d, establishes a limit for the cover that is available from the Association in such circumstances. All such claims that may be brought against the Association in relation to a Ship that is entered under an Owner's Entry, and also against any other Ship that is entered with the Association under a separate Owner's Entry, or against a ship that is entered under an Owner's Entry with any other association that is a party to the Pooling Agreement, are to be aggregated, and the Association’s liability for the oil pollution claims that are incurred by the Member as a result of any one incident or occurrence is that proportion of USD 1 billion that corresponds to the proportion that the claim against the Member bears to the aggregate of all such claims.

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8 See the commentary in (D) of the Guidance to Rule 3.2.
9 For the purposes of this calculation the amount of the claims recoverable from the Association is that proportion of the full tonnage of the Ship that is entered in the Association. See the Guidance to Rule 75.
10 See Appendix III paragraph 2.b.
11 See the Guidance to Rule 52.
For example, if claims totalling USD 2 billion are brought against five ships, two of which have separate Owner’s entries with the Association, and the claim against each of the two Ships is for USD 500 million, the limit of the Association’s liability to each Member is 25 per cent, (i.e. the proportion that USD 500 million bears to USD 2 billion) of the limit of cover of USD 1 billion, which means that the Association’s maximum exposure to each Ship is USD 250 million and its total exposure for the two entered Ships is USD 500 million.

(D) The Association’s liability under an Owner’s Entry for any and all claims which arise in respect of passengers and seamen shall be limited to such sum or sums as are set out in Appendix IV... (Rule 53.3)

Rule 53.3 reflects a provision of the Pooling Agreement that is intended to limit the potential exposure of the Association and the other associations that are parties to the Pooling Agreement for claims that relate to passengers and seamen. The imposition of a special limit of cover was considered necessary, inter alia, in view of the provisions of the 2002 Protocol to the Athens Convention that govern passenger liability and which require the owners and operators of certain ships that are certified to carry passengers to obtain evidence of financial security for certain passenger liabilities up to special limits. Therefore, as a provider of such evidence of financial security, the Association would be directly liable to passengers for such claims up to the special limits of liability that are specified in the Protocol.

Because of the significant increase of the ‘per passenger’ limit of liability under the 2002 Protocol and the abolition of an overall express limit of liability determined by the maximum number of passengers that the vessel is certified to carry, there is a risk that the aggregate of all claims that could arise as a result of a catastrophic loss of a large passenger ship could potentially exceed the Group Reinsurance Limit, and thereby lead to an Overspill Claim. Consequently, it was decided to impose a limit of cover for passenger liabilities of USD 2 billion per event, which is within the current Group Reinsurance Limit. Furthermore, recognising that any such catastrophic loss would also result in all likelihood in claims being made for loss of life and injury to seamen on board the Ship, it was decided to impose a limit of cover for the total liability that the Association might have for liability to passengers and seamen of USD 3 billion per event.

Appendix IV explains how these limits affect the cover that is made available by the Association to a Member that has effected an Owner’s Entry.

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12 See (I) below.
13 The full name of the Convention is the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974.
14 The International Group clubs have collectively purchased market reinsurance cover in respect of their exposure to Overspill Claims for the first USD 1 billion in excess of the Group Reinsurance Limit of USD 2 billion.
(E) …in respect of passengers and seamen… (Rule 53.3)

Appendix IV, section 1 defines the terms ‘passenger’ and ‘seaman’ for the purposes of Appendix IV.

A ‘passenger’ means a person that is carried on board a cruise, ferry or other passenger ship pursuant to a contract of carriage (a ticket), and any person who, with the consent of the carrier, accompanies a vehicle or live animals that is/are covered by a contract of carriage of goods.

A ‘seaman’ means any other person who is on board a ship other than a ‘passenger’ as defined above. A seaman need not only be a member of the Crew, but could also be another person that is on board such as a pilot, ship superintendent or repair worker who is being carried with the ship.

(F) …liability for any and all claims which arise in respect of passengers and seamen… (Rule 53.3)

Whilst the rationale for the initial implementation of the limit was the unacceptably high levels of direct exposure that the clubs feared they were likely to face for personal injury and death claims brought by passengers under the 2002 Protocol to the Athens Convention, the limit of liability that is applicable under Rule 53.3 and Appendix IV applies to all claims of all types for which cover is available under the Rules. Therefore, the limit can apply to the risks itemised in Rules 28 (Liabilities in respect of passengers), Rule 27 (Liability in respect of Crew), Rule 29 (Liability for other persons carried on board), Rule 31 (Diversion Expenses), Rule 32 (Stowaways, refugees or persons saved at sea) and Rule 33 (Life Salvage) insofar as they are ‘claims which arise in respect of passengers and seamen.’

(G) …shall be limited to such sum or sums and be subject to such terms and conditions as are set out in Appendix IV. (Rule 53.3)

Appendix IV, sections 2.i and ii, outline the limits of the Association’s liability for claims for liability to passengers and seamen arising under any one Owner’s Entry. Provisos a and b to section 2 go on to outline the limit of liability that the Association and any other association that is a party to the Pooling Agreement have collectively for such claims when they arise in respect of a Ship that is entered under more than one Owner’s Entry, either in the Association or in the Association and another association that is a party to the Pooling Agreement. Separate Owner’s Entries for the same Ship can arise when a Ship is entered by different interests in one or more P&I clubs for less than its full tonnage.

15 See the Guidance to Rules 1.1 and Rule 27.
16 See the Guidance to Rule 29.
17 See (D) of the Guidance to Rule 3.2.
(H) ...the Association’s aggregate liability arising under any one Owner’s Entry...
(Appendix IV, Paragraph 2)
The cover that is available from the Association is limited for claims that are made under any one Owner’s Entry to USD 2 billion per event for passenger claims and USD 3 billion per event for claims that involve both passengers and seamen. Consequently, if claims are made solely in respect of seamen, the limits that are provided in Rule 53.2 and Appendix IV do not apply. Furthermore, these limits do not apply if the Member is entitled to limit his liability to any lesser sum, in which case the Association’s liability shall be limited to that lesser sum.18

For example, if claims for passenger liabilities are made against a Member’s Ship for a sum that exceeds USD 2 billion, the Association is not obliged to pay more than USD 2 billion in respect of such liability under the Owner’s Entry19 for that Ship. Similarly, if the total of the claims for passenger and seamen liabilities that are made under that Owner’s Entry exceeds USD 3 billion, the maximum liability of the Association in respect of those liabilities is USD 3 billion.20 However, if the same event involves more than one Owner’s Entry, e.g. a collision between two large passenger Ships that are separately entered in the Association, i.e. one Owner’s Entry for each Ship, the limit of the Association’s liability is the combined total of the limits that apply to each Owner’s Entry.

Moreover, should two or more separate events occur in any one Policy Year and should each event result in liabilities that are in excess of the Association’s limits of liability for passenger claims and/or the combination of passenger and seamen claims, the limits of liability described above will apply to each such event.

(I) Provided always that: Where there is more than one Owner’s Entry...
(Appendix IV, Paragraph 2)
Provisos a and b to section 2 establish the limit of liability that the Association and any other association that is a party to the Pooling Agreement are to bear collectively for such claims when they arise in relation to a Ship that is entered under more than one Owner’s Entry either in the Association or in the Association and any other association that is a party to the Pooling Agreement. The collective liability of the Association and those other associations is limited, in the case of liability to passengers, to USD 2 billion per event and, in the case of liability to passengers and seamen, to USD 3 billion per event.

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18 See the Guidance to Rule 51 in this regard.
19 The Association’s maximum liability under a Charterer’s mutual Entry is USD 350 million each entry, as explained in the Guidance to Rule 52.
20 Ibid.
(J) …the liability of the Association shall be limited to such proportion…
(Appendix IV, provisos a and b)

Appendix 4, section 2 establishes the extent to which the Association is to bear its share of the collective limit. A distinction is made between, on the one hand, claims that are made simply in respect of passengers and, on the other hand, claims that are made in respect of passengers and seamen.

In the case of claims that are made simply in respect of liability to passengers, the Association’s share of the collective limit of USD 2 billion is that proportion of such limit that the sum recoverable from the Association bears to the aggregate of all claims that are recoverable from the Association and the other associations collectively in respect of such liability. For the purposes of this calculation, the sum that is recoverable from the Association is that proportion of the full tonnage of the Ship that is entered in the Association.21

However, in the case of claims that are made in respect of passengers and seamen then:

i when the liability of the Association and the other associations has been limited to the sum of USD 2 billion, and the Association’s share of such limit has been determined in the manner described in the previous paragraph, the liability of the Association for the additional limit of USD 1 billion that is available for claims for liability to seamen is that proportion of the limit of USD 1 billion that the sum recoverable from the Association in respect of the liability to seamen bears to the aggregate of all claims that are recoverable from the Association and the other associations collectively in respect of such liability. This situation will arise when the total recoverable passenger liabilities exceeds USD 2 billion and the combined sum of passenger and seamen liabilities exceeds USD 3 billion;

ii in all other cases, the Association’s share of the collective limit of USD 3 billion is that proportion of the limit that the sum recoverable from the Association for claims for liability to passengers and seamen bears to the aggregate of all claims that are recoverable from the Association and the other associations collectively for such liability. This situation will arise when the total of the recoverable passenger liabilities does not exceed USD 2 billion, but the combined total of passenger and seamen liabilities exceeds USD 3 billion.

21 See the Guidance to Rule 75.
**Rule 54 Amounts saved by the Member**

*Where the Member, as a result of an event for which he is covered by the Association, has obtained extra revenue, saved costs or expenses or avoided liability or loss which would otherwise have been incurred and which would not have been covered by the Association, the Association may deduct from the compensation payable under a P&I entry an amount corresponding to the benefit obtained.*

**Guidance**

The purpose and aim of the Association is to indemnify Members against that which they have suffered or lost as a result of the risks that are specified in the Rules. This reflects the fundamental principle that is the foundation of marine insurance generally. Consequently, if the Member has benefited in some way as a result of an event that is insured under the P&I cover, credit should be given for such benefit against any sums that the Member is entitled to receive from membership funds as a result of that insured event. This is particularly important in the context of mutual insurance since the individual Member should not profit at the expense of the other Members. This would be contrary to the principle of mutuality.

**(A) Where the Member...has obtained extra revenue, saved costs or expenses or avoided liability... (Rule 54)**

The aim of Rule 54 is to place the Member in the same financial position as that in which he would have been if the event that gave rise to the P&I claim had not arisen, save for any deductible that the Member has agreed to bear. Therefore, if the Member earns extra revenue, or saves costs or expenses, or avoids uninsured liability or loss, as a result of the event that gives rise to a claim on the Association, such amounts must be taken into account before determining the amount of compensation that is payable by the Association to the Member in respect of that event.

For example, if a cruise Ship were to suffer a two day disruption to her schedule as a result of a grounding incident, and the Member, consequently, decided not to call at two out of the planned seven ports of call and to pay the compensation that he is legally obliged to pay to the passengers under the applicable law in such circumstances, cover would be available from the Association for such liability pursuant to Rule 28.b, but the Association would be entitled under Rule 54 to deduct from the compensation that is payable to the Member the costs that have been saved by the Member as a result of not calling at the two ports, e.g. the saved bunker fuel, port charges, stores and the expense of ferrying passengers to and from the Ship at the cancelled ports of call.

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1 See Article 3 of the Statutes and Rule 2.
(B) …saved…or avoided…which would not have been covered by the Association… (Rule 54)

The Member must give credit for expenditure which he would have incurred but for the event and which would not have been recoverable from the Association. It is only in these circumstances that it can be said that the Member has benefited from the insured event.

For example, if a Ship breaks down during the course of a voyage as a result of a breach by the carrier (the Member) of the contract of carriage, and the cargo is discharged from the Ship at a port of refuge and subsequently on-carried in another ship at the expense of the cargo owners, cover is likely to be available under Rules 34 and/or 35 for claims that are likely to be made against the Member for loss of, and/or damage to, the cargo, and/or for the costs of the on-carriage with the other ship. However, the Member is obliged pursuant to Rule 54 to give credit to the Association for the costs and expenses that the Member would otherwise have had to incur in carrying the cargo to the contemplated discharge port and in discharging the cargo there. Those costs and expenses would not have been recoverable from the Association and have, therefore, been saved by the Member as a result of the insured event.

(C) …the Association may deduct from the compensation payable under a P&I entry an amount corresponding to the benefit obtained. (Rule 54)

Rule 54 gives the Association the right to deduct the financial value of any benefit that has been obtained by the Member as a result of the insured event from the compensation that is payable under a P&I entry. Such deduction is likely to be made if the Association has not yet compensated the Member in full. However, if compensation has already been paid in full or if the Association has already satisfied the third party claimant’s claim directly, but it subsequently transpires that the Member has either gained revenue or saved expenses as a result of the event, the logical corollary is that the Member is obliged to reimburse the Association with the amount by which he has so benefited since otherwise, the Association would not be able or reluctant to assist Members by providing speedy compensation or agreeing where appropriate to pay third party claimants directly on behalf of the Member.

Whilst Rule 54 applies solely to P&I cover, the Association has the overriding discretion when considering Defence cover to grant or withhold cover in full or in part in whatever manner it considers appropriate in the circumstances of the particular case.²

² See the Guidance to the Defence Cover in Part IV.
Rule 55 Terms of contract

The Association shall not cover under a P&I entry liabilities, losses, costs or expenses:

a which would not have arisen but for the terms of a contract or indemnity entered into by the Member, or by some other person acting on his behalf, unless the terms have previously been approved by the Association, or cover for such liabilities, losses, costs or expenses has been agreed between the Member and the Association, or the Association decides, in its discretion, that the Member should be reimbursed;

b which result from, or would not have arisen but for the Member, or some other person acting on his behalf having used terms of contract which the Association has prohibited, or omitted to use terms of contract which are specified in Appendix IV or which the Association has otherwise prescribed.

Guidance

Rule 55 is a reflection and a recognition of the principle of mutuality that is the foundation of P&I insurance. Cover is made available only for those risks that are regularly and routinely encountered by the majority of the membership. Consequently, the risks that are routinely encountered by the majority of the members by virtue of contractual terms that are commonly and regularly used in the industry should be, and are, shared between the membership as a whole. However, if a Member incurs a liability that arises solely as a result of contractual terms that are not regularly and routinely used by the majority of the membership, such risks should not be, and are not, shared by the membership as a whole.

(A) The Association shall not cover under a P&I entry... (Rule 55)

Rule 55 gives practical effect to this basic principle by providing that cover is not available for liabilities, losses, costs and expenses that arise, not as a result of the use of standardised contractual terms, i.e. terms that are broadly accepted in the industry as the norm, but as a result of terms that are more onerous for the Member. The Rule emphasises that, whilst the Member has the right to agree to such terms should he find it necessary and/or commercially advantageous to do so, he should not expect the wider membership to use its funds to bear the cost of any liability etc., that would not have been incurred had such terms not been agreed.

(B) ...liabilities...which would not have arisen but for the terms of a contract or indemnity... (Rule 55.a)

Rule 55 is designed to protect the membership against any onerous liability that is often imposed on a particular Member under, and as a result of, the terms of a ‘contract or indemnity.’ This phrase is construed widely and includes any form of agreement between the Member and a third party that imposes liability on the Member. It includes, inter alia, contracts of carriage, charterparties, letters
of indemnity, towage contracts, salvage agreements and contracts with, and indemnities that are given to, port and harbour authorities, stevedores, crane operators, harbour pilots and Crew members.

Cover is restricted only for liabilities etc., that arise under contractual terms that are more onerous than the norm and which the Member could reasonably avoid. Therefore, Rule 55 does not exclude cover for liabilities that arise as a result of contractual terms that are unavoidable, or that arise as a result of the unavoidable provisions of law, e.g. liability in tort for negligence or under statute or any other non-contractual source.

(C) ...entered into by the Member, or by some other person acting on his behalf... (Rule 55.a)
In many cases, the relevant ‘contract or indemnity’ will have been concluded by someone acting on behalf of the Member, i.e. as his agent. This could be the master or some other member of the Crew, or the Ship’s manager, crewing agent, broker, Ship’s agent or the Member’s superintendent. In some instances, such a person may be a Co-assured or Affiliate who is considered to be a Member for the purposes of the Rules.1 However, this will not always be the case, and Rule 55 makes it clear that cover may be excluded whether the contract or indemnity is entered into personally by the Member, or by someone else on his behalf, no matter who that person may be.

(D) ...unless the terms have previously been approved by the Association... (Rule 55.a)
If a Member looks to the Association for cover in respect of liability etc., that arises solely as a result of the terms of a contract or indemnity that has been entered into, or given by, the Member, the Association will normally need to consider and approve the terms of the relevant contract or indemnity before it can confirm that cover is available.

The Member has a duty both prior to, and after, the conclusion of the contract of insurance, to make full disclosure to the Association of all circumstances that the Association would consider to be relevant when deciding whether, and on what conditions, to accept the entry.2 The Member also has a duty to disclose circumstances that arise after the conclusion of the contract of insurance that result in an alteration of risk.3 Such duties include the duty to disclose the terms of any contract or indemnity that may expose the Member to additional liability etc. Therefore, a prudent Member should actively seek to disclose such contractual terms

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1 See the commentary on the meaning of ‘Member’ in the Guidance to Rule 1.
2 See the Guidance to Rule 6.
3 See the Guidance to Rule 7.
to the Association in order to enable the Association to take such terms into account when considering the overall risk. In case of doubt, the Member is strongly advised to consult the Association before agreeing the terms of any contract or indemnity.

The Association will not normally consider and approve the terms of known contracts or indemnities on standard terms that reflect a degree of liability that is generally accepted in the industry. For example, the Association and the other P&I clubs that are parties to the International Group have given their approval in advance to contracts on standard terms that are concluded for the purpose of entering or leaving port, or for manoeuvring within the port, certain towage contracts\(^4\) and to contracts of carriage that are subject to the Hague or the Hague-Visby Rules.\(^5\) However, cover is available for liabilities, loss, costs or expenses incurred by a Member under a contract of carriage that is subject to the Hamburg Rules (and, probably, the Rotterdam Rules if and when they enter into force), only when such Rules are compulsorily applicable by operation of law.

In the case of non-standard contracts and indemnities, cover will not be available unless they meet certain minimum requirements. For example, all contracts and indemnities are expected to include law and jurisdiction clauses that will enable the Member to defend his interests, and those of the Association when relevant, under systems of law, and before tribunals, that are recognised to be professional and experienced. Furthermore, such contracts and indemnities should not include provisions that waive the Member’s right to limit his liability or that transfer to the Member liability for the negligence of another party.

(E) …or the Association decides, in its discretion, that the Member should be reimbursed. (Rule 55.a)

The Association has a wide discretion\(^6\) whether or not to reimburse Members for liabilities etc., that arise under the terms of contracts and indemnities. Such discretion is exercised in a manner that is intended to safeguard the principle of mutuality that is described above. The Association will also be guided in this regard by the guidelines and recommended practices that are agreed from time to time between the parties to the Pooling Agreement.

(F) …liabilities…which result from, or which would not have arisen but for… having used terms of contract which the Association has prohibited…

(Rule 55.b)

The Association regularly issues Circulars that are designed to make Members aware of clauses in contracts and/or indemnities that are considered to be onerous for Members, together with comments that are intended to clarify the availability of

\(^4\) See (K)-(O) of the Guidance to Rule 43 (Towage).
\(^5\) See (L) of the Guidance to Rule 34 (Cargo Liability).
\(^6\) The discretion can be exercised by the administrative officers of the Association.
cover. In some instances, the Association will make it clear that it does not approve certain onerous terms of contract and that cover will not, therefore, be available for liabilities that arise as a result of the use of such terms. For example, cover is not available for liabilities that a Member incurs by virtue of having voluntarily agreed to adopt the Hamburg Rules or the Rotterdam Rules into his contract of carriage when such Rules do not apply compulsorily. However, cover is unavailable only to the extent that the Member’s liability has been increased by the use of terms or clauses that are not approved by the Association.

In circumstances where the Association has found it necessary to prohibit the use of certain contractual terms, and has communicated this decision to the membership, it is not entitled thereafter to exercise the discretion that it otherwise has under Rule 55 to reimburse a Member that has incurred liability as a result of having agreed to the use of such terms.7

(G) …or omitted to use the terms of contract which are specified in Appendix VII or which the Association has otherwise prescribed. (Rule 55.b)

Cover is not available for liabilities, losses, costs or expenses that would not have arisen but for the failure of the Member to include in his contracts the contractual terms that are specified in Appendix VII. The individual clauses that are specified in Appendix VII may change from time to time but the Association and all other P&I clubs that are parties to the International Group have recommended for many years that the ‘New Jason Clause’ and the ‘Both to Blame Collision Clause’ should be included in contracts of carriage of goods.

The ‘New Jason Clause’ is intended to protect the carrier in circumstances where, pursuant to US law, a carrier is not able to recover general average contributions from cargo when the incident that gave rise to the claim has been caused by the carrier’s negligence, notwithstanding the fact that the incident is one for which the carrier has a defence under the contract of carriage. The ‘New Jason Clause’ has the effect of reinstating the right to recover general average contribution from cargo in such circumstances.

The ‘Both to Blame Collision Clause’ is intended to protect the rights of a carrier following a collision between the Ship and another ship in circumstances where, pursuant to rights given under US law, the owners of the cargo that is carried on the Ship seek to claim the loss or damage that has been suffered by that cargo from the owners of the non-carrying ship in tort.8 Under the US ‘innocent cargo’ rule, those

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7 Such discretion can only be exercised by the Association’s Board of Directors pursuant to the authority granted by virtue of Article 6.5.b of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and Article 9.3.b of the Statutes of Assuranceforeningen Gard -gjensidig-.

8 The owners of the cargo will wish to do so in order to avoid the negligent navigation defence which would be available to the owner of the carrying vessel under the Hague or Hague-Visby Rules had the claim been made against such carrier under the contract of carriage for the cargo.
cargo interests are entitled to recover 100 per cent of their loss or damage from the non-carrying ship and not merely that proportion of the loss that can be attributed to the proportionate liability of the non-carrying ship for the collision. The non-carrying ship is then entitled to include in its claim against the carrying Ship the amount that it has paid to the cargo that was lost or damaged on the carrying Ship and to recover such proportion of that amount that the carrying Ship bears for the collision. In such circumstances, the ‘Both to Blame Collision Clause’ gives the carrying Ship the right to recover an indemnity from the owners of the cargo for the amount that has been paid by the carrier to the non-carrying ship.

The Association may give notice from time to time either by Circulars or by other means that the use of other terms or clauses are recommended by the Association.
Rule 56 Non-marine personnel

The Association shall not cover under a P&I entry liabilities, losses, costs or expenses incurred by the Member in respect of any of the following:

a personnel (other than marine crew) on board the Ship (being an accommodation vessel) employed otherwise than by the Member where there has not been a contractual allocation of risks as between the Member and the employer of the personnel which has been approved by the Association;

b hotel and restaurant guests and other visitors and catering crew of the Ship when the Ship is moored (otherwise than on a temporary basis) and is open to the public as a hotel restaurant, bar or other place of entertainment.

Guidance

Some ships are built and intended for use not as cargo or passenger-carrying vessels, but as places for the accommodation of personnel that are engaged in activities on or under the sea, e.g. in oil exploration fields. Other ships that were initially built for cargo or passenger-carrying purposes, may subsequently be used as places of accommodation, or may be permanently moored and used as places of entertainment. In both cases, whilst the ship may still be subject to marine risks, it may also be subject to many non-marine risks as a result of such usage.

The purpose and aim of the Association is to provide cover on a mutual basis for marine risks that result from the operation of a Ship. Consequently, it is not considered to be consistent with that aim and purpose for the Association to provide P&I cover for non-marine risks that result from the use of Ships for other non-marine purposes. Therefore, Rule 56 excludes certain risks that the Association considers to be essentially non-marine in character and, therefore, outside the scope of P&I cover.

(A) ...The Association shall not cover under a P&I entry liabilities...incurred by the Member in respect of any of the following... (Rule 56)

Rule 56 does not exclude cover completely when Ships that have been entered in the Association are used for the non-marine purposes to which reference is made above. Cover is excluded only for those liabilities, costs or expenses that have been incurred by the Member as a result of such usage and cover remains available for liabilities etc. that do not result from such usage.

(B) ...personnel (other than marine crew) on board the Ship (being an accommodation vessel) employed otherwise than by the Member... (Rule 56.a)

Rule 56.a excludes cover for liabilities etc., that are incurred in relation to personnel that are not Crew members as defined in Rule 1 when the Ship is used as an accommodation vessel.

1 See the Guidance to Rule 2.4.
The term ‘accommodation vessel’ includes, inter alia, an offshore multi-purpose support vessel that provides accommodation as well as other services to an oil field, or a passenger vessel that is employed to provide accommodation for people working ashore, or a ‘flotel’ that is employed as a prison ship, but not a passenger vessel that is engaged in its normal trade of carrying passengers.

Rule 56 does not affect the cover that is available under Rules 27 and 292 for liabilities, losses, costs and expenses that are incurred by the Member in relation to personnel that are employed by him, whether as members of the Crew or otherwise, or any persons that are on board for reasons other than employment, e.g. passengers or family members of the Crew. However, Rule 56 establishes that cover is not available where such liabilities etc., are incurred by the Member in relation to non-marine personnel that are employed on board the Ship by someone other than the Member, e.g. catering staff that are employed by a sub-contractor, unless the employer of such personnel and the Member have an agreement that allocates such risks inter se, and the terms of that agreement have been approved by the Association.

(C) …hotel and restaurant guests and other visitors and catering crew of the Ship when the Ship is moored (otherwise than on a temporary basis) and is open to the public as a hotel restaurant, bar or other place of entertainment. (Rule 56.b)

A Ship may be permanently moored and used as a hotel, restaurant or other place of entertainment that is open to the public, e.g. as a night club or as a nautical museum or excursion site. Such a Ship will normally be moored alongside the shore in order to allow easy access for guests and visitors, but the Ship may also be deemed to be ‘moored’ when it is at anchor and members of the public are transported to it by launch or other craft.

Rule 56.b excludes cover for liabilities etc., that are incurred by the Member in relation to any guest, visitor or catering staff, whether or not employed by the Member, when the Ship is permanently moored. However, cover is not excluded for liabilities etc., that are incurred by the Member in relation to Crew members.

Therefore, for example, if a fire were to break out on board a Ship that is permanently moored, cover is available for liabilities etc., that are incurred by the Member in relation to Crew members that are employed by the Member to maintain the Ship’s engines, but not in relation to catering staff that are employed by the Member, nor in relation to patrons and other guests that are visiting the Ship for recreational purposes.

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2 See the Guidance to these Rules.
3 See the Guidance to Rule 55.
4 Cover would normally be available in respect of Crew members under Rule 27.
However, cover is not excluded when the Ship is merely temporarily moored for such purposes. The question of what is, or is not, temporary is one of fact depending on the particular circumstances. However, factors such as the duration of the mooring time and the intention of the Member are relevant guidelines. For example, the use of cruise ships as accommodation units for a month or so during the 2004 Athens and 2014 London Olympic Games was considered to be temporary usage since the intention was to reuse the ships for cruising once the Olympic Games were over.

The term ‘open to the public’ is interpreted broadly to encompass any situation where access to the Ship is available to people that are not on board by virtue of their employment, but, rather, for the purpose of using the hotel restaurant, bar or other entertainment facilities. A Ship is not considered to be ‘open to the public’ if visitors are entitled to come on board only by special permission. For example, should a police authority charter a Ship for a prolonged period of time for use as a moored accommodation and special training facility and deny access to the Ship to any other persons, such a Ship would not be considered to be a Ship that was open to the public.

5 Cover would normally be available in such circumstances under Rule 29.
Rule 57 Liability occurring during through transports

The Association shall not cover under a P&I entry:

a liabilities, losses, costs or expenses incurred by the Member in respect of death, personal injury, loss or damage to property, delay or other consequential loss sustained by any passenger by reason of carriage of that passenger by air or during any through carriage whilst the passenger is in the care of another carrier or during carriage to or from the Ship, except liability for illness, injury or death of, or loss of or damage to the effects of, passengers during:

i carriage to and from the Ship in its own boats, or in port by means of other boats, or

ii repatriation of injured or sick passengers or of passengers following a casualty to the Ship, or

iii shore excursions from the Ship (subject to the provisions of Rule 57.b below);

b contractual liability in respect of passengers whilst on an excursion from the Ship in circumstances where either:

i a separate contract has been entered into by the passengers for the excursion whether or not with the Member, or

ii the Member has waived any or all of his rights of recourse against any subcontractor or other third party in respect of the excursion;

c liabilities, costs and expenses in respect of the carriage of cargo arising out of contracts of carriage providing for carriage partly to be performed by the Ship and partly by means of transport other than the Ship, unless the transport is performed under a form of contract approved by the Association.

Guidance

The nature of modern passenger and cargo carrying operations is such that passengers and cargo are not necessarily carried from the point at which they embark on the carriage to the point where the carriage terminates in the same carriage vehicle. For example, cruise passengers may travel to and from their home by airplane, coach, train and ship, whilst containerised cargo is carried by truck, railcar and ship, and sometimes also by airplane. However, such passengers or cargo may be carried under one contract of carriage which purports to regulate liability for the whole carriage regardless of the various modes of transport that have been used.

The risks that arise during the different stages of the transportation and as a result of the different methods of carriage pose difficulties for insurers, particularly for insurers such as the Association which provide cover on a mutual basis for marine risks that arise solely in connection with the operation of a Ship. Consequently, risks which arise in connection with the operation of other forms of transportation cannot be easily accommodated within the scope of such cover. However, in many instances, a non-marine mode of transport is an interlinked and necessary component of a carriage which may predominantly involve the operation of a Ship. Therefore, the Association and the other P&I clubs which are members of the International Group
have endeavoured to assist Members who are engaged in transport operations of this nature, but this is done in a manner which seeks to balance the needs of such Members with the needs of Members whose Ships are engaged in purely marine transportation.

Rule 57 contains provisions that outline the scope of cover that is available for liabilities, losses, costs and expenses relating to the carriage of passengers and cargo in circumstances where such liabilities etc., do not arise in direct connection with the operation of the Ship, which is, in general, a pre-requisite for cover. Therefore, whilst Rule 57 contains exclusion provisions, the purpose and effect of the Rule is to give the Association the right to compensate the Member for certain liabilities etc., which arise in relation to passengers and cargo for which cover is, otherwise, not available under Rules 28 and 34. Consequently, Rules 28 and 34 should be read in the light of Rule 57 and vice-versa.

(A) The Association shall not cover under a P&I entry… (Rule 57)

In order to safeguard the basic tenets of Rule 2.4, Rule 57 excludes P&I cover for passengers and cargo whilst in the care of another carrier except in certain limited and specifically identified circumstances. Rule 57.a and b relate to passengers whilst Rule 57.c relates to cargo.

(B) …liabilities, losses, costs or expenses incurred by the Member in respect of death, personal injury, loss or damage to property, delay or other consequential losses sustained by passengers² (Rule 57.a)

Rule 57.a is drafted very broadly to exclude cover for liabilities etc., which may be incurred by the Member in respect of all types of claim that can be brought by passengers against the Member in the circumstances outlined in Rule 57 except for those liabilities etc that are incurred in the circumstances described in (D)-(F) below.

(C) …whilst the passenger is in the care of another carrier or during carriage to or from the Ship… (Rule 57.a)

Whilst cover is available for liability incurred by the Member in respect of passengers³ and other persons⁴ carried on board the Ship, Rule 57.a excludes cover for liabilities etc., incurred by the Member for death, personal injury, loss or damage to property, delay or other consequential loss sustained by a passenger whilst on board another ship, aircraft or other means of transport, subject to the exceptions referred to below in (D)-(F).

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1 See the Guidance to Rule 2.4.
2 See (A) of the Guidance to Rule 28 for a definition of ‘passenger’.
3 See the Guidance to Rule 28.
4 See the Guidance to Rule 29.
For example, if a passenger has bought a package tour from a Member which includes transportation from his home to the port where he will commence his cruise, and he is injured during the course of air or surface transportation to that port of embarkation, he may bring a claim against the Member as tour operator or organiser, but the Member is not entitled to claim reimbursement from the Association for such liability. However, if the passenger is injured on board the Ship after embarkation, cover is available for the Member’s liability pursuant to Rule 28.

(D) …except liability for illness, injury or death of, or loss of or damage to the effects of, passengers during…carriage to and from the Ship in its own boats, or in port by means of other boats… (Rule 57.a.i)

The exclusion from cover discussed in (C) does not apply to any liability that is incurred by the Member for the injury, illness or death of passengers or for the loss of, or damage to their effects which occurs whilst the passengers are either: (i) being carried to or from the Ship, whether within the port or not, by the Ship’s own boats; or (ii) being carried to or from the Ship by boats owned by other parties, provided in these circumstances, that the carriage is effected in the port in which the Ship is situated. For these purposes the term ‘port’ is not to be understood in its strict geographical, legal and fiscal sense but as a practical description of the most convenient area or zone for the ship to be situated in order to transfer the passengers safely ashore.

For example, cover is available under Rule 28 for the Member’s liability if the passenger is injured or loses his or her effects whilst being carried to the Ship from outside the port area in the Ship’s own boats, but cover is not available for the Member’s liability if the passenger is injured whilst being carried to the Ship from outside the port area in boats owned by third parties. The word ‘effects’ includes not only luggage but also the other personal property of passengers.

(E) …repatriation of injured or sick passengers or of passengers following a casualty to the Ship…(Rule 57.a.ii)

In the event that a Ship should suffer a casualty, or in the event that a passenger should suffer injury or illness during the course of the carriage, the Member may have a legal obligation to send the passenger home or to a shore facility where proper treatment can be provided. Such repatriation may be done by helicopter or airplane, or by another ship or boat, or by some other form of conveyance, in which case the passenger will be in the care of another carrier for the whole or a part of such transportation. Rule 57.a.ii confirms that cover is available for liability incurred by the Member for the illness, injury or death of passengers or for the loss of or

5 See (A) of the Guidance to Rule 28.

6 The word ‘effects’ is construed similarly to the manner in which it is construed in Rule 28 (see (C) of the guidance to Rule 28).

7 See (A) of the Guidance to Rule 28.
damage to the effects of such passengers that may occur during such repatriation. Cover is available regardless of where or how the illness, injury or death or loss of or damage to the effects occurred so long as the Member is found to be legally liable to compensate the passenger or his dependents.

(F) ...excursion(s) from the Ship... (Rule 57.a.iii and Rule 57.b)

Rule 28.a outlines the cover that is available for the liability of the Member for the illness, injury or death of passengers or for the loss of or damage to the effects of such passengers when the event giving rise to such liability occurs whilst the passenger is on board the Ship. Rule 57.a.iii and 57.b outline the extent to which cover is available for such liability when the event giving rise to it occurs whilst the passenger is on a shore excursion from the Ship. The phrase ‘shore excursion from the Ship’ is construed broadly to include not only trips from Ship to shore but also water borne excursions from the Ship, e.g. an excursion by boat to view a coral reef or water sport activities such as a guided jet ski tour.

Whilst Rule 57.a.iii provides that cover is available for the liability of the Member for the illness, injury and death of passengers or for the loss of or damage to the effects of such passengers that occurs during shore excursions from the Ship, Rule 57.b excludes cover for such liability in certain circumstances when such liability has been incurred by the Member by virtue of a contract which has been concluded with a passenger. Cover is excluded in two circumstances, and the combined effect of Rules 57.a.iii and 57.b is to distinguish the cover that is available to the Member in his capacity as a passenger ship operator from that which is not available to him in his capacity as a specialist shore excursion provider or tour operator:

Cover is excluded:

a  Where a separate contract has been entered into by the passenger for the excursion whether or not with the Member.

If the Member permits passengers to enter into separate shore excursion contracts with him or with other parties, he is expected to ensure that they include terms which exonerate him from liability and/or to arrange other insurance cover for his potential liability to the passenger. Therefore, the Member should be aware that such a separate contract may not be considered to be a ‘contract of carriage’ which would entitle the Member to rely on the defences and limitation rights that would normally be available under the Athens Convention. Therefore, cover is not available for any liability that arises solely as a result of the terms of such a separate excursion contract. However, cover is available for the liability that the Member may incur regardless of that separate contract, e.g. for liability in tort or for liability which arises under the passenger contract of carriage with the Ship provided that the terms of that contract purport to relieve the Member from liability to the maximum extent permitted by the applicable law.8

8 See the Guidance to Rule 28.i.
b Where the shore excursion has been effected by a sub-contractor of the Member or by any other third party, and the Member has waived any or all rights of recourse against such sub-contractor or third party.

Cover is not available if the Member has waived any rights of recourse which he may have against other parties in respect of his liability to the passenger for such excursion. The exclusion applies to any waiver of such rights by the Member. The Association is not obliged to prove that the Member would have been able to recover had he not waived his rights of recourse. The rationale for this provision is that it would be contrary to the interests of the membership to cover losses which result from the fact that a Member has voluntarily waived any rights of recourse that he may have against a third party. However, cover is available in circumstances where the Member has sought to preserve his rights of recourse, but the recourse claim does not succeed or cannot be enforced under the applicable law.

For example, if a passenger is injured whilst on a shore excursion from the Ship pursuant to a separate contract which he has concluded with the Member after the start of the cruise and for which he has paid a separate fee, cover is available for any liability that the Member would have incurred to the passenger in respect of the injury in any event even if he had not entered into the contract for the shore excursion, e.g. in tort. However, if the Member incurs the liability purely by virtue of the terms of the separate contract, then cover is not available for such liability.

(G) ...liabilities, costs and expenses in respect of the carriage of cargo arising out of contracts of carriage providing for carriage partly to be performed by the Ship and partly by means of transport other than the Ship... (Rule 57.c)

Rule 57.c is intended to protect the membership against risks that arise as a result of the carriage of cargo partly by a Ship and partly by modes of transport other than by a Ship, or by ships other than those controlled by the Member. In order to enable the Association to provide the balanced form of cover described above, Rule 57.c provides that cover is available in such circumstances only when the cargo is carried under contracts which are approved by the Association.

(H) ...unless the transport is performed under a form of contract approved by the Association. (Rule 57.c)

The type of transportation to which reference is made in this Rule is usually performed under ‘through’ or ‘combined transport’ Bills of Lading the terms and legal effect of which may be substantially different. For example, under the laws of

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9 See also the Guidance to Rule 82.1.b.
10 See the Guidance to Rule 55.
11 If cargo is carried on a ship other than a Ship pursuant to a Consortium Agreement other factors and restrictions may apply. See the Guidance to Rule 52 and to Appendix II.
the United States, a carrier who issues such a Bill of Lading will be held responsible for the entire carriage unless the Bill of Lading clearly limits the carrier’s period of responsibility to a particular part or stage of the carriage.

The Association has approved the forms of ‘through’ or ‘combined transport’ Bills of Lading which are considered to be standard in the industry, e.g. the COMBICONBILL. The Association will normally approve other forms of contract if they purport to exclude the Member’s liability for cargo which is not in his care, custody or control, to the maximum extent permissible under the applicable law. The Association will also need to be satisfied that a contract of carriage which provides that the carriage is to be performed by modes of transport other than ships shall be subject to such rules of law that apply customarily to such modes of transport, and that the Member is liable for events which occur during cargo storage only to the extent that such storage is a reasonable and necessary part of the overall through transport.

Cover will be excluded if the cargo is not carried on terms which satisfy the provisions of Rule 34. Therefore the contract of carriage should give the carrier the right in relation to carriage by sea to rely on all rights and defences which are available to the carrier under the Hague or Hague-Visby Rules or the Hamburg Rules if compulsorily applicable.12 Similarly, the contract of carriage should give the carrier the right to rely on all rights and defences which are available to the carrier in relation to stages of the through transport other than sea stages. Liabilities arising at such stages may be subject to the provisions of national law or to conventions which regulate carriage by rail,13 road14 or air.15 The Member is obliged to take active steps to preserve all rights and defences which are available to him to the maximum extent permitted under the applicable law and to preserve all rights of recourse which he may have against any other carrier or other third party who may be involved in the transport operation.

In case of doubt, the Member is encouraged to consult the Association before agreeing to contracts of carriage which involve carriage with modes of transport other than his Ship.

12 See the Guidance to Rule 34.1.b.iii.
13 The Regles uniformes concernant le contrat de transport internationale ferroviaire des voyageurs et des bagages (CIM).
14 The Convention pour Merchandise par Route (CMR).
Rule 58 War risks

1 The Association shall not cover under a P&I entry liabilities, losses, costs or expenses (irrespective of whether a contributory cause of the same being incurred was any neglect on the part of the Member or his servants or agents) when the loss or damage, injury, illness or death or other accident in respect of which such liabilities arise or such losses, costs or expenses are incurred was caused by:

a war, civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or any hostile act by or against a belligerent power or any act of terrorism (provided that, in the event of any dispute as to whether or not, for the purpose of this paragraph (a), an act constitutes an act of terrorism, the Association shall in its absolute discretion determine that dispute and the Association’s decision shall be final);

b capture, seizure, arrest, restraint or detainment, (barratry and piracy excepted), and the consequences thereof or any attempt thereat;

c mines, torpedoes, bombs, rockets, shells, explosives, or other similar weapons of war (save for liabilities, costs or expenses which arise solely by reason of the transport of any such weapons, whether on board the entered Ship or not), provided always that this exclusion shall not apply to the use of such weapons, whether as a result of government order or with the agreement of the Association, where the reason for such use is the mitigation of liability, cost or expenses which would otherwise fall within the cover given by the Association.

2 The exclusion in Rule 58.1 above shall not apply to liabilities, costs and expenses of a Member insofar only as they are discharged by the Association on behalf of the Member pursuant to a demand made under:

i a guarantee or other undertaking given by the Association to the Federal Maritime Commission under Section 2 of US Public Law 89-777, or

ii a certificate issued by the Association in compliance with Article VII of the International Conventions on Civil Liability for Oil Pollution Damage 1992 or any amendments thereof,

iii an undertaking given by the Association to the International Oil Pollution Compensation Fund 1992 in connection with the Small Tanker Oil Pollution Indemnification Agreement (STOPIA),

iv a certificate issued by the Association in compliance with Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001,

v a certificate issued by the Association in compliance with Article 12 of the Nairobi International Convention on the Removal of Wrecks, 2007
to the extent such liabilities, costs and expenses are not recovered by the Member under any other policy of insurance or any extension to the cover provided by the Association. Where any such guarantee, undertaking or certificate is provided by the Association on behalf of the Member as guarantor or otherwise, the Member agrees that any payment by the Association thereunder in discharge of the said liabilities, costs and expenses shall, to the extent of any amount recovered under any other policy of insurance or extension to the
cover provided by the Association, be by way of loan and that there shall be assigned to the Association to the extent and on the terms that it determines in its discretion to be practicable all the rights of the Member under any other insurance and against any third party.

Guidance

The insurance of marine war risks is a specialised form of insurance that has traditionally been written by specialist marine war risks insurers. Therefore, most marine insurance policies will exclude war risks from the scope of cover that they provide on the basis that such risks should be separately insured. Such exclusions are commonplace in hull and machinery, loss of hire and P&I insurance policies.

(A) The Association shall not cover under a P&I entry liabilities, losses, costs or expenses...where such liabilities arise or...was caused by... (Rule 58)

Like other marine insurers, the Association excludes war risks from the P&I cover that it provides to Members except in limited circumstances. However, the exclusion does not apply in the case of Defence cover. Therefore, Members that are entered for Defence risks can seek the guidance and support of the Association on matters that are within their Defence cover, even where the problem is caused by, or is related to, a war risk. For example, the Association would be able to advise a Member that is entered for Defence risks on the possible termination of a charterparty in the event of civil unrest at a loading or discharge port, or on the merits of a dispute that the Member might have with his war risk insurers.

Rule 58 excludes cover only in those circumstances where P&I cover would have been available but for the exclusion in Rule 58. Therefore, it must be emphasised that P&I cover is not automatically available simply because the exclusion does not apply in any particular circumstance. If the Member seeks compensation from the Association he must, nevertheless, substantiate that cover is available for that risk under Part II of the Rules or under any special terms of entry.

The war risks that are excluded by Rules 58.1.a and b are the same as those that are excluded by War Risk Exclusion Clauses 23.1 and 23.2 of the Institute Time Clauses Hulls (1.10.83). They also include risks that can occur during times of peace, e.g. the risk of the Ship striking after the end of a war a mine that had been laid during that war. Different courts may construe the relevant risks differently pursuant to different laws but the meaning that is relevant for the purposes of Rule 58 is the meaning that applies under Norwegian law. However, since the wording of Rule 58 closely follows

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1 For further commentary see Chapter 26.3.1.7 of the Gard Guidance on Maritime Claims and Insurance and section 2.4.5 of Chapter 1 to the Gard Handbook on P&I Insurance, 5th edition.
2 See (S) – (X) below.
3 See the Guidance to Rule 65.j.
4 See the Guidance to Rule 90.
that of the standard English hull policy, the Norwegian courts may be influenced by the interpretation that has been given by the English courts in circumstances where there are no relevant Norwegian legal decisions.

Cover is excluded if the war risk is the proximate cause of the particular liability, loss, cost or expense that has been incurred by the Member. Therefore, if the liability etc., has not been caused by a war risk, but occurs at a time when the Ship is affected by war risks, cover is not excluded. For example, cover is not available in circumstances where a Member has compensated a Crew member that has been injured by a terrorist bomb. However, cover would be available if the Crew member had slipped and had been injured whilst the Ship was discharging cargo at a time when the Ship was in a war zone.

Since cover for war risks is excluded by Rule 58, Members should try, whenever possible, to avoid or minimise their exposure to such risks by including clauses in contracts such as charterparties, Bills of Lading, passenger contracts and Crew contracts that purport to relieve them of liability for war risks to the maximum extent permitted by the applicable law. The Member is also expected to arrange war risks insurances for hull and machinery and P&I risks for such sums and on such terms that will give the Member adequate protection against war risks. In order to assist as much as possible in this regard, the Association and the other clubs that are members of the International Group of P&I Clubs have for many years arranged a special war risks P&I cover for the benefit of their Members.\(^5\) The terms of this cover are notified to Members each year in a circular from the Association.\(^6\)

(B) \(\text{…(irrespective of whether a contributory cause of the same being incurred was any neglect on the part of the Member or his servants or agents)}\)…

(Rule 58.1)

If war or one of the other risks that are specified in Rule 58.1 is the proximate cause of the liability, loss, cost or expense that has been incurred by the Member, cover is excluded even though the negligence of the Member or his servants or agents has also contributed to some extent to the incurring of the liability etc. For example, if the Ship has foundered since the master has deliberately chosen a course through an area that is known to have mines in order to save voyage time, cover is not available for any cargo, Crew or wreck removal liabilities that may arise as a result of the fact that the Ship has struck a mine.

\(^5\) See Appendix I, paragraph 2.

\(^6\) See Circular no. 05/2007 on www.gard.no for the terms of the special war risks P&I cover for the 2008 Policy Year.
(C) …war… (Rule 58.1.a)
The exclusion is not limited to wars that affect the countries where the Ship is flagger or where her owners live or are domiciled. It applies whenever the Ship encounters, or is affected by, a state of war, no matter where or between whom.

A war is normally defined as a state of armed conflict between countries and it is a question of fact in each case whether there is a war. It is not necessary to demonstrate that there has been a formal declaration of war or some other similar formal act or declaration on the part of any country. However, ‘war’ does not include sporadic or warlike operations on a scale that does not amount to an established or reasonably settled state of armed conflict albeit that such operations are likely in most cases to constitute ‘hostile acts by a belligerent power.’

(D) …civil war… (Rule 58.1.a)
A civil war has been defined in an English case as ‘a war which has the special characteristics of being civil, i.e. internal rather than external’. In other words, it is not a war between countries, but a war between those that are citizens of, or who live within, a country.

(E) …revolution… (Rule 58.1.a)
A ‘revolution’ occurs when the established government of a country has been overthrown by the people over whom it formerly ruled, and has been successfully replaced by another form of government that then rules over and controls the territory in question and the people who live there. An element of forcible substitution is required, but, provided that there is the actual or implied threat of force, there can be a revolution even if the substitution is achieved without actual force.

(F) …rebellion… (Rule 58.1.a)
A ‘rebellion’ occurs when there is organised resistance to the rulers or the government of a country with the aim of supplanting the existing rulers or government or at least depriving them of authority over part of their territory. A rebellion may develop into a revolution.

(G) …insurrection… (Rule 58.1.a)
An ‘insurrection’ is very similar to a rebellion. It differs only in that it may be less organised and less widespread than a rebellion. Therefore, an ‘insurrection’ may be the start of a rebellion and may develop into a rebellion.

7 See (I) below.
(H) ...civil strife arising therefrom... (Rule 58.1.a)
‘Civil strife’ means major civil disorder during or following a war, civil war, revolution, rebellion or insurrection, e.g. the widespread rioting and looting that may occur after a war due to the breakdown of internal infrastructures and which may result in substantial distress to the inhabitants of that country.

(I) ...or any hostile act by or against a belligerent power... (Rule 58.1.a)
This means an offensive or defensive act of a government or organised rebels in a war or civil war. It may involve co-ordinated military action, but this is not essential.

(J) ...or any act of terrorism... (Rule 58.1.a)
This exclusion was introduced as a result of the modification of the reinsurance arrangements of the Pooling Agreement that followed the September 11 2001 terrorist attacks in New York.

A typical act of terrorism is one in which one or more individuals carry out, or threaten to carry out, acts that are intended to exert influence on a government or another political body, or to frighten all, or parts, of the population of a country. The purpose may be to promote a political, religious or ideological cause. The act may affect an enemy’s person or his interests, e.g. when bombs are placed in vehicles or on board ships, when aircraft are set on fire or when oil pipelines are cut. However, an act of terrorism need not necessarily be directed against, or directly affect, an enemy of the terrorists; it may be directed against other parties in order to draw public attention to the cause for which the terrorists are fighting. Acts of terrorism are often characterised by the fact that they endanger the lives of many people, and/or cause extensive material damage.

The question of whether a violent and/or malicious act can be classified as a terrorist act can cause uncertainty and dispute. For example, is a violent act of sabotage that has been committed by environmental activists against a ship carrying nuclear waste a terrorist act? Consequently, the Association is given the right by Rule 58.1.a to determine in its absolute discretion8 whether a particular act is considered to be a terrorist act for the purposes of Rule 58.

(K) ...capture... (Rule 58.1.b)
‘Capture’ is the taking of a Ship (with or without its Crew) and/or its cargo by an enemy or belligerent power in wartime with the intention of depriving the owners of the Ship and/or the cargo of their ownership of it. The taking of the property must be accompanied by force or the threat of force.

8 Such discretion will be exercised by the Board of Directors.
‘Seizure’ is a term that is broader in scope than ‘capture’ and includes ‘every act of taking forcible possession either by lawful authority or by overpowering force’. In contrast to ‘capture’, a seizure can occur whether or not there is a war. A temporary or permanent taking of possession of a Ship may constitute a ‘seizure’. However, it must be accompanied by force or the threat of force. It includes seizure by the passengers\(^9\) and can also include a seizure of the Ship as a result of a court or governmental order.

There is no substantial difference between these three perils that individually or collectively embrace any act by a court or local or national government that prevents the free movement of a Ship and, thereby, its ability to comply with employment orders. However, a distinction must be drawn between, on the one hand, an arrest in respect of a civil claim or a restraint or detainment of the Ship, e.g. after a pollution incident, and, on the other hand, an arrest, restraint or detainment of the Ship, and/or its cargo and/or Crew by government authorities and enforced with the use, or the threat of the use, of armed forces or other military power. The former type of arrest etc., may give rise to liabilities, losses, costs and expenses for which cover is available under the standard P&I insurance whereas cover is not available under Rule 58.1.b for liabilities etc., that arise as a result of the latter type of arrest, restraint or detention.

For example, if a Ship were to carry a cargo of munitions that has been shipped in country A for discharge in country B, and the military intelligence services of country C were to conclude that the munitions have been purchased in violation of a UN embargo, so that the armed naval forces of country C decide to intercept the Ship en route and order it to country C where the cargo is subsequently confiscated by the authorities, cover is not available by virtue of Rule 58.1.b\(^{10}\) for liabilities, losses, costs or expenses that are incurred by the Member as a result of the detention of the Ship and the confiscation of the cargo.

‘Barratry’ includes every wrongful act that is wilfully committed by the master or Crew against the Ship and the goods without the privity of the shipowner. Mere negligence or recklessness will not suffice; to constitute ‘barratry,’ there must be wilful intent. Barratry occurs most frequently when Crew members take permanent possession and control of the Ship, or sink it deliberately, i.e. scuttle it.

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\(^9\) A seizure by the crew constitutes barratry. See (N) below.

\(^{10}\) Cover may also be excluded under Rule 74 on the basis that the trade may be ‘unlawful trade’.
‘Piracy’ is robbery that is committed at sea for personal gain accompanied by the use, or with the threat of the use, of violence. Therefore, piracy is an act of robbery that is committed without political motive or without the authority of any country. Piracy is normally committed by persons from outside the Ship who board the Ship, whether in port, or in coastal waters, or on the high seas, and acts of piracy encompass a wide range of activities such as the hijacking of the Ship and/or its cargo, the taking of money and other valuables from the Ship’s safe and/or from persons on board, or the holding or kidnapping of persons for the purposes of ransom. Therefore, acts of piracy may cause death or injury as well as the loss of, or damage to, property.

Despite the violent nature of such activities, barratry and piracy have traditionally been considered to be marine rather than war risks. Consequently, cover is not excluded under Rule 58 for liabilities etc., that are proximately caused by such activities.

(O) …and the consequences thereof or any attempt thereat… (Rule 58.1.b)
These words make it clear that cover is not only excluded under Rule 58.1.b if the capture, seizure, arrest, restraint or detainment is successful. Cover is excluded for liabilities, losses etc., that arise as a result of an attempt to capture, seize, arrest, restrain or detain even if the attempt is unsuccessful.

(P) …mines, torpedoes, bombs, rockets, shells, explosives, or other similar weapons of war… (Rule 58.1.c)
The phrase ‘other similar weapons of war’ is to be construed widely and includes mortars, missiles and all other static or projected explosive devices.

Cover is excluded whether the explosive device is located on or off the Ship and the exclusion applies not only in times of war, but also in times of peace. For example, the exclusion will apply if a bomb, torpedo, shell etc., were to be used as a weapon against the Ship and cause damage even though it did not explode as intended. Similarly, if a Ship, whilst sailing in the open sea, were to strike an old mine that had been laid during the Iran-Iraq war and cause the mine to explode, cover is excluded under Rule 58.1.c for any liabilities, losses etc., that arise as a result of such event. However, it is more questionable whether cover would be excluded if the hull of the Ship were to be breached and thereby cause the Ship to become a wreck as a result of striking a mine that had been disarmed and which had, consequently, ceased to pose a warlike threat.
(Q) …save for liabilities, costs or expenses which arise solely by reason of the transport of any such weapons, whether on board the entered Ship or not...

(Rule 58.1.c)

Cover is not excluded under Rule 58.1.c if the liabilities, losses etc., arise solely as a result of the carriage of weapons of war by the Ship as cargo. However, if a Member intends to trade the Ship for the carriage of weapons and munitions, whether as a partial or full cargo, he is required to give notice to the Association pursuant to Rule 6 (The Member’s duty of disclosure) and Rule 7 (Alteration of risk), failing which his right of recovery from the Association may be rejected in full or in part.\(^{11}\) Depending on the particular circumstances, cover may also be excluded under Rule 74 if the Ship is engaged in carrying contraband or blockade running or is employed in, or on, an unlawful, unsafe or unduly hazardous trade or voyage.\(^{12}\)

If weapons of war are being transported as cargo the phrase ‘whether on board the Ship or not’ make it clear that the exclusion does not apply even if the cargo is not in fact on board the Ship at the time of the incident that causes the Member to incur liability etc. This may occur when weapons are carried by the Member as carrier pursuant to a ‘through transport’ contract of carriage that has been approved by the Association pursuant to Rule 57.1.c. In such circumstances, cover is available for liabilities that are incurred by the Member as a result of the carriage of such weapons as cargo regardless of the particular through transport stage on which the incident occurred, i.e. regardless of whether the event occurred whilst the cargo is on board the Ship, or on a feeder ship, or whilst stored ashore in between sea carriage, or whilst being transported by road or rail.

Cover is also available for liability that is incurred by the Member as a result of a collision between the Ship and another ship that is transporting weapons, e.g. if munitions carried on board the other ship were to explode and cause death and injury to the Ship’s Crew and damage to property.

(R) …provided always that this exclusion shall not apply to the use of such weapons…where the reason for such use is the mitigation of liability...

(Rule 58.1.c)

Cover is not excluded under Rule 58.1.c if weapons of war, and in particular, explosives, are used for the purpose of mitigating, i.e. avoiding or reducing, any liability, loss, cost or expense that would otherwise fall within the scope of the Association’s cover, e.g. where explosives are used to blow up a wreck when such action is the safest and/or the most economic method of wreck removal.

\(^{11}\) See the Guidance to Rules 6 and 7.

\(^{12}\) See the Guidance to Rule 74.
This proviso is applicable only in cases where explosives are used either with the prior agreement of the Association or as a result of a governmental order and even when, in the latter case, the Association has not given its agreement. For the purposes of this Rule a governmental order includes an order that is given by a coast guard or harbour authority or any other council or authority that is empowered to make such orders under national or local legislation or regulations.

\[S\] The exclusion in Rule 58.1 above shall not apply to liabilities...insofar as they are discharged by the Association on behalf of the Member pursuant to a demand made under... (Rule 58.2)

Rule 58.1.c provides that, notwithstanding the provisions of Rule 58.1, cover will not be excluded for liabilities, losses, costs and expenses that are incurred in the circumstances that are described in Rule 58.2.

