



## Gard's Defence Cover

The purpose of the Defence Cover is to indemnify the Assured's liabilities for legal and other costs necessarily incurred in establishing and defending claims arising out of the operation of a ship.

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The Defence cover insures shipowners and charterers for legal and other costs incurred in establishing and defending claims.



*Defence Cover began to evolve at the end of the 19th century. During the twentieth century, shipowners increasingly felt the need for a legal costs cover as well as a general advisory and claims handling service for non-P&I matters. To meet this growing need, in 1977 the Association introduced the Defence Cover as a supplement to P&I.*

Over the years, the number of Members taking Defence Cover has grown considerably, particularly among the Nordic Members, some of them preferring to have a *one-stop* insurance for both P&I and Defence Cover. Today, Gard has Defence Members in Norway, Sweden, Denmark and Finland, as well as in North and South America, Europe and Asia.

The Defence Department comprises a team of qualified lawyers from England, Norway and South Africa. Although these lawyers have primary areas of expertise in English, Scandinavian and South African law and practice, they

also have a general knowledge of the law and practice in a wide range of jurisdictions world-wide. This places them in the unique position of being “international” maritime lawyers. In-house lawyers from Scandinavia, the United States, Canada and South America also provide support to the Defence Department on a case-by-case basis. Resources are also available in the form of the Association’s P&I claims handlers, who have considerable experience from many areas of international trade and shipping. Furthermore, in addition to its global network of P&I correspondents, the Association has extensive experience with and knowledge of lawyers, arbitrators and experts throughout the world.

#### **The purpose of the Defence Cover**

Whereas P&I cover insures actual liabilities as well as the legal costs of defending such liabilities, the Defence cover insures shipowners and charterers for legal and other costs incurred in establishing and defending claims arising out of their business operations, as well as providing claims handling and general advisory services.

The Defence Policy covers legal and other costs necessarily incurred in establishing or defending claims which arise out of an event occurring during the period of entry of the ship in the Association in direct connection with the operation, acquisition or disposal of an entered ship, or in respect of the Member’s interests in the ship. The cover is at the sole discretion of the Association and the Association has the right to control or direct the conduct or handling of any case.

*Gard plays an important  
role as strategist*



Today, the cost of legal advice and representation – even when handling relatively small, uncomplicated disputes – may run into tens of thousands of US dollars. Some shipowners and charterers face a continuous flow of disputes in their business operations, the costs of which may constitute a considerable strain on the company's finances. Others may face one major dispute which could bankrupt the company. Defence cover enables shipowners and charterers to carry out their business secure in the knowledge that should something go wrong, they have cover available to assist in protecting their rights. This security comes in the form of a policy covering legal and other costs, as well as providing claims handling and general advisory services.

Although the cover is commonly referred to as "Freight, Demurrage and Defence" (FD&D), it is not restricted to defending cases brought against the Member, nor to claims for freight and demurrage. The Defence Cover also includes cover for costs incurred in pursuing claims. Despite being a "named risks" cover, the list of Defence risks covered by Gard has evolved to include numerous types of claims arising under charterparties and bills of lading as well as claims arising in the sale and purchase of ships.

#### Examples of Risks covered without Special Agreement

The following risks are covered under the Defence Cover without the need for express approval of, or declaration to the Association:

Legal and other costs necessarily incurred in establishing or resisting claims concerning:

- contracts of affreightment, charterparties, bills of lading and other contracts of carriage;
- loading, lightering, stowing, trimming and discharge of cargo;
- passengers and passenger monies;
- loss of/or damage to the ship or general average;
- delay of the ship;
- property damage, personal injury and loss of life;
- repairs and deliveries to the ship;
- salvage and towage unless the ship is a salvage vessel or tug;
- agents and brokers;
- insurance contracts pertaining to the ship;
- customs, harbour and other public or quasi-public authorities (excluding certain taxes).

#### Examples of Risks covered by special Agreement with the Association

- Cover for claims concerning the building, purchase and mortgaging of a ship is available,

provided it is taken out before the relevant contract has been signed. This enables the Association to assess the inherent risks involved. In addition, cover is provided on the understanding that the vessel is to be entered with the Association for P&I as from the date of delivery.