Rule 58.2 differs from Rule 58.1 in that it relates to liabilities etc., that are incurred, not by the Member, but by the Association on behalf of the Member when the Association has committed itself to provide the guarantees or undertakings to third parties that are itemised in Rule 58.2. The Association is obliged to make payment to third parties pursuant to such guarantees or undertakings even if the event that gives rise to the claim is a war risk for which the Association would have had the right under Rule 58.1 to refuse to compensate the Member if payment had been made by the Member.

Sub-paragraphs i-v of Rule 58.2 itemise the guarantees or undertakings that are given by the Association to third parties for which cover is not excluded under Rule 58.2.

\[T\] a guarantee or other undertaking given by the Association to the Federal Maritime Commission under Section 2 of US Public Law 89-777... (Rule 58.2.i)

Under the law of the United States the owner or charterer of a passenger ship that either is, or may become, engaged in voyages to or from US ports is required to provide a guarantee from an authorised insurer, surety company or other provider, for legal liabilities that he may incur for the death of, or for injury to, passengers or other persons who are carried on board during such voyages. The guarantee is to be provided to the US Federal Maritime Commission (FMC).\[13\]

Liability under the FMC guarantee will be triggered if the owner or charterer of the relevant passenger ship has not discharged his liability for such death or injury within 21 days of either a final judgment, which is no longer subject to any appeal, or of a compromise settlement that has been approved by the guarantor.

\[13\] A specimen FMC section 2 guarantee can be found on www.fmc.gov/images/pages/fmc133b.pdf
The event that gives rise to such liability may be one for which cover is not available pursuant to Rule 58.1. However, by providing such guarantees in response to the requests that are made from time to time by the owners or charterers of passenger Ships, the Association becomes exposed to direct liability under such guarantees if the Member fails to discharge his liability within the required 21 days.

(U) ...a certificate issued by the Association in compliance with Article VII of the International Conventions on Civil Liability for Oil Pollution Damage 1992...
(Rule 58.2.ii)
Details of the obligations that the Association has under Article VII of the International Conventions on Civil Liability for Oil Pollution Damage 1992 can be found in the Guidance to Rule 38.14

(V) ...undertaking given by the Association to the International Oil Pollution Compensation Fund 1992 in connection with the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) (Rule 58.2.iii)
Details of the relationship that exists between the Association and the International Oil Pollution Compensation Fund 1992 in connection with the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) and an explanation of the purpose of the guarantee or other undertaking that is given by the Association in such circumstances is explained in the Guidance to Rule 38.15

(W) ... a certificate issued by the Association in compliance with Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Rule 58.2.iv)
The provisions of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention) that entered into force on 21 November 200816 closely follow the well established liability and insurance provisions that apply to oil tankers under the Civil Liability Convention (CLC) and requires signatory States to issue similar certificates.

To enable signatory States to issue the required certificates, the P&I clubs that are members of the International Group of P&I Clubs have agreed to issue so-called ‘Bunker Blue Cards’ for ships to which the Bunker Convention applies and which are eligible ships under the collective reinsurance arrangements that is offered by the International Group. A ‘Bunker Blue Card’ is a document that is required under Article 7 of the Bunker Convention by virtue of which the issuing Club confirms that the relevant ship is insured by that Club for liabilities that the owner of that ship

15 See (J) of the Guidance to Rule 38.
16 For further information concerning the Bunker Convention see Chapter 12.4.1.1.2 of the Gard Guidance on Maritime Claims and Insurance and for further guidance re certification, please see Gard’s P&I Member Circulars Nos. 2, 4, 5, 6 and 7/2008.
may incur under the Bunker Convention. The relevant P&I clubs have also agreed to pool liabilities that exceed the relevant club retention level that have arisen as a result of a club having issued such a ‘Bunker Blue Card.’

By issuing Bunker Blue Cards the Association may incur direct liability to third parties to pay compensation, costs and expenses for bunker pollution liability that is incurred by the owner of the Ship to the same extent that the owner would have been liable had the claim been made against him under the Bunker Convention. Therefore, by issuing such Bunker Blue Cards, the Association may be exposed to liability for damage, loss etc., arising as a result of an act of terrorism that is partly caused by the owner due to his contributory negligence, but for which cover would not be available under the Rules due to the exclusion of terrorism and nuclear risks. Consequently, in the absence of Rule 58.2.iv, the issuer of the Bunker Blue Card would be exposed to certain risks that are not normally covered under P&I cover. In order to resolve such an anomaly, Rule 58.2.iv makes it clear that the exclusions that are found in Rule 58 do not apply in relation to the liabilities that the Association may incur as a result of issuing Bunker Blue Cards. Therefore, this provision has the same application in relation to Rule 58 as Rule 73.2 has in relation to nuclear risks.

(X) ...a certificate issued by the Association in compliance with Article 12 of the Nairobi International Convention on the Removal of Wrecks, 2007 (Rule 58.2.v)

The Nairobi International Convention on the Removal of Wrecks 2007 (WRC) is in force as from 14 April 2015. The Convention includes compulsory insurance provisions equivalent to those in CLC and the Bunkers Convention and similar forms of certificates (blue cards) need to be issued. Therefore, for the reasons explained in (W) above, Rule 58.2.v makes it clear that the exclusions that are found in Rule 58 do not apply in relation to the liabilities that the Association may incur as a result of issuing WRC certificates.

(Y) ...to the extent such liabilities, costs and expenses are not recovered by the Member under any other policy of insurance or any extension to the cover provided by the Association. Where any such guarantee, undertaking or certificate is provided by the Association on behalf of the Member as guarantor... (Rule 58.2)

As noted in (A) above, Members are expected to arrange primary P&I war risk insurance with other insurers. Therefore, the last paragraph of Rule 58.2 is intended to ensure that when the Member has the right to be recompensed for the relevant

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17 See (D) of the Guidance to Rule 38, for further commentary on the effect of Blue Cards under the CLC.
18 See Rule 58.1.a.
19 See Rule 73.1.
20 For more detailed commentary see Gard Circular 12/2014 and Chapter 16.2.4 of the Gard Guidance on Maritime Claims and Insurance.
liabilities etc., under other insurances, a payment that is made by the Association to a third party pursuant to the guarantees or undertakings that are itemised in Rule 58.2 is to be treated as a loan until the extent to which the Association is entitled to make recovery from such other insurers has been clarified. The same applies if the event that causes the Association to make payment under the guarantee or undertaking is one that gives the Member a right of recourse against any other third party. In exchange for its agreement to provide a guarantee or undertaking to third parties at the request of the Member, Rule 58.2 gives the Association the right to demand that all rights that the Member has to recover under such other insurance or against any third party should be assigned by the Member to the Association on such terms and to the extent that the Association in its discretion thinks necessary in order to protect the interests of the membership as a whole. The Association will normally require an assignment to be to the greatest extent that is allowed by law and the particular circumstances.
Rule 59 Specialist operations
The Association shall not cover under a P&I entry liabilities, losses, costs and expenses incurred by the Member 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 Ship), (but excluding fire-fighting), to the extent that such liabilities, losses, 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 Member or the fitness for purpose and quality of the Member’s work, products or services, including any defect in the Member’s work, products or services; or

c any loss of or damage to the contract work, provided that this exclusion shall not apply to liabilities, losses, costs and expenses incurred by the Member in respect of:

i loss of life, injury or illness of crew and other personnel on board the Ship;

ii the wreck removal of the Ship; or

iii oil pollution from the Ship

but only to the extent that such liabilities, costs and expenses are within the cover available under any other Rule or the terms of entry agreed.

Guidance
When vessels are engaged in servicing the offshore industry or in construction and maintenance projects either at sea or in port they may be considered to be engaged in ‘specialist operations’ for the purposes of Rule 59. In such a case, the cover that is available from the Association is restricted since the Member is then vulnerable to additional risks that are different from those that have traditionally been considered by the mutual Members of a P&I club to be risks that they are prepared to share inter se. Consequently, Rule 59 draws a distinction between “liabilities, losses, costs and expenses that are incurred by the Member during the course of performing specialist operations” (which are excluded from cover) and liabilities losses, costs and expenses that are incurred by the Member whilst undertaking conventional trading operations (which are not excluded from cover). The demarcation line between the two types of risk can often be blurred but the Association has a responsibility to decide the issue in an objective manner that is consistent and fair to the membership as a whole and to its pooling partners and reinsurers.
(A) The Association shall not cover...specialist operations including but not limited to... (Rule 59)

Rule 59 refers to a number of specific operations that are considered to be ‘specialist operations’. However, rapid advances in technology and the ever-changing demands that are made on specialist ships, make it impossible to compile an exhaustive list of specialist operations. Therefore, whilst Rule 59 gives examples of the types of activity that are considered to be specialist, the phrase ‘specialist operations’ is broadly construed and encompasses any activity that is not considered to be a conventional ship operation other than those operations to which reference is made in (C)-(H) below.

(B) ...incurred by the Member during the course of performing specialist operations... (Rule 59)

The exclusion is triggered, not by reference to the type of Ship that performs the operation, but by reference to the nature of the operation that is being conducted by that Ship. Therefore, the exclusion does not apply to liabilities etc., that are incurred by a Member as a result of an event that occurs whilst a specialist pipe-laying Ship is operating as a conventional ship when carrying pipes from a loading port to the project area, but it would apply to liabilities etc., that are incurred by a Member as a result of an event that occurs whilst a general purpose Ship is performing pipe-laying operations, e.g. liability arising as a result of damage caused by that Ship to the pipeline during the course of such operations. Cover is excluded in such circumstances even though the events that give rise to liability etc., are not made manifest until after the completion of those operations, e.g. the rupture of an incorrectly laid pipe that occurs after completion of the pipe-laying operations.

Cover is excluded when such liabilities etc., are incurred by the Member and usually arise when the Member carries out such specialist operations himself. However, in some circumstances, the Member may incur liability when the operations are carried out by third parties pursuant to a contract that makes the Member liable for such operations. Cover is also excluded in those circumstances.

A Member who has been using a Ship for conventional trading purposes but wishes to use the Ship thereafter for specialist operations, should be aware that such a change of use is a material fact and an alteration of risk that should be promptly disclosed by the Member to the Association pursuant to the provisions of Rules 6 and 7. If the Member fails to do so then cover may not be available.1

The Association may be able to arrange additional cover for specialist operations even though cover for such risks is excluded under the Rules.2

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1 See the Guidance to Rules 6 and 7.
2 The Association can provide Contingent General Liability (CGL) cover. For further details please refer to www.gard.no.
(C) ...but excluding fire-fighting... (Rule 59)
Traditionally, fire-fighting has been considered to be an essential and integral aspect of conventional ship operations that is necessary for the preservation of life and property at sea. Consequently, fire-fighting is not considered to be a specialist operation in the same sense as the other operations that are itemised in Rule 59. Therefore, cover is not excluded for liabilities etc., that arise as a result of fire-fighting operations regardless of whether or not such operations are performed by Ships that are specially designed for that purpose and regardless of whether the fire-fighting is necessitated by the specialist operations in which the Ship is engaged at the time.

(D) ...liabilities, losses, costs and expenses...to the extent that such liabilities... arise as a consequence of... (Rule 59)
Cover for liabilities that arise as a consequence of specialist operations is excluded in the circumstances itemised in sub-paragraphs a – c. Therefore, Rule 59 does not exclude cover for other types of claim provided that cover is available for such claims under the Rules or any special terms of cover that may have been agreed between the Association and the Member.

Sub-paragraphs a and b relate to claims that are made as a result of the manner in which the specialist operations have been carried out, whereas sub-paragraph c relates to liabilities that arise because of the loss of, or damage to, the contract work that has been caused by the Member whilst engaged in specialist operations.

(E) ...claims brought...in respect of the specialist nature of the operations... (Rule 59.a)
Rule 59.a is broadly drafted to exclude cover for a wide variety of claims that can be brought against the Member whether in contract or in tort in respect of the specialist nature of the operations. Cover is excluded whether the claim is brought by a party for whose benefit the work is being performed or by any other third party. Therefore, cover is excluded if the claim is made against the Member as sub-contractor by the party for whose ultimate benefit the work is being carried out, or by the Member’s contractual partner, or by any other third party for whose benefit the work is being carried out.

For example, if a cable-laying Ship were to reverse and collide with a diving support vessel that is being operated by a sub-contractor whilst laying a fibre optic telecommunications cable in order to avoid excessive tension on the cable, thereby causing the diving support vessel to capsize and the death of the divers and an on-site representative of the telecom company that were on board, cover is not available for the Member’s liability for such loss of life and personal injury since the incident that gave rise to the Member’s liability was caused by the specialist nature of the operation. However, if the collision had taken place before either ship was
engaged in that operation, cover would be available under Rule 36 since it would have been the result of a traditional marine risk that was not influenced by any specialist operations.

(F) ...failure to perform such specialist operations or...fitness for purpose...
(Rule 59.b)
Cover is not available if the Member fails to perform the specialist operations. For example, if a cable-laying Ship that has been contracted to lay a new telecommunications cable were to suffer an engine breakdown prior to commencement of the operations, and the breakdown cannot be repaired in time to enable the Ship to meet the contractual deadline, cover is excluded for any liability that the Member might incur to the telecom company should that company terminate the contract and claims damages for the losses that it has sustained as a result of the Member’s failure to perform.

Furthermore, cover is not available for liabilities etc., that are incurred by the Member as a result of the substandard quality of the Member’s work, or of the fact that such work is not fit for purpose, or as a result of any defect in such work, products or services. Such liability is very different in nature to the type of liability that is normally encountered by the membership at large in relation to the operation of Ships, and, consequently, cover is excluded. Typically, such a claim would normally be brought by the person on whose behalf the Member is performing the specialist operation. For example, if a fibre optic cable has not been laid in accordance with the terms of the licence that has been provided by the relevant licencing authority, the cable may have to be moved at several locations at considerable additional cost to the telecom company that owns the cable. Cover is excluded for any liability that the Member has to reimburse the telecom company for such costs.

(G) ...any loss of or damage to the contract work... (Rule 59.c)
Cover is not available for liability etc., that is incurred by the Member for the loss of, or for damage to, the works that are the subject matter of the specialist operations, e.g. to a pipe that is being laid, or to harbour works that are being repaired. It is not necessary that the loss or damage should be caused by the particular specialist operation in which the Ship is engaged at the material time provided that it arises during the course of those operations. For example, if a pile-driving vessel that is engaged in construction work on a jetty were to collide with, and damage, the jetty as a result of the negligent navigation of its Crew, cover is not available for claims that arise as a result of such collision. However, if the pile-driving vessel were to collide with another jetty that is not the subject matter of the specialist operations, cover may be available under Rule 37 subject to the scope of cover for liability for damage to fixed and floating objects that is applicable under the Hull Policies of the Ship.
(H) ...provided that this exclusion shall not apply to... (Rule 59 proviso)

Rule 59 does not exclude cover for certain types of liabilities, costs etc., although they arise during, and in connection with, the specialist nature of the operations that are being performed by the Member. The relevant liabilities are listed in provisos i, ii and iii, and cover is available to the Member in such circumstances to the extent that cover is otherwise available under the Rules or any special terms of entry that have been agreed between the Association and the Member. Therefore, cover is not excluded for liabilities etc., that are incurred by the Member for the loss of life, injury or illness of Crew members or other personnel that are on board the Ship (as opposed to persons that are not on board the entered Ship)\(^3\) or which may be incurred by the Member for the removal of the wreck of the Ship,\(^4\) or for oil pollution from the Ship, cover for which is available under Rules 27 and/or 29, 40 and 38 respectively. This reflects the desire of the clubs that are members of the International Group of P&I Clubs to provide the widest scope of cover except for when claims can be said to be caused by the particular nature of the specialist operations.

\(^3\) See the example in (E) above.

\(^4\) See the commentary in (F) of the Guidance to Rule 40.
Rule 60 Drilling, production and accommodation vessels and barges

1 For drilling vessels, barges and any other vessels or barges employed to carry out drilling or production operations in connection with oil or gas exploration or production, including accommodation units moored or positioned on site as an integral part of any such operations, the Association shall not cover under a P&I entry any liabilities, losses, costs or expenses arising out of or during drilling or production operations, provided that:
   i for the purpose of this Rule 60.1 the Ship 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 the oil is transferred directly from a producing well to the storage tanker or the storage tanker has oil and gas separation equipment on board and gas is being separated from oil whilst on board the storage tanker other than by natural venting.
   ii in respect of any Ship employed to carry out production operations in connection with oil or gas production, the exclusion in this Rule 60.1 shall apply:
      a from the time that a connection, whether directly or indirectly, has been established between the vessel and the well until such time that the vessel has been disconnected from the well as part of a planned procedure to leave the site for the purpose of navigation to shore or to another production site; or
      b where the vessel is unintentionally, as well as intentionally, as an emergency response, disconnected from the well; or
      c where the vessel remains connected to the well, but the production is shut down, whether or not as an emergency response

2 For semi-submersible heavy lift vessels and any other vessels designed exclusively for the carriage of heavy lift cargo, the Association shall not cover under a P&I entry liability for loss of or damage to or wreck removal of cargo, save insofar as the carriage is undertaken on contractual terms approved by the Association.

Guidance
Rule 60 deals with two quite separate situations that are linked by the fact that each involves the use of a Ship in activities that are not traditionally performed by Ships that are entered in the Association for mutual risks.

Whereas Rule 59 establishes the exclusions of cover that apply when a Ship is engaged in ‘specialist operations’, Rule 60.1 regulates the limited cover that is available when drilling vessels, barges and any other vessels or barges are employed to carry out drilling or production operations in connection with oil or gas exploration or production, or accommodation units that are moored on site as an integral part of such operations. Therefore, Rule 60.1 is more specific than Rule 59 in the scope of its applicability and, when considering the scope of the cover that is available, it is necessary to establish which Rule is applicable in the particular circumstances.
Rule 60.1 mirrors the terms of the Pooling Agreement that establish the contractual basis on which the Association and the other clubs that are members of the International Group of P&I Clubs are able to buy the collective market reinsurance that benefits the members of all such clubs including the Association.

Rule 60.2 deals with the quite different situation in which claims are brought against semi-submersible heavy lift vessels or any other vessels that are designed exclusively for the carriage of heavy lift cargo for loss of, or damage to, or wreck removal of, cargo, save insofar as the carriage is undertaken on contractual terms that have been approved by the Association. The rationale for this exclusion is also the appreciation that the use of such specialised Ships can give rise to very substantial claims that are substantially greater in scale and quantum that the kind of claims that Members of a mutual association are prepared to share inter se.

The structures that are identified in Rules 60.1 and 60.2 are entitled to limited P&I cover. However, those Rules must be read subject to the overriding requirement that, to qualify for any degree of cover, the various structures described in those Rules must satisfy the definition of ‘Ship’ in Rule 1.1. and the definition of ‘eligible vessel’ under the Pooling Agreement. Rule 1.1 defines a Ship as follows: a “ship or other floating structure entered in the Association (other than a mobile offshore unit entered in accordance with Part III of these Rules)”. Furthermore, Appendix II of the Pooling Agreement defines an ‘eligible vessel’ as:

“Any ship, boat, hydrofoil or other description of vessel (including a lighter, barge or similar vessel howsoever propelled but excluding (a) a unit or vessel constructed or adapted for the purpose of carrying out drilling operations in connection with oil or gas exploration or production and (b) a fixed platform or fixed rig) used or intended to be used for any purpose whatsoever in navigation or otherwise on, under, over or in water or any part of such ship, boat, hydrofoil, hovercraft or other description of vessel or any proportion of the tonnage thereof or any share therein.”

Provided that the various structures that are identified in Rule 60.1 comply with such definitions, Members are entitled to P&I cover provided that the claims also comply with the Rules and any other terms that may have been agreed between the Association and the Member other than for liabilities, losses, costs or expenses that arise out of, or during the course of, drilling or production operations that are specifically excluded by Rule 60.1.

Similarly, semi-submersible heavy lift vessels and any other vessels that are designed exclusively for the carriage of heavy lift cargo and which otherwise satisfy the definition of ‘Ship’ in Rule 1.1 are entitled to P&I cover other than for liability for loss or damage to, or wreck removal of, cargo, unless such carriage is undertaken on contractual terms that have been approved by the Association.
Such restrictions apply only to cover that is subject to the sharing and reinsurance arrangements of the Pooling Agreement. However, the Association provides alternative cover for mobile offshore units which is not reinsured in the Pool.

(A) For drilling vessels, barges and any other vessels or barges...employed to carry out drilling or production operations in connection with oil or gas exploration or production...the Association shall not cover under a P&I entry any liabilities, losses, costs or expenses arising out of or during drilling or production operations. (Rule 60.1)

It must be appreciated that the P&I cover that is available under Rule 60.1 is limited either by the nature of the relevant structure or vessel and/or by the nature of the operation in which that structure or vessel is engaged. These restrictions apply since it is considered that the risks to which the Association would otherwise be exposed are not risks that should be shared by the membership of a marine mutual association.

Since the P&I cover that is made available by the Association is restricted to structures that comply with the definition of ‘Ship’ in Rule 1.1 and ‘eligible vessel’ in Appendix II of the Pooling Agreement (see above), the scope of P&I cover that is available to vessels that are engaged in drilling operations is extremely limited by virtue of the nature of the ship.¹ However, storage tankers or other vessels that are engaged in the storage of oil may comply with such a definition. If so, it is also necessary, in order to determine whether cover is available, to consider whether the relevant liabilities, losses etc., were incurred whilst such vessels were engaged in production operations as defined for the purpose of Rule 60.1 or as a result of such operations. Rule 60.1.(i) states that a Ship is deemed to be engaged in such production operations either when the oil is transferred directly from a producing well to the storage tanker or when the storage tanker has oil and gas separation equipment on board and gas is being separated from oil whilst on board the storage tanker other than by natural venting.

Rule 60 does not establish the period during which a Ship is deemed to be engaged in drilling operations but, it does so in relation to production operations, i.e. from the time that a connection has been made between the Ship and the production site for the purposes of cargo production until such connection has been permanently disconnected including any times during which the connection between the Ship and the production site has been temporarily disconnected. The rationale for such exception is that during such period, the Ship is not able to trade as a traditional vessel and is exposed to very substantial liabilities, losses, costs and expenses that are very different in nature to those that arise normally in the ordinary course of the operation of ships, e.g. an explosion or a fire on a platform, or an uncontrolled

¹ It is unlikely that a drilling vessel can satisfy the test of ‘eligible vessel’ for the purposes of Appendix II of the Pooling Agreement.
flow of oil or gas from a well. However, cover is not excluded for liabilities, losses etc. that are incurred by specialist vessels or structures that satisfy the definitions of ‘Ship’ in Rule 1.1 and ‘eligible vessel’ in Appendix II of the Pooling Agreement when they are employed otherwise than in carrying out drilling or production operations in connection with oil or gas exploration or production, e.g. for oceanographic research purposes such as core sampling and well stimulation.

(B) …arising out of or during drilling or production operations. (Rule 60.1)
Cover for all liabilities, losses, costs and expenses is excluded if they arise either:

i  ‘out of drilling or production operations’, i.e. if they are caused by, or occur as a result of, such operations; or

ii  ‘during’ such operations, i.e. they occur whilst the Ship is engaged in such operations but regardless of whether they are in fact caused by such operations or by a normal marine or other risk.

For example, if a member of the Crew of the Ship is injured as a result of a gas blow-out, cover is excluded for any liability that the Member may have for any claim that is brought against him by the Crew member. However, cover is also excluded for liabilities, losses etc., that are incurred by a Member if a member of the Crew is injured as a result of falling down a stairwell during the course of drilling operations in circumstances which could equally have occurred even if the Ship had not been engaged in drilling activities at the time.

(C) For the purpose of this Rule 60.1 the Ship shall be deemed to be carrying out production operations if… (Rule 60.1)
Rule 60.1 describes the type of activities that are deemed to constitute production operations for the purposes of the Rule. The factor that links all of them is the use of the Ship as a storage or product separation facility and not as a means of carrying passengers or cargo.

(D) …accommodation units moored or positioned on site as an integral part of such operations… (Rule 60.1)
For the purposes of Rule 60 an accommodation unit is considered to be engaged in drilling or production operations when the vessel is moored or positioned on site as an integral part of such operations even though the vessel is not directly involved in the drilling or exploration process. However, cover is not excluded for liabilities that arise as a result of events that occur at a time when the accommodation unit is proceeding to or from the site.²

² An accommodation unit is a Ship as defined in Rule 1 and is therefore entitled to cover under Rule 2 unless it is a mobile offshore unit that is entered in accordance with Part III of the Rules.
(E) For semi-submersible heavy lift vessels and any other vessels designed exclusively for the carriage of heavy lift cargo the Association shall not cover under a P&I entry liability for loss of or damage to or wreck removal of cargo... (Rule 60.2)

Semi-submersible heavy lift vessels and any other vessels that are designed exclusively for the carriage of heavy lift cargo and which otherwise comply with the definition of ‘Ship’ in Rule 1.1 are entitled to P&I cover except for liability for loss of or damage to, or wreck removal of, cargo, unless such liability arises under the terms of a contract of carriage that have been approved by the Association.

The restriction of cover that is described in Rule 60.2 applies only to vessels that are designed exclusively for the carriage of heavy lift cargo. Therefore, the restriction does not apply to ships that have the capability to carry heavy lift cargo but which are not designed exclusively for that purpose and which regularly carry other forms of cargo as well as heavy lift cargo. The question of whether a vessel is designed exclusively for the carriage of heavy lift cargo is a question of fact depending on all the circumstances.

Cover is restricted for such vessels since the activities in which they are engaged can result in very heavy losses that are not compatible with the risks to which Members that operate conventional Ships are normally exposed. The cargoes that are normally carried by such vessels are extremely large and valuable components for on or offshore industrial projects that are transported to sites such as oil and gas exploration fields. Due to the weight and/or value of the cargo, the limits of liability that may apply in the event of claims may be very high. Furthermore, the cost of removing or raising cargo from the wreck of such a vessel, or after cargo has fallen from such a vessel, is normally very high. Consequently, it is considered that the liabilities, losses etc., that arise as a result of the carriage of such cargo on such ships differ substantially in nature and scale from those that the membership as a whole will normally expect to bear when operating their Ships. Consequently, Rule 60.2 provides that cover is available from the Association only if the carriage is undertaken on contractual terms that have been approved by the Association.

However, the restriction extends only to liabilities, losses etc., that arise in relation to claims for the loss of, or for damage to, or for the wreck removal of cargo, i.e. the type of liability for which cover would otherwise be available under Rules 34 or 40. Therefore, P&I cover is available for other types of claim that may be made against such vessels, e.g. for claims that are made in relation to the Crew under Rule 27.

(F) ...save insofar as the carriage is undertaken on contractual terms approved by the Association (Rule 60.2)

The purpose and aim of this provision is to ensure that the Association does not provide cover for liabilities, losses etc., that arise in relation to the carriage of heavy lift cargo on Ships that are designed exclusively for such carriage under terms
of carriage that are not considered to be acceptable to the Association or which are excluded under the Pooling Agreement. Cover is available for liabilities that arise pursuant to the terms of the Heavycon 2007 charterparty since such terms are approved by the Association provided that the charterparty has not been materially amended.
Rule 61 Submarines, diving bells and divers
The Association shall not cover under a P&I entry liabilities, losses, costs or expenses arising out of
a the operation by the Member of submarines, mini-submarines or diving bells; or
b the activities of professional or commercial divers where the Member is responsible for such activities other than
i activities arising out of salvage operations being conducted by the Ship where the divers form part of the crew of the Ship (or of diving bells or other similar equipment or craft operating from the Ship) and where the Member 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 Ship or in relation to damage caused by the Ship; and
iii recreational diving activities.

Guidance
(A) The Association shall not cover...liabilities, losses, costs or expenses arising out of... (Rule 61)
The risks that the members of a marine mutual association agree to share inter se are risks that relate to the surface transportation of passengers and cargo. Risks that arise solely as a result of submarine activities are of a different nature and cannot be easily accommodated within the cost sharing structure of a marine mutual association. Therefore, Rule 61 excludes cover for liabilities, losses etc., that are incurred by the Member in relation to such activities to the extent that they cannot be said to arise as a natural and necessary adjunct and component of the operation of the Ship.

(B) ...the operation by the Member of submarines, mini-submarines or diving bells... (Rule 61.a)
Subject to when used in connection with the salvage operations that are described in Rule 61.b, Rule 61.a excludes risks that arise as a result of the operation by the Member of submarines, mini-submarines or diving bells.

Cover is excluded regardless of the reason why such craft are being used. Therefore, cover is excluded whether the craft is being used in a manned or unmanned condition for scientific research purposes or for commercial or any other purposes, e.g. as an underwater camera, diving bell or trencher operated from a diving support or survey vessel.

Cover is excluded when such liabilities, losses etc., as a result of the operation of underwater craft by the Member and will usually arise when the craft are operated by the Member himself from the Member's Ship. However, the craft will also be deemed to be operated by the Member if the Ship is chartered and any underwater craft that are owned by the Member are operated by the charterers from the Member's Ship. However, if the Ship is chartered, but is used by the charterers as a
base for their own underwater craft, the Association may take the view, depending on the particular circumstances, that the craft are not being operated by the Member for the purposes of Rule 61.a.

The Member may also incur liability when the underwater craft are being operated by a third party pursuant to a contract that makes the Member liable for such operations. If the Association has not approved such contractual terms, then cover for the Member's liability is excluded under Rule 55.

(C) ...the activities of professional or commercial divers where the Member is responsible for such activities other than... (Rule 61.b)
Rule 61.b excludes all risks that arise “out of the activities of professional or commercial divers” (except for when such activities arise in connection with specified salvage, inspection, repair and maintenance operations, or recreational activities)\(^1\) in circumstances in which the Member is responsible for such activities. For example, cover is excluded for liabilities, losses etc., that are incurred by the Member for the death of, or for personal injury to, professional or commercial divers, and for any third-party liabilities that arise as a result of the activities of such divers.

Liabilities, losses etc., are deemed to ‘arise out of’ the activities of professional and commercial divers for the purposes of Rule 61 only when they arise during the course of events that occur whilst the divers are actually engaged in diving activities. Consequently, the exclusion does not apply to claims that are made against the Member as a result of events that occur, for example, whilst the divers are being carried by the Ship to or from the dive site, or whilst the divers are being carried by the Ship in between dives.

Cover is excluded only in relation to the activities of those professional and commercial divers for whose activities the Member is responsible. In the majority of cases, cover is excluded because the divers are employed and paid by the Member, but cover is also excluded if the Member has agreed to indemnify a third party employer of divers since the Member is also responsible for the activities of the divers in such circumstances.

(D) ...activities arising out of salvage operations... (Rule 61.b.i)
Traditionally, the availability of salvage operations has been considered to be an essential safeguard for the operation of ships, and the use of divers to carry out inspections or any other work that may be necessary for such purposes to be an integral component of salvage operations. Consequently, the risks that arise as a result of such diving activities are considered to be risks that should be shared by the members of a marine mutual association. Therefore, cover is not excluded for the activities of professional and commercial divers that are employed by the

\(^1\) See (D) and (E) below.
Member either on board an entered Ship as members of the Crew, e.g. where the Ship is a salvage tug, or on subsidiary craft that operate from the Ship as the mother vessel in salvage operations.

(E) …incidental diving operations carried out in relation to the inspection, repair or maintenance of the Ship in relation to damage by the Ship. (Rule 61.b.ii)

Such activities are considered to be necessary for the safe operation of the Ship and consequently, cover is not excluded for liabilities, losses etc., that arise as a result of such activities. Cover is available even if the divers are employed by third parties. However, should the Member incur liabilities which would not have arisen but for the terms of a service contract pursuant to which the divers have been appointed, cover is not available unless the terms of the contract have been approved by the Association or the Association decides in its discretion that the Member should be reimbursed.²

(F) …recreational diving activities (Rule 61.b.iii)

The operators of cruise ships and other passenger ships offer their passengers a range of recreational pursuits that include training by professional divers or diving expeditions that are led and/or accompanied by professional divers that are employed or contracted by the operators of such Ships. Such activities are considered to be a safe and logical adjunct to the services that are provided by the operators of such Ships.³ Consequently, cover is not excluded for liabilities, losses etc., that arise as a result of the provision of such services by professional divers that are employed by the Member, or for whose services the Member is responsible. However, as is stated in the commentary under (E), should the Member incur liabilities which would not have arisen but for the terms of a service contract pursuant to which the divers have been appointed, cover is not available unless the terms of the contract have been approved by the Association or the Association decides in its discretion that the Member should be reimbursed. Cover is unlikely to be available if the terms of the contract oblige the Member to indemnify the divers notwithstanding the fact that the liability that the divers incur to passengers who have been engaged in the recreational diving activities has been caused by the divers’ negligence.⁴ Therefore, to ensure that cover is available, Members are urged to ensure that the terms of such contracts have been approved by the Association.

The Association is also able to offer alternative cover for certain liabilities, losses etc., that arise as a result of diving activities that are excluded under Rule 61.⁵

² See the Guidance to Rule 55.
³ See (A) to the Guidance to Rule 28.
⁴ See also (F) to the Guidance to Rule 57.
⁵ See further details of the Divers P&I Cover on www.gard.no
Rule 62 Waste incineration, disposal operations and landfills

1 The Association shall not cover under a P&I entry liabilities, losses, costs or expenses arising out of waste incineration or waste disposal operations carried out by the Ship (other than any such operations carried out as an incidental part of other commercial activities).

2 Unless and to the extent that the Association in its discretion shall otherwise decide, the cover under a P&I entry does not include any liability, loss, cost or expense, including, without limitation, liability for the cost of remedial works or clean up operations, arising as a result of the presence in, or the escape or discharge or threat of escape or discharge from, any land based dump, site storage or disposal facility of any substance previously carried on the Ship whether as cargo, stores or waste and whether at any time mixed in whole or in part with any other substance whatsoever.

Guidance

A) …waste incineration or waste disposal operations carried out by the Ship (other than any such operations carried out as an incidental part of other commercial activities) (Rule 62.1)

Rule 62.1 excludes cover for liabilities, losses, costs and expenses that arise as a result of waste incineration or waste disposal operations that are carried out by Ships that engage in such activities as their primary commercial function. However, cover is not excluded where waste incineration or disposal occurs as a necessary and incidental part of other commercial activities, e.g. the incineration or disposal of the Ship’s own waste. The Ship’s own waste constitutes ‘any other substance’ for the purposes of Rule 38 and, therefore, should the Member incur liability as a result of the accidental discharge or escape of such material from the Ship, cover is available under Rule 38.1 However, if such material is allowed to escape from the Ship as a result of the wilful negligence of the Member then cover is excluded under Rule 72.2 If the Member is a corporation, Rule 72 will apply only if the wilful negligence is that of the person that is considered to be the alter ego of the corporation.3

(B) …the cover under a P&I entry does not include any liability…arising as a result of the presence in, or the escape…from, any land based dump…of any substance previously carried on the Ship… (Rule 62.2)

Rule 62.2 was introduced in order to protect the Association against claims that could be made against the Member as a result of problems that can arise after the removal from the Ship of substances that have previously been carried on the Ship, whether as cargo, stores or waste. Such liabilities can arise, for example, under the provisions of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) of the United States which gives local authorities or other

1 See (G) of the Guidance to Rule 38.
2 See the Guidance to Rule 72.
3 See (C) of the Guidance to Rule 72.
parties that are affected by the presence of such substances on shore (e.g. by contaminated cargo that has been taken for disposal to a land based dump), the right in some instances to hold the Member responsible for such post-discharge problems on the basis that the original cause of the problem can be traced back to the Member's Ship. Such liabilities, losses etc., are not considered to arise ‘in direct connection with the operation of the Ship’ and, consequently, cover is excluded for such liabilities etc., by Rule 62.2.

(C) …any liability, loss, cost or expense, including, without limitation, liability for the cost of remedial works or clean up operations, arising as a result of the presence in, or the escape or discharge or threat of escape or discharge from… (Rule 62.2)

Rule 62.2 is intended to exclude cover for any liabilities, losses, costs or expenses that arise in any way whatsoever as a result of the presence of the relevant substances on, or in, the land based dump, or as a result of the actual or threatened escape or discharge of such substances from such a facility. For example, the owner of the facility or the local authority might hold the Member liable for substantial clean up costs that are incurred by them should toxic substances escape from the site, or for substantial costs that are incurred in order to ensure that this does not happen. Alternatively, very large claims could be made against the Member if those who live or work in the vicinity of the site were forced to evacuate the area as a result of the escape of noxious or harmful gases emanating from substances that had previously been taken from the Ship. Cover is not available in such circumstances, nor in any other circumstances that arise as a result of the fact that such substances are present in such a facility.

(D) …whether as cargo, stores or waste… (Rule 62.2)

So long as the substance that has been taken ashore originated in the Ship it does not matter whether it was previously carried as cargo or as stores or as waste. Cover is excluded in all such circumstances.

(E) …and whether at any time mixed in whole or in part with any other substance whatsoever. (Rule 62.2)

Cover is excluded in the event that any part of the substance that has been taken to the land based dump etc., originated on the Ship. It does not matter that such a substance has been mixed with any other substance, whether in whole or on part, and whether that occurred before or after discharge from the Ship. For example, such admixture could occur when contaminated cargo is mixed with other contaminated cargo from another ship, or with some other substance in a barge after discharge from the Ship and before the mixed commodity is taken to the land based dump.

4 See the Guidance to Rule 2.4.a.
(F) …Unless and to the extent that the Association in its discretion shall otherwise decide… (Rule 62.2)

However, the Association is given the discretion in the circumstances that are described in Rule 62.2 to make cover available either in full or in part and on such terms as it thinks appropriate in the particular circumstances. Such discretion will be exercised on a case by case basis depending on the particular circumstances.

5 Such discretion can only be exercised by the Board of Directors of the Association. See Article 6.5.b of the Bye-Laws of Gard P. & I. (Bermuda) Ltd. and Article 9.3.b of the Statutes of Assuranceforeningen Gard -gjensidig-.


**Rule 63 Excluded losses**

1. The Association shall not cover under a P&I entry, except where and to the extent that they form a part of a claim for expenses under Rule 46 (measures to avert or minimise loss):

   a. loss of or damage to the Ship or any part thereof except to the extent that it forms part of a claim recoverable under Rule 49 (Confiscation of the Ship);
   
   b. loss of or damage to any equipment on board the Ship or to any containers, lashings, stores or fuel thereon, to the extent that the same are owned or leased by the Member or by any company associated with or under the same management as the Member;
   
   c. the cost of repairs to the Ship or any charges or expenses in connection therewith except to the extent that they form part of a claim recoverable under Rule 41 (General average);
   
   d. claims by or against the Member relating to loss of freight or hire on the Ship or any proportion thereof unless freight or hire forms part of a claim for liabilities in respect of cargo;
   
   e. costs of salvage or services in the nature of salvage, rendered to the Ship and any expenses in connection therewith except to the extent that they form part of a claim recoverable under Rule 33 (Life salvage), Rule 41 (General average) or Rule 42 (Salvage);
   
   f. liabilities, losses, costs or expenses arising out of salvage operations (including for the purposes of this sub-paragraph f, wreck removal) conducted by the Ship or provided by the Member, other than:
      
      i. liabilities, costs and expenses arising out of salvage operations conducted by the Ship for the purpose of saving or attempting to save life at sea; and
      
      ii. liabilities, costs and expenses incurred by a professional salvor which are covered by a special agreement between the Member and the Association, and which arise out of the operation of, and in respect of the Member’s interest in the Ship;
   
   g. liabilities, losses, costs or expenses arising out of cancellation of a charter or other engagement of the Ship;
   
   h. claims by or against the Member relating to demurrage on, detention of or delay to the Ship, unless such demurrage, detention or delay is covered under Rule 34.
   
   i. liabilities, losses, costs or expenses which would have been recoverable in General Average if the York Antwerp Rules 1994 had been incorporated into the charterparty or the contract of carriage.
   
   j. liabilities, losses, costs and expenses arising from the use of any electronic trading system, other than an electronic trading system approved in writing by the Association, 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
subparagraph (j) 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.

For the purpose of this sub-paragraph (j) a “document” shall mean anything in which information of any description is recorded including, but not limited to, computer or other electronically generated information.

2 The Association shall not cover general monetary loss, or loss of time, loss through price or currency fluctuations, loss of market or similar loss resulting from delay, except where the Member is legally liable to a third party for such loss and such liability is covered by the Association under these Rules.

Guidance
At first glance, Rule 63 appears to be a varied and somewhat random mix of claims that are either excluded from the cover that is available for P&I claims or which provide exceptions to such cover. However, there are some common factors that link many of the different exclusions, namely, that they are:

• claims that relate to the actual or potential damage to, or the loss of, the Ship and which are therefore, the subject of property insurance rather than liability insurance (Rule 63.1.a-c and e.); or

• claims that relate to the trading losses of the Member and which are therefore, the subject of what is collectively called, loss of hire insurance rather than liability insurance (Rule 63.1.d and f- h); or

• claims that arise because of the fact that Members are engaged in activities that increase the risk that is normally encountered by the majority of Members that engage in traditional shipping activities (Rule 63.1.i-j); or

• claims that relate to delay, which is an excluded risk under most traditional marine policies (Rule 63.2); or

• claims that relate to purely monetary losses, which are not considered to be claims that arise in direct connection with the operation of the Ship for the purposes of Rule 2.4.a (Rule 63.2).

Therefore, since Rule 63 is intended to be a gloss on the cover that is otherwise available in most cases under one or more of the other Rules in Part II, it must be read together with, and in the light of, the other Rules in Part II (P&I cover). Consequently, the fact that cover is not excluded under Rule 63 does not necessarily
mean that cover is available. It is also necessary to prove that cover is made available for the particular liability, loss, cost or expense by the Statutes and one or more of the specific Rules.

(A) The Association shall not cover under a P&I entry... (Rule 63.1)
Rule 63 excludes cover for specified claims that arise in relation to P&I cover. Therefore, the Rule does not apply to Defence cover\(^1\) which may still be available to the Member for legal and other costs that may be incurred by him in pursuing or defending such claims.

(B) ...except where and to the extent that they form part of a claim for expenses under Rule 46... (Rule 63.1)
Extraordinary costs and expenses that are either reasonably incurred by a Member for the purpose of avoiding or minimising any potential liability that the Association may incur for claims pursuant to Rule 46, or which may be incurred at the Association’s direction, may be covered,\(^2\) even though such claims may include items such as the cost of repairs to the Ship that would otherwise be excluded under Rule 63.

(C) ...loss of or damage to the Ship or any part thereof except to the extent that it forms part of a claim recoverable under Rule 49... (Rule 63.1.a)
The Member is expected to insure himself against damage to, or loss of, the Ship under marine hull and machinery or war risk policies, that are completely separate from the cover that is provided by the Association.\(^3\) The insurance that is provided by the Association is insurance against liabilities, losses, costs and expenses that arise in direct connection with the operation of the entered Ship. Consequently, Rule 63.1.a makes it clear that claims for damage to, or for the loss of, the Ship are excluded from P&I cover except to the extent that the Association exercises its discretion to extend cover under Rule 49 for the loss of the Ship by confiscation as a result of the infringement by the Member of customs laws etc.\(^4\)

The cause and the nature of the ‘loss of or damage’ is not relevant. The phrase is broadly construed and includes not only the loss of, or physical damage to, the Ship that is caused by traditional marine risks such as collision, grounding etc., but also the loss of, or damage to, the Ship that is caused by other events such as theft, hijack or contamination which reduces the Ship’s value.

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1 See the Guidance to Rule 65.
2 See the Guidance to Rule 46.
3 See the Guidance to Rules 50 and 71.
4 See the Guidance to Rule 49.
Cover is excluded regardless of the type of entry. Therefore, the exclusion applies equally to a charterer that has entered the Ship under a Charterer’s Entry as it does to the owner of the Ship who has entered it under an Owner’s Entry. Therefore, cover is excluded for liabilities that are incurred by a charterer for the loss of, or damage to, the Ship that is caused, e.g. by the shipment of dangerous goods or by sending the Ship to an unsafe port.\(^5\)

The exclusion applies not only to the loss of, or damage to, the Ship, but also to the loss of, or damage to, ‘any part’ of the Ship. However, a distinction is drawn between the loss of, or damage to, the Ship ‘and the loss of, or damage to ‘equipment on board the Ship’ which is the subject matter of Rule 63.1.b.\(^6\) For example, if part of the Ship’s hull structure such as the bow section, were to be lost after a collision or other event, or if damage were to be caused to the Ship’s fixed derricks by shore based stevedores, cover is excluded for such loss by virtue of Rule 63.1.a.

\(^{(D)}\) …loss of or damage to any equipment on board the Ship or to any containers, lashings, stores or fuel thereon, to the extent that the same are owned or leased by the Member or by any company associated with or under the same management as the Member… (Rule 63.1.b)

Rule 63.1.b excludes cover for the loss of, or for damage to, containers, lashings, stores, fuel or any other ‘equipment’ that is on board the Ship. The word ‘equipment’ is broadly interpreted and includes all items that are used either for the trading or the operation of the Ship (e.g. radio equipment), or for her maintenance (e.g. spare parts).

However, the exclusion applies only to equipment etc., that is owned or leased by the Member or by associated or co-managed companies. The phrase ‘owned or leased by’ is broadly construed and no technical legal distinction is intended to be drawn between various kinds of ownership or lease-holding. For example, Rule 63.1.b excludes cover in circumstances where containers have been leased to the Member, notwithstanding the fact that the Member may be liable to the owners of the containers pursuant to the terms of the leasing agreement for loss of, or for damage to, the containers.

Cover is not excluded for the loss of, or for damage to, cargo even if the cargo is actually owned by the Member.\(^7\) Therefore, cover is excluded for loss of, or damage to, the Ship’s bunkers,\(^8\) but not for the loss of, or for damage to, fuel that is carried by the Ship as cargo.

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\(^5\) Cover for such risks is available under Gard’s Comprehensive Charterers’ Liability Cover further details of which are available on www.gard.no.

\(^6\) See (D) below.

\(^7\) See the Guidance to Rule 50.

\(^8\) See also the commentary in (A) of the Guidance to Rule 50.
(E) ...cost of repairs to the Ship or any charges or expenses in connection therewith... (Rule 63.1.c)

Since cover is excluded for damage to the Ship or any part thereof, cover is also excluded for the cost of repairing such damage. For example, the exclusion applies to dry docking expenses, port charges and all other ‘charges and expenses’ that are connected with the repairs. However, cover may be available in some circumstances under Rule 41 for the cost of repairs that are reasonably necessary for the common safety of the marine adventure, and which may, therefore, be recoverable in general average.

(F) ...loss of freight or hire on the Ship...unless freight or hire forms part of a claim for liabilities in respect of cargo... (Rule 63.1.d)

The phrase ‘freight or hire’ is construed broadly to encompass all forms of remuneration that is payable by, or to, the Member for the use of the Ship or part of the Ship for the purposes of carrying cargo (including the Member’s own cargo) and passengers. It also includes the freight that would have been payable to the Member if the cargo had been delivered. Cover is excluded whether the right to remuneration arises under a contract such as a charterparty or Bill of Lading, or otherwise by operation of law, and regardless of whether such loss is suffered by the Member as shipowner or as charterer.

However, cover is not excluded to the extent that the claim for loss of freight or hire is an integral part of a claim for breach of the Member’s duties in relation to cargo. For example, if the cargo has been sold on CIF (Cost, Insurance, Freight) terms, the freight is a component of the value of the cargo for the purposes of the cargo claim. Similarly, if freight or hire is withheld by charterers or cargo interests as compensation or as security for cargo claims for which the Member has cover under Rule 34, cover for that compensation is not excluded under Rule 63.1.d for that proportion of the withheld freight or hire that is equivalent to the Member’s liability for the cargo claim. However, if the charterer is allowed by the terms of the charter to withhold from the freight the value of unpumpable cargo that remains on board after completion of discharge despite the fact that such ‘apparent loss’ has not resulted from any breach of contract on the part of the Member, cover is excluded under Rule 63.1.c for the withheld freight. The rationale for this is that the clause is not intended to provide the charterer with a remedy for a cargo claim but merely to entitle the charterer to pay less freight.

When considering the cover available under this sub-Rule and also Rule 63.1.h, the inter-relationship between Rule 34 and these two exclusions in Rule 63 should be kept in mind.

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9 See the Guidance to Rule 41.
10 For example, pursuant to a slot or part cargo charterparty.
11 Such rights are given by Cargo Retention or ROB clauses which are found in some tanker charters.
In many cases concerning cargo damage, the Ship will be delayed, e.g. because there is a delay in discharge whilst cargo interests decide what to do with the damaged cargo and how best to mitigate their loss. The lost time resulting from that delay will often give rise to claims for demurrage and hire as between owners and charterers and perhaps sub-charterers. P&I cover is not available for loss of earnings, nor for loss of time in the use of the Ship; it is a third party liability cover. Whilst cargo damage and delay may arise from a covered breach of contract, e.g. a failure to exercise due diligence to make the Ship seaworthy, that obligation will typically apply not only to the carriage of the cargo but also to the use/earnings of the Ship. Claims by or against the owner for unpaid freight, hire or demurrage in respect of the Ship are not claims for liabilities in respect of cargo or claims covered under Rule 34, even if those claims would not have arisen but for the cargo damage. They are claims in relation to the use and earnings of the Ship. Even if a charterer withholds freight, demurrage or hire because of a cargo claim, perhaps with a view to setting off one claim against the other, they are separate claims and the applicable law will determine whether the charterer is entitled to withhold such monies. The costs of handling the Member's claim for recovery of the withheld amount will fall under the Defence cover. As a practical solution, the Association may be willing to exercise its discretion to provide security for the cargo claim in exchange for the charterer paying the monies due to the Member.

If the party bringing a cargo claim includes in that claim freight, demurrage and hire, that does not automatically mean that P&I cover is available for those elements. As explained in Rule 34 cover is available for a claimant’s consequential losses as a result of cargo damage, but if the claimant is not ultimately legally responsible for freight, demurrage or hire in respect of the Member's Ship that is not a consequential loss on cargo, it is more properly the Member's loss in the earnings of the Ship. Therefore, even if freight, demurrage or hire is strictly payable in the first instance by the claimant in accordance with the terms of the contract (e.g. a delay in discharge arises from damaged cargo but does not trigger an off-hire clause or stop laytime, which will often be the case), but the claimant is able to claim these back as damages as a consequence of owner's breach of the contract, e.g. unseaworthiness, the loss of earnings lies ultimately with the owners. The same applies where the owner seeks to claim freight, demurrage or hire which has not been paid and there is a cross claim for damages in an equal amount giving rise to a defence of ‘circuity of action’. This would be consistent with the legal principle of not being able to claim for monies arising from one's own fault.

Examples of what freight, hire or demurrage would fall outside the Rule 63 exclusions and would be considered to be part of a claim for liabilities in respect of cargo or covered under Rule 34 would include freight, hire or demurrage paid by the claimant for another vessel as a consequence of the owner’s breach causing cargo damage and which is a legally recoverable consequential loss. For example, there may not be space at the place of discharge to store damaged cargo and so
the claimant pays freight and demurrage or hire for a barge until such time as he can deal with the damage cargo. There may also be a liability for freight where there is no cargo damage. If the Ship were unable to complete a cargo carrying voyage which is cut short by unseaworthiness, cargo interests may elect to pay increased freight costs to complete the carriage on another ship or increased freight costs by sending a substitute cargo. If those costs are found to be a legally recoverable loss, then cover would be available.

\[\text{(G)}\] \(\ldots\)costs of salvage or services in the nature of salvage, rendered to the Ship... (Rule 63.1.e)

A salvor is entitled to remuneration under a salvage agreement or the general law in proportion to the value of the property saved. Therefore, a salvor can normally expect to receive remuneration from the owners of the ship, the owners of the cargo and any other interests that are at risk such as the owners of bunkers and freight. That proportion of the cost of salvage or similar services that is payable by the ship is normally paid by the hull insurer. Consequently, Rule 63.1.e makes it clear that cover is not available from the Association in that regard, unless the amount that has been paid to the salvor by the Member is recoverable as life salvage under Rule 33,\(^{12}\) or as a general average claim under Rule 41\(^{13}\) or as special compensation that has been awarded to a salvor under Rule 42.\(^{14}\)

\[\text{(H)}\] \(\ldots\)liabilities, losses, costs or expenses arising out of salvage operations conducted by the Ship or provided by the Member... (Rule 63.1.f)

Whereas Rule 63.1.e excludes cover for the costs of salvage services that have been rendered to the Ship, Rule 63.1.f excludes cover for liabilities, losses, costs or expenses that arise as a result of salvage services (which include, for the purposes of this sub-paragraph, wreck removal services)\(^{15}\) that have been rendered by the Ship or provided by the Member other than in the circumstances outlined in sub-paragraphs (i) and (ii).

Due to the inherently dangerous and unpredictable nature of salvage and wreck removal operations, those parties that engage in such activities can cause further loss or damage to the property that is being salved or removed, or to other property, e.g. to other ships that are assisting the salvage or wreck removal operation, or to cargo, or to the environment. Such loss or damage can be caused either by the ship that is being used by those that are conducting such operations, or by other ships that have been sub-contracted by them to assist in such operations, or even by the personnel that are employed by such persons when working away from their mother

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12 See the Guidance to Rule 33.
13 See the Guidance to Rule 41.
14 See the Guidance to Rule 42.
15 From commentary relating to the cover that is available to the Member for the costs, expenses and liability incurred as a result of the wreck removal of the entered Ship see the Guidance to Rule 40 (Liability for obstruction and wreck removal)
vessel, e.g. divers that are working on the wreck or under a ship that is being saved. Consequently, Rule 63.1.f establishes that cover is excluded for liabilities, losses, costs and expenses that arise out of salvage operations (which, for the purposes of this sub-paragraph include wreck removal and cargo salvage operations) that are performed by the Ship, or by the Member in some other manner, unless they relate to:

i salvage operations that are conducted by the Ship for the purpose of saving or attempting to save life at sea. For example, if cargo is lost or damaged as a result of the fact that the Ship has sailed into a storm in order to save lives, cover is available for the Member’s liability to cargo under Rule 34 and such cover is not excluded under Rule 63.1.f; or.

ii liabilities, costs and expenses that are incurred by a Member that is a professional salvor and which arise out of the Member’s operation of the Member’s Ship as a salvage vessel, and which are covered pursuant to a special agreement between the Member and the Association.

(I) …cancellation of a charter or other engagement of the Ship… (Rule 63.1.g)
Cover is excluded for liabilities, losses, costs or expenses that arise as a result of the cancellation of a ‘charter or other engagement.’ The exclusion applies regardless of the type of ‘charter or other engagement’ that is cancelled, and regardless of whether the cancellation is effected by the owner or the charterer of the Ship, and of whether the cancellation is, or is not, legally valid.

However, cover is excluded only if there is a causal link between the cancellation of the charter or other engagement and the liabilities, losses etc., that are being claimed. Therefore, the exclusion does not apply to liability for loss of or damage to cargo that arises independently of the cancellation of the charter under which the cargo is being carried by the Ship.

Rule 63.1.g does not apply to contracts such as Bills of Lading or sea waybills since such contracts are not contracts for the use of a ship, but are contracts for the carriage of goods on ships, nor to passage or ticket contracts for the carriage of passengers. In the majority of cases, cover is available for claims relating to the cargo that is to be covered under such contracts under Rule 34, even if no formal

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16 The phrase ‘charter or other engagement’ includes all forms of charterparty, and all other forms of contracts for the use of the Ship, e.g. contracts of affreightment, and booking notes. Cover is also excluded if the ‘charter or other engagement’ relates merely to the use of part of the carrying capacity of the Ship, e.g. a slot charter or space sharing contract.
contract is ever drawn up, but cover is excluded under Rule 34, proviso v, for liabilities etc. that arise out of the Ship’s failure to load cargo that should have been loaded pursuant to the Member’s previously agreed commitment to do so.

(J) ...demurrage on, detention of or delay to the Ship... (Rule 63.1.h)

Reference should be made to the commentary in relation to Rule 63.1.d.

‘Demurrage’ is the amount that a charterer has contractually agreed to pay to a shipowner for any delay that has been caused to the ship as a result of the fact that the loading or discharging has taken longer than the time allowed by the contract, i.e. the laytime, or, if there is no agreed time, beyond a reasonable time. Traditionally, demurrage was payable only in such circumstances; however, there is a modern trend, particularly in the case of tanker charters, for demurrage also to be used to compensate a shipowner for delay that has been caused as a result of the fact that the charterers have asked the ship to stop or delay during the voyage, usually to enable the charterers to continue to negotiate or to renegotiate the terms of an underlying cargo sale contract.

‘Detention’ occurs when the Ship is not permitted to move or trade freely, e.g. because Bills of Lading and/or cargo documentation have not been produced by the charterer or shippers on completion of loading, or because passenger passports and seamen’s books have not been released by the local authorities. Detention may also occur because of technical faults that are discovered on board during the course of an investigation that has been carried out by port state control or by investigators after a casualty. Therefore, depending on the reason for the detention, claims may be made either by, or against, the Member for such delay.

Cover is excluded whether the claim is made by, or against, the Member, e.g. a claim by the Member as owner against the charterer for demurrage, or a claim that is brought against an owner by the Member as charterer for a failure to prosecute the voyage with reasonable dispatch. However, cover is excluded only to the extent that the claim is not otherwise covered under Rule 34 (Cargo liability). For example, cover is available for claims for loss of market or diminution in cargo value that may be brought by cargo interests against a Member as a result of the delayed arrival of the Ship at the discharge port. However, cover is excluded under Rule 34.1, proviso v, for liabilities, costs and expenses that arise as a result of the ‘late arrival of the Ship at port of loading’ or under proviso xi, for liabilities etc., that arise as a result of a deviation of the Ship on the carrying voyage.
(K) ...liabilities, losses, costs or expenses which would have been recoverable in General Average if the York Antwerp Rules 1994 had been incorporated into the charterparty or the contract of carriage. (Rule 63.1.i)

Rule 63.1.i provides that the cover that is available under Rule 41 does not include liabilities, losses, costs and expenses that would have been recoverable in General Average if the York Antwerp Rules (YAR) 1994 had been incorporated into the charterparty or the contract of carriage. The Association does not recommend the use of YAR 2004 (see below) and therefore, if a Member decides to use YAR 2004, cover is still assessed on the basis as if the YAR 1994 has been incorporated into the relevant charterparty or contract of carriage.

YAR 1994 represents a hard fought compromise between shipowner and property interests – particularly in relation to the types of pollution expenses that should be allowed in General Average. YAR 1994 excludes from General Average the costs of pollution clean-up and third party pollution liabilities incurred following a discharge, but in most instances allows the cost of preventive measures incurred prior to a spill, as well as the cost of preventing or minimising environmental damage if incurred, inter alia, as a condition of entry into or departure from a port of refuge, regardless of whether or not a spill has actually occurred.

Both prior to and after the adoption of YAR 1994 attempts have been made by charterers and cargo interests to introduce new clauses that are intended to restrict the shipowner’s rights to claim the contributions in General Average that can be made in accordance with YAR 1994.19 Furthermore, in 2004, a new version of the York Antwerp Rules (YAR 2004) was adopted without the support of all sides of the shipping industry. YAR 2004 provides for example that salvage costs shall not be included in and made subject to adjustment in General Average, whereas they are so included under YAR 1994.

Whilst the particular Member is free to decide for himself whether or not the governing contract of carriage or charterparty should incorporate YAR 1994 the principle of mutuality means that cover is available only for those risks which are regularly and commonly faced by the majority of the membership. Since the membership has determined that it does not condone any further erosion of the rights that the shipowners has under YAR 1994, Rule 63.1.(i) does not extend cover to liabilities, losses, costs and expenses that would have been recoverable in General Average if YAR 1994 had been incorporated into the charterparty or contract of carriage. This is consistent with the general provisions in Rules 55.a and b concerning terms of contract.20

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19 See Member circulars 8/98 and 1/97 for more information in this regard.
20 See (B) in the Guidance to Rule 55.
(L) ...liabilities, losses, costs and expenses arising from the use of any electronic trading system, other than an electronic trading system approved in writing by the Association, to the extent that such liabilities, losses, costs and expenses would not (save insofar as the Association in its sole discretion otherwise determines) have arisen under a paper trading system. For the purposes of this sub-paragraph (j) 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.

For the purpose of this sub-paragraph (j) a “document” shall mean anything in which information of any description is recorded including, but not limited to, computer or other electronically generated information (Rule 63.1.j)

Currently, there are no international conventions that regulate the rights and obligations of parties that use an electronic trading system. Consequently, such rights and obligations are governed by the terms of private contracts that are concluded between such users. Furthermore, electronic trading systems may give rise to liabilities, losses, costs and expenses that do not arise under paper trading systems such as, for example, liabilities that arise as a result of the malfunctioning of the electronic system itself or the fraudulent tampering with electronic records or as a result of unauthorised transmissions by third parties. Since the bulk of international trade still operates on the basis of paper documents that are regulated by international conventions such as the Hague, Hague-Visby and Hamburg Rules, the liabilities, losses, costs and expenses that are incurred by the majority of shipowners and charterers are those that arise solely as a result of such trading. Therefore, it is important, in the interests of mutuality, to ensure that Members share only those liabilities, losses, costs and expenses to which the membership as a whole is put at risk, and not liabilities, losses etc., that arise purely as a result of the use of electronic (i.e. paperless) trading systems.
Consequently, Rule 63.1.j confirms that cover is excluded for liabilities, losses etc., that would not have arisen but for the use of an electronic trading system unless the terms of such a system have been approved by the Association in writing, in which case cover is available as of right under the Standard P&I Cover. However, the Association and the other P&I clubs that are members of the International Group of P&I Clubs also try to accommodate those Members that may incur such liabilities under an electronic system that has not been approved in writing in advance by the Association. Therefore, the Association may in limited circumstances be able to obtain separate cover for its Members from market underwriters on terms to be agreed with the market underwriters and on payment of additional premium. However, such a facility is reviewed by the market insurers from year to year and on a case by case basis and there is no guarantee that a Member may be able to secure such cover. Further details are available from the Association’s underwriting department.

The exclusion contained in Rule 63.1.j does not apply to liabilities, losses, costs and expenses that would have been incurred in any event if a paper trading system had been used instead of an electronic trading system.

(M) …general monetary loss, or loss of time, loss through price or currency fluctuations, loss of market or similar loss resulting from delay… (Rule 63.2)

P&I cover is intended to protect or indemnify the Member against the kind of liabilities that are generally incurred by shipowners and charterers to third parties in direct connection with the operation of the Ship and not against losses that the Member incurs as a result of the individual way in which he chooses to operate his Ship. Such losses are not considered to be losses that should be shared by the membership generally, but losses that should be borne by the Member himself.

For example, Rule 63.2 excludes losses that are the result of entering into an unprofitable fixture, or of the unexpectedly high costs of manning and equipping the Ship, or of the loss of the Ship’s next fixture if the Ship is delayed as a result of bad weather. Similarly if the Member has agreed to charter the Ship at a certain rate in a certain currency, and the exchange rate for the chosen currency were to fluctuate disadvantageously against the Member’s operating currency, P&I cover is excluded for the loss that is thereby incurred.

21 The International Group of P&I Clubs keeps a record of electronic trading systems that may be approved by any club that is a party to the Pooling Agreement including details of the terms and conditions that govern the use of such systems. Currently, the systems that have been approved by the Group are the BOLERO Rulebook/Operating Procedures September 1999 and the Electronic Shipping Solutions (ESS) DSUA 2009.3 and DSUA 2013 systems. Further information can be found in Gard circulars 10/2010 and 1/2013 and in the “Frequently Asked Questions” that may be found on www.gard.no.
However, Rule 63.2 only excludes cover for the Member’s own loss. Cover is not excluded for the liability that the Member has for losses that are incurred by a third party in circumstances where such liability is covered by the Rules. Therefore, cover is available under Rule 34 for the liability that the Member may have to the owners of cargo for market losses that are suffered by them as a result of the delayed arrival of the Ship at the port of discharge.
Rules

Part III – Cover for Mobile Offshore Units
Rule 64 Terms of cover

Cover for mobile offshore units may be made available by the Association on the terms of separate Rules, and the provisions of the other parts of these Rules shall not apply.

Guidance

A mobile offshore unit differs from the traditional form of ship in that its mobility is merely incidental to its main function, which is to be an integral part of the production operations of the site at which it is located. It includes equipment that is intended purely for that production operation such as risers, flowlines, umbilicals, floating hoses, buoyancy floats or tanks and mooring systems. Consequently, the risks that arise in relation to the operation of such units are very different in nature to those that arise in relation to the operation of the more traditional types of ships, and are, therefore, difficult to accommodate into the mainstream structure of a mutual association that is designed to insure ships of the traditional type.

For this reason the P&I clubs that are members of the International Group of P&I Clubs have agreed to exclude risks relating to such units from the risks that they share inter se by inclusion of the following provision in Appendix II of the Pooling Agreement which defines an ‘eligible vessel’, i.e. a vessel that qualifies for cover under the Pooling Agreement, as:

“Any ship, boat, hydrofoil, hovercraft or other description of vessel (including a lighter, barge or similar vessel howsoever propelled but excluding (a) a unit or vessel constructed or adapted for the purpose of carrying out drilling operations in connection with oil or gas exploration or production and (b) a fixed platform or fixed rig) used or intended to be used for any purpose whatsoever in navigation or otherwise on, under, over or in water or any part of such ship, boat, hydrofoil, hovercraft or other description of vessel or any proportion of the tonnage thereof or any share therein”.

Therefore, mobile offshore units are not insured as Ships\(^1\) for the purposes of the Rules for Ships, but separate P&I cover is available for such units.\(^2\) Rule 64 emphasises that the Rules in Parts I, II, IV, V and VI of the Rules for Ships do not apply to mobile offshore units.

Defence cover for mobile offshore units is written on a case by case basis and is based on the Defence Cover for Ships.

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1. See the definition of ‘Ship’ in Rule 1.
2. See the Rules for Mobile Offshore Units.
Part IV - Defence cover
Introduction

The Defence cover provides insurance to shipowners and charterers for legal and other costs that are necessarily and reasonably incurred by them in pursuing or defending claims that arise\(^1\) in direct connection with the operation, insurance, acquisition or disposal of an entered Ship\(^2\) as a result of events that occur during the period that the Ship is entered in the Association. However, like P&I cover, Defence cover is a ‘named risk’ cover and is restricted to the disputes that are itemised in Rules 65 and 66. Under the Defence cover, the Association does not insure the Member against the claim in respect of which the legal or other costs are incurred, but merely against the legal and other costs that are incurred in dealing with that claim. Cover is available not only for the costs that may be incurred by the Member but also for any legal liability that the Member may have to pay the costs of the opposing party to the dispute should the Member lose the case. However, if the claim in question is a claim for which P&I cover is available, cover is available under the P&I cover not only for the underlying claim but also for the legal and other costs that are incurred by the Member in order to defend or pursue the claim.\(^3\)

Defence cover is not available for a Ship unless that Ship has valid and subsisting P&I cover with the Association. However, this condition does not apply in the case of a ship which is under construction or which is being bought. Such a ship can be entered for ‘Pre-delivery Defence Cover’ pursuant to special terms and conditions provided that the Member has undertaken to enter the ship for P&I cover in the Association no later than the time when he takes delivery of the ship.\(^4\)

Defence cover is sometimes referred to as ‘Freight, Demurrage and Defence (FD&D) cover’. However, the cover is not restricted to such matters. The majority of Defence cover claims arise under contracts that govern the operation of the Ship, e.g. charterparties and Bills of Lading and also the insurance of the Ship. However, Defence cover is also available for claims that do not arise in connection with a contract, e.g. for the defence of allegations that may be made by port authorities that the Ship is in breach of local regulations. The particular risks for which Defence cover is available are itemised in Rules 65 and 66. Rule 65 itemises the risks that relate to the operation of the Ship whereas Rule 66 itemises the risks that relate to the acquisition or disposal of the Ship.

One important feature of the Defence cover is that it enables the Association to provide advisory and financial support to a Member that may be involved in a large and/or complicated case that may involve substantial legal and other costs including, in some jurisdictions, a potential liability to pay for the legal and

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1. See Rule 2.4.c.
2. See Rule 2.4.a.
3. See Rule 44.
4. See the Guidance to Rules 2.6 and 66.
other costs that may be incurred by the Member’s opponent should the Member lose the case, e.g. a dispute between the Member and a shipyard in relation to the construction and delivery of a new ship. Furthermore, the Association’s in-house lawyers frequently act on behalf of the Member in correspondence and in negotiations with opponents, and may, in certain circumstances, also represent the Member in arbitration proceedings.

However, such financial and other support is not given unquestionably or without limit. The Association is given the authority to exercise a wide discretion when deciding whether or not to cover legal and other costs that either have already been incurred or which can be expected to be incurred; to control and direct the handling of any case; and to withdraw cover at any stage of the handling of the case if the nature or character of the case, or the manner in which the Member wishes to pursue or defend it, is considered to be contrary to the best interests of the membership as a whole. In other words, the Defence cover is not intended to provide support whatever be the merits of the case. The in-house lawyers of the Association monitor the merits and Defence cover is available only if they are of the view that a prudent uninsured would have considered it worthwhile to pursue the matter even if insurance cover had not been available for the costs of doing so.

The Association will also take account of whether the Member has complied with his obligations under the Rules. If the Member is in breach of such obligations, the Association is unlikely to exercise its discretion in favour of the Member at least until the Member has rectified such breaches, However, should the Member have failed to comply with those obligations that are considered to be fundamental Conditions of Cover for both P&I and Defence cover, such as those that are specified in Chapter 3 of Part 1 of the Rules (e.g. those that relate to the classification or certification of the Ship pursuant to Rule 8), the Association does not have any discretion to make cover available to any extent for claims that arise during a period when the Member is not fulfilling, or has not fulfilled, such obligations.

In contrast with the P&I cover that is available under Part II, the Member is normally obliged under the Defence cover to bear a proportion of the costs that are incurred, even if they are substantial. The standard deductible for a Defence Entry is currently 25 per cent of the costs incurred subject to a minimum of USD 5,000. Such a provision is intended to encourage the Member to act reasonably and to protect the Members as a whole against the unreasonable use of the Defence cover.

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5 See Appendix V Rule 3.a. The quid pro quo is that the Member is entitled to receive the same proportion of any recovery made of legal and other costs. See the Guidance to Rule 84.2.c.
Chapter 1

Risks covered
Rule 65 Cases pertaining to the operation of the Ship

The Association shall cover legal and other costs necessarily incurred in establishing or resisting claims concerning the following:

a contracts of affreightment, charterparties, bills of lading or other contracts of carriage;
b loading, lightering, stowing, trimming or discharge of cargo;
c passengers and passenger monies;
d loss of or damage to the Ship or general average;
e delay of the Ship;
f property damage, personal injury or loss of life;
g repairs or deliveries to the Ship;
h salvage or towage unless the Ship is respectively a salvage vessel or tug;
i agents or brokers;
j insurance contracts pertaining to the Ship;
k customs, harbour or other public or quasi-public authorities, but not legal and other costs incurred in connection with or relating to:
i taxes or dues payable in countries where the Ship is registered, or where the Member is resident, or where the Member has a permanent place of business;
ii actual or alleged infringement(s) of legislation or regulations relating to safety, navigation or prevention of pollution.

Guidance

A) ...legal and other costs...incurred in establishing or resisting claims...

(Rule 65)

Subject to the limit imposed by Rule 70.1 cover is available under a Defence entry for legal and other costs that are incurred by the Member in relation to the various types of disputes that are discussed below.

However, if such costs are recoverable under the P&I cover pursuant to Rule 44, then Defence cover is not available. Similarly, Defence cover is not available if P&I cover for such costs would have been available but for the fact that the Member has entered the ship for P&I risks on special terms that exclude P&I cover for such costs. For example, if the Member has excluded cargo liability from his P&I cover, Defence cover is not available for the costs that are incurred by him in defending a cargo claim. Furthermore, if the Association declines to cover the costs under a Member’s P&I cover on the basis that they have been incurred without the agreement of the Association, the Member cannot seek alternative cover for such costs under the Defence cover.

However, if the Member has entered the Ship for a P&I risk but cover is not available for the particular claim in respect of which the costs have been incurred because of an exclusion or limitation that is applicable to that claim under the particular P&I

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1 See the Guidance to Rule 71.2.
Rule, Defence cover may, nevertheless, be available. For example, if a Member is entered for the risks that are covered by Rule 34, cover is available under the Defence cover for legal and other costs that may be incurred by a Member in order to defend himself against liability for the alleged misdelivery of cargo without production of original bills of lading, even though P&I cover for such liability will not be available due to the exclusion in Rule 34.1.i.

However, cover is available only for those legal and other costs that are necessarily and reasonably incurred in pursuing or resisting claims that have arisen:

- in direct connection with the operation of the Ship, or the acquisition or disposal of the Ship, and
- in respect of the Member’s interest in the Ship, and
- out of events that occur during the period of entry of the Ship for Defence risks in the Association.

Cover is available for the costs that the Association considers will, if incurred, assist in the ascertainment or protection of the Member's legal rights except for costs that are excluded pursuant to Rule 67, or costs that the Member must bear because of his agreed deductible, or because of the other obligations that he has in relation to claims, as noted below.

The phrase ‘legal costs’ includes the cost of advisory services that are provided to the Member by external lawyers, barristers, associates, paralegals etc., at any stage of the case, as well as the cost of legal representation before a court or arbitration or any other tribunal. However, it should be noted that the phrase ‘legal costs... necessarily incurred in establishing or resisting claims’ includes legal costs that may be incurred by the Member’s opponent if the Member is obliged to pay such costs pursuant to an arbitration award, or the judgment, decree or order of a court or other tribunal, or pursuant to a settlement agreement that has been approved by the Association. However, the Defence cover does not compensate the Member for any liability or loss that he may incur in relation to the underlying claim in respect of which the costs have been incurred.

Cover is also available for ‘other costs’ that are necessarily and reasonably incurred in order to pursue or resist claims that are made by, or against, the Member, e.g. costs that are incurred when employing the surveyors or experts that may be necessary if the dispute involves issues that have a high degree of technical content.

It is important to emphasise that, notwithstanding the availability of Defence cover, the Member still has the obligation to obtain information and to provide assistance at his own cost and for his own account in circumstances where such

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2 See (G) below.
3 See the Guidance to Rule 2.4.
services should normally be performed by him or by his employees or by other persons that are regularly engaged by him. This obligation includes the obligation to make such employees or other persons available to attend meetings or to appear before a court, arbitration or any other tribunal whenever this may be necessary. Consequently, cover is not available for the work done, and time spent, by the Member's own in-house lawyers and other staff even if such involvement is necessary, substantial and productive.

(B) …contracts of affreightment, charterparties, bills of lading, or other contracts of carriage… (Rule 65.a)
Cover is available for legal and other costs that are incurred by the Member in connection with disputes that arise under various types of contracts that govern the use of the Ship or the carriage of cargo on the Ship. So long as the contract relates to the Ship that is the subject of the Defence entry, the nature of the contract of carriage is irrelevant. Consequently, Defence cover is available for costs that are incurred for disputes that arise in relation to a charterparty, whether it be a time, voyage, space or slot charter, or under a Bill of Lading, waybill, contract of affreightment or any other kind of similar contract of carriage. It is not necessary for the purposes of Rule 65.a that the contract of carriage that is the subject matter of the dispute should previously have been approved by the Association since, given the wide range of contracts of carriage that are entered into by Members, it would be impractical for the Association to review them all.

Typical types of claim for which cover is available under this Rule include claims that are made under such contracts of carriage by or against the Member for the cancellation, withdrawal or non-delivery of the Ship, or for hire, off-hire, freight, dead-freight, demurrage or other monies, or that relate to the permissibility or otherwise of carrying particular cargoes or trading to particular ports.

(C) …loading, lightering, stowing, trimming or discharge of cargo… (Rule 65.b)
Cover is available under Rule 65.b for costs that are incurred by the Member in connection with disputes that relate to the handling of cargo, e.g. disputes relating to the accuracy of a stowage plan, or to the Ship's cargo carrying capacity, or to its suitability to carry certain types or quantity of cargo.

4 See Rule 82.4.
5 See the Guidance to Rule 77.a.
6 The Member can be either a shipowner or a charterer.
7 By way of contrast, see the Guidance to Rule 55 in relation to P&I Cover.
(D) ...passengers and passenger monies... (Rule 65.c)
Cover is available under Rule 65.c for costs that are incurred by the Member in connection with disputes that relate to the carriage of passengers,\(^8\) e.g. disputes relating to the alleged misrepresentation by the Member of the nature or particulars of a cruise, or for discounts, or as a result of the earlier than planned disembarkation of a passenger.

Cover is not available under Rule 65.c for costs that are incurred by the Member in connection with disputes that arise in relation to other persons that are on board the Ship, such as visitors, pilots or agents. However, cover may be available in such circumstances under Rule 65.f.\(^9\)

Finally, subject to the cover that is available under Rule 65.f (see (G) below), cover is not available for costs that are incurred by the Member in connection with disputes that arise in relation to the Crew whether individually or collectively,\(^10\) e.g. under their contracts of employment for wage levels, dismissal or discrimination. Such disputes are not covered by any sub-section of Rule 65.

(E) ...loss of or damage to the Ship or general average... (Rule 65.d)
In principle, Defence cover is available for legal and other costs that may be incurred by the Member in pursuing or defending claims for loss of, or damage to, the Ship. However, if the Member is the owner of the Ship, he would normally have a right to be indemnified against any such loss or damage by his hull and machinery insurers under his Hull Policies, and such insurers would be entitled pursuant to their subrogation rights to pursue recovery claims against any third parties that are considered to have caused or contributed to the loss or damage. Rule 71.1.a specifies that Defence cover is not available for legal and other costs that are incurred by the Member in order to defend or pursue claims that are covered under the Hull Policies, or would have been so covered had the Ship been fully insured on standard terms.\(^11\) However, Defence cover is available for costs that are incurred by a Member that wishes to pursue a claim for damage to the Ship if the amount that is being claimed is below the applicable deductible under the Ship’s Hull Policies.

Cover is also available under Rule 65.d for costs that are incurred by the Member in connection with disputes that relate to general average,\(^12\) e.g. disputes as to whether a particular expense should be allowed in general average, or for the recovery or enforcement of undisputed but unpaid contributions from other parties.

\(^8\) See the Guidance to Rule 28.
\(^9\) See (G) below.
\(^10\) Cover is not available for costs which are incurred in connection with disputes that relate to collective bargaining agreements, e.g. ITF disputes.
\(^11\) See the Guidance to Rule 71.1.a.
\(^12\) See the Guidance to Rule 41.
(F) …delay of the Ship… (Rule 65.e)
Cover is available under Rule 65.e for costs that are incurred by the Member in connection with claims resulting from the delay of the Ship.  

Therefore, cover is available for costs and expenses that are incurred by the Member in connection with claims for demurrage and despatch. However, cover is also available in other circumstances, and regardless of whether the claim is made by the Member against a third party, e.g. when the Ship has been delayed as a result of the fact that another ship has blocked the entrance to a port or river, or if it is made by a third party that may cause delay to the Ship by arresting it in order enforce his rights against the Member.

(G) …property damage, personal injury or loss of life… (Rule 65.f)
In most cases, P&I cover will be available for claims that arise in these circumstances pursuant to Rule 44. However, Defence cover is available under Rule 65.f in circumstances where cover is not available under the P&I Rules because of an exclusion or limitation that is applicable under such Rules.

(H) …repairs or other services or deliveries provided to the Ship… (Rule 65(g))
Whilst cover is available for costs and expenses that are incurred by the Member in connection with claims that relate to the repair of the Ship, e.g. claims against a repair yard, the Member is expected to keep the Ship insured for hull and machinery risks during any period of repair, and, pursuant to Rule 71.1.a, Defence cover is not available for disputes that are covered by such Hull Policies.

Cover is also available for costs that are incurred in connection with disputes that relate to deliveries of all kinds to the Ship, e.g. equipment, provisions, spare parts, stores and other items except to the extent that such costs are incurred in relation to claims for damage to the Ship which are, or should have been, covered under the ship’s Hull Policies. For example, Defence cover is available in the case of a dispute that has arisen as to whether bunker fuel that has been delivered to the Ship is within the contractual specifications.

Furthermore, cover is available for costs that are incurred in relation to disputes that arise in relation to services that are provided to the Ship. However, cover is available only if such services are provided in relation to the direct operation of the vessel, such as, for example, costs that are incurred in relation to a bunker survey or the provision of security guards but not for costs and expenses that are incurred in

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13 See the Guidance to Rules 63.1.h and 63.2.
14 Cover is available under Rule 65.e for delays caused by arrests that are instigated by private parties, whereas cover is available under Rule 65.k for claims that are caused by the (unlawful) detention of the Ship by customs, harbour or other public or quasi-public authorities.
15 See the Guidance to Rules 27-30 and 39.
16 See (A) above.
relation to disputes between the Member and a law firm that has negligently drawn up a bunker supply contract or similar commercial agreement since such claims do not arise directly in relation to the operation of the Ship.

Finally, cover is excluded pursuant to Rule 68 for costs and expenses that are incurred for disputes that arise between the Member and service providers that are the agents, representatives or servants of the Association.

(I) …salvage or towage unless the Ship is respectively a salvage vessel or tug… (Rule 65.h)
Defence cover is available under Rule 65.h for costs and expenses that are incurred in relation to disputes that arise in connection with salvage or towage operations that are carried out for the purported benefit of the Ship. However, a distinction is drawn between the cover that is available for disputes that relate to salvage services that are afforded to the Ship and salvage services that are afforded by the Ship. Defence cover is available in principle in both situations but subject to restrictions.

If the Member is the owner of the Ship to which salvage services are being afforded, the remuneration that is payable by him to the salvors or to the party that is towing the Ship is usually recoverable under the Hull Policies of the Ship. If so, the legal and other costs that arise in relation to such disputes are also likely to be recoverable under the Hull Policies. Consequently, Defence cover is not available if the costs are recoverable under the Hull Policies or would have been so recoverable had the Ship been fully insured on standard terms without deductible. Therefore, Defence cover is available only if the costs are not recoverable under the Hull Policies, e.g. when there is a dispute as to whether the services that have been rendered to the Ship are truly ‘salvage’ services.

Defence cover is also available when salvage or towage services have been rendered by the entered Ship, but only if the Ship is not a specialist salvage vessel or tug.

(J) …agents and brokers… (Rule 65.i)
Cover is available under Rule 65.i for costs that are incurred in connection with disputes that arise with all kinds of agents and brokers, e.g. with chartering, cargo or insurance brokers or with manning agents, provided that the dispute relates to the acquisition, operation or disposal of the Ship. However, cover is not available in relation to a dispute that has arisen between the Member and an agent that is a Joint Member, Co-assured or Affiliate, e.g. a Co-assured manning agent.

17 See the Guidance to Rule 71.1.a.
18 See the Guidance to Rules 33, 42 and 43
19 See the Guidance to Rule 68.2.
(K) ...insurance contracts pertaining to the Ship... (Rule 65.j)
Cover is available under Rule 65.j for costs that are incurred in connection with disputes that arise in relation to contracts of insurance for the entered Ship, e.g. a dispute with hull underwriters as to whether a particular loss is covered by the Hull Policies. However, this Rule must be read in conjunction with Rule 68.1 that excludes cover for disputes that arise between the Member and the Association, e.g. in relation to a dispute concerning the P&I entry of the Member.

(L) ...customs, harbour or other public or quasi-public authorities, but not legal and other costs incurred in connection with or relating to:
   i  taxes or dues payable in countries where the Ship is registered, or where the Member is resident, or where the Member has a permanent place of business; or
   ii actual or alleged infringement(s) of legislation or regulations relating to safety, navigation or prevention of pollution. (Rule 65.k)
Rule 65.k is primarily intended to make Defence cover available for costs that are incurred in connection with disputes that arise as a result of the visit of the Ship to a port.

The operation of ships may expose shipowners and/or charterers to legal disputes with public or quasi-public authorities and it is generally recognised that it is in the best interests of the membership that Defence cover should be made available for legal and other costs that are incurred in connection with such disputes. Typical examples are disputes that arise between Members and customs authorities in relation to the quantity of cargo or consumables that is being carried on board, or between Members and harbour authorities concerning the amount that is properly payable for port dues or pilotage. However, Defence cover is specifically excluded under Rule 65.k.i in the case of disputes that relate to taxes or dues that are payable in the country where the Ship is registered or where the Member is resident or has a permanent place of business. Therefore, Defence cover is not available for disputes that involve tonnage taxes or for disputes that relate to a Member’s liability for the tax that is payable as result of the operation of the Ship.

Furthermore, it is considered to be an imperative requirement that the Members of a mutual association that agree to share a wide variety of risks and liabilities should operate their ships in compliance with the relevant safety and pollution prevention laws. Such laws and regulations are, for the most part, codified in international conventions that are intended to safeguard innocent parties against exposure to preventable risks that can arise as a result of the operation of ships, and which, consequently, deserve the strong support of all branches of the maritime industry. Therefore, it is not considered to be in the best interests of the membership as a whole that Defence cover should be made available for legal and other costs that are incurred by a Member as a result of becoming the subject of enquiries,
investigations or legal proceedings that are instigated by public authorities that are seeking to assess whether, and to what extent, any infringements of such legislation or regulations have taken place. Therefore, Rule 65 k.ii specifies that cover is not available in such circumstances whether the breaches are proven or merely alleged by the relevant authorities. For example, cover is not available in the event of actual or alleged violations of MARPOL regulations and similar legislation.

The Association may also decline cover in the circumstances that are outlined in Rule 67 or if the relevant violations are deemed to have resulted from wilful misconduct on the part of the Member.20

20 See the Guidance to Rule 72.
Rule 66 Cases pertaining to acquisition or disposal of the Ship

The Association shall cover legal and other costs necessarily incurred in establishing or resisting claims in connection with:

a building, purchase or mortgaging of the Ship, including claims in connection with the future employment of the Ship being built or purchased, provided always that the Ship has been entered in the Association for Defence cover at the latest on signing the relevant contract governing the building or purchase;

b sale of the entered Ship;

c conversion of or alterations to the Ship, including claims in connection with the future employment of the Ship being subject to conversion or alteration, provided always that a separate agreement, pursuant to which the Association agrees to provide Defence cover for such legal and other costs has been entered into with the Association at the latest on the signing of the relevant contract for the conversion of or the alterations to the Ship.

Guidance

(A) The Association shall cover legal and other costs necessarily incurred in establishing or resisting claims... (Rule 66)

Subject to the limits that are imposed by Rules 70.1 and 70.2 cover is available under a Defence Entry for legal and other costs that are incurred by the Member in relation to the various types of disputes that are discussed below. For an explanation of the phrase ‘legal and other costs necessarily incurred in establishing or resisting claims’, see (A) of the Guidance to Rule 65. However, it is emphasised that the phrase ‘legal costs...necessarily incurred in establishing or resisting claims’ includes legal costs that may be incurred by the Member’s opponent if the Member is obliged to pay such costs pursuant to an arbitration award, or the judgment, decree or order of a court or other tribunal, or pursuant to a settlement agreement that has been approved by the Association.

(B) ...building, purchase or mortgaging of the Ship... (Rule 66.a)

Cover is available under Rule 66.a for legal and other costs that are incurred by the Member in connection with disputes that relate to the construction and/or purchase of a Ship.1

The disputes that can arise in connection with the building of a Ship include issues such as whether the Ship has been built in accordance with, and in fulfilment of, the agreed specifications, or issues relating to the time at which the Ship should be delivered to the Member. The disputes that can arise in connection with the purchase of a Ship include issues relating to its condition at the time of its delivery to the buyer, or in relation to the place of delivery, or the terms of payment.

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1 For the meaning of ‘Ship’ in this context see (D) below.
Cover is also available for legal and other costs that are incurred by the Member in connection with a mortgage of the Ship. A mortgage is a contract whereby a third party such as a bank, is given a proprietary interest by way of security over the Ship for the repayment of the funds that it has made available for the purchase of the Ship.

(C) …including claims in connection with the future employment of the Ship being built or purchased… (Rule 66.a)

Defence cover is also available for legal and other costs that are incurred by the Member in connection with claims that relate to the future employment of the Ship that is being built or purchased. For example, cover is available for a dispute that has arisen as a result of the cancellation by a contractual party of a future time charter of a Ship that is under construction, subject to the entry conditions that are specified below.

(D) …provided always that the Ship has been entered…at the latest on signing the relevant contract governing the building or purchase\(^2\)… (Rule 66.a)

Defence cover is available under Rule 2.4.c only in respect of events that occur during the period of entry of the Ship. However, in some circumstances, the disputes that are itemised in Rule 66.a may be the result of events that have occurred before a Ship as defined in Rule 1 can be entered with the Association.\(^3\) Therefore, to ensure that the Ship is entered in the Association for Defence cover prior to the occurrence of the event that gives rise to the dispute, Rule 66.a obliges the Member to ensure that the Ship is entered for Defence risks at the latest by the time that the building or purchase contract has been signed. However, cover is not available if the Member fails, prior to the conclusion of the contract of insurance, to disclose to the Association events that are likely to give rise to a dispute.\(^4\)

In the case of disputes that arise in connection with the building of a Ship, it is also necessary to read Rule 66.a in the light of Rule 80.3.c which states that, if such a claim has arisen as a result of an event that has occurred before the contract has been signed, e.g. as a result of a misrepresentation by the shipyard of its abilities to carry out the contract works, the event that has given rise to the claim shall, for the purpose of Defence cover, be deemed to have arisen at the date that the building contract has been signed.

(E) …the relevant contract… (Rule 66.a. and c)

When considering whether or not to confirm Defence cover for disputes that have arisen under a particular contract, the Association may be influenced by the provisions of the particular contract. Whilst the Association has no proprietary

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2 Contracts for the building of ships are often based on standard industry forms such as Ship 2000 (Standard Form Shipbuilding Contract 2000), SAJ Form (Shipbuilding Contract of the Shipowners Association of Japan), the AWES Form (Association of West European Shipbuilders) or the Bimco Newbuildcon 2007.

3 See the Guidance to Rule 2.6 above.

4 See the Guidance to Rule 6.
interest in the subject matter of the dispute, it, nevertheless, has a responsibility to the membership as a whole to ensure that membership funds are not dissipated in relation to disputes that are caused either wholly or in part by the fact that the Member has agreed to terms that are considered to be unwise. Each case turns on its own facts and it is not possible to give specific examples of terms that are considered to be unwise. However, the Association would normally expect the contract to be written in the English language and to be subject to the law and jurisdiction of a country where the Member can expect to receive a fair and just hearing before a tribunal that has experience in the resolution of this type of dispute.

(F) ...sale of the entered Ship. (Rule 66.b)
Cover is available under Rule 66.b for legal and other costs that are incurred by the Member in relation to the sale of a Ship, but not in relation to the disposal of it by other means. In this context, a ‘sale’ means a contractual transaction that transfers the bona fide title to the Ship as from an agreed time in consideration for the payment of remuneration. However, it should also be remembered in this connection that the Member’s cover for Defence and P&I risks will cease automatically upon the transfer of the Ship to a new owner by sale pursuant to Rule 25.2.e. Consequently, the Association has no liability pursuant to Rule 26.2 for “anything occurring after cessation” of cover unless the dispute relates to events that have occurred before the time of cessation.

(G) ...conversions of or alterations to the Ship... (Rule 66.c)
For the purposes of Defence cover, contracts that relate to the alteration or conversion of a Ship are treated as a special risk and Defence cover is available for legal and other costs that are incurred by a Member in relation to such a contract only if the Association has agreed to do so pursuant to a separate agreement that has been entered into between the Member and the Association no later than the date on which the relevant contract has been signed by the Member. The rationale for the need of this special clause is that a conversion of a ship carries risks that are inherently similar to those that affect ship building. Consequently cover is made available only if the Association has had the opportunity prior to the signing of the conversion contract to consider the risk and the terms upon which the Association is prepared to provide Defence cover. Consequently, it is recommended that Members should discuss the probable terms of such contracts with the Association in sufficient time before the contracts are signed.

(H) ... including claims in connection with the future employment of the Ship being subject to conversion or alteration... (Rule 66.c)
The explanation for this provision is described in (C) above.

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5 The form of remuneration is immaterial. It includes not only cash but also other forms of remuneration such as ship swap arrangements and stock or partnership share swaps.
6 See the Guidance to Rule 26.2.
Chapter 2

Limitations etc. on Defence cover
Rule 67  Excluded costs

1  The Association may decline to cover under a Defence entry all or part of the Member’s costs, where it is of the opinion that:
   a  there is no reasonable relation between the amount in dispute and the costs which are likely to be incurred;
   b  there is no reasonable relation between the prospects of succeeding in establishing a claim or of having the claim enforced or the liability averted and the costs which are likely to be incurred;
   c  the Member has failed to carry out his obligations under these Rules;
   d  the claim is unreasonable or tainted with illegality or other improper conduct;
   e  for any other reason Defence cover should not apply.

2  The Association shall be under no liability to reimburse a Member for costs incurred:
   a  before the Association has been notified of a claim under the Defence cover;
   b  by the employment of lawyers, experts and other advisers appointed by the Member without the Association’s approval.

Guidance

(A) … The Association may decline to cover under a Defence entry all or part of the Member’s costs, where it is of the opinion that … (Rule 67.1)

Subject to the comments that are made in (C) below the Association has a wide discretion to decline to make Defence cover available under Rule 67.1, and such discretion will normally be exercised by the Association after consideration of any submissions that may be made on behalf of the Member. Furthermore, even if the Association does not decline cover in toto, it has a wide discretion to determine the maximum level of costs that are recoverable under any particular Defence entry and the maximum level of costs that are recoverable in any particular case.

The general right of discretion that the in-house lawyers of the Association have to determine the exclusion or restriction of Defence cover, or the control or direction of the handling of Defence cases, on a case-by-case basis must be distinguished from the right that the Board of Directors has under the Articles of Association to exercise its discretion to pay compensation for claims that are not covered under the Rules. However, the right that the in-house lawyers have to decline cover is itself subject to the overriding right of discretion that is vested in the Board of Directors of the Association under the Articles of Association.

(B) …there is no reasonable relation between the amount in dispute and the costs which are likely to be incurred… (Rule 67.1.a)

Rule 67.1.a gives the Association the right to exercise control over the manner in which costs are incurred to ensure that they are not disproportionate to the quantum of the claim that is the subject matter of the dispute. Therefore, in deciding how
much use should be made of legal or other assistance, the Association is usually
influenced and guided by what a prudent Member would have done if he did not
have insurance cover for legal costs.

The Association has the right to retain control of the conduct of the claim and, in
particular, to deal with cases internally whenever it is deemed appropriate to do so
in order to avoid or minimise the expense of external lawyers and other consultants.
Furthermore, if external lawyers, surveyors and other experts are to be appointed,
the Association will require to be consulted before this is done since the Association
has the overriding right to decide who is to be appointed, retained or dismissed.¹

(C) …there is no reasonable relation between the prospects of succeeding in
establishing a claim or of having the claim enforced or the liability averted
and the costs which are likely to be incurred… (Rule 67.1.b)

When administering the availability of the Defence cover the Association is guided
by the fundamental principle that the resources of the Association must not be
dissipated to the disadvantage of the membership as a whole by supporting cases
the merits of which do not justify such support. Accordingly, if the Association is of
the opinion that there is no reasonable correlation between the prospects of success
in establishing or defending a claim and the costs that are likely to be incurred in
order to do so, the Association has the right to decline cover for the Member’s costs
either in whole or in part.

Similarly, even though it may be possible to obtain a default or summary judgment
or award at an acceptable cost, the expense of enforcing such a judgment or award
may not be cost-effective particularly if enforcement procedures in the opponent’s
country of domicile would require certain issues to be relitigated or proved.
Therefore, the Association has the right to decline to cover costs, not only when the
Member’s opponent is bankrupt, but also when that party is no longer able to pay
his debts or is likely to have to cease trading if the Member’s case succeeds.

(D) …Member has failed to carry out his obligations under these Rules…
(Rule 67.1.c)

In considering how discretion should be exercised in any particular case, the
Association will take account of whether the Member has complied with his
obligations under the Rules. A distinction is drawn in this respect between those
obligations that are considered to be fundamental Conditions of Cover for both
P&I and Defence cover, such as those that are specified in Chapter 3 of Part 1 of
the Rules,² and other less fundamental obligations. For example, if the Member is
in breach of the obligation that is imposed upon him by Rule 8 in relation to the
classification or certification of his Ship, the Association does not have the discretion

¹ See the Guidance to Rules 82.3 and 67.2.b.
² See the Guidance to Rules 6-9.
to make Defence cover available to any extent for claims that arise as a result. However, if the Member is in breach of his obligation to provide the Association promptly with all documents and information that are necessary in order to evaluate the merits of the case, or to allow the interview of relevant persons, the Association has the discretion either to reject the claim or to reduce the sum that is payable to the Member. Such a distinction is equally relevant to P&I cover as well as to Defence cover.

(E) …the claim is unreasonable or tainted with illegality or other improper conduct… (Rule 67.1.d)

Rule 67.1.d permits the Association to decline cover for a claim for which the Member seeks Defence cover if the claim is either unreasonable or tainted with illegality or other improper conduct. Therefore, Rule 67.1.d should be read in conjunction with other Rules such as Rules 72 and 74. Consequently, the Association is unlikely to support a claim that is brought by a Member as owner against a charterer for demurrage that has been incurred by the Ship whilst loading a cargo that the Member knew to be a prohibited export since such a claim is likely to be considered to be ‘tainted with illegality or other improper conduct.’ Furthermore, although the Association has a discretion whether or not to support a claim that is tainted with ‘improper conduct,’ should such ‘improper conduct’ amount to ‘wilful misconduct’ of the Member, the Association has no such discretion since cover is automatically excluded in such circumstances under Rule 72.

Rule 67.1.d is broadly drafted to permit the Association, in the interests of the membership as a whole, to exclude claims which do not, in its opinion, deserve support under the Defence cover. Therefore, even if the claim for which Defence cover is being sought does not amount to illegality or improper conduct, the Association has the discretion to exclude claims that it considers to be unreasonable and which do not, therefore, deserve support under the Defence cover. For example, the Association is unlikely to support a claim that is brought by a Member as charterer against the owner of the Ship for breach of charterparty speed and consumption warranties, if the Member, having just sold the Ship to the new owner, has chartered it back in the full knowledge that the Ship cannot comply with the charterparty warranties.

Finally, Rule 67 should be read in conjunction with Rule 69 which gives the Association further rights to decline to provide Defence cover based on the manner in which the Member has conducted himself in relation to a particular case.

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3 See the Guidance Rule 82.1.d and e.
4 See the Guidance Rule 82.
5 For commentary on the identity of the ‘Member’ for these purposes, see (C) of the Guidance to Rule 72.
(F) …for any other reason Defence cover should not apply… (Rule 67.1.e)
Whilst the Association has a very wide discretion to exclude cover under Rule 67.1.e, it will not normally refuse to make Defence cover available if the Member has acted prudently and has complied with the terms and conditions of entry.

(G) …costs incurred…before the Association has been notified of a claim…
(Rule 67.2)
Rule 67.2 is intended to remind Members of their obligation to report claims to the Association promptly and makes it clear that the Association has the right to refuse to reimburse a Member for expenditure that the Association considers to have been unnecessarily incurred.

(H) …costs incurred…by the employment of lawyers, experts and other advisers appointed by the Member without the Association’s approval. (Rule 67.2)
This Rule makes it clear that the Association is not obliged to reimburse costs that have been incurred by the Member in relation to the appointment of external lawyers, advisers and experts unless such appointment has been approved by the Association. A similar requirement applies in the case of P&I cover. See the Guidance to Rule 44.
Rule 68  Disputes with the Association and other Members - Unpaid sums

1 The Association will not cover under a Defence entry costs of cases against the Association itself, its subsidiaries, agents, representatives or servants.

2 No cover shall be available under Defence entries to either party where a dispute arises between Joint Members, Co-assureds, affiliates or associates of the Member or Co-assureds or any combination thereof.

3 No Member shall be entitled to cover under a Defence entry so long as Advance Calls, Deferred Calls or Supplementary Calls or other sums of whatsoever nature owed to the Association, whether in respect of Defence or P&I cover or otherwise, remain unpaid.

Guidance

(A) …costs of cases against the Association itself, its subsidiaries, agents, representatives or servants… (Rule 68.1)

It would be an anomaly and contrary to the best interests of the membership as a whole if Defence cover were to be made available for the costs that are incurred by Members in order to pursue claims against the Association, or to defend claims that are brought against Members by the Association. Consequently, Defence cover is not available for legal and other costs that are incurred by Members in order to pursue claims against, or to defend claims brought by, the Association or its subsidiaries, or any other person that is acting on behalf of the Association.¹

The exclusion of cover applies whether the claim relates to P&I or Defence cover or to any other insurance. It applies not only to cases between the Member and the Association itself, but also to cases between the Member and any of the Association’s subsidiaries such as Gard AS which is the Association’s wholly owned manager in Norway, or Gard (UK) Limited or any other subsidiary of the Association, or any of their agents or representatives. For example, Defence cover is not available for the costs that are incurred by a Member in bringing a claim against a surveyor appointed by the Association for alleged negligence or malpractice.

(B) …dispute arises between Joint Members, Co-assureds, affiliates or associates of the Member or Co-assureds or any combination thereof. (Rule 68.2)

It would also be an anomaly and contrary to the best interests of the membership as a whole if Defence cover were to be made available to finance disputes between parties that are covered under the same contract of insurance. Consequently, Defence cover is not available for legal and other costs that are incurred by Members in relation to disputes between Joint Members, Co-assureds or their Affiliates or associates.

¹ Rule 83.1 exonerates the Association from liability for errors or omissions on the part of its employees or other persons engaged by the Association on behalf of the Member.
(C) ...sums of whatsoever nature owed to the Association...remain unpaid...

(Rule 68.3)

A Member is not entitled to Defence cover so long as any money is due from him to the Association, regardless of whether the outstanding amount relates to Defence or P&I cover or to any other sum that is owed to the Association.

For the purposes of Rule 68 the unpaid sum need not relate to the entry of the particular Ship for which the Member requests Defence cover and need not be due from the Member himself but from Joint Members or Co-assureds.²
Rule 69  The Association’s right to control and direct the handling of a case – withdrawal of cover

1 The Association shall have the right, if it so decides, to control or direct the conduct or handling of any case or legal and other proceedings relating to any matter in respect whereof legal and other costs are covered under a Defence entry and to require the Member to settle, compromise or otherwise dispose of the case or legal and other proceedings in such manner and upon such terms as the Association sees fit.

2 The Association may, in its sole discretion, at any stage of the handling of the case, decline to cover under a Defence entry the legal and other costs involved where:
   a  the Member, without the Association’s authority, or contrary to its advice, proceeds with the case in a manner which in the view of the Association is undesirable;
   b  the Member refuses to settle the case on conditions which the Association recommends or which are recommended by lawyers acting on behalf of the Association or the Member;
   c  any of the circumstances set out in Rule 67 subsequently materialise or are brought to the attention of the Association.

Guidance

(A)  ...to control or direct the conduct or handling of any case or legal and other proceedings... (Rule 69.1)

Rule 69.1 gives the Association the express right to control and direct the handling of a case that falls within the Defence cover and the right to require the Member to settle, compromise or dispose of the case on the basis and terms that the Association deems to be appropriate in all the circumstances, failing which the Association has the right, pursuant to Rule 69.2 to cease to continue to provide Defence cover. The right that is given to the Association to decline cover under Rule 69 is all-embracing and relates to all aspects of case handling.

(B)  ...The Association may, in its sole discretion...decline to cover... (Rule 69.2.a)

Rule 69.2.a gives the Association the right to discontinue its support if the Member proceeds with the case contrary to the Association’s advice, or without its authority, in a manner that the Association considers to be undesirable. The Association is likely to consider that a case is proceeding in an undesirable manner if the Member has, in the light of all the circumstances and the nature of the case, taken steps that are considered by the Association to be inappropriate, unnecessary or unlikely to lead to a better or more cost-efficient resolution of the case. The Association can also decline to provide cover when a Member has proceeded with a case that he has not reported to the Association, or where, notwithstanding the fact that he has received the Association’s support or authority to take certain specified steps,
or received the general support of the Association up to a certain stage of the proceedings, the Member has subsequently dealt with the case in a manner that exceeds such authority.

(C) ...the Member refuses to settle the case... (Rule 69.2.b)
The interests of the particular Member\(^1\) in settling a case will not necessarily be the same as those of the Association acting, as it must, on behalf of the membership as a whole. The Association must, when recommending particular courses of action, act not only in the interests of the particular Member, but also in the wider interests of the membership as a whole. Consequently, Rule 69.2.b gives the Association the right to decline cover if a Member refuses to settle a case on the terms that are recommended by the Association or by lawyers that are acting on behalf of the Association or the Member.

(D) ...the Association may...at any stage...decline cover where...any of the circumstances set out in Rule 67 subsequently materialise... (Rule 69.2.c)
Rule 69.2.c gives the Association the right to decline cover when it becomes aware at a later stage of the case of the circumstances that are described in Rule 67 even if the Association has provided cover for legal and other costs that have been incurred at earlier stages of the case. In some instances, material facts do not become available immediately, and therefore, Rule 69.2.c is necessary in order to protect membership funds in the event that a Member should argue that the Association has waived its right to refuse further support for a case by virtue of the fact that it has provided support at earlier stages of the case. However, if the Member is in breach of the obligations that he has under Rule 82, the Association may be entitled in such circumstances to reclaim from the Member any costs and/or expenses that it has paid to the Member or to a third party on behalf of the Member pursuant to Rule 82.2.b.

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\(^1\) See also the Guidance to Rule 82 concerning the Member’s obligations with regard to claims.
Rule 70 Limitation

1 The Association shall not be obliged to compensate under a Defence entry legal and other costs falling within the scope of Rule 65 and legal and other costs incurred in establishing or resisting claims in connection with purchase and sale of the Ship, including claims in connection with the future employment of the Ship being purchased, falling within the scope of Rule 66 (a) and (b) in excess of USD 10 million per event.

2 The Association shall not be obliged to compensate under a Defence entry legal and other costs falling within the scope of Rule 66 (sale and purchase disputes exempted) in excess of USD 1 million per event.

3 The Association shall determine in its absolute discretion whether legal and other costs for the purpose of this Rule 70 shall be deemed to have fallen within the scope of Rule 65 or Rule 66 and whether the legal and other costs have arisen out of one or several events, irrespective of whether one or several Ships were involved.

4 The Association shall be under no obligation to give reasons for any of its decision under this Rule.

Guidance

(A) The Association shall not be obliged to compensate under a Defence entry legal and other costs falling within the scope of Rule 65 and...Rule 66 (a) and (b) in excess of USD 10 million per event... (Rule 70.1)

The Defence cover that is available for legal and other costs that fall within the scope of Rule 65 or Rule 66 (a) and (b) (to the extent that Rules 66 (a) and (b) relate to disputes that arise in relation to the purchase or sale of the Ship, or the future employment of the Ship that is being purchased), is subject to an overall limit of USD 10 million per event and the Association has no liability whatsoever to compensate a Member for any legal or other costs that exceed this amount when incurred by him in relation to such claims. However, the Defence cover recoverable limit of USD 10 million is normally reached only if the total costs and expenses that are payable for a particular case exceed USD 13.33 million since the Member must normally bear 25 per cent of all costs himself pursuant to the standard deductible for Defence cover.1

(B) The Association shall not be obliged to compensate under a Defence entry legal and other costs falling within the scope of Rule 66 (sale and purchase disputes exempted) in excess of USD 1 million per event (Rule 70.2)

The Defence claims for which cover is available pursuant to Rule 66 can expose membership funds to substantial financial risk and, consequently, it has been considered prudent and necessary to take steps that are reasonable and necessary in order to protect such funds against unacceptable losses. Consequently, such claims are subject to a special cover limit of USD 1 million per event except for

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1 See Appendix V, paragraph 3.a.
claims that relate to the purchase or sale of the Ship, or the future employment of a Ship that is being purchased, which claims are subject to the substantially higher cover limit of USD 10 million per event pursuant to Rule 70.1. However, for the reasons explained in (A) above, the Defence cover limit of USD 1 million will normally be reached only if the total costs and expenses that are payable for a particular case exceed USD 1.333 million since the Member must normally bear 25 per cent of all costs himself pursuant to the standard deductible for Defence cover.

(C) The Association shall determine in its absolute discretion whether legal and other costs for the purpose of this Rule 70 shall be deemed to fall within the scope of Rule 65 or Rule 66... (Rule 70.3)

In view of the significant difference in the limit of cover that is applicable to the claims that are subject to Rules 70.1 and 70.2 it is not in the best interests of the membership as a whole to allow disputes to arise between a Member and the Association as to which Rule should apply for the purpose of cover. Therefore, Rule 70.3 emphasises that the Association has absolute discretion to determine whether legal and other costs are those that are subject to limitation under Rule 70.1 or 70.2.

(D) ...and whether the legal and other costs have arisen out of several events, irrespective of whether one or several Ships were involved... (Rule 70.3)

A Member might seek to argue in some instances that, since the case involves more than one Ship, there has been more than one event so that more than one limitation amount is applicable in such circumstances. Consequently, Rule 70.3 gives the Association the right that is necessary for the wider interests of the membership as a whole, to decide in its absolute discretion whether legal and other costs have arisen out of one or more events.

(E) The Association shall be under no obligation to give reasons for any of its decision under this Rule. (Rule 70.4)

Rule 70.4 emphasises that the decision of the Association is final in relation to the matters that are regulated by Rule 70 and that the Association need not give any reasons for its decision.
Rules

Part V - General limitations etc. on P&I and Defence Cover
Introduction
Note: Limitations which affect only P&I cover or only Defence cover are set out in Parts II and IV respectively.

Rule 71  Other insurance
1  The Association shall not cover:
   a  liabilities, losses, costs or expenses which are covered by the Hull Policies or would have been covered by the Hull Policies had the Ship been fully insured on standard terms, without deductible, for an insured value which is at all times not less than the market value from time to time of the Ship without commitment, provided that costs relating to claims for damage sustained by the Ship shall be covered under a Defence Entry to the extent that such damage is not recoverable under the Hull Policies by reason only of a deductible, and for the purposes of this proviso the deductible shall be deemed not to exceed one per cent of the Ship’s insured value;
   b  liabilities, losses, costs or expenses recoverable under any other insurance or which would have been so recoverable:
      i  apart from any term in such other insurance excluding or limiting liability on the ground of double insurance; and
      ii  if the Ship had not been entered in the Association with cover against the risks set out in these Rules;
   c  liabilities, losses, costs or expenses in relation to a person performing work in the service of the Ship covered by social insurance or by public or private insurance required by the legislation or collective wages agreement governing the contract of employment of such person, or which would have been so covered if such insurance had been effected.
2  The Association shall not cover under a Defence entry costs which are or can be covered under a P&I entry.

Guidance
A shipowner will normally require several types of insurance to give protection both for his interest in the ship and against the liabilities that he may incur to third parties in connection with the operation of the ship. Typically, the shipowner will take out marine hull and machinery insurance to safeguard the value of his investment in the structure of the ship, war risk hull insurance to protect him against the war risks that are normally excluded from cover under the marine hull and machinery policies, loss of hire insurance to protect him against loss of revenue, P&I cover to protect him against the claims that may be brought against the ship by third parties, and Defence cover as protection against the legal and other costs that he will incur when prosecuting or defending claims that are not covered under the P&I cover. He may also choose to take out additional insurances.¹

¹ For example, loss of hire, strikes and extended cargo liability insurance.
These insurances are usually provided by separate insurers on various terms in different insurance markets. Consequently, the shipowner and his various insurers will wish to avoid overlapping or ‘double’ insurance. The shipowner will not wish to pay premium twice for the insurance of the same risk whilst the insurers will wish to avoid risks that they expect to be insured elsewhere.

(A) The Association shall not cover: a liabilities, losses, costs or expenses which are covered by the Hull Policies... (Rule 71.1.a)

Rule 71.1.a states expressly that the cover that is provided by the Association does not extend to liabilities, losses, costs and expenses that are covered by the Hull Policies, since the cover that is provided by the Association is intended to complement, but not to replace, such cover.

(B) ...would have been covered under standard terms had the Ship been fully insured on standard terms, without deductible... (Rule 71.1.a)

The exclusion applies not only to the liabilities, losses, costs and expenses that are actually covered by the Hull Policies that have been taken out by the Member, but also to the liabilities, losses, costs and expenses that would have been covered if the Ship had been insured under Hull Policies that comply with the requirements of Rule 71.1.a.

Many different ‘standard’ forms of Hull Policies are commonly used in the industry and these can provide cover, not only for the loss of, or for damage to the Ship, but also for liability to third parties, e.g. for damage that has been caused by collisions with other ships, or with fixed or floating objects or other property. Since it is a fundamental requirement for a mutual association that there be uniformity of cover, Rule 71.1 emphasises that cover is not available under the Rules for liabilities, losses, costs and expenses that can be covered under standard Hull Policy terms.

The Association considers on a case-by-case basis whether the particular liability etc., is, or could have been covered, under ‘standard’ hull terms. However, for the purpose of the Rules, the Association considers that the full cover that is available under the standard Nordic, English, American, German, Japanese and French conditions is deemed to be cover on standard terms.

Cover is also excluded if the relevant liability, loss etc., is covered under the Hull Policy, or would have been covered under standard terms, were it not for the applicable deductible(s). For example, if the Member’s liability resulting from a collision exceeds USD 100,000 and the Member is insured under a Hull Policy that

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2 Hull Policies are defined in Rule 1 as ‘the insurance policies effected on the hull and machinery of the Ship, including any excess liability policy’.  
3 See also the Guidance to Rule 36.  
4 See the Appendix to the Guidance to Rule 36 for a comparison of the cover provided by different Hull Policy conditions.
Rules Part V – General limitations etc. on P&I and Defence Cover

...for an insured value which is at all times not less than the market value from time to time of the Ship without commitment... (Rule 71.1.a)

Furthermore, cover is not available for any liability, loss etc., that is incurred by the Member which he cannot recover under the Hull Policies because he has failed to keep the Ship insured for its full market value. The Ship’s insured value is normally based on its market value at the time that the Hull Policies are agreed or renewed. However, the market value of a Ship may fluctuate considerably during the period that it is insured under the Hull Policies. Therefore, the Member is required to monitor the state of the second-hand market closely and to make certain that the value for which the Ship is insured under the Hull Policies continues to reflect whatever the current market value of the Ship should be from time to time.

For example, if a Ship that has a market value of USD 1 million but is only insured for a value of USD 800,000, incurs a liability following a collision of USD 950,000, the cover that is available under the Hull Policy may be restricted to USD 800,000 because of the failure of the shipowner to insure the Ship for its full market value. In such circumstances, Rule 71.1.a provides that the Member cannot recover the balance of USD 150,000 from the Association. However, if the Ship is also insured under a standard Increased Value (IV) Hull Policy (which is normally subject to a maximum of 25 per cent of the Hull Policy value), the Member is covered under the two Hull Policies up to a maximum of USD 1 million and can, therefore, recover the balance of USD 150,000 under the IV policy and has no need to make a claim against the Association for the balance.