- Where the acquisition of a vessel is concerned, there must be an undertaking to enter the vessel for P&I upon delivery, as from the date of signing the Memorandum of Agreement (MOA).
- Cover for legal and other costs necessarily incurred in establishing or resisting claims concerning converting and altering the ship. Disputes regarding alteration or conversion contracts are treated as special risks. Cover for such disputes will only be available if a separate agreement has been made with the Association on the signing of the alteration or conversion contract at the latest, whereby the Association may agree to provide a limited cover. This provides the Club with an opportunity to review the risk.

The Club is well placed to advise on the course of action to be taken.



#### *The Cover*

An Owner Member faces a large, complex claim in London arbitration proceedings brought by a Charterer, for example, concerning the deviation of a vessel under a time charterparty. The Defence Cover will reimburse the Member for:

#### *Legal costs necessarily incurred*

These may include:

- i) The costs incurred in retaining an English law firm to represent the Member in the arbitration proceedings;
- ii) The Charterer's recoverable costs should the Member be unsuccessful in defending the claim;
- iii) The costs of the arbitration proceedings.

#### *Other costs incurred*

These may include:

- i) The costs of any experts retained to provide evidence and
- ii) The costs involved in investigating and obtaining evidence (e.g. the costs of instructing Club correspondents worldwide).

External advisers such as lawyers and experts are appointed by the Association on behalf of the Member, although the Member can expect prompt reimbursement of any costs incurred in settling their fees.

The Association exercises control over the conduct and general handling of the claim, including deciding whether external lawyers should be instructed and if so, when this will take place, as well as the right to withdraw cover in certain cases. The Association retains the right to select which external lawyers and other advisers are to be retained, albeit in consultation with the Member. In these circumstances, the

Association plays an important role as case manager and strategist, being the link between the Member and the external lawyers.

Consequently, a close partnership is formed between the Association and the Member to ensure that the Member receives the best possible legal advice and representation. The Club is well placed to advise on the course of action to be taken. This role is particularly important when litigation and/or arbitration proceedings are ongoing in several jurisdictions around the world at the same time.

#### *The Service*

Gard's Defence Group is one of the largest among the International Group Clubs and prides itself on being one of the most service-oriented, offering an in-house claims handling service as well as legal and practical advice on a wide range of issues. The service provided is akin to that of a Member's own Legal Department. Each Member is assigned a Gard lawyer, who

*Gard's Defence cases  
are handled in-house*



will be the Member's Defence claims handler, legal adviser and main point of contact. Consequently, a close and trusting relationship is built up between the Member and the Gard lawyer.

The service includes:

#### *Claims Handling*

Due to the Defence Group's expertise, Gard's Defence cases can be handled in-house. The vast majority of Defence disputes are governed by English law and the most common forum for their resolution is London arbitration. Arbitration conducted under the London Maritime Arbitrators Association (LMAA) Small Claims Procedure and LMAA documents-only arbitration can be expected to be handled in-house. This results in a cost saving for both the Association and the Member, which is particularly important in disputes involving relatively insubstantial sums.

#### *Advisory Service*

In addition to claims handling, the Association provides legal and practical advice on a range of issues which shipowners and charterers face in their daily operations. This facility enables the Member to consider potential conflicts at an early stage. Guidance and assistance provided by the Member's designated in-house lawyer may avert a dispute, promote a settlement, achieve quick payment of a debt or enable a

Member to mitigate its losses. The Association's lawyers are readily available should their assistance be required.

#### *Who is Eligible?*

Defence Cover is ordinarily available (subject to the Association's discretion) to a Member, whether an owner or a charterer, insured under the Association's P&I Rules. In extraordinary cases it may also be available (subject to the Association's discretion) to a Member who does not have the vessel insured under the Association's P&I Rules. In the case of Defence Cover for the acquisition of a ship, the Member must undertake to enter the vessel with Gard for P&I insurance upon delivery.

#### *The Structure of the Cover Legal Framework*

The terms of the Defence Cover are contained in Part IV of Gard's Rules for P&I and Defence Cover for ships and other floating structures. The Rules are governed by Norwegian law and any disputes arising between the Assured and the Association shall be resolved by arbitration in Oslo.