However, the Ship’s commercial commitments are not taken into consideration when assessing its market value since such factors might well distort its true intrinsic market value.
(D) …provided that costs relating to claims for damage sustained by the Ship shall be covered under a Defence entry to the extent that such damage is not recoverable under the Hull Policies by reason only of a deductible… (Rule 71.1.a)

Whereas the commentary that is found in (B) relates to the impact that a deductible may have in relation to the cover that is available for the claim that occasions the liability, costs etc., (i.e. the collision liability), the commentary in (D) explains the impact that the deductible may have in relation to the costs that may be incurred by the Member in relation to claims for damage to the Ship.

The normal rule is that costs that are incurred by a Member in such circumstances are apportioned between the Member and the Hull Insurers according to whatever the correlation may be between the deductible and the quantum of the claim. For example, should there be a claim for USD 200,000 under a Hull Policy that is subject to a deductible of USD 50,000, 25 per cent of the costs would be borne by the Member and 75 per cent by the insurers. Because such costs are normally recoverable, at least in part, under the Hull Policies, they are, therefore, excluded from cover by Rule 71.1.a. However, if the claim is for a sum that is below the deductible that is applicable to the Hull Policies, the costs that are incurred in relation to that claim, e.g. the costs of surveys, legal advice and/or of pursuing the claim, are not normally recoverable under such Policies. In such circumstances, Rule 71.1.a provides that Defence cover is, nevertheless, available pursuant to Rule 65.d for survey, legal and other costs that are incurred in relation to recourse claims that are made as a result of damage that has been caused or sustained by the Ship but not for survey and other costs that are incurred purely in relation to the hull claim e.g. for the repair of the Ship.

Defence cover is available either when the entire claim falls below the Hull Policy deductible, or when the claim exceeds that deductible but the Member is, nevertheless, required to contribute towards the costs of pursuing the claim by reason of the applicable deductible. For example, some hull terms provide that any recovery that is made from a third party is to be apportioned between the hull underwriter and the assured and consequently members are required to contribute proportionately towards the costs of pursuing the recovery. In this case, Defence cover may be available for these costs.

For example, if a ship is insured under a Hull policy that has a deductible of USD 100,000 were to suffer damage costing USD 60,000, Defence cover would be available for the whole of the costs that the Member might incur in relation to claims that arise as a result of such damage. On the other hand, if the claim for damage to the ship was USD 300,000, Defence cover would only be available for that proportion of the costs that would not be recoverable under the Hull Policy because of the deductible, i.e. one-third of the costs.
(E) …for the purposes of this proviso the deductible shall be deemed not to exceed one percent of the Ships insured value… (Rule 71.1.a)

The level of deductible that Members may choose to agree under their Hull Policies may be substantially different depending on their subjective requirements. However, this subjective entitlement can create a problem for a mutual association that strives to provide cover to its Members that is as uniform as possible since the level of deductible could affect the level of Defence cover that can be made available under Rule 71.1.a. Consequently, Rule 71.1.a provides that the relevant deductible shall be deemed not to exceed one per cent of the Ship’s value and, thereby, introduces a cap on the deductible that is relevant for these purposes. This ensures that the level of available Defence cover is not increased as a result of the fact that Members have agreed an unusually high deductible under their Hull Policies and the availability of Defence cover is based on either the actual deductible or a deemed deductible of one per cent of the vessels insured value, whichever is the lower.

For example, if a Ship that has an insured value of USD 40 million has a deductible under the Hull policies of USD 1 million (2.5 per cent of the ship’s insured value), the relevant deductible for the purpose of Rule 71.1.a is USD 400,000, i.e. one per cent of the Ship’s value. However, to enable the Association to determine the deductible that is relevant in any particular case, the Member is obliged to disclose the relevant Hull Policy terms to the Association.

(F) …liabilities, losses, costs or expenses recoverable under any other insurance… (Rule 71.1.b)

Whilst a Member is not obliged by the Rules to take out insurances that provide additional cover to that which is provided by the Hull Policies, many shipowners and charterers do so in practise in order to protect their interests.

However, cover is not available under the Rules if there is a duplication or overlap of insurance (commonly called ‘double insurance’) between the P&I cover and such other insurances. In the event of ‘double insurance’, the Member is required by the Rules to claim under his other (primary) insurance rather than under the Rules, since the cover that is provided by the Rules is intended merely to complement the Member’s other insurances.

(G) …or which would have been so recoverable apart from… (Rule 71.b.i and ii)

The principle that is explained in (F) also applies in the event that any such other insurance contains a ‘double insurance’ provision; i.e. a term which provides that such other insurance is considered to be complementary or subsidiary to P&I insurance or any other insurance that covers the same risk. The Association is
not privy to the terms of other insurances and is not prepared in the interests of mutuality to bear the financial consequences of such terms. Therefore, the onus is on the Member and his insurance broker to ensure that such a situation is avoided.

(H) …a person performing work in the service of the Ship covered by social insurance… (Rule 71.1.c)

For the purposes of Rule 71.1.c, the term ‘social insurance’ means a national or state insurance scheme that entitles the claimant to claim benefits in the event of death, injury or illness. Cover is not available for liabilities, losses, costs or expenses that are covered by such insurance schemes, or which could have been covered by such social insurance if this had been put into effect.

Cover is excluded under Rule 71.1.c for claims that are brought by any persons that are performing work in the service of the Ship, regardless of whether such persons are employed by the Member. Such persons include Crew members, stevedores, longshoremen, surveyors, pilots, repair workers and other independent contractors, and the purpose and aim of the Rule is to ensure that such persons make claims to the maximum extent that is possible under the appropriate social insurance scheme and not against the Member or the Association. However, the Association will usually reimburse a Member for claims that he has paid in respect of such liabilities, losses, costs and expenses provided that the claims are reduced by whatever compensation that is, or should have been available, under the applicable social insurance schemes.

(I) …public or private insurance required by the legislation or collective wages agreement… (Rule 71.1.c)

The terms of an employment contract, or a collective bargaining agreement, or the applicable law that governs such contracts or agreements, may require a shipowner or charterer to take out public or private insurance to cover their liability for the death, injury or illness of Crew members or other persons that are working on board the Ship. Cover is not available for liabilities, losses, costs or expenses that are covered by such insurance schemes, or which would have been covered by such insurance schemes if the Member had complied with his obligations to take out such insurance. However, the Association will usually reimburse a Member for claims that he has paid in respect of such liabilities, losses, costs and expenses provided that the claims are reduced by whatever compensation is or should have been available under the applicable public or private insurance scheme.

5 See also the comments made at the end of (B).
6 See Rule 76 and Appendix V Rule 3.a
(J) The Association shall not cover under a Defence entry costs which are or can be covered under a P&I entry. (Rule 71.2)

If cover is available for costs under a Member’s P&I entry, in particular under Rules 44 and 45, the Rules require the Member to claim such costs under his P&I entry and not under his Defence entry. Furthermore, if cover is available for costs under the P&I cover that is provided by the Association, but the Member has chosen to exclude certain of those risks from his P&I entry pursuant to special terms of entry, he cannot recover legal and other defence costs that have been incurred in respect of those risks under his Defence entry. Similarly, (apart from the costs that are discussed above in relation to Rule 71.1.a Defence cover is not available for costs that have been incurred in relation to a claim that, would be covered under the P&I entry but for the fact that the claim is less than the applicable deductible.

However, if the costs are incurred in relation to risks that are subject to a specific exclusion under the Rules for P&I cover, such costs may be recoverable under a Defence entry. For example, if a Member has opted to exclude cover for cargo liability under Rule 34, he cannot recover under his Defence entry any costs that he has incurred in connection with claims that are brought against him for the loading, lightering, stowing, trimming or discharge of cargo. However, cover is available under a Defence entry for costs that have been incurred by him in relation to a claim for delivery of cargo without production of a Bill of Lading, notwithstanding the fact that P&I cover for such specific risk is excluded by Rule 34.1.i.

If a particular case involves issues that involve both P&I and Defence cover it is possible that work may be conducted, and legal costs incurred, that benefit both P&I and Defence, e.g. a collision case that involves claims for damage to the other vessel and claims for loss of earnings as a result of the collision. In such cases costs may are normally divided between P&I and Defence. Such a division is normally based on the amount of work that can be attributed to each claim or, if no such division is possible, based on the values that are involved in each claim. If neither approach is possible, the costs may be split 50/50 between P&I and Defence.
Rule 72 Conduct of Member

The Association shall not cover any liabilities, losses, costs or expenses arising or incurred in circumstances where there has been wilful misconduct on the part of the Member, such misconduct being an act intentionally done, or a deliberate omission by the Member, with knowledge that the performance or omission will probably result in injury, or an act done or omitted in such a way as to allow an inference of a reckless disregard of the probable consequences.

Guidance

Rule 72 excludes cover where there has been ‘wilful misconduct’ on the part of the Member, and such exclusion is additional to the exclusions and limitations, both general and specific, that are contained elsewhere in the Rules. The Association also has the right to terminate the insurance of any or all of the Ships that have been entered by a Member without notice where a casualty or other event has been brought about by the Member’s wilful misconduct.¹

(A) …arising or incurred in circumstances where there has been wilful misconduct… (Rule 72)

An important distinction needs to be drawn between negligence and wilful misconduct on the part of the Member. Cover is generally available where liability, loss, cost or expense is caused by negligence of the Member, his servants or agents. However, the Association does not insure the Member against liabilities, losses etc., that arise as a result of wilful, i.e. intentional or reckless, misconduct on the part of the Member, since the membership as a whole should not suffer as a result of such serious wrongdoing.

Rule 72 defines what is considered to be ‘wilful misconduct’ for the purposes of the Rules and the question of whether or not the Member has been guilty of ‘wilful misconduct’ for these purposes is determined by the provisions of Rule 72 as construed under Norwegian law, which is the law that governs the legal relationship between the Association and the Member.² Therefore, the fact that the Member might not be considered to be guilty of wilful misconduct under some other system of law, or in the light of the standards that are adopted in the Member’s native country, or in the country where the incident has occurred, is not relevant.

¹ See the Guidance to Rule 24.2.a.
² See the Guidance to Rule 90.
(B) …such misconduct being an act intentionally done, or a deliberate omission
with knowledge that the performance or omission will probably result in
injury, or an act done or omitted in such a way as to allow an inference of a
reckless disregard of the probable consequences. (Rule 72)
For the purposes of Rule 72 the term ‘wilful misconduct’ includes not only intentional
acts but also deliberate omissions. Even if the Member did not intend to cause
damage or loss, cover is not available if it can be demonstrated that the Member
must, nevertheless, have appreciated that injury would probably result from his acts
or omissions, or that he acted in such a way that it is reasonable to infer that the
Member did not care about the probable consequences of his acts or omissions.

The wording of Rule 72 is similar to, albeit not identical with, the wording of the
more modern international conventions that govern the limitation of liability in the
field of transportation. For example, under the 1976 Limitation Convention, the
right to limit liability may be lost if it is proved that the loss resulted from a ‘personal
act or omission committed with the intent to cause such loss, or recklessly and with
knowledge that such loss would probably result’. Therefore, the conduct that can
cause the Member to lose his right to limit may also amount to wilful misconduct
that could deprive him of his P&I cover even though the right to limit may be
adjudged by a law other than Norwegian law and by a court or tribunal other than
in Norway.

However, in some circumstances, the Member may be unable to prove his right
to limit his liability under the applicable law but may still be entitled to P&I cover
because there has been no ‘wilful misconduct’ on his part. For example, in order
to limit his liability under the law of the United States, a shipowner must prove
that there has been no ‘privity or knowledge’ on his part, and similarly, under the
1957 Limitation Convention, he must prove that there has been no ‘actual fault or
privity’ on his part. In both cases, the right to limit liability may be lost if there has
been negligence with knowledge but such conduct is not as serious as the wilful or
reprehensible conduct that would be necessary to deny the Member cover under
Rule 72. Each and every case will be assessed on its own merits.

(C) …on the part of the Member… (Rule 72)
The intention of the Rule is to penalise the Member only if it can be shown that
he has been personally guilty of wilful misconduct. If the Member is an individual,
there must be personal wilful misconduct on his part. However, where the Member
is not a human being, but a company or some other body corporate, it is necessary
to determine which individuals are deemed to be ‘the Member’ for the purposes
of the Rule, i.e. to ascertain who is the ‘alter ego’ of the Member, or the person
whose ‘action is the very action of the company itself.’ In normal circumstances, the
directors of a company will satisfy this test, but, depending on the particular facts,
other senior managers may do so as well.

Wilful misconduct on the part of the Crew or some other agent or representative of
the Member is not likely to justify the exclusion of cover under Rule 72. However,
wilful misconduct on the part of senior employees or independent contractors to
whom the Member has delegated important functions relating to the management
and operation of the Ship, may be deemed to be wilful misconduct on the part of
the Member on the basis that, if the Member chooses to delegate such functions to
such persons, he must accept the consequences of that person’s wilful misconduct.
Therefore, wilful misconduct on the part of technical, commercial and Crew
managers that are appointed by the Member to perform important functions with
regard to the Ship may cause the Member to lose his right to cover.

Since a Member is defined in Rule 1 as including a Joint Member or Co-assured
or Affiliate, the wilful misconduct of any one of them is deemed to be the wilful
misconduct of the Member for the purposes of Rule 72.4

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3 This is the oft repeated phrase used by the English court in the case of Lennard’s Carrying Co v Asiatic
Petroleum (1915) AC 705.
4 See the Guidance to Rule 79.4.
Rule 73 Nuclear perils

1 The Association shall not cover any liabilities, losses, costs or expenses directly or indirectly caused by or contributed to by or arising from:
   a ionising radiations from, or the radioactive, toxic, explosive or other hazardous or contaminating properties of:
      i any nuclear fuel or any nuclear waste or the combustion of nuclear fuel, or
      ii any nuclear installation, reactor or other nuclear assembly or nuclear component thereof; or
   b any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter,
   c the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter,

other than liabilities, costs and expenses arising out of carriage of ‘excepted matter’ (as defined in the Nuclear Installations Act 1965 of the United Kingdom or any regulations made thereunder) as cargo on the Ship.

2 The exclusion in Rule 73.1 above shall not apply to liabilities, costs and expenses of a Member insofar only as they are discharged by the Association on behalf of the Member pursuant to a demand made under:
   i a guarantee or other undertaking given by the Association to the Federal Maritime Commission under Section 2 of US Public Law 89-777, or
   ii a certificate issued by the Association in compliance with Article VII of the International Conventions on Civil Liability for Oil Pollution Damage 1992 or any amendments thereof,
   iii an undertaking given by the Association to the International Oil Pollution Compensation Fund 1992 in connection with the Small Tanker Oil Pollution Indemnification Agreement (STOPIA),
   iv a certificate issued by the Association in compliance with Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

to the extent such liabilities, costs and expenses are not recovered by the Member under any other policy of insurance or any extension to the cover provided by the Association. Where any such guarantee, undertaking or certificate is provided by the Association on behalf of the Member as guarantor or otherwise, the Member agrees that any payment by the Association thereunder in discharge of the said liabilities, costs and expenses shall, to the extent of any amount recovered under any other policy of insurance or extension to the cover provided by the Association, be by way of loan and that there shall be assigned to the Association to the extent and on the terms that it determines in its discretion to be practicable all the rights of the Member under any other insurance and against any third party.
Guidance
The processing, carriage and use of nuclear material involves substantial and special risks and is governed by international conventions such as the Brussels Convention Relating to Civil Liability in the field of Maritime Carriage of Nuclear Material 1971. The nature of such risks is very different from that which is faced on a day-to-day basis by the vast majority of ships. Accordingly, the Association, the other P&I clubs that are members of the International Group and the market reinsurers of the Pool, have concluded that it would be contrary to the principles of mutuality to provide the same breadth of cover in respect of such risks. Therefore, cover is made available only in limited circumstances, i.e. in respect of the carriage of ‘excepted matter’ as defined in (E) below.

(A) ...directly or indirectly caused by or contributed to by or arising from...
(Rule 73)
Rule 73 is drafted in the widest terms possible to exclude cover for all liabilities, losses, costs or expenses that are caused, or contributed to, either directly or indirectly, by one or more of the various nuclear perils that are listed therein. The use of the phrases ‘either directly or indirectly’ and ‘caused by or contributed to or arising from’ emphasise that if the risks that are itemised in Rule 73.1.a have had any material causative impact or influence on the incurring of liabilities, losses etc., cover is not available.

(B) ...ionising radiations from, or the radioactive, toxic, explosive or other hazardous or contaminating properties of:
   i  any nuclear fuel or any nuclear waste or the combustion of nuclear fuel...
(Rule 73.1.a)
The term ‘nuclear fuel’ refers to a substance that is the source of energy in a nuclear reactor. ‘Nuclear waste’ refers to all products of the nuclear industry that have no readily ascertainable value, but need special handling because of their radioactive character. Spent nuclear fuel may be considered to be ‘waste’ if it cannot be re-processed to recover uranium and plutonium.

Rule 73.1.a is primarily designed to exclude cover for risks that arise as a result of the operation of nuclear-powered ships. However, cover is also excluded if the liability, loss, cost or expense arises generally because of nuclear fuel regardless of how and where it is used, or because of nuclear waste from any source, whether or not on board the entered Ship.

Cover is excluded not merely for claims that affect the Ship, its cargo or Crew, but also for claims for damage to any other property, or for damage to, or the pollution of, the environment, or for injury to any other person. For example, cover is excluded for claims that arise as a result of a collision between a non-nuclear powered Ship that is entered in the Association and a nuclear powered ship that exposes property, persons and the environment to radiation from the nuclear fuel on
the nuclear powered ship. Cover is also excluded for losses that may be suffered by the entered Ship as an innocent bystander that is affected by the fall-out of nuclear fuel or waste in the vicinity of the Ship.

Finally, Rule 73.1.a excludes cover not only for radiation damage, but also for any other form of damage that is caused by the toxic, explosive or any other inherently characteristic nature of a nuclear installation or reactor regardless of whether such installation or reactor is situated on-shore or on a nuclear powered ship.

(C) …any nuclear installation, reactor or other nuclear assembly or nuclear component thereof… (Rule 73.1.a.ii)
The phrase ‘nuclear installation, reactor or other nuclear assembly or nuclear component thereof’ encompasses any plant, machinery, equipment or appliance that is designed or adapted for the production or use of atomic energy, or for the storage, processing or disposal of nuclear fuel or nuclear waste.

(D) …any weapon or device employing atomic or nuclear fission and/or fusion… (Rule 73.1.b)
Rule 73.1.b excludes cover for liabilities, losses, costs and expenses that are caused by any form of atomic weapon. Atomic bombs, i.e. those bombs that employ fission techniques, or hydrogen bombs, i.e. those that use a fusion process, are both considered to be ‘any weapon or device’ for the purposes of Rule 73.1.b, as are any other weapons that use ‘other like reaction or radioactive force or matter’.

Cover is excluded regardless of whether the weapon is or is not being used for a warlike purpose. Therefore, cover is excluded for claims that arise as a result of an accident that involves a nuclear weapon.

Although additional war risks insurance may be arranged for the Member by the Association,¹ such insurance is also subject to the same exclusion.

(E) …the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter (Rule 73.1.c)
This provision reflects the exclusion that can be found in the Pooling Agreement and is included to ensure that the cover that is available to a Member from the Association in respect of nuclear perils does not extend beyond that which is covered by reinsurance. As stated in section (A) above, Rule 73 is drafted in the widest terms possible to exclude cover for liabilities, losses, costs or expenses whether “...directly or indirectly caused by or contributed to by or arising from…” the various nuclear perils listed therein. Therefore, Rule 73.1(c) makes it clear that

¹ See Appendix 1, paragraph 2 and the Guidance to Rule 58.
the exclusion applies to virtually any hazardous properties of any radioactive matter and applies regardless of whether the Member knew of the hazardous properties of the radioactive matter or that the substance or ‘matter’ was radioactive.

However, if the nuclear peril exclusion is to apply, there must be some causal or contributory link between the radioactive, toxic, explosive or other hazardous or contaminating properties of the radioactive matter, and the liabilities, losses, costs or expenses that form the subject-matter of the Member’s claim. Therefore, if a scrap metal cargo were to be loaded in bulk on board the Ship and it was subsequently discovered that the cargo was radioactive, cover is not available for the costs and expenses of unloading and handling the cargo even if the shipper had failed to properly describe it as being radioactive. For similar reasons, cover would not be available under a Defence entry for the legal and other costs that may be incurred in order to seek reimbursement of losses from the shipper or to defend an off hire claim that may be brought under a time charter party.

(F) ...other than liabilities, costs and expenses arising out of carriage of ‘excepted matter’ (Rule 73 proviso)

Nuclear substances are radioactive or volatile to varying degrees, and certain types of nuclear materials can be, and are, routinely carried safely by ships as cargo. Consequently, there is no reason why cover should not be made available in relation to the risks that are involved in such carriage. Therefore, Rule 73 does not exclude cover for liabilities, losses, costs and expenses that arise as a result of the carriage by an entered Ship of ‘excepted matter’ as defined in the Nuclear Installations Act 1965 of the United Kingdom or any regulations made thereunder. However, cover is available under Rule 73 only when such permitted cargo is carried on the entered Ship. If claims are made in relation to such substances when carried on another ship, or when stored elsewhere, cover is excluded as specified in Rules 73.1.a, b and c.

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2 ‘Excepted matter’ is defined in Section 26 of the Nuclear Installations Act as: “any nuclear matter consisting only of one or more of the following, that is to say –
(a) isotopes prepared for use for industrial, commercial, agricultural, medical, scientific or educational purposes;
(b) natural uranium;
(c) any uranium of which isotope 235 forms not more than 0.72 per cent.;
(d) nuclear matter of such other description, if any, in such circumstances as may be prescribed (or, for the purposes of the application of this Act to a relevant foreign operator, as may be excluded from the operation of the relevant international agreement by the relevant foreign law)”.

3 This statute was passed in order to give effect in the United Kingdom to the provisions of the Vienna Convention on Civil Liability for Nuclear Damage 1963 in the United Kingdom.

4 Article IX of the Hague-Visby Rules states that nothing in the Rules will affect the provision of ‘any International Convention or national law governing liability for nuclear damage.’ This is a reference to the Vienna Convention on Civil Liability for Nuclear Damage 1963 which imposes absolute liability on the operators of nuclear installations where damage (other than damage caused by natural disasters of an exceptional character) has been suffered as a result of a nuclear incident involving nuclear material carried from that installation.
The wording of Rule 73 reflects that of the Pooling Agreement and the Group Excess Loss Policies in order to ensure that the Association is fully protected by its reinsurers. Consequently, if an application is made to the Association to confirm cover, the Association may seek the advice of a consultant appointed by the International Group.

(G) The exclusion in Rule 73.1 above shall not apply to liabilities, costs and expenses of a Member insofar as only...

Rule 73.2 makes it clear that the exclusion in Rule 73.1 does not apply to liabilities, costs and expenses that are incurred by the Association by reason of having issued the certificates, guarantees or undertakings that are specified in Rule 73.2.

The liability regimes for which such certificates, guarantees or undertakings are issued may not protect the Member against liabilities etc., arising as a result of nuclear risks. However, although the Association and the other P&I clubs that are members of the International Group, do not provide shipowners with primary P&I cover for nuclear perils, the shipowner and the Association may incur liabilities, costs and expenses by virtue of the relevant certificates, guarantees or undertakings that have been issued. Such liability would be excluded from the P&I cover unless an exception was made to the exclusion from cover. Consequently, Rule 73.2 provides such an exception and confirms that cover is available for liabilities, costs and expenses that are incurred in such circumstances and which would have been excluded but for such exception.

Rule 73.2 has the same application in relation to nuclear risks as Rule 58.2 has in relation to war risks. For further comments, please see the guidance to Rule 58.2.
Rule 74 Unlawful trades etc.
The Association shall not cover liabilities, losses, costs or expenses arising out of or consequent upon the Ship carrying contraband, blockade running or being employed in or on an unlawful, unsafe or unduly hazardous trade or voyage.

Guidance
The aim and purpose of Rule 74 is to ensure that membership funds are not dissipated by the payment of claims that are considered to be contrary to the aims and purpose of the Association. However, the Rule recognises that shipping is not a risk-free activity and that it may not always be obvious to Members whether a particular activity does or does not contravene laws, or is or is not unduly hazardous. Many of the activities in which Ships are engaged on a day-to-day basis can be considered to have some degree of danger and it would be unrealistic and illogical for a marine liability insurer to withhold cover purely on that basis. For example, there is no one international law that determines what constitutes unlawful trading and that which is considered lawful in one country may be considered unlawful in another. Similarly, some ports or cargoes are known to have potentially hazardous characteristics but can, nevertheless, be used or carried safely if suitable precautions are taken. However, some activities are considered to involve a greater, and unacceptable, degree of risk to the mutual membership. Therefore, it is considered important from the point of view of mutuality that the Association does not provide cover for liabilities, losses, costs and expenses that arise as a result of activities that are considered by the majority of the membership to be unwise or unsafe or unduly hazardous and the purpose and aim of Rule 74 is to exclude cover for such risks and to, thereby, encourage Members to act prudently when trading their Ships.

(A) …arising out of or consequent upon… (Rule 74)
Cover is excluded under Rule 74 only if there is a causative link between the liabilities, losses, costs or expenses that the Member incurs, and one or more of the specific events to which reference is made in the Rule, e.g. the carrying of contraband or blockade running.

(B) …contraband… (Rule 74)
Cover is not available for liabilities, losses, costs or expenses that have been caused by the carriage of contraband.

The term ‘contraband’ is normally associated with war or conflict. It describes cargo that is likely to assist a country that is at war or involved in a conflict, and which may, therefore, be seized by another party to the war or conflict, even if it is carried on a neutral ship. However, the cargo does not have to consist of military hardware or equipment. A cargo of any nature can be considered to be contraband if it is susceptible to seizure by opposing governments or parties, e.g. foodstuffs or medical supplies that are intended to sustain opposing forces.
‘Blockade running’ occurs when an attempt is made, whether successfully or not, to call at ports or places to which access is denied by naval or other military forces, or which are declared to be blockaded by a country or an international organisation such as the United Nations.

A trade or voyage may be unlawful if it contravenes the laws of one or more countries. The laws of the following countries may be relevant in this regard: the country where the Member is domiciled or carries on business, the country of the Ship’s registration, the country or countries to or from which the vessel will trade, or the country the law of which applies to the contract of carriage. The Association does not treat the legal requirements of any one country as being either conclusive or more important than the law of any other country in this respect. However, the fact that the voyage or trade is considered unlawful by a particular country may be considered by the membership to be particularly relevant when considering whether the particular Member should have allowed the Ship to be engaged in the particular voyage or trade. What is relevant for the purpose of Rule 74 is the objective assessment of the Association acting on behalf of the membership as a whole rather than the subjective knowledge of the particular Member.

It is the fact that the voyage or trade is considered to be unlawful in the above sense that is relevant for the purposes of Rule 74. Therefore, if the voyage or trade is in fact lawful in the sense discussed above, but the Member or someone on his behalf, nevertheless, commits an unconnected unlawful act whilst performing the otherwise lawful voyage or trade, cover is not excluded under Rule 74. However, if such act has been committed wilfully by the Member personally, or by someone who is the ‘alter ego’ of the Member, cover may be excluded pursuant to Rule 72.1

Rule 74 should be read together with Rule 25.2.j2 which provides that the Member will cease to be covered if the Ship, with the consent or knowledge of the Member, is being used for the furtherance of ‘illegal purposes’. There are, however, two important differences between these two Rules:

i Rule 74 merely provides that the Member is not covered for claims “arising out of or consequent upon” the Ship being engaged in an unlawful trade or voyage, whereas Rule 25.2.j provides that the entry of the Member’s Ship in the Association automatically ceases in such circumstances without the need for any notice of cancellation.

ii Rule 74 excludes cover if a trade or voyage is considered by the membership to be a trade or voyage that is unsafe or unduly hazardous and one in which the particular Member should not have allowed the Ship to have been engaged even

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1 See the Guidance to Rule 72.
2 See the Guidance to Rule 25 under (M).
if the Member cannot be said to have consented to do so with knowledge of its unlawful nature whereas the Ship’s entry in the Association ceases under Rule 25.2.j only if the Ship is being used for the furtherance of illegal purposes with the consent or knowledge of the Member. Since the availability or otherwise of cover under Rule 74 depends on the objective assessment of the Association acting on behalf of the membership as a whole rather than on the subjective knowledge of the particular Member, the burden of proving that the trade or voyage was unlawful, or unsafe or unduly hazardous will normally be on the Association. This will be assessed on a case by case basis, but it is likely that the question of whether a trade or voyage was unlawful will be more clear-cut than the question of whether a trade or voyage was unsafe or unduly hazardous.

(E) ...unsafe or unduly hazardous trade or voyage. (Rule 74)
As stated above in the Introduction to the Guidance, many of the activities in which Ships are engaged on a day-to-day basis can be considered to have some degree of danger and it would be unrealistic and illogical for a marine liability insurer to withhold cover purely on that basis. However, some activities are considered by the majority of the membership to involve a greater, and unacceptable, degree of risk that should not be underwritten by a mutual underwriter. Consequently, cover is withheld under Rule 74 only when the particular trade is considered to be unduly unsafe or hazardous.

Various cases in England and elsewhere have considered what is meant by a ‘safe port’ or a dangerous cargo. Such dangers are often the subject matter of a dispute that will prompt the Member to look to the Association for cover, particularly Defence cover. However, whilst these cases provide assistance in assessing liability as between carrier and charterer or cargo interests, they are not themselves determinative of whether or not there is cover under Rule 74. Therefore, cover is excluded under Rule 74 only if the trade or voyage is one that the Member either knew, or ought to have known, involved risks that were more than normally hazardous.

For example, cover is normally unaffected if a Member incurs liability, loss, costs or expense as a result of the Ship having been ordered by a charterer to call at a port or berth which subsequently proves to be unsafe but which a reasonable Member would not have appreciated to be unsafe before the vessel used that port or berth. The term ‘unduly hazardous’ must be considered in the light of the facts of the particular case. Virtually all voyages involve a degree of hazard, but such hazard is, provided due care and attention is exercised, manageable and can be reduced to a level that is consistent with acceptable normal trading standards. Hazards that exceed such a standard are likely to be considered to be ‘unduly’ high and

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3 For more detailed commentary see Chapter 13 of the Gard Guidance on Maritime Claims and Insurance.
4 For more detailed commentary see Chapter 7 of the Gard Guidance on Maritime Claims and Insurance.
thus to require an extra degree of care and attention which, if not adopted by the Member, may give rise to unacceptable and excessive risk for which cover is not generally available.

Examples of what might be regarded as unsafe or unduly hazardous trades or voyages could be trading a non-ice-classed vessel in areas of ice or knowingly carrying a dangerous cargo otherwise than in accordance with the applicable rules and regulations. The prospective safety of the trade or voyage will be judged at the time that the decision was taken to engage in it or to perform it, and in the light of all the information and facts that were either known to the Member at that time, or which should have been known to him at that time.
Rule 75 Part Tonnage

Where a Ship is entered with the Association for less than its full tonnage, the Association shall only be liable to the Member for such proportion of any liability, loss, cost or expense as the entered tonnage bears to the full tonnage.

Guidance

A Ship may be entered for part of her tonnage only.1 If so, the Member is entitled to recover from the Association only such proportion of any liability, loss, cost or expense that the entered tonnage bears to the full tonnage.

1 See the Guidance to Rule 3.2.
Rule 76 Deductibles

Unless otherwise agreed, cover shall be subject to the Association’s standard deductibles set out in Appendix V.

Guidance

A ‘deductible’ is the amount of liability, loss, cost or expense that is insured by the Association which the Member has agreed to bear and which must be exceeded before compensation is payable by the Association to the Member. When the deductible is exceeded, it is only the amount that is in excess of the deductible that is recoverable from the Association. For example, if the Member has agreed to bear a deductible of USD 20,000 and incurs a liability for a claim that is made against him for USD 100,000, the Member is entitled to receive only USD 80,000 from the Association.

A ‘deductible’ should be distinguished from a ‘franchise’. A franchise provides that no claim is paid by the insurer unless it exceeds a specified sum, but that any claim that is made for a sum that exceeds the franchise is paid in full. For example, if the Association has agreed to a franchise of USD 20,000 and the Member incurs a liability for a claim that is made against him for USD 100,000, the Member is entitled to receive USD 100,000 from the Association.

Deductibles reduce the time and expense that would otherwise be spent on handling and processing small claims, and allow the Association to concentrate on larger claims. Deductibles also encourage Members to exercise more care in their affairs since, by agreeing a deductible, they retain a measure of financial responsibility for any loss or liability that may arise.

A list of the standard deductibles for P&I entries and Defence entries that apply from time to time is set out in Appendix V. However, by use of the phrase “unless otherwise agreed”, the Association and the Member are able to agree that deductibles other than the standard deductibles should apply to a particular entry. This flexibility enables the Member to increase or decrease the degree of risk that he wishes to retain and also to modify the premium that is payable. Indeed, Members will often prefer to accept higher deductibles in exchange for the payment of lower premiums if this is acceptable to the Association.
Rule 77 Administrative costs, insolvency and sanctions etc.

1 The Association shall not cover:
   a the Member’s internal administrative costs or expenses;
   b liabilities, losses, costs and expenses arising out of the insolvency of the
      Member or any other person or out of overdue or irrecoverable debts or out of
      any of the circumstances described in Rules 25.1(a) and (b).

2 The Association shall not indemnify a Member against any liabilities, costs or
   expenses where the provision of cover, the payment of any claim or the provision
   of any benefit in respect of those liabilities, costs or expenses may expose the
   Association to any sanction, prohibition, restriction or adverse action by any
   competent authority or government.

3 The Member shall in no circumstances be entitled to recover from the Association
   that part of any liabilities, costs or expenses which is not recovered by the
   Association from any party to the Pooling Agreement and/or from any reinsurer
   because of a shortfall in recovery from such party or reinsurer by reason of any
   sanction, prohibition or adverse action by a competent authority or government
   or the risk thereof if payment were to be made by such party or reinsurer. For the
   purposes of this paragraph, “shortfall” includes, but is not limited to, any failure
   or delay in recovery by the Association by reason of the said party or reinsurer
   making payment into a designated account in compliance with the requirements
   of any competent authority or government.

Guidance

(A) …internal administrative costs or expenses… (Rule 77.1.a)

The purpose of the Association is to provide insurance cover for liabilities, losses,
costs and expenses that are fortuitously incurred by the Member in relation to
the operation of the Ship, but not to provide insurance cover for the internal,
administrative costs and expenses that are incurred by the Member, even if these
are higher than usual as a result of claims that involve the Member. Therefore,
whilst Rule 46 makes cover available for extraordinary costs and expenses that are
reasonably incurred by the Member on or after the occurrence of a casualty or event
for the purpose of avoiding or minimising any liability that may be incurred by the
Association, it does not make cover available for any internal administrative costs
and expenses that the Member incurs for this purpose.1 Similarly, Defence cover is
not available for work done, and time spent, by the Member’s own in-house lawyers
and other staff in relation to claims for which the Member seeks Defence cover even
if such involvement is necessary, substantial and productive.2

It is not possible to give a definitive list of those cost items that are deemed to be
‘internal administrative costs or expenses’ for the purposes of Rule 71.1.a but they
include items such as the costs of staffing the Member’s office and rental and utility

1 See the Guidance to Rule 46.
2 See also (A) to the Guidance to Rule 65.
charges. Furthermore, in order to ensure that the claims of all Members are handled by the Association with the same degree of consistency, the Association is given the discretion to determine whether particular items are to be treated in any particular circumstances as ‘internal administrative costs or expenses.’

Notwithstanding the exclusion of cover for such costs and expenses, the Member is obliged in the event that cover is available from the Association for a particular claim, to obtain, at his own cost, any information that may be required by the Association, and to make calculations, attend meetings and provide whatever assistance that may be required by the Association, whether by use of his own employees or by the use of others that are regularly used to perform such services. If the Member fails to do so, he may be considered to be in breach of the duty that he has under Rule 82 to provide the Association with the necessary assistance that may be required by the Association in order to deal with claims. In such circumstances, the Association has the right, under Rule 82.2 to reject the claim or to reduce the sum that would otherwise be payable to the Member. The Association also has similar rights in relation to Defence cover.

(B) …insolvency of the Member or any other person or out of overdue or irrecoverable debts or out of any of the circumstances described in Rules 25.1.a and b. (Rule 77.b)

Rule 77.b deals with two quite separate scenarios – the financial failure of the Member, and the financial failure of others with whom the Member carries on business. In either case, cover is not available for liabilities, losses, costs or expenses that arise in such circumstances since liabilities, losses etc., that arise as a result of financial failure affect all types of business activity and cannot be said to arise purely and simply in direct connection with the operation of the particular Ship.

Furthermore, in the event that the Member becomes insolvent in the circumstances described in Rules 25.1 and 25.2, he ceases automatically upon the occurrence of any such event to be covered by the Association in respect of any and all Ships that are entered by him.

(C) The Association shall not indemnify a Member against any liabilities…

where the provision of cover may…expose the Association to any sanction…

(Rule 77.2)

Rules 77.2 and 77.3 were introduced with effect from the 2011 policy year as a result of the introduction of new sanctions clauses into the International Group General Excess Loss reinsurance contract and the Pooling Agreement the purpose of which

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3 See the Guidance to Rule 82.4.
4 See the Guidance to Rules 65 and 67.
5 See Rule 2.4.a.
6 See the Guidance to Rule 25.1.
is to protect reinsurers against exposure to any sanctions, prohibitions or restrictions that may be applied by individual states and/or international organisations. Rules 77.2 and 77.3 are intended to ensure that the cover that is provided by the Association to its Members is ‘back to back’ with the reinsurance cover that is provided to the Association by the International Group Pool and market excess loss reinsurance, and to thereby avoid the risk that the Association may be exposed to liabilities, costs and expenses for which there would be no reinsurance protection or for which there would be a shortfall in reinsurance recovery.

Unlike Rules 24.3 and 25.4, Rules 77.2 and 77.3 do not provide for the termination or automatic cesser of the contract(s) of insurance for the subject Ship(s). Therefore, subject to Rules 24 and 25 where applicable, the contract(s) of insurance will remain in force, albeit that the Association will not be obliged to indemnify the Member in the circumstances that are described in Rules 77.2 and 77.3. Furthermore, Rules 77.2 and 77.3 have wider application than Rules 24.3 and 25.4 in that they apply in circumstances where the Association may be exposed to, or be unable to recover under the Pooling Agreement as a result of, “any sanction, prohibition, restriction or adverse action by any competent authority or government.”

Rule 77.2 provides, firstly, that the Association shall be under no legal obligation to indemnify a Member for any liability, cost or expense in circumstances where the mere provision of insurance cover for the subject liabilities, costs or expenses may expose the Association to any sanction, prohibition, restriction or adverse action by any competent authority or government. In recent years, various sanctions regimes have been promulgated by the United Nations and the European Union and by individual countries including the United States, the United Kingdom, Bermuda and Norway that have imposed sanctions on any business activities that contravened the prohibition rules including the insurance of such business activities and the transfer of funds to sanctioned countries. The prohibition has applied to countries such as Iran, the Ivory Coast, Libya, Syria and Russia and it is realistic to assume that similar sanctions may well be promulgated against other countries in the future. It should also be appreciated that sanctions provisions are often voluminous, complex and often lack uniformity which makes compliance extremely difficult.

Rule 77.2 also applies in circumstances where there is a risk that the Association may be exposed to sanctions etc., as a result of the payment of claims or the provision of any benefit in respect of the subject liabilities, costs or expenses. For example, the Association is not obliged to pay any sums to a third party pursuant to any judgment, award or settlement agreement, or to provide security for claims on behalf of a Member, if such payment or provision of security might expose the Association to sanctions for having contravened any regulations that prohibit or restrict such payment or the provision of such security. Similarly, the Association is not obliged to indemnify a Member that had made such payment and thereafter
seeks recovery from the Association under the P&I insurance if the provision of such indemnity might expose the Association to any risk of sanction. This provision also applies to the payments of costs and expenses for P&I correspondents and/or legal services in the country that is subject to such sanctions, if such payment contravene regulations that prohibit or restrict the transfer of funds.

The Association will invoke this provision if it believes that it may be exposed to sanctions, even if the underlying transaction is legal. For example, even if the Ship is carrying foodstuffs, such as grain, that has been duly licensed by the US and/or any other relevant authority, and is therefore, not in breach of any relevant sanctions regime, the Ship could still be involved in a casualty in Iranian territorial waters or could make contact with a fixed or floating object in such waters. If the person or entity that is pursuing a claim in such circumstances is a designated or blacklisted citizen under an applicable sanctions regime, the Association would not be able to make any payments in relation to such a claim.

(D) The Member shall in no circumstances be entitled to recover from the Association that part of any liabilities, costs or expenses which is not recovered by the Association from any party to the Pooling Agreement and/or from any reinsurer because of a shortfall in recovery from such party or reinsurer by reason of any sanction, prohibition or adverse action by a competent authority or government... (Rule 77.3)

Rule 77.3 makes it clear that the Association is not obliged to pay compensation to any Member in respect of any liabilities, costs or expenses if the Association is not able to be indemnified for such payment by any party to the Pooling Agreement and/or from any reinsurer because of the applicability of any sanction, prohibition or adverse action on the part of any competent authority or government. The provision also makes it clear that the inability to recover from a party to the Pooling Agreement and/or reinsurer is also deemed to occur where such parties are not permitted by the competent authority or government to transfer funds to the Association, but only to a designated account. It is envisaged that a competent authority or government could well decide to order that payment must be made in this manner as an interim measure, e.g. in order to complete investigations to determine whether payment of the compensation by such parties constitutes a breach of the relevant sanctions regulations.

Rule 77.3 is intended to protect the Association against any shortfall in recovery from the Pool or reinsurers by reason of sanction risks. It applies in circumstances where, although payment of a claim or provision of cover by the Association may not expose the Association itself to the risk of sanction, the Association may not be able to recover from another association in the International Group of P&I Clubs or a reinsurer by reason of a sanction risk to which that association or reinsurer is exposed (e.g. in another jurisdiction). For example there could be a situation where US reinsurers are not allowed to make the payment that is required under the relevant
reinsurance arrangements, in which case, the Association is not obliged to make any payment to the Member of any sum that the Association is not able to recover from its reinsurers.

Therefore, Rule 77.3 has the result that the risk of a shortfall in recovery is transferred from the Association to the relevant Member. Whilst this is disadvantageous to the Member, the Association has a duty to the membership as a whole and such a result is considered to be in the interests of the mutual membership as a whole in order to ensure that the assets of the Association are protected.
Rules

Part VI - Miscellaneous provisions
Introduction

Several parties that are, according to the law, separate legal entities may be involved in the operation of a ship and may, therefore, be in need of insurance protection against liabilities, losses, costs and expenses that arise as a result of their activities. The Member may have outsourced operational or commercial functions to third parties such as ship managers, whether technical or commercial, or crew managers, any of whom may incur liability to third parties as a result of the responsibilities, activities or functions which have been delegated to them in relation to the Ship. The Member may also have entered into contracts for the provision of services to or by the Ship and those contractual partners may wish to be protected against claims that are made by third parties as a result of the provision of such services.

The Member may also be a corporation which is part of a bigger group of companies, one or more of which may in reality be owned by the same beneficial owner, and there is a risk that claims that arise as a result of the operation of the Ship may be made against other companies in the group and/or against the beneficial owner, despite the fact that none of these related companies may have performed any activities in relation to the Ship. The charterer\(^1\) and the owner of the Ship may be part of the same group of companies and the charterer may, therefore, wish to have the benefit of any insurance which has been arranged by the owner as Member.

No party will normally have any right of recovery from the Association under the contract of insurance unless he is a Member, Joint Member or Co-assured. The only exceptions are where a third party obtains such a right as a result of the operation of law,\(^2\) or pursuant to a certificate\(^3\) or guarantee that has been provided by the Association, or by virtue of a permitted assignment or other transfer of rights under the contract of insurance.\(^4\)

Rules 78 and 79 describe the status, rights and responsibilities of the various categories of persons or companies under the contract of insurance and the Rules:

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1. A charterer has the right to effect a separate entry with the Association. See the definition of a ‘Charterer’s Entry’ in the Guidance to Rule 1 and see the Guidance to Rule 3.1.
2. Under Norwegian law, a third party may obtain rights pursuant to Section 7-8 of the Insurance Contract Act of 1989. See also the Guidance to Rule 87.
3. The Association may be obliged to make payment directly to third parties as a result of the evidence of insurance for pollution liability that is issued pursuant to CLC 92. See (A) of the Guidance to Rule 38.
4. See the Guidance to Rule 89.
• Each Member, or Joint Member, is entitled to the full benefit of the contract of insurance and to membership of the Association, including the right to vote at General Meetings. In other words, a Member has the status of an assured and an insurer;

• A Co-assured is a party to the contract of insurance and will be named in that capacity on the Certificate of Entry, but does not have any membership rights. In other words, a Co-assured has the status of an assured, but not that of an insurer. A Co-assured is covered in respect of liabilities, losses, costs and expenses only to the extent determined in Rule 78, and will be liable to pay premium and other sums that are due to the Association to the extent determined in Rule 79.

• An Affiliate is not a party to the contract of insurance. Therefore, he has no right to recover under the contract of insurance and does not have any liability for any sums that are due to the Association under it. Furthermore, an Affiliate has no membership rights. An Affiliate is a person, whether an individual or a corporation, to whom or to which, the Association may, by the exercise of its discretion, extend cover within the boundaries of Rule 78.7.

It is important to take note of the inter-relationship between the rights and duties of each category of person that is described in Rules 78 and 79. For example, a Co-assured has a right of recovery from the Association which is co-extensive with that of a Member, but is also jointly and severally liable with the Member for all sums that are due to the Association. Furthermore, the act or omission of a Co-assured which causes a breach of the contract of insurance is deemed to be the act or omission of all assureds, including the Member.

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5 For the definition of ‘Member’ see the Guidance to Rule 1. However, please note that the context does not allow a Co-assured and an Affiliate to be considered to be ‘Member’ for the purposes of Rules 78 and 79.

6 For the definition of ‘Joint Member’ see the Guidance to Rule 1.

7 See the Guidance to Rule 78.2.

8 For the definition of ‘Co-assured’ see the Guidance to Rule 1.

9 For the definition of ‘Certificate of Entry’ see the Guidance to Rules 1 and 5.

10 For the definition of ‘Affiliate’ see the Guidance to Rule 1.

11 Whilst Rule 1.1 defines an ‘Affiliate’ as ‘any person who is insured pursuant to Rule 78.1.a’ this is intended simply to point out the status that an Affiliate is given by virtue of Rule 78.1.a and not to make an Affiliate a party to the contract of insurance.

12 Such discretion can be exercised by the administrative officers of the Association.
Chapter 1
Joint Members, Co-assureds and Affiliates
Rule 78 Cover for Co-assureds and Affiliates

1 The Association may agree, subject to the provisions of this Rule 78 and to such other terms as may be required, to extend the cover afforded by the Association to the Member to:

   a any person who is affiliated to or associated with the Member (not being a Co-assured or other Affiliate), and who shall not be specifically named in the terms of entry; and

   b any other named co-assured.

2 Affiliates and Co-assured shall not be entitled to membership of the Association.

3 The cover afforded to a Co-assured in categories (a), (b) and (c) below shall extend only to liabilities, losses, costs and expenses (or, in respect of Defence cover, to costs incurred in connection with claims) arising out of operations and/or activities customarily carried on by or at the risk and responsibility of shipowners (or, in the case of a Charterer’s Entry, charterers):

   a any person interested in the operation, management or manning of the Ship;

   b the holding company or the beneficial owner of the Member or of any Co-assured falling within category (a) above;

   c any mortgagee of the Ship.

4 The cover afforded to a Co-assured who is a charterer of the Ship and who is affiliated to or associated with the Member (other than a Co-assured expressly given cover by the Association in accordance with Rule 78.6) shall extend only to the risks, liabilities, losses, costs and expenses in respect of which that Member has cover, and shall be limited in accordance with Rule 52.

5 The cover afforded to a Co-assured who has entered a contract with the Member for the provision of services to the Ship, and any sub-contractor of the Co-assured shall extend only to liabilities, losses, costs and expenses which are to be borne by the Member under the terms of the contract and which would, if borne by the Member, be recoverable by the Member from the Association, provided that

   a the contract has been approved by the Association; and

   b the contract provides that each party shall be similarly responsible for any loss or damage to its own (or its sub-contractors’) property or loss of life or personal injury to its own (or its sub-contractors’) personnel.

6 The cover afforded to all other categories of Co-assured, other than those referred to in Rules 78.3, 78.4 and 78.5, shall only extend insofar as such Co-assured may be found liable to pay in the first instance for loss or damage which is properly the responsibility of the Member (or, in the case of Defence cover, insofar as such Co-assured may be required to resist a claim arising from such a liability), and nothing herein contained shall be construed as extending cover in respect of any amount which would not have been recoverable from the Association by the Member had the claim in respect of such loss or damage been made or enforced against him.

7 The cover afforded to an Affiliate shall extend only, in the case of P&I cover, to claims made or enforced through the Affiliate in respect of any liabilities for which the Member has cover and, in the case of Defence cover, to costs incurred.
in resisting claims which, if brought against the Member, would be within his cover, and nothing herein contained shall be construed as entitling an Affiliate to recover any amount which would not have been recoverable from the Association by the Member had the claim been made or enforced against the Member.

8 To the extent that the Association has indemnified a Co-assured (other than a Co-assured in the categories referred to in Rules 78.3 and 78.4) or an Affiliate in respect of a claim, it shall not be under any further liability and shall not make any further payment to any person whatsoever, including the Member, in respect of that claim or of the loss or damage in respect of which that claim was brought.

Guidance

(A) The Association may agree...to extend the cover... (Rule 78.1)

The owner, operator or charterer of a Ship becomes a Member of the Association when the Ship is entered in the Association.1 Where a Ship is entered on behalf of more than one owner, operator or demise charterer, the parties on whose behalf the Ship has been entered become Joint Members of the Association.2

The Association also allows certain categories of Co-assureds3 to be made parties to the contract of insurance subject to the requirements of Rule 78. Co-assureds are usually companies that are involved with the operation of the Ship or companies that are associated with the Member, and who may, therefore, incur liabilities to third parties in connection with that involvement or association, e.g. a charterer that is part of the same group of companies as the Member and who may be sued by third parties instead of, or in addition to, the Member.

Members, Joint Members and Co-assureds will be named in the Certificate of Entry whereas Affiliates cannot, and will not, be so named.

(B) ...such other terms as may be required... (Rule 78.1)

The Association has the right to impose special terms of cover for Co-assureds or Affiliates, but will not usually do so since the cover that is made available to them is normally substantially the same as the cover that is provided to the Member.

(C) ...any person who is affiliated to or associated with the Member... (Rule 78.1.a)

Cover may be extended to any person that is affiliated to, or associated with, the Member, but not to anyone who is affiliated to, or associated with, a Co-assured. Furthermore, cover cannot be extended to an individual.

1 See Article 2 of the Bye-Laws of Gard P&I (Bermuda) Ltd and Article 4 of the Statutes of Assuranceforeningen Gard -gjensidig-.
2 See Article 1 of the Bye-Laws of Gard P&I (Bermuda) Ltd and Article 2.1 of the Statutes of Assuranceforeningen Gard -gjensidig-.
3 See the introductory comments to the Guidance to this Rule.
The words ‘affiliated’ and ‘associated’ are not defined, but include individuals and companies in a conglomerate of companies which includes the Member, and who may incur liability as a result of the operation of the Ship despite the fact that such liability should properly be borne by the Member, e.g. the holding company or beneficial owner of the Member or the subsidiaries of that holding company or beneficial owner.

The Member has the right to name as Co-assureds in the Certificate of Entry all companies etc., that, in his view, run the risk of incurring liability in relation to the operation of the Ship. However, this may be impractical in the case of large conglomerates that include several companies that are substantially at ‘arms length’ from the operation of the Ship. It should also be appreciated that if such companies were to become Co-assureds, they would become jointly and severally liable for sums that are due to the Association under the contract of insurance. Therefore, the Member may prefer not to name such companies as Co-assureds in the Certificate of Entry, but to rely instead on the agreement of the Association to extend cover to such a company as an Affiliate should it incur liability in relation to the operation of the Ship.

An Affiliate is not a party to the contract of insurance and does not have any right to recover from the Association. Therefore, the Association is under no obligation to extend cover to any Affiliate at any time. However, the Association has the discretion to do so in the limited circumstances described in Rule 78. The application for cover may be made by either the Member or the Affiliate, but will not usually be made until a claim has been brought, since it is only at such time that the Member and/or Affiliate will know the company or companies against which a claim has been brought. If the application is made by the Affiliate, the Association will not extend cover unless the Member also agrees, since any compensation that is paid to the Affiliate will affect the Member’s loss record.

The Association is entitled to set off against any compensation that is paid to an Affiliate any amount that is due to the Association from the Member.

(D) …any other named co-assured… (Rule 78.1.b)
In principle any individual or company can be insured under Rule 78.1.b as a named Co-assured. However, the cover that is available to a Co-assured differs depending on the type of Co-assured that is involved. The cover that is available in the majority

4 See the Guidance to Rule 79.1.
5 The discretion can be exercised by the administrative officers of the Association.
6 See the Guidance to Rule 21.1. The rationale for this provision is that an Affiliate should not be entitled to recover any sums that would not have been paid to the Member, had the Association been requested to pay compensation to the Member in the same circumstances.
of cases is set out in Rules 78.3, 78.4 and 78.5, but it is important to note that the scope of cover that is available to other Co-assureds is narrower. Please see (L) below in this regard.

(E)  …not…entitled to membership… (Rule 78.2)
Affiliates and Co-assureds are not entitled to membership7 of the Association and are, consequently, not entitled to attend or vote at General Meetings or to share in any surplus upon the dissolution of the Association.

(F)  …cover afforded to a Co-assured in categories a, b and c… (Rule 78.3)
The cover that is made available to Co-assureds is designed to protect those persons that are most likely to incur liability, as a result of their direct involvement with the operation of the Ship, for liabilities, losses, costs and expenses that arise as a result of activities that are customarily undertaken by shipowners, or, where such persons are Co-assureds under a Charterer’s Entry, as a result of activities that are customarily undertaken by charterers.

For example, cover is available to the managers of a Ship who are responsible for bunkering arrangements, and who receive a claim from a bunkering company for the damage that has been caused to their barge by the allegedly negligent navigation of the Ship by its Crew during the course of bunkering operations.

It is important to note that the cover that is available to a Co-assured is not wider than the cover that would have been available to the Member had he incurred the subject liability, loss, cost and/or expense.

(G)  …any person interested in the operation, management or manning of the Ship… (Rule 78.3.a)
Companies to whom the Member has delegated ship management functions either in full or in part can be Co-assureds, as can the sub-contractors of such managers, e.g. a crewing agent that has a contract with the owner’s crew manager and who is responsible for the supply of Crew members from a certain country or region.

The number of Co-assureds that may be entered on the Certificate of Entry, and the different functions for which any particular Co-assured may be responsible, will depend on the Ship’s type and trade and the nature of the operation in which the Ship is engaged.

7 See Article 2 of the Bye-Laws of Gard P&I (Bermuda) Ltd and Article 4 of the Statutes of Assuranceforeningen Gard -gjensidig-.
(H) ...holding company or...beneficial owner... (Rule 78.3.b)
A ‘holding company’ is a company that is empowered to direct or control another company by virtue of being a controlling shareholder or otherwise. A ‘beneficial owner’ is a person who is entitled to the benefit of property and is, in the case of a Member that is a corporation, a shareholder or, if the shareholder is a mere nominee or trustee, a person for whom he holds the shares in trust.

(I) ...any mortgagee of the Ship... (Rule 78.3.c)
Mortgagee banks customarily seek to secure their loans by receiving an assignment of the benefit of the Member’s cover and by having a ‘loss payee’ clause endorsed onto the Certificate of Entry. This gives the mortgagee the right to receive the proceeds of any claim that may be made pursuant to the Member’s entry. However, such an assignment\(^8\) does not protect the mortgagee against any liabilities that the mortgagee may incur to third parties in relation to the operation of the Ship. Consequently, a mortgagee may also require protection from the Association against such potential liabilities.

Rule 78.3.c entitles a mortgagee of a Ship to become a Co-assured and, thereby, to gain protection against liabilities, losses, costs and expenses that it incurs provided that such liabilities, losses etc., arise out of operations and/or activities that are customarily carried on by, or at the risk and responsibility of, shipowners. Therefore, a mortgagee who is a Co-assured is protected against claims that are made against it because, as a result of the control that it has exercised over the shipowner, it is held responsible for the acts and omissions of the shipowner in relation to the operation of the Ship. However, mortgagees do not often seek to become a Co-assured pursuant to Rule 78.3 since they would, thereby, become jointly and severally liable with the Member for payment of the premium and other sums that are due to the Association.\(^9\)

If a mortgagee enforces his mortgage and enters into possession of a Ship, the cover for the Ship will cease automatically\(^10\) from the time that the mortgagee assumes such possession. In such an event, the entry of the Member and that of the mortgagee, if he is Co-assured pursuant to Rule 78.3, will both cease. Therefore, if the mortgagee wishes thereafter to secure protection from the Association, he must apply for the entry of the ship in his own name, and submit a new application for entry.

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\(^8\) See also the Guidance to Rule 89.
\(^9\) See the Guidance to Rule 79.1.
\(^10\) See the Guidance to Rule 25.2.g
(J) The cover afforded to a Co-assured who is a charterer of the Ship and who is affiliated to or associated with the Member... (Rule 78.4)

If a Member that is the owner of a Ship enters into a time, voyage, slot or other charterparty with a company that is affiliated to, or associated with, the Member, Rule 78 entitles such a charterer to be included on the Owner's Entry as a Co-assured. Cover will, thereby, be available to the charterer for all risks, liabilities, losses, costs and expenses for which the shipowner Member has cover. However, the cover that is available to a Co-assured charterer is subject to additional limitations.

Charterers who are not affiliated to, or associated with, the shipowner Member are not entitled to be a Co-assured on the Owner's Entry. They must insure their interest under a separate Charterer's Entry.

(K) The cover afforded to a Co-assured who has entered into a contract with the Member for the provision of services to or by the Ship... (Rule 78.5)

Operators and contractors that are engaged in the offshore industry and their respective sub-contractors frequently enter into contracts on terms whereby the various parties agree that the risk and responsibility for death, personal injury and loss or damage to property is to be borne by the party (including his sub-contractors) that suffers the injury, loss or damage regardless of which party actually caused or contributed to that injury, loss or damage. This is called the ‘knock-for-knock’ principle.

A Member who enters into this type of contract may wish to give protection to the other party to the contract, against liabilities, losses, costs and expenses for which the Member would have had a right of recovery from the Association if the claim had been made against the Member rather than against the other party pursuant to the ‘knock-for-knock’ agreement. Such protection can be achieved by naming the contractual party as a ‘Protective Co-assured’ in the Member’s Certificate of Entry for the Ship to or from which that party may render or receive services. The cover that is available under Rule 78.5 is, in many respects, similar to the ‘misdirected

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11 A charterparty does not mean a demise or bareboat charter in this context. A demise or bareboat charterer can be insured as a Joint Member on an Owner’s Entry. See the Guidance to Rule 1.3.
12 See the Guidance to Rule 3.
13 See the Guidance to Rule 52 and Appendix II.
14 This distinction reflects the fact that Ships are chartered to companies which are affiliated to or associated with the shipowners more for internal, administrative reasons rather than for commercial ‘at arm’s length’ reasons.
15 For the definition of Charterer’s Entry see the Guidance to Rules 1.1 and 3.1.
16 The term ‘Protective Co-assured’ is not used or described in Rule 78.5, but is frequently used in the Certificate of Entry. This is to distinguish ‘Protective Co-assurees’, whose rights of cover pursuant to Rule 78.5 are more limited than the cover available to other Co-assurees who fall within the categories described in Rules 78.3 and 78.4. ‘Protective Co-assurees’ may also, pursuant to special terms of entry, be free from liability for sums that are due to the Association pursuant to Rule 79.1.
arrow’ cover for other Co-assureds and Affiliates that is described in more detail below under Rules 78.6 and 78.7. The sub-contractors of the contractual party may also be named as ‘Protective Co-assureds’ in the Certificate of Entry.

Cover is available to ‘Protective Co-assureds’ subject to two specific conditions, i.e.:

1. the Association has approved the contract that determines the allocation of responsibility between the Member and his contractual party,
2. the relevant contract is on terms which provide that each party is to be responsible for injury, loss or damage to their own personnel and property, i.e. ‘knock-for-knock’ terms.

Cover is not available for liabilities, losses etc., that the Member's contractual party, rather than the Member, is to bear under the ‘knock-for-knock’ agreement, i.e. claims for loss of life or personal injury to his own personnel or to the personnel of his sub-contractors, or for the loss of, or damage to, his own property or to that of his sub-contractors. He is expected to arrange his own insurance as protection against such liability.

For example, if several members of the Crew of a semi-submersible oil platform that is entered in the Association (the Ship) are injured as a result of the tortious acts of the crew of an anchor handling vessel that is rendering services to the Ship, then, if the contract between the Member and the operator of the anchor handling vessel is on ‘knock-for-knock’ terms, the Member should, by virtue of those terms, bear the responsibility for the injuries, notwithstanding the fact that the cause of the injuries was the tortious acts of the operator of the anchor handling vessel. Nevertheless, if the Crew of the entered Ship were to commence legal proceedings against the operator of the anchor handling vessel then, if that operator is named as a ‘Protective Co-assured’ on the Member’s Certificate of Entry for the Ship, cover is available to the operator in respect of any liabilities, losses, costs and expenses that it may incur for the personal injury claims that are made by the Crew of the entered Ship. Such cover is available since the operator of the anchor handling vessel would, upon payment of such liabilities, losses etc., be entitled to claim reimbursement from the Member pursuant to the ‘knock-for-knock’ terms of their contract, and, if so, the Association would have covered the Member’s liability to reimburse him.

On the other hand, if members of the crew of the anchor handling vessel are injured as a result of the tortious acts of the Crew of the entered Ship, the Member will be protected against liability for such claims by the operator of that vessel by virtue of the ‘knock-for-knock’ terms. Therefore, the injury to the crew members of the anchor handling vessel will not give rise to ‘…liabilities, losses, costs and expenses which

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17 See (L) and (M) below.
18 This condition reinforces the general requirement in Rule 55 concerning approval of contracts.
are to be borne by the Member under the terms of the contract...’ with the result that cover is not available from the Association for any liabilities, losses etc., that the operator of the anchor handling vessel may incur in this regard.

(L) The cover afforded to all other categories of Co-assured, other than those referred to in Rules 78.3, 78.4 and 78.5, shall only extend insofar...

(Rule 78.6)

Rule 78.6 makes cover available to all categories of Co-assureds that are named on the Certificate of Entry for the Ship other than those described above in relation to Rules 78.3, 78.4 and 78.5. Therefore, Rule 78.6 makes it possible for the Member to name as Co-assureds in the Certificate of Entry persons that have no involvement in, but who might, nonetheless, be exposed to liabilities arising from, the operation of the Ship. However, the Rule does not apply to charterers\(^{19}\) that are not affiliated to, or associated with, the Member.\(^{20}\)

For example, the type of Co-assured to which Rule 78.6 refers might be a company that is part of the same group as the Member but which has no involvement in the operation of the Member's Ship. If such a company has property or other assets in a country where a claim may be brought against the Ship as a result of the fact that the Ship trades to that country, the Member may wish to name that company as a Co-assured in the Certificate of Entry since there is a risk that such property or other assets might be seized or arrested in connection with liabilities that may arise in relation to the Ship.

The Member is entitled to add or delete the Co-assureds that are named on the Certificate of Entry by endorsement during the course of the Policy Year, but any such Co-assured will be protected only for liabilities that arise as a result of incidents that occur whilst he is named as a Co-assured and after the time that he has been so included in the Certificate of Entry.\(^{21}\)

Cover is available to such Co-assureds to the extent that they are held liable to pay in the first instance for loss or damage that is properly the responsibility of the Member. The cover that is available under Rule 78.6 is sometimes referred to as ‘misdirected arrow cover’, i.e. an ‘arrow’ (the claim) that is directed against the wrong target. Therefore, in order to recover from the Association pursuant to Rule

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19 The Association will not agree to name a charterer as a Co-assured under Rule 78.6. A charterer must either be entered separately under a Charterer's Entry or must be a Co-assured as a company that is affiliated to or associated with the Member pursuant to Rule 78.4.

20 See section (J) above.

21 See also the Guidance to Rule 6 concerning the Member's duty of disclosure. If, at the time of adding another company as a Co-assured in the Certificate of Entry, the Member is aware that that company already is or may be exposed to liability which may give rise to cover pursuant to Rule 78.6, the Member has a duty to disclose that information to the Association.
78.6, the Co-assured is required to demonstrate that the Member would have been held liable for the relevant loss or damage had the original claim been brought against him rather than against the Co-assured.

The cover that is available to a Co-assured under Rule 78.6 is limited to that which the Member could have recovered from the Association had the claim been made or enforced against the Member. Therefore, the right that the Co-assured has to recover from the Association is no better than the right which the Member would have had in the same circumstances, and the Association is entitled to invoke any and all rights against the Co-assured that it could have invoked against the Member, e.g. the right under Rule 21.1 to set off any amount that is due from the Member to the Association against any compensation that is payable by the Association.

(M) The cover afforded to an Affiliate… (Rule 78.7)
The Association has the discretion to extend cover to any Affiliate, but the cover that can be extended is restricted, in the case of P&I cover, to the liabilities for which the Member has cover, and in the case of Defence cover, to the costs for which the Member has cover, and the amount payable to the Affiliate by the Association must not exceed the amount that would have been paid to the Member had the claim been made or enforced against the Member. This reflects the same principle that applies in the case of the ‘misdirected arrow’ cover under Rule 78.6 which is discussed in (L) above.

For similar reasons, the Affiliate will be required to demonstrate that the Member would have been liable if the relevant claim had been brought against him rather than against the Affiliate. However, the cover that is available under Rule 78.7 does differ from the ‘misdirected arrow’ cover in that it extends to situations where the Affiliate is a legitimate target for the claim, albeit an additional target to the Member. For example, the Rule applies in circumstances where the claimant has succeeded in ‘piercing the corporate veil’ and has persuaded the court that a group of companies should be considered to be a single entity, and that each company in the group is a legitimate target that should share the particular liability in full or part.

(N) To the extent that the Association has indemnified a Co-assured…or an Affiliate… (Rule 78.8)
Rule 78.8 is intended to protect the Association against the risk that multiple recovery claims may be brought against the Association in respect of the same third party liabilities, losses, costs or expenses by different parties that are either insured by, or offered protection by, the Association under the contract of insurance. Therefore, once the Association has indemnified a Co-assured (other than a Co-assured that is insured pursuant to Rules 78.3. and 78.4), or an Affiliate, for a claim,
it has no further liability to indemnify any other person whatsoever, including the Member, in relation to that same claim, or the loss or damage in respect of which the claim was brought.

The Rule applies regardless of the knowledge of the different parties of their respective claims against the Association. For example, the Member may have compensated a third party for a claim in ignorance of the fact that a Co-assured had already paid compensation for the same claim. If the Association has indemnified the Co-assured for that claim, the Member is not able to demand recovery from the Association for the compensation that has also been paid by the Member.23

However, Rule 78.8 applies only to Co-assureds other than those described in Rules 78.3 and 78.4, and to all Affiliates, i.e. to those who have ‘misdirected arrow’ cover and who are, therefore, covered only in relation to the acts or omissions of the Member. The Rule does not apply to any Co-assured that is insured under Rules 78.3 and 78.4, i.e. to those that are assumed to have some involvement in the operation of the Ship, and whose own acts or omissions may give rise to liability.

23 See also the Guidance to Rule 79.2.
Rule 79 Joint Members, Co-assureds, Affiliates and Fleet Entries

1 Joint Members and Co-assureds insured on any one entry shall be jointly and severally liable for all sums due to the Association in respect of such entry. Members, Joint Members and Co-assureds insured on any entry in respect of one or more Ship(s) forming part of a Fleet Entry shall be jointly and severally liable in respect of all sums due to the Association in respect of any or all Ships forming part of the Fleet Entry. For the purpose of this section a Fleet Entry shall mean the entry of more than one Ship by one or more Members on the basis that those Ships shall be treated together as a fleet.

2 Any payment by the Association to one of the Joint Members, Co-assureds or Affiliates shall fully discharge the obligations of the Association in respect of such payment.

3 Any communication by the Association to one Joint Member or Co-assured shall be deemed to be communication to all.

4 The conduct or omission of one Joint Member or Co-assured which under these Rules would constitute a breach of the contract of insurance, shall be deemed as the conduct or omission of all the Joint Members and Co-assureds.

Guidance

(A) …jointly and severally liable… (Rule 79.1)

The legal effect of these words is that all parties that have been named as Joint Members and Co-assured on any one Certificate of Entry are both individually and collectively liable for all sums that are due to the Association in relation to that entry. The Association has the right, in its discretion, to seek to recover any such sums from any one or more Joint Members and/or Co-assureds.

For example, the technical and commercial managers of the Ship may be included on an Owner’s Certificate of Entry as two separate and distinct Co-assureds for whom cover is available pursuant to Rule 78.3. Should the owner of the Ship subsequently incur financial difficulties and fail to pay premium to the Association, the Association has the right to recover the sums due from either or both of the Co-assured managers. Similarly, if the Association is obliged to pay a third party claim pursuant to the terms of a guarantee that has been issued by the Association at the request of the Member, and it subsequently transpires that cover is not available for such a claim, the Member is obliged to indemnify the Association for such payment. If he is unable to do so, the Association is entitled to seek recovery from the Co-assured managers.

Whilst each Ship is entered in the Association pursuant to a separate contract of insurance between the Member and the Association, it is considered to be in the interests of the mutual membership as a whole that the Association should be able to enforce a claim for outstanding premium and calls that relate to one Ship

1 See the Guidance to Rule 88.3.
against any other Ship that is part of the same fleet of entered Ships. Therefore, Rule 79.i includes a ‘Fleet Entry’ category. If it has been agreed between the relevant Member(s) and the Association that the Ships are to form part of such a Fleet Entry, premiums and calls that are payable in relation to one Ship that forms part of the Fleet Entry are also recoverable from all other Ships that form part of the same fleet of entered Ships.

Rule 79.1 regulates the relationship between the Association and the various parties that are insured by it but not the relationship between the parties that are insured by it. Therefore, whilst a Joint Member or Co-assured that has paid monies to the Association in relation to the insurance cover that is provided to another Joint Member or Co-assured is normally entitled under most systems of law to recover those sums from the other Joint Member or Co-assured, this does not concern or involve the Association as this is a private matter between that Joint Member and Co-assured.

An Affiliate is not a party to the contract of insurance and has no liability to pay any sums that are due to the Association under the contract of insurance. Therefore, the Association cannot seek recovery from any Affiliate of sums that have not been paid by the Member and which cannot be recovered from the Member or any Joint Member or Co-assured. However, the Association has the right pursuant to Rule 21.1 to set off any amount that is due to the Association against any amount that it agrees to pay to an Affiliate pursuant to the exercise of the discretion that is given to the Association by Rules 78.1 and 78.7.

(B) Any payment by the Association... (Rule 79.2)
If payment is made by the Association to any one Joint Member, Co-assured or Affiliate under the terms of entry, this will fully discharge the obligations of the Association to all such persons in relation to such payment. Since the Association has no detailed knowledge of the relationship that exists between Joint Members, Co-assureds and Affiliates, the Association is not obliged to ensure that the recipient has accounted properly to these other parties for any payments that are received from the Association which should be transferred to, or shared with, other parties that are entitled to the whole or part of such payments.

Rule 79.2 applies to ‘any payment’. In the majority of cases, this would be a payment that is made by the Association by way of compensation for claims, but it could also include other payments such as the return of premium pursuant to Rule 22 as a result of the laying up of the Ship, or the partial return of deposit premium that has been paid by the Member in advance in relation to a Charterer’s Entry.
(C) Any communication by the Association… (Rule 79.3)

The Association will often communicate directly with the Member in relation to certain matters, e.g. in relation to debit notes for payment of premium, but may communicate with a Co-assured in relation to other matters, e.g. communications with the technical manager for the Ship in relation to any surveys and inspections that may be required by the Association. It is important both for the Association and the wider membership that the Association is able in either case to act on the premise that the communication has been brought to the attention of the relevant personnel or organisation. Consequently, in cases where material prejudice or inconvenience may be caused to one or more Members, Joint Members or Co-assureds that are insured under the same entry as a result of the fact that they have not been informed of any particular fact or notice, Rule 79.3 is intended to protect the Association against allegations that the Association has failed to communicate such matters to all the parties that are insured under the same entry.

It is the responsibility of all Members, Joint Members and Co-assureds that are named in the Certificate of Entry – and not the responsibility of the Association – to ensure that there is effective communication between such parties in relation to all issues that are relevant to the contract of insurance. Consequently, Rule 79.3 emphasises that the Association is entitled to rely on the fact that any communication that may be sent by the Association to the Member, or to any Joint Member or Co-assured, will be forwarded promptly and properly to any other relevant party. In practice, the Association will normally correspond in relation to claims with one company that has been nominated under the terms of entry. This is usually the Member or one of the Joint Members, but in some cases, it is the manager of the Ship, or the insurance broker that is appointed by the Member. For example, if the Member has confirmed that communications from the Association are to be sent to him via his insurance broker, all communications that have been sent by the Association to the broker for onward transmission to the Member are deemed to have the same legal effect as communications that have been sent directly to the Member. Therefore, written notices that have been sent by the Association to the broker for the attention of the Member are treated as having been received by the Member when they are received by the broker.

(D) The conduct or omission of one Joint Member or Co-assured… (Rule 79.4)

When considering whether there has been a breach of the contract of insurance, Rule 79.4 makes it clear that the acts or omissions of one Joint Member or Co-assured are deemed to be the acts or omissions of all Joint Members and Co-assureds. The rationale for this Rule is that, since the Association has no knowledge of the manner in which the Member organises his affairs, it is the responsibility of the Member to ensure that he appoints trustworthy and competent parties to conduct those affairs. It is in the interests of the membership as a whole that a Member should not, and cannot, by outsourcing or delegating responsibilities,
activities or functions that relate to the operation of the Ship to third parties, have better rights vis-à-vis the Association than the rights that he would have had, had he not done so.

Therefore, the Association has the right to terminate the Member’s cover,\(^2\) or to refuse to indemnify the Member,\(^3\) if the conduct that would have justified such action, if committed by the Member, has in fact been committed by a Joint Member or Co-assured. It follows that, if the Member or one Co-assured under that entry incurs a liability, but another Co-assured under that same entry is guilty of conduct that would have given the Association the right to refuse compensation had the liability been incurred by that other Co-assured, the Association has the right to refuse to compensate the Member or Co-assured that has in fact incurred the liability.

Whilst Rule 79.4 does not refer to Affiliates, they are, in any event, not entitled to cover if the Member would not have been entitled to cover had the relevant claim been made against him.\(^4\)

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2 See the Guidance to Rule 24.
3 For example of such situations see the Guidance to Rules 8.3 and 72.
4 See the Guidance to Rule 78.7.
Chapter 2

Claims etc.
Rule 80  Time of occurrence

1  The event giving rise to a claim incurred by one Member in respect of damage to or loss of cargo (including claims in respect of cargo’s contribution to general average payable by the Member solely by reason of breach of contract of carriage) shall be deemed to arise as follows:

   a  all loss or damage to cargo carried on the same cargo carrying voyage shall be deemed to arise out of the same event (a ‘deemed event’), and that event shall be deemed to have occurred at the earliest of
      i  the first place of discharge or port at which such loss or damage was ascertained and at the time of such ascertainment; and
      ii  if such loss or damage was ascertained after discharge of the cargo from the Ship, at the time and place of discharge; and
      iii  where the Member sold the Ship (or otherwise disposed of his interest in the Ship) during a cargo carrying voyage, at the time when his last entry for the Ship with the Association or any other association which participates in the Pooling Agreement terminated and at the place where the Ship was at that time

   provided that
      i  any reference in this Rule 80.1 to a cargo carrying voyage shall include, in cases where cargo is carried under a contract of carriage partly in the Ship and partly by other means of transport, the entire through or combined transport of that cargo under that contract; and
      ii  whenever the Association can demonstrate that any loss or damage either actually arose out of a particular event and that that event occurred at or prior to the time of the deemed event, or actually arose out of an event which occurred after the deemed event (irrespective of whether the particular event or the date on which it actually occurred can be identified), the Association may require that such claim be treated separately from those other claims deemed as aforesaid to have arisen out of the deemed event.

   b  all loss or damage to cargo carried under a contract for carriage partly in the Ship and partly by other means of transport, being a contract entered into during the period of entry of the Ship, arising out of an event occurring after the discharge of the relevant cargo from the Ship (or after the Member sells the Ship, or otherwise disposes of the interest in the Ship, if earlier) shall be deemed for the purpose of Rule 2.4.c to have occurred at the time of discharge of the relevant cargo from the Ship (or immediately prior to sale or disposal referred to above, if earlier).

2  Where the Member incurs a liability in respect of the death, disease or personal injury of an individual, and the specific date on which any event causing such death, disease or personal injury has not been ascertained, the Member shall be deemed to have incurred the liability at a uniform rate over the period during which the event or events causing the death, disease or personal injury occurred or may have occurred (‘the period of exposure’), and any claim the Member may
have against the Association shall be limited to such proportion of the liability as the period for which the Member has relevant cover bears to the period of exposure.

3 For the purposes of Defence cover the event giving rise to a claim shall be deemed to arise as follows:
   a claims arising out of contract (subject to paragraphs (b) and (c) below), in tort or under statute: when the cause of action accrues;
   b claims for salvage or towage: when the services are commenced;
   c claims arising in connection with the building of a ship: at the date of signing the building contract.

Guidance
Rule 2.4.c emphasises that the Association provides cover for liabilities, losses, costs and expenses that arise solely out of events that occur during the period of entry. However, liabilities, losses etc., may sometimes be caused by the cumulative effect of a number of different events, or by events that occur at a time that cannot be determined, or by events that overlap more than one Policy Year. Furthermore, if the Member terminates the Ship’s entry and enters it in another association with effect from 20 February, this may make it difficult to determine which association has the responsibility to cover claims that arise as a result of such overlapping events.

Such situations make it difficult for the Member and the Association to determine whether cover is available in the particular circumstances, whether one or more deductibles should be applied, whether the steps that the Rules require to be taken promptly or within a stated time limit have been taken within such time, and whether notice of the claim has been given to the Association within the time bar specified in Rule 81. Therefore, Rule 80 provides guidelines that are intended to assist the Member and the Association to resolve such issues.

In circumstances where it is possible to state with precision how and when an event that has resulted in loss or damage has occurred, the Association may treat it as having occurred as a result of such event and at that time. However, when it is not possible to identify either the precise event that has caused the loss or damage, or the time when that event occurred, the provisions of Rule 80 are intended to establish how and when it is deemed to have occurred for the purposes of the Rules.

(A) The event giving rise to a claim incurred by one Member in respect of damage to or loss of cargo...shall be deemed to arise as follows...
   (Rule 80.1)
It is frequently difficult to establish exactly when cargo has been lost or damaged during a voyage. This may be because the loss or damage is not visible or apparent until the end of the voyage, e.g. since the cargo has been overstowed by other cargo or stowed in a sealed container, or because the relevant event has occurred without the knowledge of the Crew. Alternatively, the damage may be progressive
and cannot be traced to any one particular event, e.g. condensation damage that
increases on a day by day basis. In such circumstances, if the loss or damage cannot
be traced to one specific event, it is necessary to administer claims on the basis that
a deemed event has caused the loss or damage.

(B) ...all loss or damage to cargo carried on the same cargo-carrying voyage
shall be deemed to arise out of the same event...and that event shall be
deemed to have occurred at the earliest of... (Rule 80.1.a)

Rule 80.1.a applies when the event that has caused the loss or damage to the cargo
that is being carried on board the Ship cannot be ascertained. Firstly, such loss or
damage is deemed to have been caused by one event with the result that only one
deductible is applicable to such a claim. This may be important in the case of loss
or damage that is progressive during the course of a voyage. Secondly, the Rule
establishes the time at which the causative event is deemed to have occurred, which
is important in order to establish whether the Ship was entered with the Association
at that time for the purpose of providing cover.

Unless the precise event that has caused the loss or damage can be identified Rule
80.1.a provides that all loss or damage that has occurred on any one ‘cargo-carrying
voyage’ is deemed to have been caused by the one and the same event. In most
cases, a ‘cargo-carrying voyage’ can be easily identified by reference to the ports
where the cargo has been loaded and discharged, but this issue may be more
difficult to resolve where part cargoes are loaded and discharged at different ports,
or where, as in the liner trade, Ships perform round voyages. In such circumstances,
the Association will be guided by what is stipulated in the governing contract of
carriage and by other operational considerations.

In the case of through or combined transport, proviso i to Rule 80 makes it clear that
a ‘cargo-carrying voyage’ refers to the whole of the through or combined carriage,
even though only part of the carriage has been performed by the Ship and part by
another mode of transport.

(C) ...and that event shall be deemed to have occurred at the earliest of...and
at the time of such ascertainment... (Rule 80.1.a)

If the Association can demonstrate that the loss or damage was caused by a
particular event, proviso ii to Rule 80.1.a will apply. However, if the precise event
cannot be identified, Rule 80.1.a establishes the time at which the event that has
caused the loss or damage to the cargo is deemed to have occurred.

Rule 80.1.a establishes that all loss and damage to cargo that is carried on the same
cargo-carrying voyage shall be deemed to have arisen out of the same event, and
Rule 80.1.a.i establishes that such event is deemed to have occurred at the time
that the loss or damage is first ascertained at the port or place at which such loss
or damage is first ascertained. Rule 80.1.a.ii then goes on to say that, if the loss or damage is not ascertained until after the discharge of the cargo from the Ship, then the event is deemed to have occurred at the time and place of discharge.

Therefore, if the cargo is carried from port A to port B, any loss or damage that has occurred on that voyage is normally deemed to have occurred when the cargo is discharged at port B or, if the loss or damage is ascertained at an earlier time, e.g. when opening the hatches at port B, or at a port en route from A to B, then it is deemed to have occurred at that earlier point in time. However, if the loss or damage has not been ascertained until after discharge of the cargo at port B, then the event that caused the loss or damage is deemed to have occurred at the time and place of the discharge of that cargo.

However, in the case of through or combined transport that involves part carriage of the cargo by a ship other than the entered Ship, or by another mode of transport, any loss or damage that has not been ascertained until after discharge from the entered Ship is deemed to have occurred at the time and place of discharge from the entered Ship.

If the Member sells or otherwise disposes of his interest in the Ship during the course of a cargo carrying voyage, Rule 80.1.a.iii establishes the time when loss of or damage to cargo that has occurred during the course of such voyage is deemed to have occurred. Rule 80.1.a.iii provides that:

- If, following the sale or disposal of the Ship, it is entered afresh in the Association by the new owner, then the Association will apply the ‘deemed event’ provisions of Rule 80.1.a to ascertain whether cover is available to the former owner or the new owner. Therefore, unless the sale or disposal was effected after the ascertainment of cargo loss or damage at the first place or port of discharge, the Association will provide cover to the new owner pursuant to his terms of entry and subject to the deductible that he has agreed for cargo claims.
- If, following the sale or disposal of the Ship, it is entered in another P&I club that participates in the Pooling Agreement, then that other P&I club will provide cover to its member on the same basis. This is because the Pooling Agreement, to which all the P&I clubs that are members of the International Group of P&I Clubs are parties, have provisions that mirror those of Rule 80.1.a.iii. In other words, unless the sale or disposal was effected after the ascertainment of cargo loss or damage at the first place or port of discharge, then the other P&I club will provide cover to its member.
- However, if following the sale or disposal of the Ship, it is not entered with any of the P&I clubs that are parties to the Pooling Agreement, then Rule 80.1.a.iii establishes that the relevant event is deemed to have occurred at the time “when his last entry for the Ship with the Association terminated” or ceased pursuant

1 See the Guidance to Rule 80.1.b. Rule 80 Time of occurrence.
to Rule 25.2.e and “at the place where the Ship was at that time”. Therefore, if the loss of or damage to cargo is ascertained after the sale or disposal has been effected, whether at the first place or port of discharge or after discharge, the event that caused the Member to become liable for cargo loss or damage is deemed to have occurred immediately before the cover has terminated or ceased. In this connection, it should be appreciated that a sale or disposal of the Ship will cause the entry of the Ship in the Association to cease automatically when such sale or disposal occurs.²

(D) ...provided that whenever the Association can demonstrate that any loss or damage...actually arose out of a particular event...the Association may require that such claim be treated separately from those other claims deemed...to have arisen out of the deemed event. (Rule 80.1.ii)

If the Association is able to establish clearly that loss or damage to cargo has been caused by a specific and particular event, the Association has the right to treat the loss or damage as having been caused by that particular event and not in accordance with the deemed event provisions of Rule 80.1.a.i-iii. In appropriate circumstances, the Association may conclude that it should exercise such right in the interests of the membership as a whole. Furthermore, if the Association is able to establish that the loss or damage was caused by more than one specific event, this may affect the question of whether cover was available from the Association at the time that one or more such events occurred, and the number of deductibles that are applicable.³

(E) Where the Member incurs a liability in respect of the death, disease or personal injury of an individual...and the specific date on which any event causing such...has not been ascertained... (Rule 80.2)

Rule 80.2 is intended to regulate the administration of claims for long-term injury or disease that only becomes manifest after a prolonged period of time and in circumstances where the specific event that has caused the injury or disease cannot be identified. The Rule was introduced predominantly as a response to the asbestosis claims that were made, in the main, in the United States.

Cover is available for only such proportion of the relevant liability that the period for which the Member has relevant cover from the Association bears to the period of exposure, i.e. the total period for which the individual has been subject to the injury or disease. For example, if a claim is made for USD 1 million in relation to a disease that has been developing over a period of five years (the period of exposure) against a Member that has been entered for only one year during the five year period of exposure, cover is available for only one-fifth of the claim, i.e. for USD 200,000.

² See Rule 25.2.e.
³ Only one deductible will normally apply in respect of all cargo claims that arise on any one voyage.
(F) For the purposes of Defence cover the event giving rise to a claim shall be deemed to arise as follows... (Rule 80.3)

Rule 80.3 establishes the time at which certain events are deemed to have occurred for the purposes of Defence cover.

...claims arising out of contract...in tort or under statute: when the cause of action accrues... (Rule 80.3.a)

When a Member seeks Defence cover from the Association for a claim that is made in contract or in tort or pursuant to statute, the time at which the event that gives rise to the claim is deemed to occur is the time when the relevant cause of action accrues. The time at which a cause of action accrues is determined by the law that governs the particular claim. For example, under English law, a cause of action for the purposes of a contractual claim is the act or omission that has caused a breach of the contract whereas the cause of action for the purposes of a claim in tort is the act or omission that has caused loss, damage or injury to another person or to that person’s property.

...claims for salvage or towage: when the services are commenced... (Rule 80.3.b)

The term ‘salvage or towage’ includes not only the services that are rendered during the course of the salvage or towage operation, but also the preparatory work that may be necessary before commencement of the salvage or towage operation, e.g. the inspection and survey of a casualty, or the pumping out of water, or the carrying out of temporary repairs to make a damaged Ship ready for salvage. Therefore, the time when towage or salvage services commence may predate the actual salvage or towage. Rule 80.3.b establishes that, for the purposes of Defence cover, the event that gives rise to claim for salvage or towage is deemed to have occurred when salvage or towage services as defined above commence.

...claims arising in connection with the building of a ship: at the date of signing the building contract. (Rule 80.3.c)

Rule 80.3.c should be read together with Rule 66 that includes specific provisions relating to the Defence cover that is available in connection with the building of a ship. Rule 80.3.c provides that the event that has given rise to a claim relating to the building of a ship is deemed to have arisen at the date that the building contract is signed, and Rule 66 provides that Defence cover is available only if the Ship has been entered for Defence cover at the latest on signing the relevant building contract.

4 The law of most countries establish that each person has a duty of care not to cause harm to another person or to that person’s property. A breach of such duty (e.g. a negligent act or omission) gives rise to a liability in tort even though there is no contractual relationship between the two persons concerned.
5 See (C) of the Guidance to Rule 66.
Rule 81 Time bar

1. The Member shall have no right to compensation unless he has given notice to the Association of any event which may give rise to a claim on the Association within six months of his becoming aware of it.

2. The Member’s claim for compensation becomes time-barred three years from the date on which he became aware of his claim and of the circumstances that determine its extent.

3. Where a time-bar has not taken effect earlier, the Member’s claim for compensation becomes time-barred ten years from the occurrence of the event unless litigation or a general average adjustment is in progress, when the claim becomes time-barred one year after the issue of the final judgment or adjustment.

Guidance

Time limits are relevant for a Member in two different situations. Firstly, a time limit may apply to a claim that is made against the Member by a third party, e.g. for cargo loss or damage. However, different time limits also apply to claims that the Member makes against the Association. Therefore, the time limits that are described in Rule 81, which apply to claims that are made by Members against the Association, should not be confused with the time limits that apply to the claims that are brought against Members by third parties.

(A) The Member shall have no right to compensation unless he has given notice to the Association… (Rule 81.1)

It is in the interests of the membership as a whole to ensure that the Association is able to assess all potential claims against it, and all potential liabilities, in a timely manner. If this is not done, the financial well-being of the Association can be prejudiced, e.g. by the inability to take timely steps to avoid or minimise liability, or by a failure to levy the required level of premiums. Prompt notification also ensures that Policy Years can be closed as soon as possible. Consequently, Members are obliged to notify the Association promptly of any event that may give rise to a claim on the Association. Rules 81 and 82.1.a both emphasise this obligation and these Rules should be read together.

Whilst there are no formal requirements for the giving of notice to the Association for these purposes, it is obviously sensible that such notices should be given in writing in order to avoid any misunderstanding.

Rule 82.1.a requires the Member to give prompt notice to the Association of any event that may give rise to a claim on the Association, and if this is not done, then the Member’s right to compensation may be prejudiced. However, if the Member does not give notice to the Association within six months of becoming aware of
such an event, then Rule 81.1 emphasises that he loses his right to receive any compensation from the Association for any claim that arises as a result of the relevant event.

(B) …of any event which may give rise to a claim... (Rule 81.1)
Notice is required not only of an event that has given rise to a claim against the Association, but also of any event that may give rise to a claim on the Association. Therefore, a Member is obliged to give notice to the Association of events that may possibly give rise to a claim, such as a grounding of the Ship or a shifting of the cargo, even if the Member does not think it likely that a claim will materialise.

(C) …within six months of his becoming aware of it... (Rule 81.1)
A period of six months after becoming aware of an event is considered to be a sufficiently long period of time for the Member to ascertain whether the event may give rise to a claim on the Association, and to communicate the relevant information to the Association. The Member is deemed to have become aware of the event for the purposes of Rule 81 when notice of it has been brought to the attention of the Member himself, or to the attention of senior executives in the Member's organisation, or to the attention of independent contractors to whom the Member has delegated the particular area of responsibility for the operation and management of the Ship. However, the Member will not normally be prejudiced by the late reporting of an event by the Crew, provided that the Member informs the Association as soon as he becomes aware of it.

(D) The Member’s claim for compensation becomes time-barred three years from the date on which he became aware of his claim and of the circumstances that determine its extent. (Rule 81.2)
Even if the Member does comply with his obligations under Rules 81.1 and 82.1.a to give notice to the Association of an event that may give rise to a claim on the Association, Rule 81.2 requires the Member, including a former Member, to present a claim for compensation to the Association within three years of becoming aware that he has such a claim and of the circumstances that determines its extent.

The period of three years commences to run when the Member becomes aware that he has the possibility of a claim against the Association and becomes aware of the facts that determine the likely nature and quantum of the claim. These are cumulative, but not precise, requirements. The Member is deemed to have become aware of the possibility of a claim even before he has full knowledge of every last fact and piece of information, e.g. as soon as he is aware that he will incur liability to a third party and that he may be entitled to receive compensation from the Association for that liability, even if it is not completely clear at that time that cover will be available. However, time will only start to run once the Member has sufficient information to enable him to determine the likely nature and quantum of that claim.
Provided that the Member has given timely notice of the event that may give rise to a claim, it would be unusual for a claim to become time-barred pursuant to the provisions of Rule 81.2 since, in the majority of cases, the Member and the Association will work closely together after the occurrence of the event and it will be clear to the Association well within three years that the Member has a claim against the Association and is pursuing such a claim. Therefore, the Association is likely to have made it clear, in the majority of cases, within the three years, that the Member need not take further steps to protect the time bar. However, in some instances, the Association may not be satisfied within that period that cover is in fact available and, although the Association may continue to assist the Member to resist liability or to avoid or minimise costs, it will, nevertheless, reserve its position as to cover. In these rare instances, the Member’s claim will become time-barred unless the Member has commenced arbitration proceedings against the Association pursuant to the provisions of Norwegian law as implemented by Rule 91 within the stated period of three years, or has received a time extension from the Association.

(E) …the Member’s claim for compensation becomes time-barred ten years from the occurrence of the event… (Rule 81.3)

It is important in any business, and particularly so in the context of mutual insurance, that an insurer is able to treat its accounts for a particular Policy Year as final at a particular point in time since Members need to be certain that they will not be called upon to contribute more funds after that point in time. Consequently, it is important to be able to specify that no further claims will be accepted by the Association from individual Members after that point in time. However, that requirement is complicated by the fact that some claims that are made against a Member in some jurisdictions may not become manifest for many years. Accordingly, it is necessary to establish a ‘long-stop’ time limit which, on the one hand, gives Members protection against the risk that delayed claims are made against them but which, on the other hand, protects the interests of the membership as a whole.

Rule 81.3 is such a ‘long-stop’ time limit. It applies to compensation claims that are made by the Member against the Association a very long time, i.e. ten years or more after the occurrence of the event that gave rise to the claim, and has the

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1 The Association does not, by so doing, acknowledge that there is cover. See the Guidance to Rule 82.3.
2 See the Guidance to Rule 91.
3 The Association’s experience is that the claims that are most likely to generate time bar problems under this Rule are those relating to customs fines and dues in certain jurisdictions, such as Egypt, Syria and Yemen. However, similar problems may arise in relation to asbestosis claims particularly in the USA. Albeit that Policy Years are normally closed after three years with the result that no further Supplementary Calls can be levied on the Members that were entered in that Year, a claim that is made as a result of an event that occurred during that Policy Year, but which is not in fact put forward until after that Policy Year has been closed, will have to be funded from reserves and/or by levying a Supplementary Call on the Members that are entered in any Policy Years that remain open at the time that the claim is put forward. See the Guidance to Rule 16.
result that the Member or former Member against whom claims are made is obliged to bear the risk of such claims himself as cover for such claims is not available from the Association.

The ten year time limit to which reference is made in Rule 81.3 is interrupted, and the Member is thereby protected against the time bar, only when the Association admits liability under the contract of insurance or the Member commences arbitration proceedings pursuant to Norwegian law as implemented by Rule 91.5. However, if a claim against the Member is still in the process of litigation at the expiry of the ten year period, or if a general average adjustment process is still in progress at that time, the claim will not become time-barred until one year after the issuance of an adjustment\(^6\) or a final award or judgment in the relevant litigation.

The ten year time limit in Rule 81.3 operates in conjunction with, and not instead of, the three year time limit in Rule 81.2. The time bar under Rule 81.2 applies when the Member does not proceed to make a claim within three years of becoming aware of the circumstances of an event, and of the fact that such circumstances give rise to a claim against the Association. However, in certain circumstances, the Member may not become aware of these factors until after three years has expired, in which case, Rule 81.3 provides that the claim becomes time barred ten years after the occurrence of the event. Therefore, the ten year time limit applies even if the Member or former Member does not become aware of the event and of his right to make a claim on the Association in respect thereof until shortly before the ten years has elapsed, or even if he is still unaware of them on the expiry of the ten years.

In some circumstances, the ten year time limit may have the effect of abbreviating the three-year period to which reference is made in Rule 81.2. For example, if the Member becomes aware of the extent of his claim against the Association eight years after the occurrence of the relevant event, the claim will be time-barred after two more years pursuant to Rule 81.3 and not after three more years pursuant to Rule 81.2.

\(\textbf{(F)}\) …unless litigation or a general average adjustment is in progress when the claim becomes time-barred one year after the issue of the final judgment or adjustment. (Rule 81.3)

If a claim against the Member is still in the process of litigation at the expiry of the ten year period, or if a general average adjustment process is still in progress at that time, the claim will not become time-barred until one year after the issuance of an adjustment or a final judgment in the litigation in question.

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5 See the Guidance to Rule 91.
6 See (F) below.
For the purposes of Rule 81.3 the words ‘in progress’ are used in the widest possible sense. It will therefore be sufficient if legal proceedings have been commenced, e.g. by service of a writ or the appointment of an arbitrator, or if an average adjuster has been appointed, even if there has been very little subsequent progress due to procedural or other delays.

For example, if an average adjuster has been appointed before the expiry of the ten year period, and the adjustment is published two years later, the claim against the Association will become time-barred one year after the adjustment has been issued, i.e. thirteen years after the event. However, if at the expiry of the ten year period, the parties are still negotiating general average liabilities but no adjuster has yet been appointed, the claim against the Association will be time-barred on the expiry of the ten years.
Rule 82 Obligations with respect to claims

1 A Member shall:
   a promptly notify the Association of any event which may give rise to a claim upon the Association, and of any formal enquiry into a loss or casualty involving the Ship;
   b upon the occurrence of any event which may give rise to a claim upon the Association, take and continue to take all such steps as may be reasonable, including the preservation of any right of recourse against a third party, for the purpose of averting or minimising any liability, loss, cost or expense in respect whereof he may be insured by the Association;
   c notify and, if possible, consult the Association prior to taking any action as described in Rule 82.1(b) above;
   d promptly provide the Association with all documents and information which may be relevant to such event and which are required to enable the Association to determine whether the event is covered according to these Rules;
   e allow the Association or its appointees to interview any person who in the opinion of the Association may have knowledge relevant to the event;
   f not without the prior consent of the Association admit liability for or settle any claim for which he may be insured by the Association.

2 If a Member commits a breach of any of these obligations:
   a the Association may reject any claim, or reduce the sum payable, in relation to such event; and
   b the Member shall reimburse to the Association such part of any costs or expenses incurred by the Association in relation to such event as the Association shall determine.

3 The Association shall have the right if it so decides to control or direct the conduct of any claim or legal or other proceedings relating to any liability, loss, cost or expense in respect whereof the Member is or may be insured, in whole or in part, and to instruct, on behalf of the Member, lawyers and other advisers and experts to assist and to require the Member to settle, compromise or otherwise dispose of such claim or proceedings in such manner and upon such terms as the Association sees fit, provided that no actions or directions of the Association shall imply an obligation to cover the liability, loss, cost or expense. If the Member does not settle, compromise or dispose of a claim or of proceedings after being required to do so by the Association, any recovery by the Member from the Association in respect of such claim or proceedings shall be limited to the amount he would have recovered if he had acted as required by the Association.

4 A Member shall, in respect of a dispute which falls under the cover, for his own account, obtain information, make calculations, attend meetings and otherwise provide assistance, where such work can be performed by him or by persons employed by him or regularly engaged by him to perform such services.
Guidance

Since all claims and all costs and expenses that are incurred by the Association in handling claims are financed predominantly by the membership as a whole out of premiums that are levied on the membership, all Members have a duty to ensure that any event that may give rise to a claim on the Association is promptly notified to the Association, and dealt with in a manner that minimises the risk to the Association of unnecessary financial loss. The Association has a duty to ensure that claims that are made by individual Members against the Association are administered with proper discipline and cost control, which may require the Association to assume claims handling control in certain cases in order to fulfil this responsibility. Individual Members must seek to comply with the requirements of the Rule to the best of their ability since any failure to do so may give the Association the right to reject any claim or to reduce the compensation that is payable.

(A) …promptly notify the Association of any event which may give rise to a claim upon the Association… (Rule 82.1.a)

The obligations that are imposed by this Rule are mandatory. Notice is required not only of an event that has given rise to a claim against the Association, but also of any event that may give rise to such a claim. Members must notify the Association of any event that may give rise to a claim even if the Member considers it unlikely that such a claim will in fact arise. There are no formal requirements for the giving of notice to the Association for these purposes although it is sensible that such notice should be given in writing to avoid any misunderstanding.

The Member must notify the Association promptly. Rule 82.1.a does not specify exactly what is meant by ‘prompt’ notice, but the Member is normally expected to communicate information to the Association without delay as soon as he comes aware of the event.

Rule 82.1.a requires the Member to give prompt notice to the Association of any event that may give rise to a claim on the Association, and if this is not done, the Association has the right to reduce or reject the claim pursuant to Rule 82.2.a. However, if the Member does not give notice to the Association within six months of becoming aware of such an event, then Rule 81.1 emphasises that he loses his right to receive any compensation from the Association for a claim that arises as a result of the relevant event.

(B) …take and continue to take all such steps as may be reasonable…notify and, if possible, consult the Association prior to taking any action…

(Rules 82.1.b and c)

The combined effect of Rules 82.1.b and c is to require a Member, on the occurrence of an event that may give rise to a claim against the Association, to take steps to mitigate such claim and to notify and, if possible, consult the Association before taking such steps. These Rules are consistent with general principles of
marine insurance law that require an insured to act as though he is uninsured and
to ‘sue and labour’ to minimise or prevent loss. If the Member fails to take the
steps that are required by Rules 82.1.b and/or c then the Association has the right
to either reject or reduce the claim under Rule 82.2.a. However, if the Member
complies with his duties under Rules 82.1.b and/or c, cover may be available for
extraordinary costs and expenses that are reasonably incurred by him by so doing.¹

The obligation of the Member to take steps to minimise loss continues until such
time as the claim is finalised, and it includes the duty to preserve any rights that
the Member may have to claim against third parties since the Association may wish
to exercise such rights of recourse by way of subrogation after it has compensated
the Member.

The Member is required to take such steps as may be reasonable, and the
question of what is ‘reasonable’ may differ from case to case. For this reason,
Rule 82.1.c requires the Member, if time allows, to consult the Association
before taking any of the steps that are described in 82.1.b since the Association
has substantial experience of the appropriate measures that should be taken
in different circumstances, and can provide valuable advice in that regard. In
view of the ease and speed of modern communication, it is only in exceptional
circumstances that a Member will be considered not to have had sufficient time
to consult the Association. In any event, when assessing whether any course of
action is reasonable, the Association will balance, on the one hand, the cost and
appropriateness of taking such action in the light of the loss or damage that has
been incurred or is anticipated, and, on the other hand, the time that was available
to the Member to take such action.

(C) …promptly provide the Association with all documents and information…
(Rule 82.1.d)

Rule 82.1.d requires the Member to disclose all available information to the
Association as soon as possible. This is required for two reasons: firstly, to enable
the Association to provide the fullest possible advice in the light of the information
available; and secondly, to allow the Association to assess the extent to which it
should be involved, and the extent to which cover is, or is not, available for any
particular matter.

¹ See the Guidance to Rule 46.
(D) ...allow the Association or its appointees to interview any person who in the opinion of the Association may have knowledge relevant to the event... (Rule 82.1.e)

Rule 82.1.e obliges the Member to assist any lawyers, surveyors or other experts that have been appointed by the Association to investigate an event that may give rise to a claim on the Association. The Member is obliged to make his own servants or agents and all other persons who may have information that is relevant to an investigation, available for interview.

(E) ...not without the prior consent of the Association admit liability for or settle any claim... (Rule 82.1.f)

It may not be appropriate for the Member to make an admission of liability before a proper and full analysis of the relevant facts and law has been concluded since such an admission may prejudice the Member’s prospects of defending or minimising the claim. Similarly, it may not be beneficial for the Member to settle a claim that has been brought against him until all the circumstances and the merits of the case have been properly assessed. In most cases, the Association and the Member will agree on whether a claim should be settled and the basis upon which it should be settled. However, Rule 82.1.f gives the Association the right to direct the Member not to make any admission of liability, nor to settle a case, if it considers that such a course of action is inappropriate having regard to all the circumstances.

If a Member decides to settle a case on terms that do not reflect the true legal merits of the case, e.g. for his own commercial reasons, the Association is likely to decline cover for such settlement either in full or in part pursuant to Rule 82.2.a since the loss that the Member has incurred in such circumstances would not be considered to be a loss that the membership as a whole should share in the spirit of mutuality.

The same considerations apply in relation to both P&I and Defence cover.

(F) If a Member commits a breach of any of these obligations... (Rule 82.2.a)

Rule 82.2 establishes the sanctions that are applicable should the Member not comply with the requirements of Rule 82.1, and such sanctions are applicable irrespective of the circumstances, and regardless of the reasons for the non-compliance.

(G) ...the Association may reject any claim, or reduce the sum payable... (Rule 82.2.a)

Rule 82.2.a gives the Association the right to either reject the claim in full, which it will do in cases of flagrant breach, or to reduce the sum that is otherwise payable if the breach has, in the Association’s opinion, resulted in additional liability, costs or expenses.
This provision operates both as a supplement to, and independently from, any similar provisions that may apply under other Rules.

(H) …the Member shall reimburse to the Association such part of any costs or expenses incurred by the Association… (Rule 82.2.b)

Rule 82.2.b provides a similar sanction for the costs and expenses that the Association has been obliged to incur if the Member has not complied with the requirements of Rule 82.1, e.g. costs and expenses that have been incurred by the Association in relation to legal services, correspondents or surveyors.

(I) The Association shall have the right…to control or direct the conduct of any claim or legal or other proceedings… (Rule 82.3)

The Association has the right, but not the duty, to control or direct the handling of claims. This right is not exercised in all cases, but is likely to be exercised if the claim is substantial or complex or may have a material impact on the operations of other Members or the Association itself. The Association may also exercise such right if it is of the opinion that the manner in which the Member is conducting the handling of the claim and/or any legal or other proceedings is likely to cause material prejudice to the Association, or is otherwise contrary to the best interests of the membership.

(J) …to instruct, on behalf of the Member, lawyers and other advisers and experts to assist…(Rule 82.3)

In most cases, the Member will consult the Association before instructing lawyers, advisers or experts, and this is usually beneficial for both the Member and the Association, as it avoids possible later disagreement. In almost all cases, the Association will wish to be satisfied that the lawyers, surveyors and other experts that are instructed to act on behalf of the Member are those who, in the Association’s experience, have the capacity and/or expertise that is necessary to deal with the particular claim and are people with whom the Association already has an established relationship. Therefore, Rule 82.3 gives the Association the right to make such appointments on behalf of the Member whenever it thinks it necessary to do so.

In some cases, a Member may instruct an external lawyer or other adviser in his own jurisdiction to help the Member to fulfil the obligations that he has under Rule 82.1, b, c and d and Rule 82.4. However, since these are obligations that the Member must satisfy in any event in order to secure cover from the Association, cover is not available for the cost of doing so.

(K) …provided that no actions or directions of the Association shall imply an obligation to cover the liability, cost or expense… (Rule 82.3)

Should the Association suggest or direct the appointment of lawyers and other experts, or even appoint such people on behalf of the Member, or suggest or direct a particular course of action, in an effort to assist the Member before it has been
established that cover is in fact available for the particular claim, Rule 82.3 makes it clear that the Association does not, by so doing, acknowledge or confirm to the Member that cover is in fact available for the claim. Notwithstanding the provision of such assistance the availability or otherwise of cover will be determined by the provisions of the Rules and any special terms of entry.

(L) …If the Member does not settle, compromise or dispose of a claim or of proceedings after being required to do so by the Association any recovery… shall be limited… (Rule 82.3)

Rule 82.3 goes on to outline the consequences of the Member’s failure to settle, compromise etc., the claim or any proceedings as and when required by the Association. In such circumstances, the Association is obliged to limit the compensation that is payable to the Member to the amount that the Association considers would have been recoverable by the Member if the matter been concluded as directed.

If the Association directs a Member to settle a claim, it will normally indicate the maximum figure that will be recoverable from the Association if the Member settles the case as directed by the Association. In the case of P&I cover, this figure will generally be gauged by reference to an available settlement offer, and in the case of Defence risks, by reference to the costs and recoverable costs that have been incurred up to the time of the direction.

(M) A Member shall…provide assistance, where such work can be performed by him or by persons employed or regularly engaged by him… (Rule 82.4)

Rule 82.4 obliges the Member to play an active role in the claims handling process, and to ensure that the work that can and should be done by the Member or his employees is in fact done in order to avoid or minimise the unnecessary involvement of experts or other third parties and the consequent costs of doing so. Rule 82.4 should also be read in conjunction with Rule 77.a which provides that cover is not available for costs that are incurred by the Member in order to provide such assistance to the extent that such costs can reasonably be considered to be the Member’s internal administrative costs and expenses.
Rule 83 Exclusion of liability

1 The Association shall not be liable for errors or omissions in the handling of a case which may be committed by the Association's employees or by lawyers, advisers or other experts engaged by the Association on behalf of the Member.

2 The Association shall not be liable for monies which are lost, having been collected by persons engaged by the Association on behalf of the Member, or entrusted to such persons.

3 The Association shall not be liable to pay interest on any sums due from it to the Member.

Guidance

It is considered both necessary and reasonable in the context of mutual insurance that the Association should not be liable for the consequences of any negligence in the handling of a case or for any advice that is given in relation to a case or to a Member generally, whether on the part of the Association's own employees, or on the part of experts, such as lawyers and surveyors, that are engaged by the Association to handle the case on the Member's behalf. The reason for this is that any damages or other sums that would be payable to an individual Member in the event of such liability would have to be financed by the membership as a whole, and would, therefore, result in a reduction of the funds that are available to protect the interests of the other Members.

For similar reasons, the Association also has no liability for monies that are lost after they have been collected by, or entrusted to, correspondents, agents or other persons that are engaged by the Association on behalf of the Member.

Finally, Rule 83.3 establishes that the Association is not liable to pay interest on sums that are payable to the Member regardless of the time that may expire between the moment when the Member incurs a liability, cost or expense, and the time when he is reimbursed by the Association.
Rule 84 Recoveries from third parties

1. When the Member has a right of recourse against a third party for any liability, loss, cost or expense covered by the Association, the Association shall be subrogated to the Member's right of recourse upon payment by the Association to the Member in respect of the liability, loss, cost or expense.

2. Where the Association has made a payment in respect of any liability, loss, cost or expense to or on behalf of a Member, the whole of any recovery from a third party in respect of that liability, loss, cost or expense shall be credited and paid to the Association up to an amount corresponding to the sum paid by the Association together with any interest element on that sum comprised in the recovery, provided however, that

   a. where because of a deductible in his terms of entry the Member has contributed towards a liability, loss, cost or expense any such interest element shall be apportioned between the Member and the Association taking into account the payments made by each and the dates on which those payments were made; and

   b. the Association shall retain the whole amount of any award of costs in respect of its own handling of any case, and

   c. in respect of a Defence entry, any recovery from a third party in respect of legal and other costs or expenses (the “Recovery”) shall be applied as follows and in the following order:

      i. first, if and to the extent a maximum deductible is agreed, the Recovery shall be credited and paid to the Association up to an amount corresponding to the sum of legal and other costs paid by the Association, in excess of the Member’s maximum deductible, together with any interest element on that sum comprised in the Recovery.

      ii. secondly, if and to the extent the Association only has agreed to cover an agreed percentage of legal and other costs or expenses incurred by the Member, the Association shall be credited and paid a proportion of the Recovery corresponding to the percentage of legal and other costs and expenses the Association has agreed to cover pursuant to these Rules and the terms of entry agreed.

      iii. finally when the requirements in (i) and (ii) above have been satisfied the Recovery shall be applied against the Member’s minimum deductible.

3. Subject to Rule 84.2, all monies recovered for a Member with Defence cover shall be paid over to the Member, except that the Association may deduct from such monies and retain any amount due to the Association from the Member.

4. Where a Member settles or compromises a claim within its Defence cover for a lump sum which includes costs or without making provision as to costs, the Association shall determine what part of that lump sum shall be deemed attributable to costs.
Guidance

The Member may have a right of recourse against a third party for a liability, loss, cost or expense that is covered by the Association. Such right of recourse can arise under a contract between the Member and the third party such as, for example, the right that arises as result of a clause in a time charterparty that obliges the charterer to indemnify the shipowner for any liability that he incurs to cargo receivers as a result of the inadequate cargo stowage that has been performed by the charterers’ servants or agents. Alternatively, the right of recourse may be founded in statute or on common law principles such as bailment or tort.

If the Member has rights or potential rights of recourse against a third party, he is obliged under the Rules to take, and to continue to take, reasonable steps to preserve those rights, in order to protect the interests of the Association, e.g. by ensuring that his recourse claim does not become time-barred or prejudiced in any way by his acts or omissions. However, the Member does not have any obligation to pursue a claim against a third party to its conclusion before he is entitled to compensation from the Association.

Rule 84 regulates the rights and obligations of the Association and the Member in relation to any rights that the Member may have to make recoveries from third parties.

(A) ...the Association shall be subrogated to the Member’s right of recourse upon payment by the Association... (Rule 84.1)

Rule 84.1 provides that, upon payment of compensation for the Member’s claim, the Association is subrogated to any rights of recourse that the Member may have against third parties, whether they be charterers, cargo owners, the owner of another ship, or any other third party. In such circumstances, the Association takes over from the Member the rights that the Member would have in respect of the recourse claim if that claim were to be pursued by the Member himself. However, the Association is subrogated only to the extent that it has compensated the Member. This is important to remember since the recourse claim that may be made against a third party may include items of claim that do not concern the Association, e.g. liabilities, losses etc., that are insured by other insurers and/or uninsured losses that are borne by the Member.

For example, if the Ship has been struck by another ship whilst moored at a berth, and the collision has caused injury to members of the Ship’s Crew, damage to the Ship and the cancellation of a voyage charter, the Association will be subrogated to the Member’s rights of recourse against the other ship upon payment of

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1 See the Guidance to Rule 82.1.b. If the Member breaches his obligations in this respect, the Association may reject the Member’s claim or reduce the sum payable and require the Member to reimburse the Association for costs and expenses incurred as a result of the breach. See the Guidance to Rule 82.2.
compensation to the Member for the Crew injury claims. However, whilst the
Association will be subrogated to whatever rights the Member has to bring a
recourse action against the owners of the other ship for the personal injury claims,
the Association will not be subrogated to that part of the recourse claim that is made
in relation to the damage to the Ship, or for the financial losses that have been
incurred by the Member as a result of the cancellation of the voyage charterparty.
Therefore, the Member will retain the right to sue the owners of the other ship for
the uninsured loss that has been caused by the cancellation of the charterparty,
whilst the right of recourse for the claim for damage to the Ship lies with the hull
underwriters who will be subrogated to such claims pursuant to the Hull Policies.

(B) ...the whole of any recovery from a third party...shall be credited and paid
to the Association up to an amount...together with any interest... (Rule 84.2)
If the Association has compensated the Member for any particular liability, loss,
cost or expense, the Association has the right to receive any and all monies that
are recovered from a third party in respect of such liability, loss etc., up to, but not
exceeding, the amount that has been paid by the Association.

However, the right of recovery may be complicated if, for example, the claims that
are brought against the other colliding ship in the example that is given in (A) were
to be settled with the approval of the Association,2 on terms that 90 per cent of all
claims is payable by the other ship. In such circumstances, the hull underwriters will
receive 90 per cent of the claim to which they are subrogated under the Hull Policy,
the Member will receive 90 per cent of the uninsured claims and the Association
will receive 90 per cent of the personal injury claims to which they have been
subrogated under the Rules. The Association is entitled to receive the full 90 per
cent even if part of that recovery relates to a deductible that the Member has
borne for the Crew injury claims since the Association is entitled to receive all of
the recovery up to the amount of the compensation that it has paid to the Member
before the Member has the right to retain funds in respect of the deductible.

The recovery claim may also include interest for the time that has elapsed between
the date on which the Member has incurred the liabilities, losses etc., and the
date on which he has been able to obtain recovery from the third party. In such
circumstances, the Association is entitled to receive its proportion of such interest
since the Member has benefited, and the funds of the membership have been
depleted, as a result of the fact that the Member has received compensation from
the Association before recovering from the third party. Therefore, Rule 84.2 gives the
Association the right to receive that proportion of such interest that the sum paid
by the Association to the Member bears to the total principal sum that has been
claimed by the Member from the third party.

2 See Appendix V, section 3.a.
For example, if the Association were to pay USD 200,000 to the Member in compensation for the Crew injury claims in the example that is described in (A) above and the Member were to make a full recovery of all of the claims that are made against the owners of the other ship in the amount of USD 1 million plus a further USD 100,000 by way of interest, the Association is entitled to receive USD 20,000 in addition to the principal amount of USD 200,000, i.e. 20 per cent of the interest that has been recovered. Similarly, if the hull underwriters have compensated the Member for repair costs etc., resulting from the damage to the Ship in the amount of USD 500,000, they would be entitled to receive 50 per cent of the interest that was recovered, i.e. USD 50,000.

(C) ...where because of a deductible in his terms of entry the Member has contributed towards a liability...any such interest element shall be apportioned between the Member and the Association... (Rule 84.2.a)

Finally, if the Member has received compensation from the Association for the amount of the deductible that the Member has contributed to the settlement of the claim that has been brought against him, and a recovery claim is then brought against a third party to recover the sums that have been paid to the claimants, the Member is entitled to receive that proportion of the interest that is recovered from the third party in relation to such claim that the deductible bears to the total principal amount that has been recovered.

For example, if, in the example described above in (B), the Association has paid the sum of USD 180,000 to the Member by way of compensation for the sums that have been paid by the Member to the claimants for Crew injuries, and the Member has also paid the sum of USD 20,000 to the claimants corresponding to the value of the deductible, that proportion of the interest that is recoverable from the third party (the owners of the other ship) for the Crew injuries claims (USD 20,000) is shared in the following proportions: USD 18,000 to the Association and USD 2,000 to the Member.

(D) ...the Association shall retain the whole amount of any award of costs in respect of its own handling of any case... (Rule 84.2.b)

Whereas the commentary in (B) relates to the principal amount that has been recovered from the third party by way of subrogation and the commentary in (C) relates to the interest that may have been recovered in addition to the principal amount, the commentary in (D) relates to the costs that may have been recovered from the third party.

In some countries a successful claimant is entitled to receive all, or at least a proportion of its costs from the losing party in any litigation. In such circumstances, such recoverable costs are apportioned between the various parties that have an interest in the recovery claim. Therefore, in the example described in (A) above, the recoverable costs will be apportioned between the Association, the hull underwriters...
and the Member in accordance with the proportions that their respective claims bears to the total claim that is made against the third party, i.e. the owners of the other ship. Once the recoverable costs have been apportioned between the Association and the Member, on the one hand, and the other interested parties (the hull underwriters in the above example), on the other hand, it is necessary to apportion the balance of the recovered costs between the Association and the Member. In this regard, a distinction is drawn between the costs that the Association may have incurred in relation to P&I claims and the costs that it may have incurred in relation to Defence claims.

In the case of the costs that have been incurred in relation to P&I claims, Rule 84.2.b permits the Association to retain out of any recovery that may be made from a third party the whole amount of the costs that have been incurred by the Association that have either been awarded by a court or tribunal or agreed to be payable as part of a settlement. Such costs include travelling costs that have been incurred by Association staff and legal and enquiry costs that have been incurred by the Association under Rules 44 and 45.

However, the costs that have been recovered in relation to Defence claims are allocated between the Association and the Member in the manner described in (E) below.

(E) In respect of a Defence Entry, any recovery from a third party in respect of legal and other costs or expenses (the “Recovery”) shall be applied as follows and in the following order:

i first, if and to the extent a maximum deductible is agreed, the Recovery shall be credited and paid to the Association up to an amount corresponding to the sum of legal and other costs paid by the Association, in excess of the Member’s maximum deductible, together with any interest element on that sum comprised in the Recovery.

ii secondly, if and to the extent the Association only has agreed to cover an agreed percentage of legal and other costs or expenses incurred by the Member, the Association shall be credited and paid a proportion of the Recovery corresponding to the percentage of legal and other costs and expenses the Association has agreed to cover pursuant to these Rules and the terms of entry agreed.

iii finally when the requirements in (i) and (ii) above have been satisfied the Recovery shall be applied against the Member’s minimum deductible.

The standard percentage deductible for defence entries is 25 per cent, subject to a minimum deductible of USD 5,000.3 Therefore, should the costs of a Defence claim exceed USD 5,000 any additional costs will be borne partly by the Member and partly by the Association. Consequently, should the Member be successful

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3 See Appendix V, section 3.a.
in recovering costs from a third party in relation to such claim, those costs are to be shared between the Member and the Association in proportion to the costs that each has paid prior to the recovery. However, if the recovered costs are less than the costs that have been incurred then such allocation is made in accordance with a system of priority that is based on the principle of the “last dollar paid the first recovered.”

Therefore, if the Defence entry is subject not only to the standard percentage deductible of 25 per cent and a minimum deductible of USD 5,000 but also a maximum deductible of USD 1 million then the costs will be borne, and the recovery will be allocated, in the manner illustrated by the following diagram:

**Defence deductible structure**

*Applying the deductible, with cap*

**Deductible**
- Minimum: USD 5,000
- Percentage: 25%
- Maximum: USD 1 m

For example:

**Scenario 1**

**A Costs Incurred**
- If the total costs incurred are USD 1.5 million (i.e. in excess of the maximum deductible of USD 1 million) then:
  1. The Member pays the first USD 5,000;
  2. The Association pays the next USD 15,000;
  3. The Member pays 25 per cent of the next USD 980,000 (i.e. USD 245,000) and the Association pays 75 per cent of that figure (i.e. USD 735,000), i.e. up to the maximum deductible of USD 1 million;
  4. The Association pays the total costs in excess of the maximum deductible of USD 1 million (i.e. USD 500,000);

Therefore, the Member pays a total of USD 250,000 and the Association pays a total of USD 1.25 million.
B Costs Recovered
If USD 600,000 costs are recovered from the third party then:

a The Association recovers in full the USD 500,000 that it has paid in excess of
   the Member’s maximum deductible of USD 1 million; and

b 75 per cent of the balance of the recovered costs of USD 100,000 which fall
   within the bracket between USD 20,000 and the maximum deductible of
   USD 1 million
Therefore, The Association recovers USD 575,000 and the Member recovers
USD 25,000 towards the total costs that they have paid.

Scenario 2

A Costs Incurred
If the total costs are USD 500,000 (i.e. less than the maximum deductible of
USD 1 million) then:

1 The Member pays the first USD 5,000;
2 The Association pays the next USD 15,000;
3 The Member pays 25 per cent of the next USD 480,000 (i.e. USD 120,000) and
   the Association pays 75 per cent of that figure (i.e. USD 360,000);
Therefore, the Member pays a total of USD 125,000 and the Association pays a
total of USD 375,000.

B Costs Recovered
If USD 300,000 costs are recovered from the third party then:
The Association recovers 75 per cent of the balance of the recovered costs of
USD 300,000 (i.e. USD 225,000) and the Member recovers 25 per cent of the
recovered costs (i.e. USD 75,000)

Therefore, if the Member’s Defence entry provides that the Member’s percentage
deductible has an upper limit, the Association is entitled to retain out of any
recovery any amounts that is has paid in excess of the Member’s deductible limit
before the Member is entitled to recover its share of the balance. The balance is
then shared in accordance with the percentage contribution that the Member and
the Association has made.
However, if the Defence entry is not subject to a maximum deductible then the costs will be borne, and the recovery will be allocated, in accordance with the percentage contribution that they have made in the manner illustrated by the following diagram:

**Defence deductible structure**
Applying the deductible, standard

*Deductible*
Minimum: USD 5,000
Percentage: 25%

For example:

**A Costs Incurred**
If the total costs incurred are USD 1.5 million then:
1. The Member pays the first USD 5,000;
2. The Association pays the next USD 15,000;
3. The Member pays 25 per cent of the next USD 1,480,000 (i.e. USD 370,000) and the Association pays 75 per cent of that figure (i.e. USD 1,110,000);
Therefore, the Member pays a total of USD 375,000 and the Association pays a total of USD 1.125 million.

**B Costs Recovered**
If USD 600,000 costs are recovered from the third party then:
The Association recovers 75 per cent of such costs (i.e. USD 450,000) and the Member recovers 25 per cent (i.e. USD 150,000) towards the total costs that they have paid.

(F) **Subject to Rule 84.2, all monies recovered for a Member with Defence cover shall be paid over to the Member, except that the Association may deduct from such monies and retain any amount due to the Association from the Member... (Rule 84.3)**
Rule 84.3 gives the Association the right to set-off any amounts that are due from the Member to the Association against any and all monies that have been recovered for a Member in a case for which the Member has been afforded Defence cover.
Such amounts include unpaid premiums, deductibles or any other sums but a deduction cannot be made unless the relevant amount is due and payable to the Association at the time that the monies are recovered for the Member. Furthermore, such monies include not only the costs and expenses that have been incurred in order to pursue or defend claims for the principal amount in dispute, but also the principal amount itself and any interest that has been paid thereon.

For example, if the Association has recovered the sum of USD 125,000 from a charterer on the Member’s behalf in late June in respect of outstanding hire, at a time when a total of USD 25,000 is due to the Association from the Member by way of accrued deductibles, and at a time when the second instalment of the Advance Calls for that Policy Year has been debited in the amount of USD 250,000, but has not yet fallen due for payment, the Association is entitled to deduct and retain the sum of USD 25,000 from the recovered amount of USD 125,000, but is not entitled to deduct the Advance Call since this is not yet due for payment. Therefore, the Association must release the sum of USD 100,000 to the Member out of the total sum of USD 125,000 that has been recovered from the third party.

(G) …the Association shall determine what part of that lump sum shall be deemed attributable to costs. (Rule 84.4)

If a Member has settled a claim for which he has received Defence cover for a lump sum, Rule 84.4 gives the Association the right to decide what proportion of such lump sum is to be deemed to represent the costs that should be credited in whole or in part to the Association. Rule 84.4 is intended to avoid arguments between the Member and the Association as to how such lump sums should be apportioned between the principal amount which, subject to Rule 84.3, is to be retained by the Member, and the costs that should be paid to the Association. The rationale for this provision is the fact that since the Association has afforded cover for legal costs, the Association has probably been instrumental in recovering that lump sum for the Member.

However, if, on the other hand, the lump sum is payable not to, but by, the Member, Rule 84.4 gives the Association the right to determine what proportion of that amount is attributable to the third party’s claim that is payable by the Member, and what proportion is attributable to the third party’s recoverable costs that are payable by the Association under the Member’s Defence entry.
**Rule 85 Discharge**

*Payment of a claim by the Association to a manager of the Ship or to any other agent of the Member shall fully discharge the Association’s liability to the Member.*

**Guidance**

(A) *Payment of a claim by the Association… (Rule 85)*

Rule 85 does not apply to all payments that may be made by the Association, but only to payments of ‘a claim’, i.e. a claim that is covered under the Rules and terms of entry, as opposed to other forms of payment such as a return of premium when the Ship is laid up.¹

Rule 85 merely deals with the payment of claims to the Manager of the Ship or to any other agent of the Member. The Association may also be authorised to pay claims to other parties such as a mortgagee bank pursuant to an assignment to the bank of the Member’s right to receive such payments. Such issues are regulated by Rule 89 not Rule 85.

(B) *Payment of a claim…to a manager of the Ship…shall fully discharge the Association’s liability to the Member (Rule 85)*

Rule 85 should be read in conjunction with Rule 79.2, which establishes that any payment that is made by the Association to one of the Joint Members, Co-assureds or Affiliates shall fully discharge the obligations of the Association in respect of such payment. Therefore, if the manager has the status of a Joint Member, Co-assured or Affiliate,² the effect of such payment is governed by Rule 79.2. However, a manager does not always have such status under the contract of insurance and Rule 85 is intended to protect the Association in the event that a claim is paid to a manager that does not have such status. Therefore, Rule 85 is based on the premise that the Association can reasonably expect the manager of the Ship to have an involvement with the claim, and that, consequently, the Association is justified in making such payment to him.

(C) *Payment of a claim…to any other agent of the Member…shall fully discharge the Association’s liability to the Member (Rule 85)*

The Association’s liability to the Member for the claim will also be discharged when the Association has paid the claim to ‘any other agent’ of the Member. In practice, this will usually be the insurance broker that has been appointed by the Member, but, in principle, it may be any person that the Member has nominated as his agent for this purpose, such as a local representative in the country where the third party claim has arisen. In this context, the word ‘Member’ is construed in its widest sense pursuant to the definition in Rule 1.1 and will include a Co-assured and an Affiliate.

¹ See Rule 22.
² See the Guidance to Rule 78.1.b and 78.3 for further details concerning the status of a Co-assured that has an interest in the management of the Ship.
However, the Association is discharged only if it is established that the relevant agent is authorised to accept payment. Therefore, the Association’s liability to the Member is discharged fully only if it is proved that the broker has been authorised by the Member to receive such payment, or, if his authority in this regard has been withdrawn, that it was, nonetheless, reasonable for the Association to assume that he had such authority when the payment was made. In practice, the Association will not pay claims to a broker in the absence of an express notice from the Member that payment can be made in this manner. Such notice may be in the form of a general notice that confirms that the broker has authority to receive payment in respect of all claims, or in the form of a special notice that is restricted to a particular claim. In the absence of such a notice, the Association will pay a claim directly to the Member, and send notice to the broker that such payment has been made.

Should the Member revoke the authority of a manager of the Ship or any other agent to receive such payments, the Member must give notice of that event to the Association in order to ensure that the Member’s position is not prejudiced should the Association make a payment to such a party after his authority has been revoked. In the absence of such a notice, the Association is entitled to assume that payment can still legitimately be made to such a manager or agent, and any such payment will fully discharge the liability of the Association to the Member.
Rule 86 Currency of payments

1 The Association shall make all payments for liabilities, losses, costs and expenses covered by the Association in the currency in which the Member’s Premium Rating is calculated (the ‘premium currency’).

2 Where the Member has made a payment in respect of any liability, loss, cost or expense which is covered by the Association in a currency other than the premium currency, that payment shall be converted into the premium currency at the rate of exchange ruling on the day payment was made by the Member.

3 Where a deductible under Rule 76 is expressed in Appendix V in a currency other than the premium currency, the deductible shall be converted into the premium currency at the rate of exchange ruling on the day payment was made by the Member.

4 Where a payment in respect of a liability, loss, cost or expense is due at a fixed time and the Member without valid reason neglects to make payment when due, the Member shall not be entitled to compensation at a higher rate of exchange than that ruling on the day on which payment was due.

5 All rates of exchange for the purposes of this Rule 86 shall be as conclusively certified by the Association.

Guidance

The provisions of Rule 86 recognise the reality that it is not possible in an international business environment to carry on business in one currency. However, it is also important for the financial well-being of the Association and of the membership as a whole that, whatever be the currency of a particular payment, the officers of the Association are able to maintain an accurate record of debits and credits that affect the overall financial standing of the Association. Consequently, Rule 86 provides guidelines that are intended to assist that process.

(A) The Association shall make all payments...in the...premium currency...
(Rule 86.1)

Rule 86 establishes the currency in which the Association should pay claims to Members. The Association will indemnify the Member in the currency in which the Member's Premium Rating is calculated (the premium currency). For example, if a Member's premium is rated in US Dollars, he will be indemnified in that currency.

(B) ...shall be converted...into the premium currency... (Rules 86.2 and 86.3)

If a Member has settled a claim in a currency other than his premium currency, Rules 86.2 and 86.3 provide the mechanism for calculating the amount of the indemnity and any deductible that is to apply. Conversion is made from the currency of payment, and from the currency of the deductible, if that is different from the premium currency, to the premium currency at the rate of exchange that prevailed on the date when the Member paid the claim. However, if the Association has
exercised its discretion to pay the third party claim directly\(^1\) to the third party on behalf of the Member or made payment directly to a third party pursuant to a ‘blue card’ or a similar guarantee,\(^2\) the conversion is made on the date that the Association made payment.

(C) …the Member…neglects to make payment when due… (Rule 86.4)
If a Member fails without valid reason to pay a claim when due, Rule 86.4 ensures that the Association will not be prejudiced by subsequent adverse exchange rate fluctuations. In such circumstances, the Member cannot recover more compensation than that which he would have been entitled to recover at the rates that prevailed on the date that payment was due.

(D) All rates of exchange…shall be conclusively certified by the Association.
(Rule 86.5)
Rates of exchange fluctuate rapidly and constantly and much time and expense could be incurred to the detriment of the membership as a whole if such issues were to be debated at length on each and every occasion on which the issue arose for consideration. Consequently, Rule 86.5 provides that if there is a dispute as to the correct rate of exchange, the rate determined by the Association is to be conclusive.

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1 See the Guidance to Rule 87.
2 This is a reference to the certificates of financial responsibility that the Association provides pursuant to the compulsory requirements of the CLC, Bunkers, and Nairobi Wreck Removal Conventions and the 2002 Protocol to the Athens Convention or pursuant to the STOPIA Agreement or the requirements of the Federal Maritime Commission (FMC) of the United States or the regulations of the European Union. See (A) to the Guidance to Rule 87.
Rule 87  Payment first by Member

1  Unless the Association shall in its absolute discretion otherwise determine, it is a condition precedent to a Member’s right to recover from the Association in respect of any liability, loss, cost or expense that he shall first have discharged or paid the same.

2  The Association shall not be obliged to compensate a Member for a payment made to a third party unless the Member’s liability to make that payment has been determined by:
   a  a final judgment or order of a competent court; or
   b  a final arbitration award (if settlement of the dispute by arbitration was agreed upon before the dispute arose, or was, with the consent of the Association, agreed upon subsequently); or
   c  a final settlement of the dispute approved by the Association.

3  Notwithstanding sections 1 and 2 above, where a Member has failed to discharge a legal liability to pay damages or compensation for personal injury, illness or death of a member of the Crew, or in respect of repatriation under any statutory enactment giving effect to the Maritime Labour Convention 2006 or any materially similar enactment, the Association shall discharge or pay such claim on the Member’s behalf directly to such member of the Crew or dependant thereof, provided always that:
   a  the member of the Crew or dependant has no enforceable right of recovery against any other party and would otherwise be uncompensated; and
   b  the amount payable by the Association shall under no circumstances exceed the amount which the Member would otherwise have been able to recover from the Association under the Rules and the Member’s terms of entry
   c  with regard to liability, costs and expenses falling within Rule 27.3 above any payment made by the Association shall be made as agent only of the Member, and the Member shall be liable to reimburse the Association for the full amount of such payment.

Guidance

(A) ...it is a condition precedent to a Member’s right to recover...in respect of any liability, loss, cost or expense that he shall first have discharged or paid the same... (Rule 87.1)

It is a fundamental characteristic of a contract of marine insurance that it is a contract of indemnity, and the contract between the Member and the Association is a contract of marine insurance in this sense. Consequently, unless the Association in its absolute discretion determines otherwise, the Member is not entitled to be indemnified by the Association until he has either incurred the relevant loss, cost or expense or discharged his liability to the third party claimant. This is generally referred to as the ‘pay to be paid’ or ‘payment by the Member first’ principle.
It follows that no third party has any right to claim compensation directly from the Association in relation to claims that the third party has against the Member except in the limited circumstances described below. Except in those limited circumstances, the Association will pay compensation to the Member only, and will do so only when the Member has first paid or otherwise discharged his liability, loss etc.

However, the Association may decide ‘in its absolute discretion’ to waive this provision in individual cases and to compensate a third party directly on behalf of the Member. This is normally done when the matter is straightforward and there are no unusual or complicating factors, as this facilitates prompt settlement which benefits all parties. However, the fact that this may occur in individual cases cannot be treated as a general waiver by the Association of the ‘pay-to-be-paid’ principle.

In limited circumstances, the ‘pay to be paid’ principle cannot apply. In some circumstances, a third party may be entitled to bring a claim directly against the Association pursuant to the applicable law, e.g. if the Member has become insolvent and is, therefore, unable to discharge his liability. If such ‘direct action’ is permitted under the applicable law, the Association will usually be entitled to rely on all defences that are, or would have been available, to the Member in relation to the third party claim, and on all policy defences that the Association would have been entitled to invoke in relation to the Member’s claim under the contract of insurance had the Member first discharged his liability to the third party and, thereafter, sought compensation from the Association.

In other circumstances, the Association will provide guarantees, certificates or undertakings to various authorities pursuant to international conventions or local laws that make the Association directly liable to such authorities for claims that such authorities or other third parties have against the Member, e.g. certificates that may be provided by the Association under the CLC, Bunkers and Nairobi Wreck Removal Conventions or the 2002 Protocol to the Athens Convention, or undertakings that are given pursuant to the STOPIA Agreement, or guarantees or other undertakings that are given to the Federal Maritime Commission under Section 2 of US Public Law 89-777 or to the European Commission pursuant to the EU Passenger Liability Regulation (EC) No. 392/2009.

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1 Such discretion can be exercised by administrative officers of the Association.
2 For example, Section 7-8 of the Norwegian Insurance Contract Act of 1989 [Forsikringsavtaleloven].
3 The scope of policy defences available to the Association in such circumstances would depend on the merits of the case and under which laws the ‘direct action’ claim was made.
4 See (A) to the Guidance to Rule 38.
5 See the Introduction to the Guidance to Rule 40.
6 See (H) to the Guidance to Rule 28.
7 See (J) to the Guidance to Rule 38.
8 See (T) to the Guidance to Rule 58.
9 See (H) to the Guidance to Rule 28.
(B) The Association shall not be obliged to compensate a Member for a payment made to a third party unless the Member’s liability to make that payment has been determined... (Rule 87.2)

Cover is available only for liabilities, losses, costs and expenses for which the Member is legally liable, and cover is not available for liabilities, losses etc., that have been incurred by the Member in circumstances where there is no legal liability to do so. Consequently, Rule 87 is intended to ensure that membership funds are used by the Association only when the Association is satisfied that it is reimbursing the Member for liabilities, losses, costs and expenses for which the Member is legally liable.

The Member’s liability may be determined for this purpose by a judgment or order of a competent court, or if the dispute is subject to arbitration, by an award of a competent arbitration tribunal, or by a settlement that has been agreed with the prior approval of the Association. In all cases, the judgment, award or settlement must be final in the sense that it is a final determination of the rights of the parties without the necessity for further legal proceedings, and without the possibility of any further appeal.

Rule 87.2 states that the Association ‘shall not be obliged to compensate,’ which means, in effect, that the Association has the discretion to compensate the Member in circumstances other than those set out in sub-paragraphs a to c of the Rule. For example, if the Member is obliged, pursuant to the applicable law, to pay compensation or damages to a third party against a judgment that is not a final judgment in the sense that the Member is entitled to recover that amount if the judgment were to be overturned on appeal, the Association has the discretion to compensate the Member at the time that he makes the payment, rather than obliging the Member to remain ‘out-of-pocket’ until the case is finally resolved.

(C) ...where a Member has failed to discharge a legal liability to pay damages or compensation for personal injury, illness or death of a member of the Crew, the Association shall discharge or pay such claim on the Member’s behalf directly to such member of the Crew or dependent thereof... (Rule 87.3)

The International Group of P&I Clubs has agreed that the ‘payment by Member first’ principle may be waived by those Associations that are members of the International Group in the case of claims that are brought against Members by the Crew or their dependants for personal injury, illness or death subject to the provisos in Rule 87.3 a and b. Therefore, Rule 87.3 aligns the Rules of the Association to the terms and conditions that are applied by the other International Group Clubs and obliges the Association to discharge or pay such claims if the

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10 See further comments on this principle in (A) above.
11 See the Guidance to Rule 27.1 (c) in relation to the cover that is available for claims for compensation or damages for personal injury, illness or death of a member of the Crew.
Member has failed to do so. In other words, the Association is obliged to treat such claims as if the Member had discharged its legal liability to do so and had thereafter made a claim for recovery against the Association. Consequently, it enables members of the Crew or their dependants, as the case may be, to make a claim directly against the Association in these limited circumstances.

(D) ... provided always that;

a the member of the Crew or dependent has no enforceable right of recovery against any other party and would otherwise be uncompensated;

(Rule 87.3.a)

Rule 87.3 is subject to two provisos, the first of which restricts the ability of the Association to discharge the Member's legal liability to pay such damages or compensation to circumstances in which the Crew member or his or her dependent, as the case may be, has no enforceable legal right of recovery from any other party. Consequently, the first proviso mirrors the policy that underpins Rule 71 and the phrase ‘any other party’ could either be a person or entity that is legally co-responsible with the Member for the occurrence that caused the injury, illness or death, or any social, public or private insurer that is required to indemnify the Crew member or his or her dependants by the legislation or collective wages agreement that governs the contract of employment of the Crew.12

It also follows logically that if a social security provider or some other third party has compensated the Crew member and wishes to seek an indemnity from the Association by way of subrogation, or as a result of an assignment of the claim by the Crew member, the Association has no liability for such claim since it is clear in such circumstances that the Crew or dependent did have an enforceable right of recovery against another party and has not been uncompensated.

(E) ...the amount payable by the Association shall under no circumstances exceed...

(Rule 87.3.b)

The second proviso to Rule 87.3 provides that the Association’s ability to discharge the Member’s legal liability to pay such damages or compensation cannot exceed the amount to which the Member would otherwise have been entitled to recover from the Association under the Rules and the Member’s terms of entry.

12 See Guidance to Rule 71.1.c for further comments concerning such insurances.
Consequently, if the Member has excluded\(^\text{13}\) liability in respect of Crew from the scope of P&I cover under his terms of entry, Rule 87.3 is inapplicable and does not enable the Association to discharge or pay such claim on the Member’s behalf directly to the relevant Crew member or dependant. Similarly, the right to claim under Rule 87.3 does not extend to any deductible that may apply to the Member’s terms of entry.

Proviso (b) also makes it clear that the Association is entitled to apply against the claim any defences that it could have applied against the Member if the Member had made a claim against the Association after discharging his liability to the Crew member or dependants. The purpose of this proviso is to ensure that the third party claimant does not acquire any better legal rights against the Association than the Member would have had if the Member had discharged his legal liability and made a recovery claim against the Association. Therefore, the Association is entitled to utilise any available policy defence to the subject claim, e.g. that the personal injury, illness or death has been caused by non-compliance by the Member with the rules, recommendation and requirements of the classification society, or by non-compliance with the statutory requirements of the vessel’s flag state relating to e.g. the safe operation or security of the Ship.\(^\text{14}\)

Rule 87.3 is likely to be relevant in most cases where the Member has failed to discharge its legal liability to the Crew as a result of insolvency, or the winding up of the operation or some other financial difficulty. In such circumstances, the Member may also have failed to pay premiums, calls or other sums to the Association when due so that, if the claim were to be brought by the Member against the Association, the Association would have the right under Norwegian law,\(^\text{15}\) to set off such unpaid premiums etc., against any sums that were being claimed by the Member. Consequently, the Association is entitled to set off against any damages or compensation that is payable to Crew members or dependants pursuant to Rule 87.3, any unpaid premiums that are owed by the Member that have fallen due for payment in the two years prior to the time when the Association is called upon to pay damages or compensation to the Crew or dependents.\(^\text{16}\)

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\(^{13}\) The Member may either have relied on other insurance to cover such liabilities or had a crew supply agreement with a crew manager whereby the manager had responsibility for placing insurance for such liabilities.

\(^{14}\) See Guidance to Rule 8 for further details.

\(^{15}\) The Rules are subject to Norwegian law. See the Guidance to Rule 90 in this regard.

\(^{16}\) See the Norwegian Insurance Contract Act 1989 §8-3, § 7-8 and § 7-6.
(F) Notwithstanding sections 1 and 2 above, where a Member has failed to discharge a legal liability to pay damages or compensation..., or in respect of repatriation under any statutory enactment giving effect to the Maritime Labour Convention 2006 or any materially similar enactment, the Association shall discharge or pay such claim on the Member’s behalf directly to such member of the Crew or dependent thereof...

c with regard to liability, costs and expenses falling within Rule 27.3 above any payment made by the Association shall be made as agent only of the Member, and the Member shall be liable to reimburse the Association for the full amount of such payment. (Rule 87.3)

Although the Maritime Labour Convention 2006 (MLC) does not require Clubs to issue ‘blue cards’ that make them directly liable to seafarers for the cost of repatriation should the seafarers have been abandoned as a result of the insolvency of the shipowners, it does require shipowners to provide evidence that they have ‘financial security’ for such claims.

Each State can determine the precise form of financial security that it requires in the domestic legislation that it uses to implement the MLC, and some form of evidence (such as proof that adequate insurance is in place) is likely to be required to satisfy the requirement of financial security for claims under (a) and (c) above. The Association and other P&I clubs have agreed to provide cover for such liability on limited terms and Rule 87.3 enables the Association to satisfy the requirements of the convention and to discharge such liability on the Member’s behalf should the Member fail to do so. However, the Association acts as agent for the Member when doing so and the Member remains liable to reimburse the Association in full.

More detailed commentary is found in the Guidance to Rule 27.3.
Rule 88  Payments and undertakings to third parties

1 The Association shall be under no obligation to provide any guarantee, certificate, bail or other security or undertaking ("security") for or on behalf of a Member, or to pay the costs of such provision.

2 The Association may at its discretion provide security or pay the cost of such provision in relation to liabilities within the scope of a Member's cover, and may recover any costs incurred thereby from the Member.

3 The Member shall indemnify the Association for any liability the Association may incur to a third party under or in connection with any security issued by the Association for or on behalf of the Member and for any payment made by the Association to a third party for or on behalf of the Member (irrespective of whether that liability was incurred, or that payment was made during or after the period of the Member's insurance by the Association), save to the extent that, had that third party pursued its claims in respect of the relevant liability against the Member rather than against the Association, or had that payment been made by the Member rather than by the Association, the Member would have been entitled to reimbursement pursuant to these Rules.

Guidance

(A) The Association shall be under no obligation to provide...security...or to pay the costs of such provision... (Rule 88.1)

The Association and all other P&I clubs that are members of the International Group of P&I Clubs provide indemnity insurance to their Members in accordance with the 'pay to be paid' principle. Consequently, if the Association were to be legally obliged to provide a guarantee, certificate, bail or other security to a third party, that would undermine the 'pay to be paid' principle since the Association would, thereby, become committed to pay compensation directly to the third-party beneficiary of the security. Rule 88.1 recognises the importance of this principle and emphasises that the Association does not have a legal obligation to provide security to third parties on behalf of the Member except in special and very limited circumstances. Similarly, all the other P&I clubs that are members of the International Group have adopted the same principle.

Furthermore, if the Member pays a fee to some other security provider to provide security to a third party claimant in the form of a bank guarantee or bail bond or some other form of guarantee, Rule 88.1 makes it clear that the Association is not obliged to compensate the Member for the costs that are incurred by him in this respect.

1 See the Guidance to Rule 87.1.
(B) The Association may at its discretion provide security or pay the cost of such provision in relation to liabilities within the scope of a Member’s cover...
(Rule 88.2)

Notwithstanding the above, the Association recognises the importance to a Member of the ability to trade his Ship without any undue risk of arrest by claimants that are seeking security. Therefore, the Association may, as a service to the Member and on a discretionary basis, agree to provide security on behalf of the Member, or to reimburse the Member for the cost that he has incurred in order to provide security by other means, e.g. a commission paid for a bank guarantee.

Should the Association exercise its discretion to provide security, it will usually do so only for claims that are, or are expected to be, within the scope of the Member’s cover. The Association is less likely to provide security on behalf of the Member if there is doubt whether the claims fall within the scope of cover, or if the claims exceed any applicable limit of cover, or if they fall within the Member’s agreed deductible, particularly if a high deductible has been agreed pursuant to special terms of entry. Similarly, it is unlikely that the Association will provide security if the event or claim is likely to cause the Member to incur a liability that is specifically excluded under the Rules, e.g. liability for delivery of cargo without production of the original Bills of Lading.

The Association will usually agree to provide security only in respect of claims that have already arisen, in the sense that an event has occurred that is likely to result in a claim or claims for which cover is available. In other words, the Association in common with all the other P&I clubs that are members of the International Group of P&I Clubs, will not, except in special and very limited circumstances, agree to provide security before a claim has arisen, i.e. they will not provide what is known as ‘anticipatory security’.

The Member will normally request the Association to provide security for a claim that has already arisen when the claimant tries to enforce a claim by the arrest or threatened arrest of the Member’s Ship, or by an injunction or other legal measures that prevent the Member from drawing upon funds in bank accounts, collecting

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2 Such discretion can be exercised by administrative officers of the Association.
3 See the Guidance to Rule 34.1.i. Whilst the P&I clubs who are members of the International Group have jointly suggested the wording of a standard letter of indemnity that members of those clubs may wish to use if they decide to deliver cargo in such circumstances, the use of the suggested wording does not mean that cover for such risk is still available. The letter of indemnity is intended to provide alternative protection since cover is not available for the liability that members of the clubs may incur in such circumstances.
4 For example, by the provision of CLC and Bunker Convention certificates, as well as the STOPIA undertaking to the 1992 IOPC Fund. The Association may also in certain circumstances agree to provide confirmation of insurance cover to port authorities after an event has occurred, whereby the Association confirms that P&I cover is in place to pay compensation in accordance with applicable law as a condition set by the port authorities to accept that the port is used as place of refuge for the Ship following a casualty.
freight or hire, or obtaining payment from hull insurers. Such action may cause damage to the Member's business interests since it may delay the sailing of the Ship, or affect the Member's cash flow, or his ability to repay his financiers. Since the Association is not obliged to provide security in such circumstances, but has the discretion to do so, the Association will, when deciding whether to exercise such discretion, consider all the relevant circumstances including factors such as whether the Member has paid all premiums and other sums that are due to the Association. The Association will also take account of whether the Member has complied with his other obligations under the Rules. If the Member is in breach of such obligations, the Association is unlikely to exercise its discretion in favour of the Member at least until the Member has rectified such breaches. However, should the Member have failed to comply with those obligations that are considered to be fundamental Conditions of Cover for both P&I and Defence cover, such as those that are specified in Chapter 3 of Part 1 of the Rules (e.g. the obligation to classify or certify the Ship properly pursuant to Rule 8), it is almost certain that the Association will not exercise its discretion to offer security for claims that have arisen during a period when the Member is not fulfilling, or has not fulfilled, such obligations.

If the Association agrees to provide security, it will, in most circumstances, offer its own letter of undertaking (the so-called 'Club letter of undertaking'), which is a form of security that is normally acceptable to claimants in most, but not all, countries. The provision of security in the form of a Club letter of undertaking has many advantages. It can be issued quickly once the amount and the terms and conditions of the security have been agreed. Furthermore, since the Association does not normally make any charge for providing a Club letter of undertaking, the Member does not incur the commission or other charges that a bank or surety bond provider would normally require, and his funds are not ‘tied up’ as collateral for the provision of such security.

If the claimant insists on receiving security in the form of a bank guarantee, surety bond or other financial guarantee rather than a Club letter of undertaking, the Association does have the ability to assist the Member by doing so. However, it is very unlikely that the Association will provide security in the form of a cash deposit, except where it is necessary to make a payment of cash into court in order to assist the Member to establish a limitation fund under the applicable law. Since such a limitation fund serves as security for all claims in respect of which the Member is entitled to limit his liability, the Association may exercise its discretion to make such a payment if it is mutually beneficial to the Member and the Association to establish a limitation fund promptly.
(C) The Member shall indemnify the Association for any liability the Association may incur to a third party under or in connection with any security...save to the extent that...the Member would have been entitled to reimbursement pursuant to these Rules. (Rule 88.3)

The fact that the Association provides security at the Member’s request is not to be treated as an admission by the Association that cover is available for the claim. Security may be, and often is, demanded shortly after the event that gives rise to the claim, e.g. upon discharge of the damaged cargo, or when the Ship reaches its next port of call after a collision. A detailed investigation of the circumstances of the event or casualty may not be feasible at such an early stage since it may delay the trading of the Ship. Consequently, security may be provided for a claim for which, at that stage, cover appears to be available.

However, further information may come to light during the course of subsequent investigation or litigation that casts doubt upon the Member’s entitlement to cover. For example, it may transpire that the claim arises as a result of a deviation that would deprive the Member of defences or rights of limitation that would otherwise be available to him. Consequently, Rule 88.3 requires the Member to indemnify the Association in respect of any liability that may arise under, or in relation to, any payment that has been made by the Association pursuant to any security that has been provided by the Association on behalf of the Member in circumstances where the Member would not be entitled to receive compensation from the Association for the particular claim if such claim had been enforced against the Member rather than against the security that has been provided by the Association.

It is important to the membership as a whole to ensure that membership funds are not used to pay claims that are not insured by the Association. Accordingly, in order to secure a Member’s potential liability to indemnify the Association in such circumstances, the Association may require the Member to provide counter-security as a condition of providing security to a third party on behalf of the Member. It will also require such counter-security if it is clear that only a part of the claim will be for the Association’s account, e.g. if the Member’s entry is subject to a large deductible or, in the case of collision claims, if the Association covers less than four-fourths of the liability.

The Association has the right to determine the form of counter-security that is to be provided by the Member in such circumstances. For example, the Association may require a guarantee from a first class bank, or a surety bond from some other financial institution provided that it has an acceptable credit rating. The Association will also normally require such guarantee or surety bond to be issued in, and be

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5 See the Guidance to Rule 34.1.b proviso xi.
6 See the Guidance to Rule 36.
subject to, the law and jurisdiction of, a country where the guarantee or surety bond can be easily enforced, e.g. guarantees or surety bonds that are issued in the United Kingdom or the USA and which are subject to English or US law and jurisdiction.

If, in the case of a collision or damage to fixed and floating objects, counter-security is to be provided by the hull underwriters, the Association will not normally accept separate security from each individual underwriter for their individual share of the overall risk that is covered under the Hull Policies. The Association will normally insist on the receipt of one, single, counter-security from one underwriter that secures the liabilities of all individual underwriters, e.g. from the ‘lead underwriter’ if that underwriter has an acceptable credit rating.
Rule 89 Assignment

1 The Member shall not assign or otherwise transfer its rights under its contract of insurance with the Association or otherwise arising pursuant to these Rules, save as provided in Rule 89.2.

2 The Association may, in its absolute discretion, consent to an assignment or transfer by a Member of its rights as referred to in Rule 89.1, subject to such terms and conditions as the Association deems fit and subject to the Association’s right to deduct from any sum due or to become due from the Association to any assignee or transferee of the Member’s rights such amount as the Association may estimate to be sufficient to discharge any existing or anticipated liability of the Member to the Association.

Guidance

The Association is more than just an insurer; it is a club of Members. The identity and standing of each Member is important to the other Members and the Association has gone to some lengths on behalf of its Members to vet each applicant, its management structure and its Ships before agreeing to accept it as a Member. Therefore, the premium rating that the Association has attributed to that Member reflects the risk that the Association has assessed the entry of that Member to be in the light of such vetting process. Consequently, it is vital that such important safeguards should not be undermined by the ability of a Member to assign or transfer its rights under the contract of insurance to another organisation that might constitute a bigger risk to the membership and thereby, to the funds of the membership. Rule 89 restricts the ability of a Member to make such transfers outside the control of the Association.

(A) The Member shall not assign...its rights... (Rule 89.1)

There are various reasons why a Member may wish to assign either in whole or in part the benefit of the cover that is made available to him by the Association, e.g. where the Member wishes to make the benefit of his P&I cover available to a charterer or the purchaser of the Ship. A Member may also wish to transfer the right to receive the proceeds of any claim that the Member may have against the Association, e.g. to his mortgagee. Such assignments or transfers are prohibited by Rule 89.1 unless they are done with the consent of the Association.

(B) The Association may in its absolute discretion consent to an assignment or transfer by a Member of its rights... (Rule 89.2)

Should the Member wish to assign or otherwise transfer his rights under the contract of insurance, the Member may ask the Association to consent to him doing so. It is not sufficient merely to give notice to the Association that an assignment or transfer has taken place; permission must be sought and obtained from the Association.

1 For these reasons Rule 25.2 provides that membership ceases in the event of a sale of the Ship or the appointment of new managers or the entry into possession of the Ship by mortgagees.
before this is done. Any purported assignment or transfer that is made without the consent of the Association is null and void and does not bind the Association. Consequently, if no such permission is given, the original contract remains binding as between the Member and the Association, which means that the Member retains all rights and obligations under it, including the obligation to pay premiums and other sums that are due to the Association.

Whilst the Association has an absolute discretion whether or not to consent to the assignment or transfer, or to impose conditions on the giving of consent, it will normally give its consent if the assignment is intended merely to give the third party a right to receive the proceeds of a Member's claim. This is particularly relevant where a Member has assigned the benefit of insurances to a mortgagee bank. In such circumstances, the Association will normally agree to acknowledge receipt of a notice of assignment, and to endorse a 'loss payable' clause on the Certificate of Entry. Such a clause authorises the Association to pay the proceeds of claims that are made by the Member under the terms of his entry directly to the mortgagee in certain circumstances, and provides that such payment to the mortgagee will discharge the Association's liability for the Member's claim under the contract of insurance. However, the clause continues to entitle the Association to settle all third party claims in respect of which the Member has a right of recovery from the Association, and all third party claims in respect of which the Association has provided financial security.

The Association will also normally agree to confirm to the mortgagee in writing that the relevant Ship is entered with the Association and to notify the mortgagee if the Ship's entry is terminated or ceases.

(C) …subject to the Association’s right to deduct from any sum due…

(Rule 89.2)

The Association has the right under Rule 89.2 to deduct or retain from any sums that it may agree to pay to any assignee or transferee, such amount that the Association estimates to be sufficient to discharge any liabilities that the Member has to the Association, either at that time, such as unpaid Advance Calls, or that the Member may have in the future, such as any forecasted Deferred Call. The right to deduct is not limited to sums that are due from the Member for the Ship in respect of which the claim arises, but extends to any sums that are due, or estimated by the Association to become due, to it from the Member or his Co-assured\(^2\) in relation to any Ship that is entered under that certificate of entry. Consequently, the rights of set-off to which the Association is entitled under Rule 21 are fully preserved vis-a-vis an assignee.

\(^2\) In this context the definition of ‘Member’ in Rule 1 includes a Co-assured. See the Guidance to Rule 79.1.
**Rule 90 Governing law**

The legal relationship between the Association and the Member shall be governed by these Rules and Norwegian law, but the provisions of the Insurance Contracts Act of 16 June 1989 shall not apply.

**Guidance**

(A) The legal relationship between the Association and the Member… (Rule 90)

The legal relationship that exists between the Association and the Member under the contract of insurance is separate and distinct from the legal relationship that exists between the Member and third parties. The Association provides cover for voyages that are performed by Ships worldwide and the claims that arise out of the operation of such Ships will usually be governed by a variety of laws and regulations. Therefore, in most circumstances, the laws and regulations that apply to claims that are made by third parties against the Member will be different from the law that governs the Member’s rights to claim compensation from the Association.

(B) …shall be governed by these Rules and Norwegian law… (Rule 90)

Rule 90 stipulates firstly that the legal relationship between the Association and the Member is to be governed by the Rules. Therefore, the Rules are incorporated into the contract of insurance and are made an integral part of that contract. All the Rules will be so incorporated unless particular Rules are specifically excluded, limited or otherwise varied pursuant to any special terms of entry that may be agreed between the Association and the individual Member.

Rule 90 also establishes that the legal relationship between the Association and the Member is to be governed by Norwegian law. There are two aspects to this statement. Firstly, the Rules are governed by Norwegian law in the sense that they are to be interpreted in accordance with Norwegian law. Secondly, the contract of insurance between the Association and the Member is governed by Norwegian law unless varied by special terms of entry that provide for the contract of insurance to be governed by the law of some other country.

Rule 90 states that the Insurance Contracts Act of 16 June 1989 (ICA), which is the principal Norwegian legislation that regulates contracts of insurance, does not apply to the contracts of insurance that have been concluded between the Association and its Members except in certain limited circumstances.¹ However, all other provisions of Norwegian law, including those that govern contracts generally, will apply to the legal relationship between the Association and each Member.

When considering legal issues that arise under a contract of insurance, Norwegian courts will have regard to all applicable written acts, codes and regulations and the ‘travaux preparatoires’ to such provisions, previous court and, to some extent,

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¹ See (C) below.
arbitration, decisions, as well as textbooks and treatises on insurance law. Norwegian courts are likely to be guided by the manner in which similar insurance contract issues have been treated in the Nordic Marine Insurance Plan and past versions of the Norwegian Marine Insurance Plan and the Commentary to that Plan. This is particularly likely where the Rules use expressions that are defined in the Plan, but which do not have a clearly established meaning under the general law.

\[(C) \quad \text{…the Insurance Contract Act…shall not apply. (Rule 90)}\]

The Norwegian Insurance Contracts Act 1989 (ICA) regulates both personal and non-life insurance. It was intended, when first enacted, to modernise the Norwegian insurance regulations that then applied and to extend the scope of those regulations. The ICA renders the conditions of insurance policies that are less favourable to the insured than its own provisions null and void.

The ICA allows marine and certain other insurances to be written on conditions that differ from those of the ICA. Therefore, the Association is allowed to exclude most of the provisions of the ICA from the Rules and the contracts of insurance that it concludes with Members. The Association has utilised this liberty to the maximum extent to enable it to align the Rules to the provisions of the Pooling Agreement of the International Group of P&I Clubs which is the regulatory foundation of the reinsurance that the Association requires to protect the interests of the membership. However, it is not possible to exclude Section 7-8 of the ICA which applies compulsorily to the legal relationship between the Member and the Association. Section 7-8 enables a third party to bring a direct action against the insurer when the assured is insolvent. Accordingly, if the Member is not insolvent, or subject to bankruptcy proceedings, or is not seeking protection from his creditors in some other way, then the ‘pay to be paid’ principle\(^2\) also applies under Norwegian law.

\(^2\) See the Guidance to Rule 87.
Rule 91 Arbitration

1 Unless otherwise agreed, disputes between the Association and a Member or a former Member or any other person arising out of the contract of insurance or these Rules shall be resolved by arbitration. Each party shall nominate one arbitrator and those so nominated shall appoint an Umpire. If the arbitrators cannot agree on an Umpire or a party fails to nominate his arbitrator, the nomination shall be made by the Chief Justice of the Oslo City Court. Reasons shall be given for the award. Arbitration proceedings shall take place in Oslo.

2 Any of the issues referred to in paragraph 4.2 of Appendix VI to these Rules on which the Association and a Member cannot agree shall be referred to a panel (the “Panel”) constituted and acting pursuant to such terms and conditions as are set out in Appendix VI.

Guidance

Court proceedings are, generally, public by nature with the result that documents that are produced in, and statements that are made during, such proceedings are available to the general public, as is the judgement of the court. However, arbitration proceedings are private by nature so that, unless both parties to the arbitration agree, no other party is entitled to have access to the information and evidence that has been disclosed during the arbitration proceedings, or to the award of the arbitration tribunal. Because of the mutual nature of the relationship that exists between the Association and the membership it is considered more beneficial to the parties that any dispute between the Association and a Member is resolved by arbitration rather than by a court.1 Rule 91 recognises this necessity and sets out the mechanics of the arbitration reference.

(A) Unless otherwise agreed… (Rule 91.1)

Rule 91.1 provides that any dispute that arises between the Association and the Member, or former Member, or any other person that seeks to derive a benefit from the contract of insurance or the Rules, is to be resolved by arbitration in Oslo unless the parties have otherwise agreed. Therefore, if both parties have specifically agreed to do so, disputes may be resolved by a court, or by an arbitration tribunal sitting somewhere other than in Oslo. Furthermore, the parties can agree to do so either before or after the dispute has arisen.

(B) …disputes between the Association and a Member or a former Member arising out of the contract of insurance or these Rules… (Rule 91.1)

Rule 91 applies when there is a dispute between the Association on the one hand, and an existing Member or a former Member on the other hand. In this context, ‘Member’ includes a Joint Member, Co-assured(s) or Affiliate(s).2

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1 This is also the view adopted by the other P&I clubs that are members of the International Group of P&I Clubs.

2 See the Guidance to Rule 1.1.
(C) Each party shall nominate one arbitrator... (Rule 91.1)
The Oslo arbitration tribunal is to consist of an arbitrator that has been appointed by each party and an umpire that has been appointed either by the two arbitrators or, failing agreement between the two arbitrators, by the Chief Justice of the Oslo City Court.

The time limit for the commencement of the arbitration proceedings is governed by Norwegian law pursuant to Rule 90. If the issue that is to be arbitrated arises under Rule 81 then the time limits that are laid down in Rule 81 will apply. Otherwise, the normal time limit under Norwegian law is three years from the alleged breach of contract or, in the unlikely event that the claimant does not have knowledge of his claim within such period, the claim is time barred at the end of one year after he acquires, or should have acquired, the necessary knowledge, subject to a maximum time limit of ten years from the alleged breach of contract.

(D) Any of the issues referred to in paragraph 4.2 of Appendix VI... (Rule 91.2)
Should a dispute arise between the Association and a Member in relation to certain matters that affect Overspill Claims as described in paragraph 4.2 of Appendix VI, such dispute is not to be resolved by arbitration in Oslo in accordance with the provisions of Rule 91.1, but by expert determination before a panel that has been constituted in accordance with the provisions of the Pooling Agreement, which will resolve the dispute, not as an arbitration tribunal, but as a body of experts. Unlike Rule 91.1 the Association and the Member are not allowed to agree any other means for the resolution of such disputes.

3 For further details of the manner in which the Panel will resolve the dispute see Paragraph 4 of Appendix VI. 7.
Rule 92 Amendments to the Rules

1. The Rules may be amended at any time with effect from the beginning of the following Policy Year, and the Association shall, where practicable, give notice of amendments to Members before 20 January.

2. If, in the determination of the Association, a substantial alteration of risk occurs, as a result of new legislation or for any other reason, the Association may make such amendments to the Rules as the situation may require, giving (save in the case where the amendment involves only the making available of additional cover to the Member) at least two months’ notice of the amendment.

3. When war has broken out or, in the determination of the Association threatens to break out, the Association may decide that amendments shall come into force at shorter notice.

Guidance
Because of the mutual nature of the Association an amendment to the Rules is not something that should be done lightly, and it is done only when a Rule change is necessary for the protection of the whole of the membership, or a significant part of the membership, rather than for the benefit of individual Members. Rule 92 gives the Association the power to change its Rules in various circumstances. It deals with three different situations that reflect the different circumstances in which the Rules may be amended, and the time limits that are appropriate for the introduction of any amendments to the Rules in each circumstance.

The Board of Directors of the Association has the primary responsibility for the Association’s Rules and normally exercise such responsibility during the course of their planned periodic meetings.\(^1\) However, should it be necessary to make amendments to the Rules in circumstances in which it would be impractical to call and conduct such a meeting, the Board will normally endeavour to do so by correspondence or by delegating authority to the Executive Committee. For example, this may occur when it is necessary to ensure that the Rules are aligned with changes that have been made to the Pooling Agreement prior to the commencement of a new Policy Year.

(A) …may be amended at any time with effect from the beginning of the following Policy Year… (Rule 92.1)

Rule 92.1 gives the Association, whether acting through the Board of Directors or the Executive Committee acting pursuant to authority delegated by the Board, the right to amend the Rules at any time. However, since Members have entered into contracts of insurance with the Association on the assumption that specific rights, duties, terms and conditions will continue to apply to the contract, any amendments that are made pursuant to Rule 92.1 will not take effect until the beginning of the

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\(^1\) See Article 6.2.b. of the Bye-Laws of Gard P&I (Bermuda) Ltd and Article 9.2.a of the Statutes of Assuranceforeningen Gard -gjensidig-. 
next following Policy Year. This gives Members the opportunity to consider whether they wish to continue to be insured on such terms and conditions. It also means that the Members’ cover will not be affected during the currency of the Policy Year.

**(B) ...the Association shall, where practicable, give notice of amendments to Members before 20 January... (Rule 92.1)**

A Policy Year runs from noon GMT on 20 February in any year to immediately prior to noon GMT on the following 20 February. Whenever it is practicable to do so, the Association will give notice of any amendments to the Rules before 20 January in order to give Members at least one month within which to consider the implications of such amendments before the start of the next Policy Year. However, if it is impractical to give notice by 20 January, the Association may, nonetheless, proceed to make amendments to the Rules for the following Policy Year.

**(C) ...in the determination of the Association, a substantial alteration of risks occurs... (Rule 92.2)**

Whereas Rule changes are usually planned at the end of a Policy Year, and take effect from the beginning of the next Policy Year, Rule 92.2 gives the Association the authority to make Rule changes that take effect during the course of a Policy Year if there is a substantial, and usually unexpected, alteration of risk that affects all or a substantial category of Members.

A ‘substantial’ risk is not capable of precise quantitative meaning, but it indicates that the alteration of risk must be serious. Rule 92.2 gives the Association the discretion to determine whether an alteration of risk is, or is not, substantial, and to decide how the Rules are to be amended in response to the alteration of risk. For example, the then current cesser/termination provisions of Rules 24 and 25 were amended during the 2010-11 Policy Year as a result of the then current and impending legislation in the USA which sought to impose sanctions on both domestic and foreign entities “underwriting or otherwise providing insurance or reinsurance” for “any activity that could contribute to the enhancement of Iran’s ability to import refined petroleum resources.” Such legislation (which was likely to be adopted quickly by other countries) had the effect of prohibiting the provision of insurance cover for any vessel(s) regardless of country of flag or registry or beneficial ownership that engaged in trading refined products into Iran and imposed severe sanctions against both companies and individuals that sought to provide such insurance. Such legislation would clearly seriously hamper the ability of the Association to maintain the quality and efficiency of the service that it could provide to the membership generally and therefore, it was considered that this was

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2 See Rule 23. A Member who wishes to terminate his entry in respect of one or more Ships with effect from the end of the Policy Year must give written notice thereof prior to 20 January.
a substantial alteration of risk that was deemed sufficiently serious to justify making an amendment to the Rules to take effect on 23 April 2010 during the 2010-11 Policy Year.

If the Association decides to limit or reduce the level of cover, then the Association is required to give Members at least two months’ notice of the proposed amendment. However, if the Association decides to increase the level of cover, then the Association does not need to give two months’ notice of the proposed amendment.

A distinction needs to be drawn between Rule 92.2 and Rule 7. Rule 92.2 will normally apply only where there is an alteration of risk that affects all or a substantial category of Members, and which is caused by events that are outside the power and control of the Association and the Members. However, Rule 7 applies when the alteration of risk affects an individual Member but not the membership at large, and which may entitle the Association, in certain circumstances, to refuse to compensate that Member.3

(D) …as a result of new legislation or for any other reason… (Rule 92.2)
Legislative changes have the potential to substantially alter the risks that the Association has agreed to cover. Reference has already been made in (C) to the impact that the sanctions legislation of different countries has had and earlier historical examples include the US Oil Pollution Act of 1990 (OPA 90) that caused the P&I clubs that are members of the International Group of P&I Clubs to make only contingent cover available for certain oil tankers for oil pollution liabilities that arose under OPA 904 whilst the adoption of the 2002 Protocol to the Athens Convention persuaded such clubs to limit the cover that is available for liability to passengers and seamen.5

However, substantial changes to the insured risks may also be caused by reasons other than changes in legislation, e.g. as a result of natural disasters that make the transit of particular waters more hazardous.

(E) When war has broken out or, in the determination of the Association threatens to break out… (Rule 92.3)
Rule 92.3 enables the Association to take account of any outbreak of hostilities that will substantially affect the risks that are insured by the Association. The Association may amend the Rules, not only when war has actually broken out, but also when the Association considers that there is a threat that war may break out. War is often preceded by a deterioration of relations, during the course of which the participants

3 See the Guidance to Rule 7.
4 See Rule 53.2 and Appendix III.
5 The 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974. 7 See Rule 53.3 and Appendix IV. However, in that particular instance, the change took effect from 20 February 2007 and not during the course of any Policy Year.
issue threats of war or engage in hostile acts against each other. In such situations, Rule 92.3 enables the Association to react quickly to protect the interest of the membership. The Rule gives the Association the authority to introduce amendments to the Rules by giving less than two months’ notice if it considers, in its discretion, that there is a danger of war breaking out.
Appendix I Additional insurances

The additional insurances to which reference is made in this Appendix are intended to assist Members and those that work closely with Members in circumstances in which the Standard P&I Cover that is provided by the Association under the Rules does not provide full and complete cover. In some instances, the additional cover is provided by the Association itself\(^1\) whereas, in other instances, the Association may be able to arrange additional insurance for the Member with other insurers, e.g. shipowner’s liability (SOL) cover for deviation risks which is placed in the commercial market.

Some insurances are intended to protect all Members against risks that have traditionally been excluded from the Standard P&I Cover, e.g. the Deviation liability cover for deviation risks. However, in other cases, the additional cover is designed to protect a particular class of Member against risks that affect that particular class, but not all Members, e.g. the Comprehensive Charterers’ Liability Cover, or a particular class of organisations that work closely with Members but are not Members, e.g. the Crew managers cover.

1  Introduction

Additional insurances set out in this Appendix shall be subject to the Rules for P&I and Defence cover of Ships and other floating structures (the Rules) save to the extent to which any of such Rules are inconsistent with the terms and conditions expressly agreed between the Member and the Association.

Paragraph 1 makes it clear that additional insurances will also be subject to the Association’s Standard Rules on P&I and Defence cover unless and to the extent that such Rules are not consistent with any terms and conditions that have been expressly agreed between the Association as Insurer and the Member as Assured under the particular additional insurance.

2  War Risks

The Association has arranged an additional war risk insurance for the benefit of its Members. The details of this additional war risk insurance will be set out in a separate circular to the Members.

For further details see the Guidance to Rule 58.

3  Paperless Trading

The Association may be able to arrange for the benefit of its Members an insurance for liabilities, costs or expenses that do not arise under the electronic trading systems that have been approved by the P&I clubs that are members of the International Group of P&I Clubs and which would be recoverable under

\(^1\) See the Guidance to the Additional Covers.
the Rules but for the Paperless Trading Exclusion of the 2012 International Group Pooling Agreement. Further details are available from the Association’s underwriting department.

After reviewing a number of electronic trading systems, the International Group of P&I Clubs has agreed that cover is available for typical cargo P&I liabilities that arise as a result of the use of the Bolero Rulebook/Operating Procedures September 1999 and the ESS DSUA 2009.3 and DSUA 2013 systems. Consequently, cover for such liabilities is available under the Standard P&I Cover. However, the Rule 63.1.j exclusion is still applicable if liability has arisen as a result of the use of some other electronic system that has not been approved in advance in writing by the Association.2

In such circumstances, the Association may in limited circumstances be able to obtain separate cover for its Members from market underwriters on terms to be agreed with the market underwriters and on payment of additional premium. However, such a facility is reviewed by the market insurers from year to year and on a case by case basis and there is no guarantee that a Member may be able to secure such cover. Further details are available from the Association’s underwriting department.

4 Other additional insurances
The Association may on terms and conditions expressly agreed between the Member and the Association provide or assist in arranging other additional insurances for a number of liabilities or risks not covered under the Rules. Further information is available from the Association’s underwriting department.

See the guidance to the Additional Covers for further commentary on the Comprehensive Carrier’s Liability Cover (CCC), the Extended Crew Cover (ECR), the Deviation Liability Cover, the Crew Manager’s Cover and the Bunkers Cover, and the Association’s website (www.gard.no/Products/shipowners) for details of the other additional covers that are available.

2 See paragraph (L) to the Guidance to Rule 63
Appendix II Charterers limits including special limit for Consortium Claims

1 Introduction
The cover afforded under Charterer’s Entries and to charterers co-assured under Owner’s Entries as described in Rule 78.4 is limited pursuant to Rule 52 in accordance with this Appendix II.

2 Charterers co-assured under an Owner’s Entry
Cover afforded in respect of charterers co-assured under an Owner’s Entry as described in Rule 78.4 is limited each incident or occurrence each entry to whichever is the lesser of the Limitation Amount (if any) and USD 350 million. Any reference in this Appendix II, section 2, to the ‘Limitation Amount’ means the amount to which the registered owner of the Ship could have limited its liability in the respect of the relevant matter had the registered owner of the Ship sought and not been denied the right to limit.

3 Charterers’ Entry – all categories of claims
Subject to the provisions in section 4 below, the cover afforded to all assured under a Charterer’s Entry in respect of all liabilities, losses, costs or expenses falling within Part II, chapter 1 of the Rules, is limited each incident or occurrence each entry each Ship to USD 350 million.

4 Oil pollution – salvage

a Where the Ship provides salvage or other assistance to another ship following a casualty, a claim by the Member in respect of oil pollution arising out of the salvage, the assistance or the casualty shall be aggregated with any claim or claims for liabilities, losses, costs or expenses incurred in respect of oil pollution by any other ship(s) similarly engaged in connection with the same casualty when such other ship(s) are either:

i insured by the Association in respect of oil pollution under Charterer’s Entries; or

ii covered for those risks under Charterer’s Entries with any other association which participates in the Pooling Agreement.

In such circumstances the limit of liability of the Association shall be such proportion of the sum set out in section (b) below as the claim by the Member bears to the aggregate of all the said claims.

b Where a Ship is separately insured under more than one Charterer’s Entries with the Association or with the Association and any other association(s) which participate(s) in the Pooling Agreement, the aggregate of all claims for oil pollution brought against the Association and/or such other association(s) following an incident or occurrence shall be limited to USD 350 million. The liability of the Association in respect of each such
claim shall be limited to that proportion of USD 350 million that that
claim bears to the aggregate of the claims against the Association or the
Association and such other association(s), if any.

5  **Consortium vessels**

5.1  **Definitions**

For the purpose of this section 5 to Appendix II to the Rules for Ships, the
following words and expressions shall have the following meanings:

**Consortium Agreement**
any arrangement under which a Member agrees with other parties to
the reciprocal exchange or sharing of cargo space on the Ship and
Consortium Vessels.

**Consortium Claim**
means a claim as described in sub-paragraph 5.2 of this section 5 to
Appendix II to the Rules for Ships.

**Consortium Vessel**
means a ship, feeder vessel or space thereon, not being the Ship, employed to
carry cargo under a Consortium Agreement.

5.2  **Consortium Claims**

A claim shall be a Consortium Claim where:

a  it arises under a P&I entry of a Ship; and

b  it arises out of the carriage of cargo on a Consortium Vessel; and

c  that the Member and the operator of the Consortium Vessel are parties to a
Consortium Agreement; and

d  at the time cover pursuant to the special provisions in this section
5 initially attaches, the Member employs a Ship pursuant to that
Consortium Agreement.

For the purpose of a Consortium Claim under this Appendix II to the Rules for
Ships, the Consortium Vessel shall be treated as a Ship entered on behalf of
the Member under a Charterer’s Entry in the Association.

5.3  **Allocation of Consortium Claims**

Where a Ship under an Owners’ Entry and a Ship under a Charterer’s Entry are
both employed by the Member pursuant to a Consortium Agreement at the
time of the event giving rise to the Consortium Claim occurs, the Consortium
Claim of the Member shall for the purpose of these Rules be treated as a claim
arising in respect of the Owner’s Entry of the Member.
5.4 **Aggregation**

a Where the Member has more than one ship employed pursuant to the Consortium Agreement at the time the event giving rise to a Consortium Claim occurs, all such ships shall be deemed to be an Entry of one Ship.

b Where a Member employs one or more ships pursuant to the Consortium Agreement at the time the event giving rise to a Consortium Claim occurs and the Member has an entry in respect of such ships in the Association and another association which is a party to the Pooling Agreement

i each such ship shall be deemed to be a part entry of one ship in the Association and the other association(s) which is a party to the Pooling Agreement, and

ii where the Consortium Claims incurred by the Association and the other association(s) in respect of the Ship arising from that event out of the carriage of cargo on a Consortium Vessel in the aggregate exceed the sum specified in paragraph 5 below, the liability of the Association for such Consortium Claims shall be limited to that proportion of the sum specified in paragraph 5 below that the Consortium Claims recoverable from the Association in respect of each part entry bears to the aggregate of all the Consortium Claims incurred by the Association and any other association which is a party to the Pooling Agreement.

5.5 **Limit of insurance**

The cover afforded for a Consortium Claim is limited pursuant to Rule 52 to USD 350 million each incident or occurrence in respect of all ships under any and all P&I entries of a Member in the Association and any other association which is a party to the Pooling Agreement.

**Guidance**

For further Guidance to Appendix II see the Guidance to Rule 52.

**(A) Charterers co-assured under an Owner’s Entry**

This section reflects the wording of the Pooling Agreement and provides in effect for one combined single limit of USD 350 million per incident or occurrence per entry for both pollution and non-pollution claims.
Appendix III Oil pollution

1 Definitions
Any reference in this Appendix to

a the ‘Limitation Amount’ means the amount to which the registered owner of the Ship could have limited its liability in respect of the relevant matter had the registered owner of the Ship sought and not been denied the right to limit;

b ‘oil pollution’ includes attempts to reduce or prevent oil pollution;

2 Limit of insurance for Owner’s Entries

a The cover afforded for oil pollution for Owner’s Entries is limited pursuant to Rule 53.1 in accordance with this paragraph 2.

b Cover afforded to a charterer co-assured under an Owner’s Entry as described in Rule 78.4 is limited to whichever is the lesser of the Limitation Amount (if any) and USD 350 million.

c The limit of insurance for any and all claims in respect of oil pollution is USD 1 billion each incident or occurrence each Owner’s Entry, provided that if the total amount of claims against a Member in respect of oil pollution following any one incident or occurrence exceeds USD 1 billion the Association will not be liable to make any payment in respect of the amount by which any such claims exceed USD 1 billion.

d Where the Ship provides salvage or other assistance to another ship following a casualty, a claim by the Member in respect of oil pollution arising out of the salvage, the assistance or the casualty shall be aggregated with any claim or claims for liabilities, losses, costs or expenses incurred in respect of oil pollution by any other ships similarly engaged in connection with the same casualty when such other ships are either:

i insured by the Association in respect of oil pollution under Owner’s Entries; or

ii covered for those risks under Owner’s Entries with any other association which participates in the Pooling Agreement.

In such circumstances the limit of the liability of the Association shall be such proportion of the sum set out in paragraph 2(c) above as the claim by the Member bears to the aggregate of all the said claims.

e Where the Member and another party or other parties interested in the operation of the Ship are insured under separate Owner’s Entries with the Association or with the Association and any other association(s) which participate(s) in the Pooling Agreement, the aggregate of all claims for oil pollution brought against the Association and/or such other association(s) following an accident or occurrence, shall be limited to the sum set out in paragraph 2(c) above. The liability of the Association in respect of each such claim shall be limited to that proportion of the sum set out in paragraph 2(c) above that that claim recoverable from the Association bears to the aggregate of the claims recoverable against the Association or the Association and such other association(s), if any.
Guidance
For further Guidance to Appendix III see the Guidance to Rules 52 and 53.
Appendix IV  Passengers and seamen

1  For the purposes of this Appendix IV, and without prejudice to anything else contained in these Rules for Ships, a “Passenger” shall mean a person carried onboard a ship under a contract of carriage or who, with the consent of the carrier, is accompanying a vehicle or live animals covered by a contract for the carriage of goods and a “Seaman” shall mean any other person onboard a ship who is not a Passenger.

2  Unless otherwise limited to a lesser sum, the Association’s aggregate liability arising under any one Owner’s Entry shall not exceed

i  in respect of liability to Passengers USD 2,000,000,000 any one event; and

ii  in respect of liability to Passengers and Seamen USD 3,000,000,000 any one event.

Provided always that:
Where there is more than one Owner’s Entry in respect of the same ship in the Association and/or or by any other association which participates in the Pooling Agreement

a  the aggregate of claims in respect of liability to Passengers recoverable from the Association and or such other associations shall not exceed USD 2,000,000,000 any one event and the liability of the Association shall be limited to such proportion of that sum as the claim recoverable by such persons from the Association bears to the aggregate of all such claims otherwise recoverable from the Association and from all such associations;

b  the aggregate of all claims in respect of liability to Passengers and Seamen recoverable from the Association and/or such other associations shall not exceed USD 3,000,000,000 any one event and the liability of the Association shall be limited:

i  where claims in respect of liability to Passengers have been limited to USD 2,000,000,000 in accordance with proviso (a) to such proportion of the balance of USD 1,000,000,000 as the claims recoverable by such persons in respect of liability to Seamen bears to the aggregate of all such claims otherwise recoverable from the Association and all such associations; and

ii  in all other cases, to such proportion of USD 3,000,000,000] as the claims recoverable by such persons in respect of liability to Passengers and Seamen bears to the aggregate of all such claims otherwise recoverable from the Association and all such associations.
3 The Association’s liability in respect of repatriation pursuant to Rule 27.3 shall be limited to an amount, per Ship per event, equal to the Club retention* under the Pooling Agreement in the Policy Year the event giving rise to the claim(s) occurred.¹

*In the 2015 Policy Year the Club retention will amount to USD 9 million.

Guidance
For further Guidance to Appendix IV see the Guidance to Rule 53.

¹ For more detailed commentary see the Guidance to Rule 27.3.
Appendix V Deductibles

1  Introduction
   a The Association’s standard deductibles shall be as set out in this Appendix. However, readers are warned that the standard deductibles are subject to annual review by the board of Directors. Consequently, readers are urged to consult the Gard website to check the then level of deductibles at the time of the particular consultation.
   b For the purposes of this Appendix, the Association shall determine in its absolute discretion under which Rule any particular liability, loss, cost or expense is covered.

2  P&I entries
   a The standard deductibles for liabilities, losses, costs and expenses incurred by all the assured under any one P&I entry are as follows (subject to paragraphs 2(b) and (c) below):
      i Crew
         All liabilities, cost and expenses covered under Rule 27, and arising out of any one event USD 7,000.
      ii Passengers and others carried on board
         All liabilities, costs and expenses covered under Rules 28 or 29 and arising out of any one event: USD 7,000.
      iii Cargo
         All liabilities, costs and expenses covered under Rule 34 and arising out of any one cargo carrying voyage: USD 19,000.
      iv Pollution
         All liabilities, losses, costs and expenses covered under Rule 38 and arising out of any one event: USD 19,000.
   b For the purpose of applying a deductible under this paragraph 2 there shall be added to the relevant liabilities, losses, costs and expenses (‘the relevant liabilities’) as described in sub-paragraph (a) above the amount of any losses, costs and expenses which are covered under any of Rules 44, 45 and 46 and which are incurred in relation to the relevant liabilities.
c Where it is agreed in the terms of P&I entry that a separate deductible shall apply in respect of a particular category (but not all) of the liabilities, losses, costs or expenses referred to in any of paragraphs 2 (a) (i) to 2 (a) (vi) above, that separate deductible shall apply to all liabilities, losses, costs or expenses within that category and the standard deductible shall apply to all other liabilities, losses, costs or expenses covered under the same Rule or Rules and arising out of the same event or cargo carrying voyage.

3 Defence entries

a The standard deductible for all legal and other costs covered under Rules 65 and 66 and incurred by all the assured under any one Defence entry and arising out of any one event shall be 25 per cent of the legal and other costs incurred, subject to a minimum deductible of USD 5,000.

b The Association shall determine in its absolute discretion in respect of Defence cover whether legal and other costs and expenses have arisen out of one or several events, irrespective of whether one or several Ships are involved.

Guidance

For further Guidance to Appendix V see the Guidance to Rule 76.
Appendix VI  Rules on Overspill Claims and Overspill Calls and related matters

1  Interpretation

1.1  In this Appendix the following words and expressions shall have the following meanings:

Convention Limit
In respect of a ship, the limit of liability of the shipowner of that ship for claims (other than claims for loss of life or personal injury) at the Overspill Claim Date, calculated in accordance with Article 6, paragraph 1(b) of the International Convention on Limitation of Liability for Maritime Claims 1976 (the Convention) and converted from Special Drawing Rights into United States Dollars at the rate of exchange conclusively certified by the Association as being the rate prevailing on the Overspill Claim Date, provided that:

a  when a ship is entered for a proportion (the “relevant proportion”) of its tonnage only, the Convention Limit shall be the relevant proportion of the limit of liability calculated and converted as aforesaid, and

b  each ship shall be deemed to be a seagoing ship to which the Convention applies, notwithstanding any provision in the Convention to the contrary.

Group Reinsurance Limit
The amount of the smallest claim (other than any claim arising in respect of oil pollution) incurred by the Association or any other party to the Pooling Agreement which would exhaust the largest limit for any type of claim (other than any claim arising in respect of oil pollution) from time to time imposed in the Group Excess Loss Policies.

Overspill Call
A call levied by the Association pursuant to paragraph 5 for the purpose of providing funds to pay part of a Overspill Claim.

Overspill Claim
That part (if any) of a claim (other than a claim arising in respect of oil pollution) incurred by the Association or by any other party to the Pooling Agreement under the terms of entry of a ship which exceeds or may exceed the Group Reinsurance Limit.

Overspill Claim Date
In relation to any Overspill Call, the time and date on which there occurred the incident or occurrence giving rise to the Overspill Claim in respect of which the Overspill Call is made, or if the Policy Year in which such incident or occurrence has been closed in accordance with the provisions of paragraphs 6.1 and 6.2, noon GMT on 20th August of the Policy Year in respect of which the Association makes a declaration under paragraph 6.3.
1.2 All claims incurred by the Association or any other party to the Pooling Agreement under the entry of any one ship arising directly from any one incident or occurrence including any claim in respect of liability for the removal or non-removal of any wreck shall be treated for the purposes of this Appendix VI as if they were one claim.

1.3 Any reference to a claim incurred by the Association or by any other party to the Pooling Agreement shall be deemed to include the costs and expenses associated therewith.

2 Recoverability of Overspill Claims

2.1 Without prejudice to any other applicable limit, any Overspill Claim incurred by the Association shall not be recoverable from the Association in excess of the aggregate of

a that part of the Overspill Claim which is eligible for pooling under the Pooling Agreement but which, under the terms of the Pooling Agreement, is to be borne by the Association, and

b the maximum amount that the Association is able to recover from the other parties to the Pooling Agreement as their contributions to the Overspill Claim under the terms of the Pooling Agreement.

2.2 The aggregate amount referred to in paragraph 2.1 shall be reduced to the extent that the Association can evidence

a that costs have been properly incurred by it in collecting or seeking to collect

i Overspill Call levied to provide funds to pay that part of the Overspill Claim referred to in paragraph 2.1(a) or,

ii the amount referred to in paragraph 2.1(b) or

b that it is unable to collect an amount equal to that part of the Overspill Call referred to in paragraph 2.1 sub-paragraph (a) which it had intended to pay out of the levy of Overspill Calls because any Overspill Calls so levied, or parts thereof, are not economically recoverable, provided that if due to change in circumstances such amounts subsequently become economically recoverable, the aggregate amount referred to in paragraph 2.1 shall be reinstated to that extent.

2.3 In evidencing the matters referred to in paragraph 2.2 sub-paragraph (b) the Association shall be required to show that

a it has levied Overspill Calls on all of its Members in respect of the Overspill Claim referred to in paragraph 2.1. on all Members entered in the Association on the Overspill Claim Date in accordance with and in the maximum amount permitted under paragraph 5, and
b it has levied those Overspill Calls in a timely manner, has not released or otherwise waived a Member’s obligation to pay those Calls and has taken all reasonable steps to recover those Calls.

3 Payment of Overspill Claims
3.1 The funds required to pay any Overspill Claim incurred by the Association shall be provided
   a from such sums as the Association is able to recover from the other parties to the Pooling Agreement as their contribution to the Overspill Claim, and
   b from such sums as the Association is able to recover from any special insurance which may in the discretion of the Association have been effected to protect the Association against the risk of payments of the Overspill Claims, and
   c from such proportion as the Association in its discretion determines of any sums standing to the credit of the reserves as the Association may in its discretion have established, and
   d by levying one or more Overspill Calls in accordance with paragraph 5, irrespective of whether the Association has sought to recover or has recovered all or any of the sums referred to in paragraph 3.1 sub-paragraph (b), but provided the Association shall first have made a determination in accordance with paragraph 3.1 sub-paragraph (c), and
   e from any interest accruing to the Association on any funds provided as aforesaid.

3.2 The funds required to pay such proportion of any Overspill Claim incurred by any other party to the Pooling Agreement which the Association is liable to contribute under the terms of the Pooling Agreement shall be provided in the manner specified in paragraph 3.1 sub-paragraphs (b) – (e).

3.3 To the extent that the Association intends to provide funds required to pay any Overspill Claim incurred by it in the manner specified in paragraph 3.1 sub-paragraph (d), the Association shall only be required to pay such Overspill Claim as and when such funds are received by it, provided that it can show from time to time, in seeking to collect such funds, it has taken the steps referred to in paragraph 2.3 sub-paragraphs (a) and (b).

4 Overspill Claims – expert determinations
4.1 Any of the issues referred to in paragraph 4.2 on which the Association and a Member cannot agree shall be referred to a panel (the Panel) constituted in accordance with the arrangements established in the Pooling Agreement, which, acting as a body of experts and not as an arbitration tribunal, shall determine the issue.
4.2 This paragraph 4 shall apply to any issue of whether, for the purpose of applying any of the provisions in paragraphs 2.2, 2.3 and 3.3 in relation to any Overspill Claim (the “relevant Overspill Claim”),

a costs have been properly incurred in collecting or seeking to collect Overspill Claims,

b any Overspill Call or part thereof is economically recoverable, or

c in seeking to collect the funds referred to in paragraph 3.3, the Association has taken the steps referred to in that paragraph 3.3.

4.3 If the Panel has not been constituted at a time when the Member wishes to refer an issue to it, the Association shall, on request by the Member, give a direction for the constitution of the Panel as required under the Pooling Agreement.

4.4 The Association may (and, on the direction of the Member, shall) give such direction as is required under the Pooling Agreement for the formal instruction of the Panel to investigate any issue and to give its determination as soon as reasonably practicable.

4.5 The Panel shall in its discretion decide what information, documents, evidence and submissions it requires in order to determine an issue and how to obtain these, and the Association and the Member shall co-operate fully with the Panel.

4.6 In determining any issue referred to it under this paragraph 4 the Panel shall endeavour to follow the same procedure as it follows in determining issues arising in respect of the relevant Overspill Claim which are referred to it under the Pooling Agreement.

4.7 In determining an issue the members of the Panel

a shall rely on their own knowledge and expertise, and

b may rely on any information, documents, evidence or submission provided to it by the Association or the Member as the Panel sees fit.

4.8 If the three members of the Panel cannot agree on any matter, the view of the majority shall prevail.

4.9 The Panel shall not be required to give reasons for any determination.

4.10 The Panel’s determination shall be final and binding upon the Association and the Member (subject only to paragraph 4.11) and there shall be no right of appeal from such determination.
4.11 If the Panel makes a determination on an issue referred to in paragraph 4.2 sub-paragraphs (b) or (c) the Association or the Member may refer the issue back to the Panel, notwithstanding paragraph 4.10, if it considers that the position has materially changed since the Panel made its determination.

4.12 The costs of the Panel shall be paid by the Association.

4.13 Costs, indemnities and other sums payable to the Panel by the Association in relation to any Overspill Claim, whether the reference to the Panel has been made under this paragraph 4 or under the Pooling Agreement, shall be deemed to be costs properly incurred by the Association in respect of that Overspill Claim for the purposes specified in paragraph 2.2 sub-paragraph (a).

5 Levying of Overspill Calls

5.1 If

a the Association shall at any time determine that funds are or may in future be required to pay part of an Overspill Claim (whether incurred by the Association or by any other party to the Pooling Agreement); and

b the Association shall have made a declaration under paragraphs 6.1 or 6.3 that a Policy Year shall remain open for the purpose of levying an Overspill Call or Calls in respect of that Overspill Claim, the Association in its discretion, at any time or times after such declaration has been made, may levy one or more Overspill Calls in respect of that Overspill Claim in accordance with paragraph 5.2.

5.2 The Association shall levy any such Overspill Call

a on all Members entered in the Association on the Overspill Claim Date in respect of ships entered by them at that time, notwithstanding the fact that, if the Overspill Claim Date shall be in a Policy Year in respect of which the Association has made a declaration under paragraph 6.3, any such ship may not have been entered in the Association at the time the relevant incident or occurrence occurred, and

b at such percentage of the Convention Limit of each such ship as the Association in its discretion shall decide.

5.3 An Overspill Call shall not be levied in respect of any ship entered on the Overspill Claim Date with an overall limit of cover equal to or less than the Group Reinsurance Limit.

5.4 The Association shall not levy on any Member in respect of the entry of any ship an Overspill Call or Calls in respect of any one Overspill Claim exceeding in the aggregate two and a half per cent (2.5%) of the Convention Limit of that ship.
5.5 If at any time after the levying of an Overspill Call upon the Members entered in the Association in any Policy Year, it shall appear to the Association that the whole of such Overspill Call is unlikely to be required to meet the Overspill Claim in respect of which such Overspill Call was levied, the Association may decide to dispose of any excess which in the opinion of the Association is not so required in one or both of the following ways:

a. by transferring the excess or any part thereof to the reserve in accordance with Rule 19 in the Rules for Ships; or

b. by returning the excess or any part thereof to those Members who have paid that Overspill Call or Calls in proportion to the payments made by them.

6 Closing of Policy Years for Overspill Calls

6.1 If at any time prior to the expiry of a period of thirty-six months from the commencement of a Policy Year (the “relevant Policy Year”), any of the parties to the Pooling Agreement sends a notice (an “Overspill Notice”) in accordance with the Pooling Agreement that an incident or occurrence has occurred in the relevant Policy Year which has given or at any time may give rise to an Overspill Claim, the Association shall as soon as practicable declare that the relevant Policy Year shall remain open for the purpose of levying an Overspill Call or Calls in respect of that claim and the relevant Policy Year shall not be closed for the purpose of making an Overspill Call or Calls in respect of that claim until such date as the Association shall determine.

6.2 If at the expiry of the period of thirty-six months provided for in paragraph 6.1, no Overspill Notice as therein provided for has been sent, the relevant Policy Year shall be closed automatically for the purpose of levying Overspill Calls only, whether or not closed for any other purposes, such closure to have effect from the date falling thirty-six months after the commencement of the relevant Policy Year.

6.3 If at any time after a Policy Year has been closed in accordance with the provisions of paragraphs 6.1 and 6.2, it appears to the Association that an incident or occurrence which occurred during such closed Policy Year may then or at any time in the future give rise to an Overspill Claim, the Association shall as soon as practicable declare that the earliest subsequent open Policy Year (not being a Policy Year in respect of which the Association has already made a declaration in accordance with paragraphs 6.1 or 6.3) shall remain open for the purpose of levying an Overspill Call or Calls in respect of that claim, and such open Policy Year shall not be closed for the purpose of making an Overspill Call or Calls in respect of that claim until such date as the Association shall determine.
6.4 A Policy Year shall not be closed for the purpose of levying Overspill Calls save in accordance with this paragraph 6.

7 **Security for Overspill Calls on termination or cessor**

7.1 If

a. the Association makes a declaration in accordance with paragraphs 6.1 or 6.3 that a Policy Year shall remain open for the purpose of levying an Overspill Call or Calls, and

b. a Member who is liable to pay any such Overspill Call or Calls as may be levied by the Association in accordance with paragraph 5 ceases or has ceased to be insured by the Association for any reason, or the Association determines that the insurance of any such Member cease, the Association may require such Member to provide to the Association by such date as the Association may determine (the “due date”) a guarantee or other security in respect of the Member’s estimated future liability for such Overspill Call or Calls, such guarantee or other security to be in such form and amount (the “guarantee amount”) and upon such terms as the Association in its discretion may deem to be appropriate in the circumstances.

7.2 Unless and until such guarantee or other security as is required by the Association has been provided by the Member, the Member shall not be entitled to recovery from the Association of any claims whatsoever and whensoever arising in respect of any and all ships entered in the Association for any Policy Year by him or on his behalf.

7.3 If such guarantee or other security is not provided by the Member to the Association by the due date, a sum equal to the guarantee amount shall be due and payable by the Member to the Association on the due date, and shall be retained by the Association as a security deposit on such terms as the Association in its discretion may deem to be appropriate in the circumstances.

7.4 The provision of a guarantee or other security as required by the Association (including a payment in accordance with paragraph 7.3) shall in no way restrict or limit the Member’s liability to pay such Overspill Call or Calls as may be levied by the Association in accordance with paragraph 5.

**Guidance**

See also the Guidance to Rule 18.
Appendix VII Particular clauses
The “New Jason Clause” and the “Both to Blame Collision Clause” are recommended inserted in all charterparties, Bills of Lading, waybills and other contracts containing or evidencing the contract of carriage used in international trade.

Guidance
For further Guidance to Appendix VII see the Guidance (G) to Rule 55. It is emphasised that whilst the Association recommends that these clauses be included in the specified documents in order to ensure that the Member has the maximum protection against claims, Rule 55 makes it clear that, should the Member fail to do so but should nevertheless seek cover from the Association for liabilities, losses, costs or expenses incurred thereby, the Association is not able to provide such cover. Furthermore, although there may be variations of these clauses, the clauses to which Appendix VII refers are the BIMCO approved clauses that may be found on the BIMCO website.
Additional Covers
**Introduction**

P&I cover is intended to give protection and comfort to shipowners and operators against the losses and liabilities that they regularly incur whilst engaged in shipping operations, and has been doing so for centuries. Since such cover is mutual in nature in the sense that Members indemnify each other against such risks and do not seek to make a profit when doing so, the scope of P&I insurance has been able to expand when necessary in response to the rapidly expanding character, scope and demands of shipping operations. However, such expansion has always been guided and restricted by the need to maintain the concept and requirements of mutuality. In other words, as the scope of risk and liability that is ordinarily and routinely faced by conventional ship operators has expanded, the scope of P&I cover has also expanded in response. However, some owners and operators are exposed to risks that are special to their particular form of shipping operation and which are different to the risks that are experienced by the majority of owners and operators. Claims arising from such special risks do not readily fit into the framework of mutuality. Such risks can result either from the specialist nature of the operations in which relatively few owners or operators are engaged, or from non-standard terms of contracts and other agreements that are used in a particular trade and which impose (often non-negotiable) liabilities that are more onerous than those that are normally imposed on conventional owners and operators by compulsory international and national laws.

The Association is sympathetic to the needs of such owners and operators to secure adequate insurance protection even though the risks are not capable of being shared on a mutual basis within the Standard P&I Cover that is reinsured through the International Group Pool. Consequently, the Association has developed a number of Additional Covers that are intended to meet such needs but which must necessarily be separately reinsured from the Standard P&I Cover. However, such additional insurances are normally offered to Members that already have Ships that are entered in the Association for the Standard P&I Cover and such additional insurances are intended to ‘bolt on’ to such Cover in order to provide cover where it is not available under the Standard P&I Cover.

All such Additional Covers are written by the Association (as insurer) on a fixed premium basis and are subject to a number of general provisions that are set out in Part I General Provisions of the Terms and Conditions. Most of these provisions replicate the general terms of the Rules that govern the Standard P&I Cover that the Association offers on a mutual basis, e.g. the duty of disclosure, alteration of risk, termination and cesser etc. Therefore, the Member, as Assured, should appreciate and be aware that the guidance that is given elsewhere in this publication as to the importance that such issues have to the Rules is equally applicable in relation to these Additional Covers.
Finally, it must be emphasised that, if the Association acts as the Insurer for the purposes of these Additional Covers, then unless the Assured already satisfies the definition of Member in Rule 1 of the Association’s Rules, the acceptance of him as Assured by the Insurer for the purposes of one or more of these Additional Covers does not give the Assured a right to be a Member of the Association.
Additional covers terms and conditions

PART I  GENERAL PROVISIONS

Chapter 1  Introductory provisions
Section 2  The cover
1  An Assured shall be covered for such of the risks specified in Part II as are agreed between the Assured and the Insurer in accordance with these terms and Conditions and as specified in the Insurance Policy.
2  If the Insurer is a mutual association the Additional Cover shall not give the Assured rights to membership with the Insurer.
3  The Assured is only covered in respect of liabilities, losses, costs and expenses incurred by him which arise out of events occurring during the Period of Insurance for the relevant risk.

PART II  AVAILABILITY OF COVER, RISKS COVERED AND SPECIAL EXCLUSIONS

Chapter 1  Availability of cover
Section 16  Availability of cover
1  The Insurer shall cover the categories of risks as set out below to the extent that they are specified in the Insurance Policy. The categories of risks are;
   A  Comprehensive Carrier’s Liability Cover (Section 17.A);
   B  Extended Crew Cover (Section 17.B);
   C  Deviation liability Cover (Section 17.C);
   D  Tour Operator Passenger Liability Cover (Section 17.D);
   E  Divers’ Cover (Section 17.E);
   F  Container and Equipment Cover (Section 17.F);
   G  Cover in relation to Seafarer Recruitment and Placement Services (Section 17.G);
   H  Ship Manager’s Liability Cover (Section 17.H).
Bunkers Cover

Introduction
The owners of bunkers normally encounter two different types of risk: liability to third parties for loss or damage caused by the bunkers and the loss of, or damage to, the bunkers themselves, i.e. liability risks and property risks. Cover for liability risks is provided either under the Association’s Standard P&I Cover (if the bunkers are owned by the shipowner) or by the charterers’ P&I liability insurers (if the bunkers are owned by the time charterers). However, cover is not normally available under either cover for the interest that the owners of the bunkers have in the bunkers themselves, i.e. for the property risks. However, the Member may be able in some circumstances to recover for such loss or damage indirectly if it is proved that the Member would have a legal liability for such loss or damage if the bunkers had been owned by a third party.

The question of who owns the bunkers is a complicated one. The terms of many bunker suppliers contain Retention of Title (Romalpa) Clauses which provide that the supplier retains ownership of the bunkers until payment has been made even after the bunkers have been delivered on board a vessel that is owned by a third party. In other cases, the ownership may pass from the supplier to the buyer once payment has been made, in which case, the ownership may have passed before the bunkers are actually taken on board the recipient vessel, e.g. whilst they are still in a barge that is carrying the bunkers to the vessel. However, if the ownership has passed from the supplier, then the question of who is the owner normally depends on the following factors:

- if the ship is not chartered, the bunkers are owned by the shipowner.
- if the vessel is voyage chartered, the bunkers are owned by the shipowner.
- if the vessel is bareboat or time chartered, the bunkers are owned by the charterer.

1 For more detailed commentary on the various issues that can arise in relation to bunkers see Chapter 2 of the Gard Guidance on Maritime Claims and Insurance.
2 See the Guidance to Rules 38 and 39
3 The Association also provides such cover through the medium of the Comprehensive Charterers Liability Cover which is an additional cover that is provided on a fixed premium basis. Further details can be found on the Gard website.
4 See, for example, the Guidance to Rule 63.1.b.
5 See the Guidance to Rules 39 and 50.a
6 For further commentary see Chapters 2.7.3 and 2.8 of the Gard Guidance on Maritime Claims and Insurance.
7 The reason for this is that most bareboat and time charters provide that the charterer will take over and pay for all bunkers that are on board on delivery of the vessel to them and that they will provide and pay for any further bunkers that are required during the period of the charter and that the shipowners will take over and pay for any bunkers that remain on board on redelivery of the vessel to them at the end of the charter. See Chapter 2.1 of the Gard Guidance on Maritime Claims and Insurance.
The Bunkers Cover is intended to protect the property interest that the owners of the bunkers (whether they be the shipowners or the bareboat or time charterers) have in the bunkers and provides cover for bunkers that either are being carried, or are intended for carriage. Consequently, cover can be in place before the bunkers are pumped onto the declared vessel if the property is owned by the Assured at such time.

The cover is made available by the Association as insurer to a named Assured or named Assureds on a fixed premium basis in respect of a named Ship or Ships for a specified period and is subject to specially agreed terms and the exclusions and other general terms and conditions that are specified in the Rules of the Association’s Standard P&I and Defence Cover insofar as applicable to fixed premium entries. However, it is emphasised that the acceptance of the Assured by the insurer for the purposes of this Bunkers Cover does not give the Assured a right to be a Member of the Association.

Cover is available under the Bunkers Cover for any and all of the claims that are specified below, up to the value of the bunkers that were taken on board the declared vessel at her last bunkering port prior to the event that has caused the loss or damage and subject to a standard cover limit of USD 2 million per event.

**Guidance**

The Bunkers Cover is normally offered on the following terms and conditions which are standard terms that are offered by Lloyd’s of London and the Institute of London Underwriters (ILU) on the London insurance market:

- Institute Bulk Oil Clauses 1.2.83.
- Institute War Clauses (Cargo) 1.1.82.
- Institute Strikes Clauses (Cargo) 1.1.82.
- Institute Notice of Cancellation, Automatic Termination of Cover, War and Nuclear Exclusion Clause (Hulls etc. 01.01.95), but not to be subject to current London Market War Risks Exclusions.
- Radioactive Contamination Exclusion Clause LSW 370.

Therefore, cover is normally available for the loss or contamination of bunkers that is caused by:

- Fire or explosion;
- Stranding, grounding, sinking;
- Collision or contact;
- Discharge at port or place of distress;
- Earthquake, volcanic eruption or lightning;
- General Average sacrifice;

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8 All persons and/or companies that are named as Assured are jointly and severally liable for all sums that are due to the Association in respect of this insurance.
• Jettison;
• Leakage from connecting pipelines;
• Negligence of Master, Officers or Crew in pumping cargo, ballast or fuel;
• Stress of weather;
• Contribution to General Average and Salvage award;
• Proportional liability under the contract of affreightment ‘Both to Blame Collision’ clause;
• Strikes, lock-outs, labour disturbances, riots or civil commotions;
• War or war-like circumstances.

Therefore, should the declared vessel run aground with the result that the ship and bunkers have become a total loss, cover is available under the Bunkers Cover for the loss of the bunkers since such loss had been caused by an insured peril, i.e. grounding.

Alternatively, cover would normally be available under the Bunkers Cover in the following scenario: after bunkering at port A, the declared vessel proceeds on her voyage using bunkers that have previously been taken on board at a different port B and before receipt of the test analysis results for the bunkers that have been loaded at port A. In due course, the test analysis results indicate that the bunkers that have been loaded at port A are ‘off spec’ and need to be discharged at the next port of call C. On arrival at port C, the vessel takes on new bunkers, but such bunkers are mistakenly loaded on top of the bunkers that had been loaded at port B and in the same tank, thereby contaminating all the bunkers in that tank. Cover is available under the Bunkers Cover since the damage to all the bunkers in that tank has been caused by an insured peril (i.e. the negligence of the Master, officers or crew in pumping fuel) provided that the ‘old’ bunkers that had been loaded at port B and the ‘new’ bunkers that have been loaded at port C were both owned by the Assured at the time that both batches of bunkers were contaminated at port C. However, cover would not be available for the ‘off spec’ bunkers that had been loaded at port A since such bunkers had not been damaged by an insured peril.

Finally, cover would also be available under the Bunkers Cover for any general average contribution that the Assured might have to make in his capacity as the owner of the bunkers that were on board the declared vessel at the time of the incident that occasioned the general average event.9

However, cover is not available under the Bunkers Cover for purely economic losses that are caused by circumstances other than any of the perils specified above, e.g. for a depreciation in the value of bunkers that remain on board the declared vessel on termination of the charter.

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9 For more detailed commentary in relation to General Average see Chapter 10 of the Gard Guidance on Maritime Claims and Insurance.
Finally, it is to be noted that this cover should be viewed in conjunction with the Comprehensive Charterers’ Cover. As noted, the Bunkers Cover is a property loss or damage cover, whereas the Comprehensive Charterers’ Cover affords cover for a charterer’s liability for loss or damage caused to a vessel by the supply by charterers of inappropriate bunkers and for the cost of removing the inappropriate bunkers from the vessel and disposing of these.
Comprehensive Carrier’s Liability Cover (Section 17.A)

Chapter 2 Risks covered and special exclusions
Section 17 Risks covered and special exclusions

A  Comprehensive Carrier’s Liability Cover
1  Special Definitions
   In this Section 17A, the following words or expressions shall have the following meanings:

   Bill of Lading:
   bill of lading or similar document of title.

   Document:
   non-negotiable Bill of Lading, waybill or similar document provided production of such document by the person to whom delivery of the Cargo is made 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.

   Cargo:
   Any lawful and merchantable commodity or goods intended to be or being or having been carried on board a ship pursuant to a contract of carriage but excluding any other equipment, stores, fuel (unless carried as Cargo) or any other substance of whatsoever nature, and shall further exclude waste and residues of Cargo(es) and/or of such equipment, stores, fuels and/or other substances.

   Owner of Cargo:
   Any buyer or seller of Cargo, or any holder of the Bill of Lading issued in respect of Cargo.

2  Capacity of the Assured
   The cover afforded to the Assured shall extend only to liabilities, losses, costs or expenses that have arisen out of the activities and/or operations customarily carried on by or at the risk and responsibility of the Assured in any one of the capacities set out below, but only to the extent specified in the Insurance Policy:
   a  an owner, operator or charterer of the Ship;
   b  an owner or operator of a container accepted for carriage on the Ship;
   c  a non vessel operating common carrier (NVOCC);
   d  a user of a cargo terminal and cargo handling equipment;
   e  an Owner of Cargo carried on a ship; or
   f  an operator of a terminal.
3 **Special conditions**
None.

4 **Risks covered**
The Insurer shall cover any one of the risks set out below only to the extent specified in the Insurance Policy as “Covered” and always subject to the Terms, Conditions and Exclusions as set out in Sections 1-16 above, this Section 17 A and Sections 18-52 below:

a  **Cargo**
Liabilities incurred by the Assured to cargo interests in respect of Cargo accepted for carriage by the Assured.

b  **Property**
Liabilities incurred by the Assured in respect of physical loss of or damage to property not specified elsewhere in this Section 17 A other than property owned or leased by the Assured or by any company associated with the Assured.

c  **Personal injury, death, illness**
Liabilities incurred by the Assured in respect of death, personal injury or illness of any person.

d  **Environmental damage**
Liabilities incurred by the Assured in respect of environmental damage.

e  **Indemnities**
Liabilities incurred by the Assured to any party to whom the Assured has given an indemnity.

f  **Waiver of general average contribution**
Losses, costs and expenses incurred or suffered by the Assured as a result of having waived, in the Bill of Lading or Document, his right in whole or in part to claim general average contributions from the other parties to the adventure.

g  **Irrecoverable general average contribution**
The proportion of general average which the Assured may be entitled to claim from cargo interests and which is not legally recoverable solely by breach of contract of carriage when the Cargo has been carried on terms less favourable to the Assured than compulsorily required, or otherwise applicable international conventions regulating carriage of goods by sea.
5  **Special exclusions**

5.1  Notwithstanding the terms of subsection 4 (a) above, the Insurer shall not cover liabilities, losses, costs and expenses as described in subsection 5.1 (i) to (iii) below, save to the extent any one or more of the liabilities, losses, costs and expenses listed below are identified as covered by the Insurer in the Insurance Policy subject to the special terms as set out in section 5.2 below;:

i  Delivery of cargo without production of Bill of Lading  
The Insurer shall not cover liabilities, losses, costs and expenses arising out of delivery of Cargo under a negotiable Bill of Lading without production of that Bill of Lading by the person to whom delivery is made;

ii  Delivery of cargo without production of a Document  
The Insurer shall not cover liabilities, losses, costs and expenses arising out of delivery of cargo carried under a 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 evidence by it) is subject;

iii  Delivery of cargo without production of Bill of Lading or Document at a port or place other than stated in the Bill of Lading or document  
The Insurer shall not cover liabilities, losses, costs and expenses arising out of delivery of Cargo carried under a Bill of Lading or Document, at a port other than that stated in the Bill of Lading or Document, as the case may be, without production of all originals of that Bill of Lading or 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 evidence by it) is subject; and

5.2  Special terms delivery without production of Bill of Lading. If any one or more of the liabilities, losses, costs and expenses described in section 5.1 (i) to (iii) above are identified as covered by the Insurer in the Insurance Policy, such cover shall be subject to the terms and conditions as set out in this section 5.2.

i  Delivery of Cargo without production of Bill of Lading  
The Insurer shall cover liabilities, losses, costs and expenses arising out of delivery of Cargo under a negotiable Bill of Lading without production of that Bill of Lading by the person to whom delivery is made subject to the following terms, conditions, restrictions and limitations:
a The Assured shall receive an undertaking on the terms of the Standard Form of Undertaking attached as Appendix 1 from either the charterer of the Ship or the person to whom delivery of the Cargo is made, or;
b The Assured shall be required by law to deliver or relinquish custody or control of the Cargo without production of the Bill of Lading, or;
c where delivery is made against a forged, fraudulent, misappropriated or otherwise unauthorised version of the Bill of Lading, the Assured shall satisfy the Insurer that he took such steps as appear to the Insurer to be reasonable to ascertain that the Cargo was properly delivered to the person entitled to such delivery, save that liabilities, losses, costs or expenses arising out of any wilful misconduct or gross negligence on the part of the Assured are always excluded, or;
d where an agent or other designated representative acting on behalf of the Assured has caused the Cargo to be delivered without production of the relevant Bill of Lading, the Assured shall satisfy the Insurer that this has been done without the Assured’s approval.

ii Delivery of Cargo without production of a Document
The Insurer shall cover liabilities, losses, costs and expenses arising out of delivery of cargo carried under a 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 evidence by it) is subject, subject to the following terms, conditions, restrictions and limitations:
a The Assured shall receive an undertaking on the terms of the Standard Form of Undertaking attached as Appendix 2 from either the charterer of the Ship or the person to whom delivery is made, or;
b where delivery is made against a forged, fraudulent, misappropriated or otherwise unauthorised version of the Document, the Assured shall satisfy the Insurer that he has taken such steps as appear to the Insurer to be reasonable to ascertain that the Cargo was properly delivered to the person entitled to such delivery, save that liabilities, losses, costs or expenses arising out of any wilful misconduct or gross negligence on the part of the Assured are always excluded; or

c where an agent or other designated representative acting on behalf of the Assured has caused the Cargo to be delivered without production of the relevant Document, the Assured shall satisfy the Insurer that this has been done without the Assured’s approval.

iii Delivery of Cargo without production of Bill of Lading or Document at a port or place other than stated in the Bill of Lading or Document.
The Insurer shall cover liabilities, losses, costs and expenses arising out of delivery of Cargo carried under a Bill of Lading or Document, at a port other than that stated in the Bill of Lading or Document, as the case may be, without production of all originals of that Bill of Lading or 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 evidence by it) is subject, provided always that the party to whom delivery is made or the charterer of the Ship has given to the Assured an undertaking on the Standard Form of Undertaking attached as Appendix 3.

5.3 Environmental damage and clean up obligations and any consequential loss or damage relating thereto;

The Insurer shall not cover liabilities, losses, costs and expenses in respect of environmental damage and clean up obligations and any consequential loss or damage relating thereto, save insofar as such liabilities, losses, costs or expenses are caused by a sudden, unintended and unexpected escape of oil or any other substance, provided that

a such escape of oil or any other substance does not result from any failure to comply with any national or international statute, rule or regulation; and

b the Assured has submitted to the Insurer a written notice of claim within one year from the expiry of the Period of Insurance in which the event giving rise to the claim(s) occurred.

Guidance

(A) Explanatory remarks

NB! Since the Assured must also be a Member of the Association before he can be accepted for CCC cover (see below), the following references to ‘Assured’ and ‘Member’ are inter-changeable and refer to the same person.

As explained in the general introduction to the Association’s additional covers, the Comprehensive Carrier’s Liability cover (CCC) offers Members a ‘menu’ of options from which they can select those parts of the overall additional cover that are best suited to the risk profile to which they are exposed. The precise scope of cover can be negotiated between the Member and the Association and the relevant risks are then specified in the Insurance Policy as ‘Covered’.

The CCC, which is written on a fixed premium basis, is one of the broadest forms of liability cover that is available for carriers in the current market and provides cover for a wide range of liabilities that are not covered under the standard P&I insurance. For example, cover is provided for many of the risks and liabilities relating to the carriage of cargo that is not available as of right under the mutual P&I Rules since they are excluded from cover under Rule 34.1 unless the Association exercises its
discretion to afford cover in the particular case, and for risks and liabilities relating to the carriage of cargo whether on or off the ship that can lead to loss of, or damage to, the cargo itself whilst in the care, custody and control of the Members, or to other cargo whilst stored at a terminal. Cover is also provided for other liabilities that the Member may have to third parties such as liability for the death of, or for personal injury to, persons, or for damage to property, or for pollution or for onerous contractual liabilities that are excluded under the standard P&I cover.

However, it is a pre-requisite of cover under the CCC that the Assured, i.e. the Member of the Association, is entered for underlying P&I cargo cover with the Association and that the liability that the Assured incurs arises either under, or pursuant to, contractual terms that have been approved by the Association, or which are normal and customary in the trade, or which arise in tort or similar principles of the applicable law.

A special and fundamental characteristic of the CCC is that the cover applies regardless of whether the cargo is on board a ship and is not limited to the entered Ship that is entered for P&I cover under the Rules. Therefore, the CCC can benefit not only those Members that are involved in liner operations with full door-to-door services but also other Members of all kinds that are involved in the carriage of liquid and bulk cargo that require special storage arrangements and those that may have to comply with other onerous contractual provisions. In such circumstances, the Member may be required to accept responsibility for the cargo from the time that it leaves the factory prior to loading on the ocean vessel until it arrives at the final place of delivery. Both places are often inland and far away from the ports at which the cargo is loaded and discharged from the vessel. Therefore, the cargo may need to be stored on land at either or both ports for long periods of time before loading or after discharge from the ship. Furthermore, the cargo will often be transhipped, either from or to smaller vessels (feeder ships) and may also be carried inland by road or rail. Each such transport phase gives rise to different risks but because the CCC ‘follows the cargo’, it provides cover for liabilities, losses etc., that the carrier may incur to third parties that arise during the whole of the period for which the carrier is responsible for the cargo and during any of the various transport phases. In the majority of cases, such liabilities will relate to the loss of, or damage to, the cargo, but may also involve liability for pollution damage, or damage to other property, or for death or personal injury.
(B) Capacity of the Assured (Section 17.A. 2)

“...liabilities, losses, costs or expenses that have arisen out of the activities and/or operations customarily carried on by or at the risk and responsibility of the Assured in any one of the capacities set out below, but only to the extent specified in the Insurance Policy:”

The CCC provides cover only if, and to the extent that, the Assured incurs liability whilst acting in one of the capacities that are specified below and provided that the relevant liabilities, costs etc., have arisen as a result of activities or operations that are ‘customarily carried out’, (i.e. normally and usually performed) by, or at the risk and responsibility of, the Assured when acting in one or more of the specified capacities. Therefore, provided that the Assured has made a full disclosure to the Insurer when making the application for cover of all circumstances which would be of relevance to the Insurer in deciding whether, and on what conditions, to accept the insurance1 and provided that the relevant activities or operations are ‘customarily carried out’ in a manner that is consistent with such disclosure, cover is normally available. However, cover is generally not available if an activity or operation is not ‘customarily carried out’ by the Assured but is performed on a ‘one-off’ basis, unless the Association has specifically agreed to provide cover in such circumstances. In any event, cover is available only to the extent that the activity or operation is specified in the particular policy of insurance.

Furthermore, if liability arises as a result of a contract that has been agreed between the Assured and a third party, cover is available if the contract terms can be considered to be terms that are normal and usual in the trade for the particular activity or operation, but if the particular terms cannot be considered to satisfy such a test, cover is available only if the Insurer has specifically agreed to provide cover for liabilities that arise under such a contract.2

Terms are considered to be ‘normal and customary’ if they are generally accepted and used for the particular activity or operation in the relevant industry sector. Such contracts tend to be on a standard form that has either been produced by an industry body or trade association such as BIMCO but could also include other forms that the Association has seen and previously approved. However, if the contract is a tailor-made contract that is used for a specific and non-standard activity or operation, the insurer is likely to consider its terms to be ‘normal and customary’ only if they meet certain minimum requirements, e.g. the Assured preserves the right to limit his liability in accordance with the applicable law and does not accept liability for sole negligence on the part of the other party.

1 See section 6 of the Additional Covers Terms and Conditions.
2 See section 21 of the Additional Covers Terms and Conditions.
**a an owner, operator or charterer of the Ship;**

The most likely persons that will be Assureds under the CCC will be the owners, operators or the charterers of the relevant Ship since they are the ones that are most likely to incur contractual liabilities that are onerous and/or outside the scope of the Standard P&I Cover that is provided by the Association under the Rules and any other special terms of entry.

**b an owner or operator of a container accepted for carriage on the Ship;**

In some circumstances, the Assured will not be the person that is actually performing the carriage, i.e. the actual carrier, but merely the owner or operator of a container that has been accepted for carriage on the Ship. Provided that the container has been accepted for carriage on the Ship the definition is satisfied although the liabilities, losses etc., arise at a time which is either before or after the actual carriage on the Ship. This is often the case when a Member charters ‘slots’, or spaces, on a container vessel and thereby becomes a party to a Consortium Agreement.

The Member may need CCC cover in such circumstances since he may not otherwise satisfy the requirements of Rule 2.4 which are pre-requisites for the Standard P&I Cover that is provided by the Association. For example, although he is not the owner of the Ship, he may incur liability as the owner of a container that causes loss or damage to other property or people, including damage that has been caused by pollution resulting from a leak of a hazardous chemical from the container. Cover is available under the CCC in such circumstances and for any liability that the Member has incurred for the loss of, or for damage to, a container that is owned by a third party. Cover would not be available in the former circumstances under the Standard P&I Cover since Rule 38, affords cover only for pollution liabilities that arise as a result of the “…discharge or escape from the Ship…” Similarly, cover would not be available for liabilities, losses etc., that arise as a result of damage to other property (including containers that are owned by a third party) under Rule 39 because it does not arise “in direct connection with the operation of the Ship…”

**c a non vessel operating common carrier (NVOCC);**

A Member may be acting as an NVOCC, in which case, notwithstanding the fact that he does not own or operate the vessel(s) that will be carrying the cargo, he will, nevertheless, have entered into a contractual commitment to the owners of the cargo to ensure that it is carried carefully and properly and in compliance with the terms of the contract of carriage. The NVOCC will then normally enter into a contract with the owners, operators or charterers of the carrying vessel to enable him to carry the cargo on such vessel(s). Consequently, should the cargo be damaged

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3 The ‘Ship’ is defined in Section 1 of Chapter 1 of Part 1 (General Conditions) as: “the ship(s) or other floating structure(s) identified in the Insurance Policy”.

4 This term and the term Consortium Claim are defined in Appendix II, paragraph 5 of the Rules for Ships.

5 See the Guidance to Rule 2.4.
because of the negligence of the carrying vessel, the Member may be liable to the cargo owner pursuant to the terms of the contract of carriage that he has concluded with the cargo owner. However, since such liability has not arisen “in direct connection with the operation of the Ship” but in connection with the operation of another vessel, cover would not be available under the Standard P&I Cover. Consequently, the necessary cover is made available under the CCC.

d a user of a cargo terminal and cargo handling equipment;
Members, or companies that are associated with Members, will often enter into contracts that allow them to use a terminal, or part of a terminal, to load, store and/ or discharge cargo that they have contracted to carry. Such activities may require them to use sophisticated and valuable cargo-handling equipment that may cause loss or damage to the owners of the terminal or the equipment, or to their own cargo that they may be storing at the terminal at their risk and expense, or indeed to the owners of other property. Should the Member or its associated company incur liability in such circumstances, cover is not available under the Standard P&I Cover for the reasons explained above and consequently, the necessary cover is made available by the CCC provided that the terms of the contract have been approved by the Association, or are normal and customary terms.

e an Owner of Cargo carried on a ship; or
Members may incur liability by virtue of the fact that they have a financial interest in the cargo that is being carried on a vessel. This liability may arise by operation of legislation which applies to a marine peril (for instance, a cargo owner may be liable to third parties for property damage and pollution caused by the release of the cargo).

f an operator of a terminal.
In some circumstances, a Member may also act as the owner of a terminal in which the cargo that he has contracted to carry is stored either before or after carriage on a ship. In such circumstances, he may incur some of the liabilities, losses etc., that are described in (C). For the reasons described above, cover is not available in such circumstances under the Standard P&I Cover. Furthermore, whilst the CCC is not designed to operate as a typical Terminal Operations Insurance, cover could be made available in specific and limited circumstances.

(C) Risks covered (Section 17.A.4)
The Insurer shall cover any one of the risks set out below only to the extent specified in the Insurance Policy as 'Covered' and always subject to the Terms, Conditions and Exclusions as set out in Sections 1-16 above, this Section 17 A and Sections 18-52 below:
**Additional Covers**

**a Cargo**
Liabilities incurred by the Assured to cargo interests in respect of Cargo accepted for carriage by the Assured (Section 17.A.4.a). (See Rule 34)

**b Property**
Liabilities incurred by the Assured in respect of physical loss of or damage to property not specified elsewhere in this Section 17 A other than property owned or leased by the Assured or by any company associated with the Assured. (See Rules 37 and 39)

**c Personal injury, death, illness**
Liabilities incurred by the Assured in respect of death, personal injury or illness of any person. (See Rules 27-33)

**d Environmental damage**
Liabilities incurred by the Assured in respect of environmental damage. (See Rule 38)

**e Indemnities**
Liabilities incurred by the Assured to any party to whom the Assured has given an indemnity. (See Rule 55)

**f Waiver of general average contribution**
Losses, costs and expenses incurred or suffered by the Assured as a result of having waived, in the Bill of Lading or Document, his right in whole or in part to claim general average contributions from the other parties to the adventure. (See Rules 41 and 55)

**g Irrecoverable general average contribution**
The proportion of general average which the Assured may be entitled to claim from cargo interests and which is not legally recoverable solely by breach of contract of carriage when the Cargo has been carried on terms less favourable to the Assured than compulsorily required, or otherwise applicable international conventions regulating carriage of goods by sea. (See Rules 41 and 55)

**(D) Cargo**
The cover that is available in respect of cargo is extremely broad and encompasses the various situations that are described in the provisos to Rule 34 for which cover is excluded or restricted under the Standard P&I Cover subject to the exercise by the Association of its discretion to extend cover. The Assured is able to choose the cover that he believes to be the most appropriate for his particular operational requirements and the particular risk is then specified in the Insurance Policy as ‘Covered’.
The following are examples of risks that are commonly stated to be ‘Covered’ under ‘cargo’:

1 **Ad valorem bills of lading**

If a particularly valuable cargo is shipped, the parties may agree that the value of the cargo should be inserted on the Bill of Lading. This is often done when cargoes such as gold ingots, cash and bonds, antiques, sophisticated scientific equipment, pharmaceutical products, art work etc., is shipped. This is also particularly common in the case of container carriage and many of the standard forms of container Bills of Lading include a box for this purpose. The cargo owner may wish this to be done since, by doing so, he avoids the package limitation that would otherwise be applicable under Article IV Rule 5 of the Hague or Hague-Visby Rules and which could reduce the compensation that he could expect to receive from the carrier should the cargo be lost or damaged as a result of the carrier’s breach of contract to a sum that is substantially below the real value of the cargo. It also means that the declared value may well be treated as the real value of the cargo in the event of such loss or damage. However, in consideration of allowing the value to be inserted on the Bill of Lading and thereby losing the protection of the package limitation, the carrier is likely to demand a substantially higher freight.

Whilst such an arrangement may benefit the individual carrier, it is considered that the increased liability that it presents is contrary to the spirit of mutuality and should not be borne by the membership as a whole. Consequently, cover is restricted in such circumstances under the Standard P&I Cover pursuant to proviso vi of Rule 34 to the sum of USD 2,500 (or the equivalent in other currencies) per unit, piece or package of the cargo that is lost or damaged unless the Association exercises its discretion otherwise.

However, cover is available in such circumstances under the CCC for liability that exceeds USD 2,500 (or the equivalent in other currencies) per unit, piece or package provided that the Assured has notified the insurer prior to entering into any contract of carriage that includes a declared value.

2 **Ante-dated and Post-dated Bills of Lading or Documents**

Carriers owe a duty of care to all parties that have an interest in Bills of Lading or documents to ensure that the information that is included on the Bills or documents is accurate since such parties are relying on the truth of such information. Consequently, carriers may incur liabilities if such information is not accurate and third parties, particularly the holders of the Bill of Lading or document, have suffered loss as a result of such misrepresentations.⁶

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⁶ For more detailed commentary see (T) of the guidance to Rule 34 and Chapter 3.5 of the Gard Guidance on Maritime Claims and Insurance.
Since the Bill of Lading or document is a receipt for the quantity of cargo that is recorded as having been shipped on board (or received for shipment in the case of a received for shipment Bill of Lading or document), the date of the Bill or document should be the date on which the full quantity of cargo recorded on the Bill or Document has in fact been shipped or received as the case may be. Such a date is important for many reasons including the fact that such date will determine whether or not a seller of goods has shipped the goods to his customer on time and/or the price of the commodity. Therefore, the carrier has a duty of care to ensure that the correct date is inserted on such documents since the insertion of an inaccurate date whether it be ante-dated, i.e. dated before the correct date, or post-dated, i.e. dated after the correct date, can have substantial financial impact.

Cover is not available for liabilities that arise in such circumstances under the Standard P&I Cover pursuant to proviso ix of Rule 34. However, provided that an incorrect date has been recorded by mistake or by a third party, e.g. a charterers’ agent, on behalf of the carrier or master without the knowledge of the Assured, cover is available under the CCC. On the other hand, if the date has been inserted deliberately by the Assured and with full knowledge that the date is not correct, cover is not available. Indeed, such practise might well be considered to amount to willful misconduct on the part of the Assured, thereby depriving the Assured of cover pursuant to Part III, section 18 of the Additional Covers Terms and Conditions.

3 Contract terms that are more onerous than the Hague or Hague-Visby standards

The Hague and Hague-Visby Rules have been adopted by most countries and are, therefore, considered to be the industry bench-mark that establishes the standard of duty and responsibility that carriers of goods by sea are expected to achieve in relation to such carriage. However, some countries have not adopted such Rules and apply the Hamburg Rules or other local laws compulsorily when ships trade to their jurisdiction. Such alternative Rules or laws may place duties and responsibilities on carriers that are more onerous than those that bind carriers under the Hague or Hague-Visby Rules. The cover that is available under the Standard P&I Cover strikes a balance in the interests of mutuality between the need to give protection only against liabilities that most carriers incur when engaged in the carriage of goods and the need to give protection to Members that are obliged through no fault of their own to incur additional liabilities. Therefore, proviso iii to Rule 34 makes it

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7 Over 50 countries give effect to the Hague Rules whilst slightly fewer give effect to the Hague-Visby Rules. In general, it can be said that most of the major seafaring countries give effect to the Hague-Visby Rules. However, the matter is complicated by the fact that many countries give effect to amended versions of the Rules as part of their national law, e.g. the USA in relation to the Hague Rules and the United Kingdom in relation to the Hague-Visby Rules. Other countries give effect to some aspects of the Hague or Hague-Visby Rules and some aspects of the Hamburg Rules (e.g. China) whilst other countries do so only when trading with like-minded countries (e.g. the Nordic countries).

8 Currently, less than 30 countries give effect to the Hamburg Rules but it must be appreciated that many of those countries are land-locked countries.
clear that the Member is insured as of right only against the liabilities that carriers normally incur pursuant to the Hague and Hague-Visby Rules and are covered against liabilities that arise under other terms that are less favourable to the Member only if such terms are of mandatory application and cannot be avoided. Therefore, if the Member were to agree to the application of the Hamburg Rules or other terms voluntarily in circumstances in which they do not apply compulsorily, cover is not available for any ‘additional’ liability that he thereby incurs unless the Association exercises its discretion to extend cover.

However, some carriers, notably car carriers, are often obliged for commercial reasons to comply with the demands of their customers to agree to terms that place more responsibility on them than that which is imposed by the Hague and Hague-Visby Rules, or to waive certain of the contractual defences, e.g. the fire defence, and/or package or kilo limits that normally apply under such Rules, i.e. thereby assuming liability up to the full value of each car. The CCC can provide protection in such circumstances and although it does not provide cover for the full range of such additional exposure, it does afford cover for certain additional liabilities over and above the Hague/Hague-Visby Rules benchmark up to a cover limit of USD 50 million per event provided that the terms of the relevant contract of carriage and any subsequent amendments have been reviewed and approved by the Association.

For example, if the Assured has agreed to carry cars for his customer on terms that the usual Hague-Visby Rules fire defence is not to apply, the Assured may be obliged to compensate his customer for the value of any cars that have been damaged by fire during the carriage on board his Ship. Alternatively, the contract may not have excluded the fire defence but the Assured is not able to rely on the defence and has agreed to waive the Hague-Visby Rules package limit. In both cases, cover is available under the CCC, and in the case of the second example, cover is available under the Standard P&I Cover up to the package limit, and under the CCC for the difference between the package limitation figure and the total amount payable.
(E) Special exclusions

1 Delivery of Cargo without production of negotiable Bills of Lading or Document (Sections 17.5.1-2)

Section 17.A.1 of the Terms and Conditions provides that:

“In this Section 17A the following words or expressions have the following meanings:

Bill of Lading:
bill of lading or similar document of title.

Document:
non-negotiable Bill of Lading, waybill or similar document provided production of such document by the person to whom delivery of the Cargo is made 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.

Cargo:
Any lawful and merchantable commodity or goods intended to be or being or having been carried on board a ship pursuant to a contract of carriage but excluding any other equipment, stores, fuel (unless carried as Cargo) or any other substance of whatsoever nature, and shall further exclude waste and residues of Cargo(es) and/or of such equipment, stores, fuels and/or other substances.

Owner of Cargo:
Any buyer or seller of Cargo, or any holder of the Bill of Lading issued in respect of Cargo”.

Unless the Association exercises its discretion to extend cover, Rule 34.1 of the Standard P&I Cover clearly excludes liabilities, losses, costs and expenses that arise when Cargo is delivered without production of negotiable Bills of Lading, or when Cargo is delivered without production of a Document when such production is required either by the governing law or by the express terms of the relevant Document. However, cover is available under the CCC in such circumstances provided that such risks are expressly identified in the Insurance Policy and provided that the following terms, conditions, restrictions and limitations apply:
1 **Delivery of Cargo without production of Bill of Lading**

i The Assured has received in an unamended form a letter of indemnity (LOI) from either the charterer of the Ship, or the person to whom the Cargo is actually delivered, in the Standard Form of Undertaking that is attached to the insurance policy as Appendix 1. This form is based on the form A that has been jointly produced by the clubs that are members of the International Group of P&I Clubs; or

ii The Assured satisfies the Insurer that he is required by the law (whether this be the law that governs the Bill of Lading or the local law where the cargo is to be delivered) to deliver or relinquish custody or control of the Cargo without production of the Bill of lading; or

iii The Assured satisfies the Insurer that although the Cargo has been delivered against a forged, fraudulent, misappropriated of otherwise unauthorised version of the Bill of Lading, the Assured has taken such steps as appear to the Insurer to be reasonable to ascertain that the Cargo was properly delivered to the person entitled to such delivery and is not guilty of wilful misconduct or gross negligence; or

iv The Assured satisfies the Insurer that if the Cargo has been delivered without production of the relevant Bill of Lading by an agent or other designated person that is acting on behalf of the Assured, this has been done without the Assured’s approval.

2 **Delivery of Cargo without production of a Document**

- The Assured has received in an unamended form a letter of indemnity (LOI) from either the charterer of the Ship, or the person to whom the Cargo is actually delivered, in the Standard Form of Undertaking that is attached to the Insurance policy as Appendix 2. This form is based on the form B that has been jointly produced by the clubs that are members of the International Group of P&I clubs; or

- In the circumstances that are described in ii and iii of the section above that identify the terms, conditions, restrictions and limitations that apply when Cargo has been delivered without production of a Bill of Lading, the Assured satisfies the same requirements.

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9 See the Guidance to Rule 34.1 proviso i.
10 If such a form is adapted to provide for counter-signature in the manner that is adopted in the double letter versions of the forms that have been produced by the clubs that are parties to the International Group of P&I clubs (e.g. Form AA), this is not considered to be an amendment for these purposes.
11 For more detailed commentary on LOI see Chapter 20 of the Gard Guidance on Maritime Claims and Insurance.
12 See the Guidance to Rule 34.1 proviso ii.
13 See footnote 7.
3 Delivery of Cargo without production of Bill of Lading or Document at a port or place other than stated in the Bill of Lading or Document\footnote{4}

- The Assured has received in an unamended\footnote{5} form a letter of indemnity (LOI) from either the charterer of the Ship, or the person to whom the Cargo is actually delivered, in the Standard Form of Undertaking that is attached to the Insurance policy as Appendix 3. This form is based on the form C that has been jointly produced by the clubs that are members of the International Group of P&I Clubs.

(F) Property

Liabilities incurred by the Assured in respect of physical loss of or damage to property not specified elsewhere in this Section 17 A other than property owned or leased by the Assured or by any company associated with the Assured. (Section 17.A.4.b)

Cover is available under Rules 37 and 39 of the Standard P&I Cover for loss or damage that is caused to fixed or floating objects or to other property. However, such cover is available when loss or damage is caused by the Ship and liabilities are incurred by the Member in direct connection with the operation of the Ship and in respect of the Member’s interest in the Ship.\footnote{6} However, as has been stated in (B) above, Members sometime act in different capacities and may incur liability for damage to property whilst operating in such a different capacity, in which case, cover is not available under the Standard P&I Cover.

The CCC can provide cover for liabilities that are incurred in such situations but not when the property that has been lost or damaged consists of containers or other property that is owned or leased by the Assured or any company that is associated with the Assured. For example, cover would be available under the CCC if property that is owned by a third party such as a port installation, warehouse or port equipment such as forklift trucks were to be lost or damaged, or even if a walkway bridge outside the port limits were to be damaged as a result of heavy cargo falling off a truck during the transport by road to its final destination.

\footnote{4} See the Guidance to Rule 34.1 proviso iv.
\footnote{5} See footnote 7.
\footnote{6} See the Guidance to Rule 2.4.
(G) Personal injury, death, illness

Liabilities incurred by the Assured in respect of death, personal injury or illness of any person (Section 17.A.4.c)

Cover is available under the Standard P&I Cover for liabilities that arise in relation to the death, personal injury or illness of any person under Rules 27-30 when the liability is incurred by the Member in direct connection with the operation of the Ship and in respect of the Member’s interest in the Ship but not when the liability is incurred by the Member when acting in a different capacity. Cover is available under the CCC for any liability that the Assured incurs in such circumstances provided that such liability arises either as a result of the compulsory provisions of the applicable law (e.g. as a result of international convention, local statute or common law principles such as tort) or under a contract the terms of which have been approved by the insurer. Therefore, cover is available for liability that the Assured may incur for injury, illness or death incurred by any third parties such as terminal workers or innocent by-standers in connection with the handling (storing or carriage) of the cargo, or by the Assured’s own crew/personnel.

Cover is available regardless of the type of injury, illness or death so long as the particular medical condition gives rise to a right of compensation or damages, and is the result of an incident for which the assured is legally liable.

(H) Environmental damage

Liabilities incurred by the Assured in respect of environmental damage (Section 17.A.4.d)

Whilst cover for environmental damage is available under Rule 38 of the Standard P&I Cover, such cover is restricted in scope and is available only when the liability is incurred by the Member in direct connection with the operation of the Ship and in respect of the Member’s interest in the Ship, but not when the liability is incurred by the Member when acting in a different capacity. Consequently, the principle that the CCC ‘follows the Cargo, not the Ship’ is important since the environmental damage may occur not only when the Cargo is on the Ship, but also before it has been loaded, or after it has been discharged so long as it has occurred at a time when the Cargo is within the care, custody and control of the carrier. This is particularly important in the container trade since the carrier is often contractually responsible for the care of the Cargo from ‘door to door’.

Certain cargoes, particularly hazardous or dangerous cargoes, may, following an incident, cause environmental damage for which the carrier is liable. For example, a container that contains a chemical cargo may be found to be damaged and leaking whilst the container is stored ashore in a container yard either before loading or after discharge. The leak may affect the health of nearby residents who may have to be

17 See the Guidance to Rule 2.4.
18 See the Guidance to Rule 2.4.
evacuated from their homes and businesses, and may also cause physical damage to nearby property, and contaminate land thereby rendering it unusable until extensive remedial measures have been taken. Therefore, it is inevitable that extensive measures will have to be taken to protect persons, property and the environment.

The responsibility for the incident will usually be determined in accordance with the local law as there is no international convention that is currently in place to deal with such situations. However, if and to the extent that liability is imposed on the carrier that brought the container to that location by third parties that have suffered loss or damage as a result of the incident, cover is available for such liabilities, losses, costs and expenses under the CCC subject to the provisions of the following Special Exclusions in Section 17.A.5.3:

Environmental damage and clean up obligations and any consequential loss or damage relating thereto;
The Insurer shall not cover liabilities, losses, costs and expenses in respect of environmental damage and clean up obligations and any consequential loss or damage relating thereto, save insofar as such liabilities, losses, costs or expenses are caused by a sudden, unintended and unexpected escape of oil or any other substance, provided that
a such escape of oil or any other substance does not result from any failure to comply with any national or international statute, rule or regulation; and
b the Assured has submitted to the Insurer a written notice of claim within one year from the expiry of the Period of Insurance in which the event giving rise to the claim(s) occurred.

The Insurer shall not cover liabilities...save insofar as such liabilities, losses, costs or expenses are caused by a sudden, unintended and unexpected escape of oil or any other substance...

In accordance with the approach that has been adopted in relation to the Standard P&I Cover, the CCC affords cover for specific incidents that are “...sudden, unintended and unexpected...” Therefore, cover is not available for environmental damage etc., that has been caused by a continuous and possibly gradual escape of oil or any other substance over a period of time. This restriction on the scope of cover is intended primarily to protect the Insurer against liabilities etc., that arise as a result of the escape of oil or any other substance from a land-based dump, site storage or disposal facility. Such liabilities etc., are regarded as being too far removed from those that are encountered during the course of mainstream shipping.

19 The International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (the 2010 HNS Convention) is not yet in force and will, in any event, apply only from the time when the HNS enters the Ship’s equipment or passes its rail on loading, and ends when the HNS ceases to be present in any part of the ship’s equipment or passes its rail on discharge.
activities which are the activities for which the CCC has been designed. Therefore, the CCC should be read in conjunction with Rule 62.2 of the Standard P&I Cover and in the light of the guidance to that Rule.

**a such escape of oil or any other substance does not result from any failure to comply with any national or international statute, rule or regulation;**

Even if the liability etc., has arisen as a result of a sudden, unintended and unexpected escape of oil or any other substance, cover is not available if there has been a failure by the Assured to comply with any relevant national or international statute, rule or regulation, which means, in reality, that cover is available under the CCC principally for liabilities that have been incurred under, or pursuant to, a contract the terms of which have either been approved by the Association or are on normal and customary terms.

**b the Assured has submitted to the Insurer a written notice of claim within one year from the expiry of the Period of Insurance in which the event giving rise to the claim(s) occurred.**

This time limit applies to claims that are brought by the Assured against the Insurer but it should be remembered that a different time limit may apply to the claim(s) that are brought by third parties against the Assured.

It is important that the Assured should give prompt notice of any claim to the Insurer in accordance with the provisions of Section 43 of the Additional Covers Terms and Conditions since the Insurer will need to investigate the claim properly whilst the evidence is still fresh in order to ascertain whether the Assured and/or the Insurer are likely to incur any liability as a result of it. Therefore, the time limit that is specified in this provision does not exclude the obligations that the Assured has under Section 43 but applies in addition to such obligations.

Notice of the claim must be given within the stated time limit to the Association in writing which includes the giving of notice by e-mail. For example, if the “...event giving rise to the claim...” occurred on 1 May 2015 and the period of insurance ran from 1 June 2014 to 31 May 2015, written notice must be given to the Insurer by 31 May 2016 at the latest. However, as stated above, the Insurer must in any event be given prompt notice of any event that may give rise to a claim and, in the majority of cases, this means immediate notice.

(I) Indemnities

**Liabilities incurred by the Assured to any party to whom the Assured has given an indemnity (Section 17.A.4.e).**

Cover is available under Rule 55 for liabilities that are incurred by a Member pursuant to an indemnity that is given to a third party provided that such liability has been incurred by the Member in direct connection with the operation of the Ship
and in respect of the Member’s interest in the Ship, but not when the liability is incurred by the Member when acting in a different capacity. Furthermore, depending on the extent to which the indemnity purports to impose liability onto the Member, the Association may take the view that they are not terms that are normally encountered by the membership as a whole during the course of normal trading and should not, therefore, be liabilities that should be shared by mutual members.

However, Members are often obliged due to commercial pressures to give indemnities when acting in one or more of the other capacities that are described above in (A) and, consequently, incur liability in that capacity despite the fact that P&I cover may not be available in such circumstances. For example, P&I cover may not be available if the indemnity:

- imposes strict liability on the Member; or
- excludes the contributory negligence of another party; or
- restricts the right of recourse against another party; or
- makes the Member liable for the acts of another party; or
- is enforceable notwithstanding the fact that the liability has been caused by the gross negligence or even the sole negligence of another party; or
- deprives the Member of the right to limit liability in circumstances in which the Member would have been entitled to do so but for the terms of the indemnity.

The CCC makes cover available in such circumstances and for a wide range of other contractual liabilities, costs and expenses that are incurred by the Assured in relation to events that have occurred on or off the Ship. However, as in the case of Rule 55, cover is available only if the relevant terms have been pre-approved by the Insurer. The Insurer is fully aware that the Assured’s ability to protect its interests will vary from case to case and that the Assured may be obliged to accept terms and conditions that favour their contracting party, but provided that the terms are either terms that are normal and customary in the trade, or are the best that can be obtained in the particular circumstances, they will usually be approved. However, the Insurer will need to assess and evaluate the terms of each contract separately in order to properly assess the risk that the Assured will be running and the appropriate premium that should be charged in such circumstances.

For example, cover is normally available under the CCC for specified liabilities to which the owners and operators of LNG Ships may be exposed pursuant to very onerous Conditions of Use (COUs) that are imposed by many LNG terminals around the world. Such COUs seek to make a shipowner contractually responsible for the sole negligence of the terminal and/or to oblige shipowners to waive any rights that they may have to limit their liability in accordance with national or international law. Liability that a Member incurs in such circumstances is excluded under the standard P&I cover, but cover may be available under the CCC.

20 See the Guidance to Rule 2.4.
**Indemnities to the Assured’s agents**

Members may employ local shipping agencies to organise the handling and transportation of cargoes to or from the ocean vessel and do so as agents for the Member as the ‘door-to-door’ carrier. Therefore, should the agent be held liable by third parties for incidents that have occurred during the land transportation or for other claims relating to the receipt or forwarding of the Cargo (e.g. liability to the port authority for prolonged usage of the port facilities), the agent will look to the Member for an indemnity. Consequently, most contracts that are concluded between the Member and the agent will include terms whereby the Member agrees to indemnify the agent in such circumstances. Depending on the particular circumstances, cover may not be available in such circumstances under the Standard P&I Cover for the reasons explained above. Consequently, cover may be available under the CCC provided that the terms of the relevant contract are either terms that are usual and customary in the trade or have been pre-approved by the insurer.

**Indemnities to Terminal operators and owners**

Some Members, particularly those that provide worldwide Ro-Ro vehicle transportation services, will often conclude contracts with terminal and warehouse operators for the storage of cargo before, during or after the ocean carriage. Such contracts will often contain terms that oblige the Member to waive their right of recourse against the terminal or warehouse operator should the cargo be lost or damaged whilst in the custody of the terminal or warehouse operator or alternatively, to indemnify the terminal or warehouse operator in such circumstances. For example, should cars be damaged as a result of a fire that has occurred at a terminal or warehouse, the terminal or warehouse operator may incur liability to the owners of the cars but will then be able to rely on the terms of the contract that has been concluded with the Member to pass such liability on to the Member. For the reasons explained above, cover may not be available under the Standard P&I Cover for such liability but cover may be available under the CCC provided that the terms of the relevant contract are either terms that are usual and customary in the trade or have been pre-approved by the Insurer.

Members that operate LNG vessels may face similar problems as a result of the onerous non-negotiable provisions of the Conditions of Use (COU) that are imposed by the owners and operators of LNG terminals. Since such extreme risks and liabilities are not shared by the majority of the mutual membership, cover is generally not available under the Standard P&I Cover, but additional cover is available for pollution and other liabilities under the CCC.

**Indemnities to shipyards**

Shipbuilding contracts may also contain specific indemnity provisions that limit or restrict the yard’s liability for loss or damage that occurs during its performance of the shipbuilding contract. Such liability may not be available under the Standard P&I
Cover for the reasons explained above but cover may be available under the CCC provided that the terms of the shipbuilding contract have either been pre-approved by the Insurer or are terms that are usual and customary in such situations.

**Indemnities to sub-contractors, including rail and trucking companies**

Members that engage in multimodal door-to-door services will engage sub-contractors to transport the cargo by road and/or rail and/or river barge and/or by air on any inland transport phase from the inland location at which the cargo has been accepted for carriage until it reaches the inland location where the cargo is to be finally delivered to the receiver. In most circumstances, an incident or event that occurs during the non-sea transit phase will result in the loss of, or in damage to, the cargo. However, it may be that the means by which the cargo is being transported during such phases can be damaged either by the cargo or as a result of other events that occur during the transportation of the cargo, e.g. the vehicle or the relevant transport infrastructure. For example, a train derailment could result in damage to the cargo which could in turn cause damage to the locomotive or rolling trucks and/or the rail infrastructure. Consequently, sub-contractors that are engaged by the Member to perform such services will normally require the terms of the relevant contract to include an obligation on the part of the Member to indemnify them for any liabilities, losses etc., that they may incur whilst performing the services.

Cover may not be available in such circumstances under the Standard P&I Cover for any liability that the Member may incur to the sub-contractors because of the reasons explained above. However, cover may be available under the CCC provided that the terms of the relevant contract have either been pre-approved by the Insurer or are terms that are usual and customary in such situations.

**(J) Waiver of general average contribution**

Losses, costs and expenses incurred or suffered by the Assured as a result of having waived, in the Bill of Lading or Document, his right in whole or in part to claim general average contributions from the other parties to the adventure (Section 17.A.4.f)

Cover is available under Rule 41 of the Standard P&I Cover for the proportion of general average, special charges or salvage which a Member may be entitled to claim from cargo or from any other party to the marine adventure but which is not recoverable solely by reason of a breach by the Member of the contract of carriage. However, cover is not available under the Standard P&I Cover if the Member is unable to recover general average contributions for other reasons. Consequently, should the Member be obliged for commercial reasons to waive his entitlement to receive contribution from another party to the marine adventure (usually the cargo interests), cover is not available under the Standard P&I Cover for the amounts that are thereby not recovered by the Member. However, cover is available under the CCC for such loss.
(K) Irrecoverable general average contribution

The proportion of general average which the Assured may be entitled to claim from cargo interests and which is not legally recoverable solely by breach of contract of carriage when the Cargo has been carried on terms less favourable to the Assured than compulsorily required, or otherwise applicable international conventions regulating carriage of goods by sea (Section 17.A.4.g)

For the reasons that are explained in (J) cover is not available under the Standard P&I Cover if the Member is unable to recover general average contributions from any other party to the marine adventure for reasons other than as a result of a breach by the Member of the contract of carriage. However, such cover is based on the premise that the Member has contracted on terms that provide the Member as carrier with the maximum protection that is allowed by international conventions such as the Hague or Hague-Visby Rules or by any other compulsory legislation. Therefore, if the Member is unable to make recovery purely because he has voluntarily agreed to terms that are less favourable, cover is not available under the Standard P&I Cover pursuant to the provisions of Rule 55. However, cover is available under the CCC for such loss provided that the terms of the relevant contract have been approved by the Insurer in advance.
Crew Managers Cover

Introduction

Whereas shipowners would traditionally appoint their crew members directly, they are far more likely today to engage specialist crew managers to recruit and employ crews for them. Such crew managers enter into contractual relationships with the crew members that they employ and, consequently, run the risk that they may incur liabilities to such crew members. However, since such crew managers do not own or charter the ships on which the crew members are to serve and may not be co-insured under the shipowners’ P&I insurance, they may not be able to benefit from the protection that such insurance provides. For these and other reasons, crew managers may wish to take out separate insurance to protect them against any liabilities, losses, costs and expenses that they may incur in connection with the recruitment of crews. The Crew Managers Cover that is available from the Association is intended to provide such protection against traditional crew liabilities, losses, costs and expenses that normally arise under a crew employment contract and/or collective bargaining agreements.

The cover that is provided is in effect an incorporation of a number of the Association’s mutual P&I Rules and claims that arise under this cover are handled by the same claims handlers that handle similar claims under the Standard P&I Cover.

The cover is made available by the Association as Insurer to a named Assured or named Assureds1 on a fixed premium basis in respect of a named Ship or Ships for a specified period and is subject to any agreed deductibles, specially agreed terms and the exclusions and other general terms and conditions that are specified in the Rules of the Association’s standard P&I and Defence cover insofar as applicable to fixed premium entries. However, it is emphasised that the acceptance of the Assured by the Insurer for the purposes of this Crew Managers Cover does not give the Assured a right to be a Member of the Association.

1 Risks covered

The Assured shall be covered for liabilities, losses, costs and expenses as specified below, however, only in his capacity as Crew Manager for the Ship and to the extent such liabilities, losses, costs and expenses have arisen out of operations and/or activities customarily carried on by or at the risk and responsibility of a Shipowner:

- Crew liabilities: Liabilities, costs and expenses arising under contract or otherwise relating to crew as set out in Rules 27, 29, 31, 33, 46, 47 and 48;

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1 All persons and/or companies that are named as Assured are jointly and severally liable for all sums that are due to the Association in respect of this insurance.
b War Risks: Notwithstanding Rule 58.1 of the Rules, liabilities, losses, costs and expenses as set out in this Section 1 caused by War Risks, except where directly or indirectly caused by or contributed to by or arising from any chemical, biological, bio-chemical or electromagnetic weapon; and

c Legal costs and enquiry expenses: Costs and expenses as set out in Rules 44 and 45 relating to such crew liabilities.

...(a) Crew liabilities: liabilities, costs and expenses arising under contract or otherwise relating to crew as set out in Rules, 27, 29, 31, 33, 46, 47 and 48...

The backbone of the Crew Managers Cover is Rule 27 but other important risks that affect Crew members are regulated by the other Rules that are specified in Section 1 (a) of the cover. However, whilst some of these Rules relate to personnel other than Crew members, the Crew Managers Cover is restricted in scope to the cover that is provided by such Rules to Crew members. Bearing this important restriction in mind, the guidance that is given in relation to such Rules is equally applicable to the cover that is provided by the Crew Managers Cover and should be consulted when considering the breadth of cover that is available under such additional cover. The aim of the Crew Managers Cover is to provide the crew manager as Assured with the same breadth of cover in relation to the Crew of the named Ship(s) that is available to a Member under the specified Rules of the Standard P&I Cover.

...(b) War Risks: Notwithstanding Rule 58.1 of the Rules, liabilities, losses, costs and expenses as set out in this Section 1 caused by War Risks, except where directly or indirectly caused by or contributed to by or arising from any chemical, biological, bio-chemical or electromagnetic weapon...

Liabilities, losses, costs and expenses that are caused by war risks are excluded from the Standard P&I Cover for the reasons that are explained in (A) to the Guidance to Rule 58. Consequently, those P&I risks that would have been covered by the Association but for the exclusion in Rule 58.1 are often covered under standard war risks conditions subject to a separate limit. However, if the crew manager is not a co-assured under such a policy, he can obtain the necessary cover for such risks under the Crew Managers Cover apart from liabilities etc., that are directly or indirectly caused by, or contributed to, by any chemical, biological, bio-chemical or electromagnetic weapon.

Alternatively, if the crew manager is a co-insured under such a war risks policy, he will have the protection that is afforded by such insurance, in which case, cover is available under the Crew Managers Cover only for liability that exceeds the limit that is applicable under the war risks policy, or for liability that arises as a result of the fact that the Crew Managers Cover affords cover in circumstances in which cover is not available under the war risks policy.

2 See also the commentary in Chapter 26.3.1.7 of the Gard Guidance on Maritime Claims and Insurance.
...(c) Legal costs and enquiry expenses: Costs and expenses as set out in Rules 44 and 45 relating to such crew liabilities...

Crew managers are just as likely as Members of the Association to incur costs and expenses in relation to litigation and enquires relating to Crew and, therefore, require the same insurance protection. Detailed commentary on the scope of the cover that is available under Rules 44 and 45 of the Standard P&I Cover can be found in the Guidances to such Rules. Such comments are equally applicable to the scope of cover that is available to crew managers under the Crew Managers Cover and should be consulted in relation thereto. However, it should be emphasised that cover is available only if such legal costs and enquiry expenses have been incurred with the agreement of the Insurer.

2 Limit of insurance

   It has been agreed that the cover afforded all assured(s)...is limited for any and all claims to...per event.

The cover is subject to whatever limit that has been agreed between the Assured(s) and the Association as insurer. The cover limit is to apply per event that occurs during the duration of cover and for all claim(s) that are made against one or more of the Assured(s) as a result of each event.
Deviation Liability Cover (Section 17.C)

Chapter 2 Risks covered and special exclusions
Section 17 Risks covered and special exclusions

C Deviation Liability Cover

1 Special definitions
In this Section 17 C, the following words or expressions shall have the following meanings:

Bill of Lading:
bill of lading or similar document of title.

2 Capacity of the Assured
The cover afforded to the Assured shall extend only to liabilities, losses, costs or expenses that have arisen out of the activities and/or operations customarily carried on by or at the risk and responsibility of the Assured in his capacity as an owner, operator or charterer of the Ship;

3 Special conditions
The Assured is only covered in respect of liabilities, losses, costs and expenses incurred by him which arise in direct connection with the operation of, the Ship and in respect of the Assured’s interest in the Ship.

4 Risks covered
The Insurer shall cover liabilities incurred by the Assured to cargo interests in respect of cargo accepted for carriage by the Assured as a result of a deviation or departure from the contractually agreed voyage or adventure, as specified in the Insurance Policy.

5 Special exclusions
a Cargo on deck
The Insurer shall not cover liabilities, losses, costs and expenses arising out of cargo being carried on deck against under deck Bill(s) of Lading, save insofar as the Assured has notified the Insurer of the cargo being carried on deck against under deck Bill(s) of Lading once the Bill(s) of Lading has been issued and the Insurer has agreed to reinstate the cover on such terms and conditions as may be deemed appropriate and the Assured has agreed to such terms (including but not limited to the payment of additional premium).

b Delivery of cargo without production of Bill of Lading
The Insurer shall not cover liabilities, losses, costs and expenses arising out of delivery of cargo under a Bill of Lading without production of that Bill of Lading by the person to whom delivery is made.
c Delivery of cargo at a port other than stated in the Bill of Lading
The Insurer shall not cover liabilities, losses, costs and expenses arising out of delivery of cargo carried under a Bill of Lading issued in a set of two or more originals at a port other than that stated in the Bill of Lading without production of all originals of that Bill of Lading.

d Environmental damage
Liabilities, losses, costs and expenses in respect of environmental damage and clean up obligations and any consequential loss or damage relating thereto.

e Personal injury, illness and death
The Insurer shall not cover liabilities, losses, costs and expenses in respect of personal injury, illness or death of any person.

Guidance
(A) Risks covered
The Insurer shall cover liabilities incurred by the Assured to cargo interests in respect of cargo accepted for carriage by the Assured as a result of a deviation or departure from the contractually agreed voyage or adventure, as specified in the Insurance Policy (Section 17.C.4)
The meaning, scope and effect of deviation is explained in (U) of the Guidance to Rule 34.1 proviso xi and the question of whether or not there has been a deviation is important since, traditionally, the effect of a deviation has been to deprive the carrier of the benefit of any contractual defences and also, possibly, any rights to limit liability that he might otherwise have in relation to the carriage of cargo. However, deviation is a complex issue that is treated differently depending on the applicable law. Therefore, since deviation can give rise to substantial liabilities against which the carrier has no protection, enquiry needs to be made in each case to determine whether the Member has been deprived of defences or limitation rights that would otherwise have been available to him had there been no deviation. If such rights have not been prejudiced then cover continues to be available pursuant to Rule 34 of the Standard P&I Cover. However, if such rights have been prejudiced, then cover is excluded for such liabilities, losses etc., pursuant to proviso xi of Rule 34.1 unless the Association exercises its discretion to make cover available.

The Deviation Liability Cover is intended to provide the Assured with protection in the circumstances that are described in proviso xi of Rule 34.1. In specified cases, cover is made subject to specific terms, conditions, restrictions and limitations (see below). However, in all cases, cover is available subject to the specific provisions of the Assured's Insurance Policy and Part 1 General Provisions of the Additional Covers Terms and Conditions including section 2.3 which provides that:
“The Assured is only covered in respect of liabilities, losses, costs and expenses incurred by him which arise out of events occurring during the Period of Insurance for that relevant risk.”

Furthermore, the Deviation Liability Cover is not intended to protect the Assured against liability to cargo interests that is the inevitable consequence of a deviation but for liability to cargo interests that arises as a result of fortuitous events that occur after a deviation and for which the Member’s right to rely on defences and/or limitation rights has been prejudiced by the earlier deviation. Therefore, cover is not available if the event that gives rise to liability to cargo interests after the deviation is the result of the Assured’s deliberate, i.e. unfortuitous, operational decision regardless of whether this has been prompted by a request from the cargo interests or some other party.

(B) Special exclusions (Section 17.C.5)

a Cargo on deck

The Insurer shall not cover liabilities, losses, costs and expenses arising out of cargo being carried on deck against under deck Bill(s) of Lading, save insofar as the Assured has notified the Insurer of the cargo being carried on deck against under deck Bill(s) of Lading once the Bill(s) of Lading has been issued and the Insurer has agreed to reinstate the cover on such terms and conditions as may be deemed appropriate and the Assured has agreed to such terms (including but not limited to the payment of additional premium) (Section 17.C.5.a)

The most common example of a deviation, other than that relating to the geographical voyage, is the carriage of cargo on deck. The carrier is normally under an implied obligation to stow the goods under deck unless otherwise authorised by custom, convention or agreement, e.g. it is generally accepted that containers may be carried on the deck of purpose-built container ships and lumber on the deck of purpose-built log and forest product carriers. However, unauthorised deck carriage may amount to deviation.

However, there may be operational reasons why a carrier wishes to carry on deck cargo that would normally be carried under deck. Almost all bills of lading contain a ‘liberty clause’, that allows the carrier to carry cargo on or under deck. However, such clauses are strictly interpreted. Therefore, if the cargo has been carried on deck without the shipper’s consent, the cargo interests may claim that the carrier is in breach of contract and has, furthermore, committed a deviation that has deprived him of his right to rely on any contractual and defences and limits of liability that would otherwise have been available to him. Consequently, cover is excluded under proviso xi of Rule 34.1 of the Standard P&I Cover.
Cover may be available under the Deviation Liability Cover in such circumstances provided that the Assured has notified the Insurer that cargo is being carried under Bills of Lading that provide for under-deck carriage once such Bills of Lading have been issued. On receipt of such notice, the Insurer will notify the Assured whether it is prepared to reinstate cover and the terms upon which it is prepared to do so, including, but not limited to the payment of additional premium. If the Assured agrees to such terms, cover will be reinstated on such terms.

Please note cover is not available under the Deviation Liability Cover for the liabilities, losses etc., itemised below under b-e. However, cover is available under the CCC – See the guidance to the CCC.

b Delivery of cargo without production of Bill of Lading
The Insurer shall not cover liabilities, losses, costs and expenses arising out of delivery of cargo under a Bill of Lading without production of that Bill of Lading by the person to whom delivery is made (Section 17.C.5.b)

c Delivery of cargo at a port other than stated in the Bill of Lading
The Insurer shall not cover liabilities, losses, costs and expenses arising out of delivery of cargo carried under a Bill of Lading issued in a set of two or more originals at a port other than that stated in the Bill of Lading without production of all originals of that Bill of Lading (Section 17.C.5.c)

d Environmental damage
Liabilities, losses, costs and expenses in respect of environmental damage and clean up obligations and any consequential loss or damage relating thereto (Section 17.C.5.d)

e Personal injury, illness and death
The Insurer shall not cover liabilities, losses, costs and expenses in respect of personal injury, illness or death of any person (Section 17.C.5.e)
Extended Crew Cover (Section 17.B)

Chapter 2 Risks covered and special exclusions

Section 17 Risks covered and special exclusions

B Extended Crew Cover

1 Special definitions

In this Section 17 B, the following words or expressions shall have the following meanings:

Crew:
Officers, including masters and seamen, contractually obliged to serve on board a Ship owned or operated by the Assured.

Personnel:
Agents, servants, sub-contractors and employee(s) of the Assured other than Crew, performing functions directly related to the operation of a ship, mobile offshore unit or other floating structure.

2 Capacity of the Assured

The cover afforded to the Assured shall extend only to liabilities, losses, costs or expenses that have arisen out of the activities and/or operations customarily carried on by or at the risk and responsibility of the Assured in any one of the capacities set out below, but only to the extent specified in the Insurance Policy:

a an owner or operator of a Ship; and/or
b an employer of the Crew and/or Personnel involved; and/or
c a party otherwise responsible for the Personnel involved:

3 Special conditions

None.

4 Risks covered

a Crew and Personnel

The Insurer shall cover liabilities, losses, costs and expenses as covered by a Standard P&I Cover for Crew, Diversion expenses and Life salvage in respect of Crew and Personnel as specified in the Insurance Policy. The Insurer shall cover any one of the risks set out below, but only to the extent specified in the Insurance Policy:

i Crew whilst being on

1 leave; or
2 extended leave not exceeding the number of days specified in the Insurance Policy.

provided that the Crew member served on board a Ship immediately prior to commencing the leave.
Additional Covers

ii Crew whilst being on standby duty waiting to be ordered by the Assured to commence to serve on board a Ship.

iii Crew and/or Personnel whilst attending or travelling to or from courses, seminars, training sessions, briefings, debriefings, visits to the Assured(s) office(s), conferences or similar arrangements at the request of the Assured provided that the Crewmember’s last service at sea was on a Ship or that the Crewmember’s next service at sea is on a Ship.

iv Crew and/or Personnel whilst attending a ship not being entered with the Insurer under a Standard P&I Cover on behalf of the Assured, including the travelling to or from that ship at the request of the Assured, prior to that ship being delivered to the Assured.

v Crew and/or Personnel whilst remaining on board a ship not being entered with the Insurer under a Standard P&I Cover on behalf of the Assured for a period specified in the policy at the request of the Assured after the Assured has sold or otherwise disposed of that ship, provided that the ship until she was sold or otherwise disposed of was entered with the Insurer under a Standard P&I Cover on behalf of the Assured.

vi Crew and/or Personnel whilst temporarily carrying out work on board, or travelling to or from a ship, mobile offshore unit or other floating structure not being entered with the Insurer under a Standard P&I Cover on behalf of the Assured; or on an offshore structure or installation or in or at a shore based work site; provided that such Crew and/or Personnel remain under the direction and responsibility of the Assured.

b Close relatives of Crew
The Insurer shall cover liabilities incurred by the Assured to compensate a member of Crew in respect of illness, injury or death of the Crew member’s spouse and/or children, provided that the Assured’s liability has arisen under terms of contract approved by the Insurer.

c Third party liabilities incurred by the Crew and/or Personnel
The Insurer shall cover liabilities to third parties incurred by Crew or Personnel which are indemnified by the Assured, arising solely by reason of acts or omissions committed within the scope of the employment of the Crew or Personnel, provided always that the Assured took reasonable steps to avoid the event giving rise to the liability.
d Assured’s Reimbursement of Fines imposed on Crew*
   The Insurer shall cover fine(s) imposed upon Crew (including any associated
   legal and other costs thereto) by any court, tribunal or other authority of
   competent jurisdiction arising from any act, default or omission committed by
   the Crew within the scope of their employment, which the Assured reimburses
   with the agreement of the Insurer, provided always the Assured has satisfied
   the Insurer that the Assured took such steps as appear to the Insurer to be
   reasonable to avoid the event giving rise to the fine.

e Extra costs of crew detention*
   The Insurer shall cover extra costs and expenses, over and above the costs
   that would have been incurred but for the incident, which are reasonably
   incurred by the Assured in relation to the detention of crew members where
   such detention has been ordered by a court or tribunal or any other legally
   empowered authority for the purpose of investigating a casualty or other event
   involving a Ship, where such extra costs and expenses are incurred with the
   approval of the Insurer and provided always that the Assured has satisfied the
   Insurer that he took such steps as appear to the Insurer to be reasonable to
   avoid the casualty or event giving rise to the detention.

(* NB! Such covers are available only by special agreement)

5 Special Exclusions
a Other professional activities of the Crew and/or Personnel whilst on leave
   The Insurer shall not cover liabilities, losses, costs and expenses incurred by
   the Assured as a result of the Crew and/or Personnel being engaged by others
   than the Assured on a professional basis or the Crew’s and/or Personnel’s own
   professional business activities.

b Professional divers
   The Insurer shall not cover liabilities, losses, costs and expenses in respect
   of the injury to or the illness or death of a professional or commercial diver
   employed by, or operating on behalf of, an Assured or an affiliated or
   associated company of an Assured arising out of or during professional or
   commercial diving activities.

c Environmental damages and liabilities
   The insurer shall not cover liabilities, losses, costs and expenses including fines
   in respect of environmental damage, clean up obligations and violations of
   MARPOL or other applicable laws or conventions and any consequential loss
   or damage relating thereto unless arising out of sudden and accidental escape
   or discharge of oil or other substances.
Introduction
The availability of experienced and competent crew has become increasingly important to shipowners, operators and crew managers, some of whom, consequently, seek to gain an advantage over their competitors by offering better terms of employment than those that are required by law in order to attract good quality personnel. However, these improved terms often impose greater responsibilities and liabilities on the employer, and since they are not terms that are generally offered by the majority of owners, it is not possible for the Association to offer cover for such terms under the Standard (i.e. mutual) P&I Cover. Consequently, the Association has developed a special Extended Crew Cover (ECR) to assist Members that wish to offer such terms to their Crew members. Whereas the cover that is available under the Standard P&I Cover is essentially restricted to events or circumstances that either occur on board a Ship, or as a direct result of something that happens on board, the ECR is wider in scope, both in relation to the period of time for which the Crew is covered, and also in relation to the additional personnel that are covered.

The ECR is available to all the Association’s Members provided that they are entered in the Association for Crew cover under the underlying P&I Rules.

Guidance
(A) ‘Crew’ and ‘Personnel’ (Section 17.B.1) and ‘Close relatives of Crew’ (Section 17.B.4.b)
Cover is available under the ECR for Crew members, which term includes all masters, officers and seamen that are contractually obliged to serve on Ships that are owned or operated by the Assured. Cover is also available for other Personnel, which term includes agents, servants, sub-contractors and all other employees of the Assured that perform functions that are directly related to the operation of a Ship. Finally, cover is available for close relatives of the Crew, which term includes a Crew member’s spouse, civil partner and biological or legally adopted children.

Cover is available under the ECR for the liabilities that an employer may incur in relation to Crew members and other Personnel, for liabilities incurred by an employer to third parties and for the injury or death of a Crew member’s family. The cover responds to a wide range of liabilities that extends beyond the Standard P&I Cover and thus enables an employer to offer improved employment terms to those Crew members that he particularly wishes to attract or retain.

(B) ‘Capacity of the Assured’ (Section 17.B.2)
Cover is available only for liabilities, losses, costs or expenses that have arisen as a result of those activities and/or operations that are customarily carried on by, or at the risk and responsibility of, the Assured in any one of the following capacities:

- a as owner or operator of a Ship; and/or
- b as an employer of the Crew and/or Personnel; and/or
- c as a party that is otherwise responsible for the Personnel.
The capacity or capacities in which the Assured is covered must be specified in the Insurance Policy.

(C) ‘Risks covered’ (Section 17.B.3)
The cover that is available under the ECR is intended to expand the scope of the cover that is available under the Standard P&I Cover for Crew,1 Diversion expenses2 and Life Salvage3 to Personnel as well as Crew and to fill some of the ‘gaps’ in such cover. Cover is available in all the various circumstances that are itemised in sub-paragraphs i-vi of section 17.B.4; however, it is not obligatory to take all of them and the majority of Assured do not do so and merely choose those additional risks that they require and exclude the ones that are not relevant for them. The extent and scope of cover is then specified in the Insurance Policy and will determine the amount of premium that is payable.

1 Crew that are on leave or on standby leave (Section 17.B.4.a.i-ii)
Cover is available under the Standard P&I Cover for the contractual liability that the Member has to permanently employed Crew members whilst they are on leave or on standby leave ashore in between postings,4 but is not available in such situations if the Crew member is not permanently employed by the Member. However, cover is available for temporary Crew members under the ECR provided that the Crew member served on the Assured's Ship immediately prior to commencing the leave and that the Assured's contractual commitment to him extends to the post-service leave period.

The cover that is available under the ECR includes whatever contractual liability the Assured has to pay medical expenses, sick wages, disability and compensation for illness, injury or death that is incurred whilst the Crew member is on leave. However, cover is not available pursuant to Section 36.4 of the Additional Covers Terms and Conditions to the extent that the particular liability, loss, cost or expense is also covered by social insurance or by public or private insurance that is required by the legislation or collective wages agreement that governs the contract of employment, or which would have been so covered if such insurance had been effected. Sick wages are covered from the time that the Crew member is scheduled to return to work. However, an Assured will typically exclude cover for illness injury and death that has been incurred as a result of unlawful activities or extreme sports such as hang-gliding or white-water rafting.

1 See the Guidance to Rule 27.
2 See the Guidance to Rule 31.
3 See the Guidance to Rule 33.
4 See the Guidance to Rule 27.
2 Crew and/or Personnel that are attending shore-based courses, meetings etc. (Section 17.B.4.a.i-iii)

Cover is also normally available under the Standard P&I Cover for the contractual liability that the Member has to permanently employed Crew members whilst they are attending courses, seminars, training sessions or similar arrangements at the request of the Assured during the course of their employment but is not available if the Crew member is not permanently employed by the Member. Furthermore, cover is available for liabilities that the Member has to other Personnel only whilst such Personnel are carried on board. However, cover is available under the ECR for whatever contractual liability that the Assured may have to temporary Crew members whilst they are engaged in such activities during the leave or standby period, or to other Personnel whilst ashore, but provided, in the case of Crew members, that the Crew Member’s last service at sea was on a Ship that is identified in the Insurance Policy, or that his next service at sea will be on such a Ship.

3 Crew and/or Personnel attending on board a ship that has yet to be delivered to the Assured (Section 17.B.4.a.iv)

Non-crew personnel

A Member that is in the process of taking delivery of a ship that is either being bought or built will often instruct a Crew member or other Personnel to attend on board the ship to supervise the purchase or building arrangements on his behalf. However, since such a ship may not yet have been entered by the Member with the Association, there may be circumstances in which the Member will not have cover under the Standard P&I Cover for all liabilities, losses, costs and expenses that he may incur in such circumstances. However, cover is made available under the ECR for liabilities, losses etc., that are incurred by the Assured in such circumstances including liabilities, losses etc., that may be incurred whilst the Crew member or Personnel is travelling to or from the ship at the Assured’s request to the extent that cover is not available under the Standard P&I Cover.

4 Close relatives of Crew (Section 17.B.4.b)

Cover is available under the ECR for any liability that the Assured may have to compensate a Crew member for the illness, injury or death of the Crew member’s spouse, civil partner and/or biological or legally adopted children provided that the insurer has approved the various benefits that are provided by the Assured. However, cover is not available pursuant to Section 36.4 of the Additional Covers Terms and Conditions to the extent that the particular liability, loss, cost or expense is also covered by social insurance or by public or private insurance.

5 See (A) to the Guidance to Rule 29.

6 See the definition of Ship in Section 1 of Chapter 1 of PART I GENERAL PROVISIONS of the Additional Cover Terms and Conditions.
that is required by the legislation or collective wages agreement that governs the contract of employment, or which would have been so covered if such insurance had been effected.

The Insurer and Assured will normally agree that the cover for the close relatives of the Crew will be subject to certain restrictions such as the following:

- cover is restricted to spouses or civil partners under the age of 60 and to children under the age of 21 and the names and dates of birth of the spouse, civil partner and children are be advised by the crew member to the Assured and recorded in a Beneficiary Form when the crew member commences employment with the Assured;
- the Crew member must inform the Assured and/or the manning agent within a specified period (usually three working days) of any event that may give rise to a claim and/or must submit a claim for reimbursement within a specified time limit;
- cover is not available for illness, injury and death that is self-inflicted or the result of unlawful and/or hazardous activities and extreme sports activities, cosmetic treatment and alternative treatment (e.g. homeopathic medicine), dentistry, optometry and eye correction, pre-existing conditions and congenital disorders. However, cover is available for emergency C-sections that may be necessary in order to save the life of mother and child and cover may be available for cosmetic treatment in the case of burn injuries if this is recommended by the doctor that is treating the injury;
- Since the Member usually has agreements with various local clinics in the country where the close relative is domiciled, cover is not normally available for medical treatment outside that country. However, subject to the Insurer’s approval, cover may be available abroad if such treatment is not available locally;
- Cover ceases when the Crew member’s period of employment by the Assured ceases although it is often agreed that cover will remain in force for one month thereafter.

Normally, cover is subject to a deductible in a sum that is to be agreed but it is for the Assured to decide whether the deductible is to be borne by the Assured itself or, as is the case under the Standard P&I Cover, by the Crew member.

5 Third party liabilities incurred by the Crew and/or Personnel (Section 17.B.4.c) If a third party is injured by the negligence of a Crew member whilst working on board a Ship cover is normally available for any liability that the Member may have to such third party pursuant to Rules 27-30 of the Standard P&I Cover. However, cover is not always available under the Standard P&I Cover in such circumstances. For example, if a chief engineer that is working on board a new ship that is being built were to negligently allow a piece of heavy machinery to fall into the engine room and thereby seriously injure a shipyard worker, the worker might prefer (or might be obliged) to claim compensation from his employer (the yard) which would then pursue a claim against the ship owner. Consequently, the shipowner would be
obliged to indemnify the yard pursuant to the terms of the contract which the ship owner had concluded with the yard prior to commencing the building work, which indemnities are often based on strict liability. Cover is available to the shipowner as Assured under the ECR in such circumstances.

Alternatively, if a crew manager that is not listed as an additional assured under the owner’s Standard P&I Cover were to supply a Crew to a shipowner Member pursuant to a knock for knock arrangement, cover is not available under the Standard P&I Cover for any liability that the crew manager may have to third parties for the acts or omissions of the Crew but cover is available under the ECR should the crew manager choose to effect such an insurance in its own name as Assured pursuant to right that it has to do so under Section 17.B.2.

6 Assured’s Reimbursement of Fines imposed on Crew (Section 17.B.4.d)
Members have sought insurance protection against such risks in recent years as a result of the increasing tendency to bring criminal proceedings against seafarers and the increasing concern that this has caused to seafarers. Fines are imposed on members of the Crew, often the master rather than the Member itself, in an increasing number of states and for an increasing number of alleged offences. Consequently, seafarers have sought contractual protection against such exposure from their employers and some Members have considered it necessary to agree to indemnify and hold harmless their Crew members against certain categories of fines provided that the Crew member has acted within the scope of his or her employment.

Cover is available under Rule 47 of the Standard P&I Cover for fines that are imposed on Crew members in specified situations provided that the Member is contractually obliged to indemnify the Crew members in such circumstances or that the Association agrees to such indemnification. Such cover is in reality a ‘misdirected arrow’ type of cover which is applicable regardless of whether the fine is justified or the size of the fine. However, there may be circumstances in which fines are imposed on Crew members in situations other than those that are itemised in Rule 47, or the Member may decide that it should indemnify the Crew member even if it is not contractually obliged to do so. The ECR cover was designed to provide the Assured with cover in such circumstances and cover is available for fines (including any associated legal or other costs) that are imposed on Crew members by any court, tribunal or other authority of competent jurisdiction.

Such cover is subject to special agreement and special terms that are negotiated between the Insurer and the Assured and details of the specific fines that are to be covered are specified in the Insurance Policy. However, notwithstanding any other additional special terms, cover is available only if:

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7 For further commentary see Chapter 8.3.3 of the Gard Guidance on Maritime Claims and Insurance.
• the fines are imposed in relation to acts, omissions or defaults of the Crew that were committed whilst acting within the scope of their employment; and
• the Insurer is satisfied that the Assured took such steps that appear to the Insurer to be reasonable to avoid the event that gave rise to the fine; and
• the insurer has agreed to the reimbursement of the Crew member.

Therefore, the availability or otherwise of cover will be considered on a case by case basis and, for example, cover will not be made available for fines that are imposed on a Crew member for the commission of a crime in circumstances where there is evidence that the relevant Crew member was involved in the crime. Furthermore, cover may be withheld if the provision of cover is considered to seriously undermine the deterrent purpose of the fine.

7 Extra costs of crew detention (Section 17.B.4.e)

In certain cases, Crew members may be prevented for many reasons from leaving a country in which an alleged offence, e.g. smuggling, has been committed or a casualty, e.g. a grounding or a pollution, has occurred. This may be because they themselves are under investigation, or because they are considered to be material witnesses and the detention period can be months or even years. Fortunately, Crew members are not often imprisoned, but are normally allowed to stay in a hotel or apartment. Nevertheless, the accommodation costs and living expenses that are incurred by the Crew members during this time can be significant and, depending on the circumstances, will either have to be borne in the first instance by the Crew members themselves, or they will be paid or reimbursed to the Crew members by the Member. However, cover is not available under the Standard P&I Cover in such circumstances since such cover is restricted to fines and penalties that are incurred by the Member and does not extend to other costs and expenses that are incurred by the Crew as a result of their detention albeit that such detention is related to the fine or penalty.

Cover may be available under the ECR for such costs and expenses even if the Crew member is acquitted of the commission of any crime or wrong-doing. However, cover is not available for any salary that is paid to the Crew member during the period of the detention.

The cover is subject to special agreement and special terms that are negotiated between the Insurer and the Assured and details of the specific risks that are to be covered are specified in the Insurance Policy. Furthermore, notwithstanding any other additional special terms, cover is available only to the extent that such costs and expenses exceed that which would have been incurred but for the incident, and only if:
• the extra costs have been reasonably incurred by the Assured in relation to the detention of the Crew member; and
• the Insurer is satisfied that the Assured took such steps that appear to the Insurer to be reasonable to avoid the event that gave rise to the Crew detention; and
• the costs and expenses have been incurred with the approval of the insurer.

Furthermore, cover is available under the ECR only to the extent that cover is not otherwise available under the Standard P&I Cover

8 Special Exclusions (Section 17.B.5)

a Other professional activities of the Crew and/or Personnel whilst on leave (Section 17.B.5.a)

Cover is not available under the ECR for any liabilities, losses, costs and expenses that are incurred by the Assured as a result of the Crew and/or Personnel being engaged by others than the Assured on a professional basis or the Crew’s and/or Personnel’s own professional business activities since these are not activities and/or operations that are customarily carried on by, or at the risk of, the Assured in any of the capacities that are specified in Section 17.B.2.

b Professional divers (Section 17.B.5.b)

Cover is not available under the ECR for liabilities, losses, costs and expenses in respect of the injury to or the illness or death of a professional or commercial diver employed by, or operating on behalf of, an Assured or an affiliated or associated company of an Assured arising out of or during professional or commercial diving activities. Cover is excluded for such risks since they relate to specialist operations that are not directly connected to mainstream shipping operations and have a different/increased risk profile. However, separate cover is available for such risks under the Association’s Diver’s cover details of which can be found on the Gard website under Offshore Products.

c Environmental damage and liabilities (Section 17.B.5.c)

This section is consistent with, and mirrors the principles that underpin, Rules 38 and 47.1.c and emphasises that although the ECR is intended to provide wider cover than the Rules, it does not provide cover for liabilities, losses, costs and expenses including fines in respect of environmental damage, clean up obligations and violations of MARPOL or other applicable laws or conventions and any consequential loss or damage relating thereto unless they arise out of the sudden and accidental escape or discharge of oil or other substances.

Limit of Cover

The limit of cover is USD 10 million per event. Higher limits can be negotiated by special agreement.
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C = Comprehensive Carriers’ Cover
CM = Crew Managers’ Cover
D = Deviation liability cover
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