#### *Deductibles*

Unless otherwise agreed, all legal and other costs incurred under the Defence Cover will be subject to a deductible of 25 per cent, subject to a minimum contribution by the Member of USD 5,000. One deductible applies in respect of all liabilities, losses, costs and expenses arising out of any one event. However, the Association may decide that a separate deductible shall apply in respect of certain risks. Furthermore in the event that a Member is successful in any legal action and makes a recovery from a third party the Member will be entitled to retain a pro-rata portion of any costs recovered.

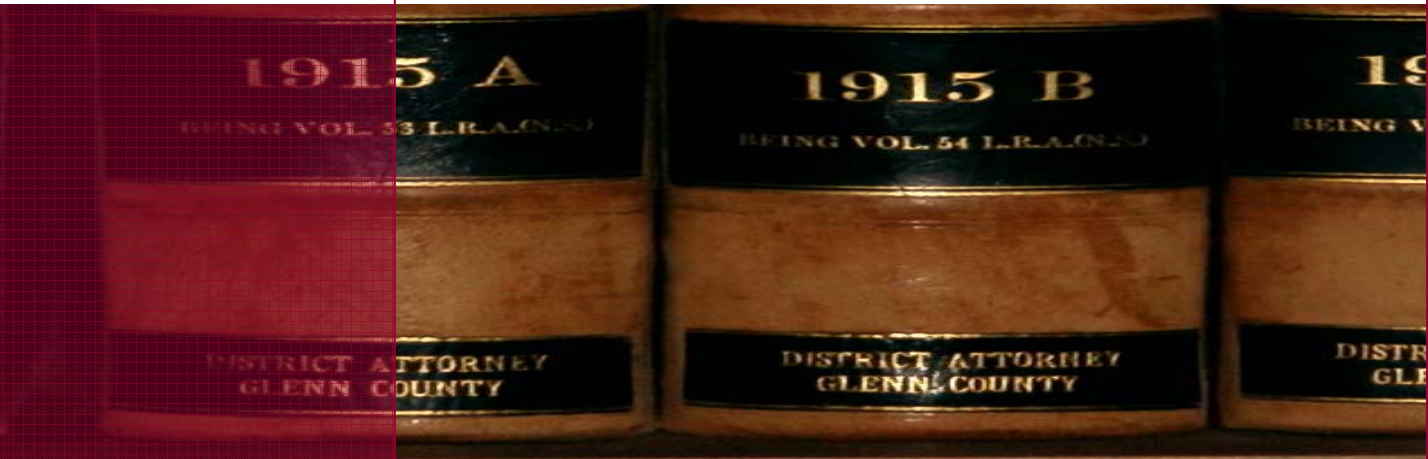
#### *Limits of Cover*

The limit of the Defence cover is USD 10 million per event although the Association has the discretion to extend cover on a case-by-case basis. The limit of cover for newbuilding and conversion cover must be specifically agreed with the Association prior to attachment of cover.

#### *Premiums and Record*

The premium for Defence Cover is quoted according to standard underwriting criteria depending on the Member's risk exposure factors, such as area of trade, scope of contractual obligations, jurisdiction exposure, size of fleet and relevant loss record.

The cover is afforded at cost without any profit element for the Association.



The cover is afforded at cost without any profit element for the Association. It is available to both shipowners and charterers. The cover for charterer Members is charged on a fixed premium basis. Any supplementary calls levied on the mutual shipowning Members follow the calls levied for P&I.

#### **Conditions and Exclusions**

The cover is subject to several conditions to ensure that unviable cases are not pursued or defended. The Defence Rules allow the Club to deny cover when, for example, the legal costs which are likely to be incurred in pursuing, enforcing and/or defending the claim unreasonably outweigh the amount in dispute. Furthermore, Defence does not protect against costs and expenses covered by the Member's hull policies or other insurance covers. Finally, the Defence Rules provide that the Club has an express right to control and direct the handling of the claim.

It is important to note that the Defence Cover is intended to assist with normal commercial risks and not sub-standard or fraudulent operations. Should a case arise where there has been wilful misconduct on the part of the Member, the Association will deny cover.

*Limit of USD 10 million  
per event*



## Practical examples of the Defence Cover in operation

### 1) Time Charterer Member's vessel is ordered off the berth by the Port Authorities following Master's refusal to load

Gard's Defence Cover can respond as follows:

- i. Review and advise the Member on his time charter obligations. Provide the Member with assistance in negotiations with Owners.
- ii. Review and advise the Member on his sub-voyage charter obligations (if any). Provide assistance with any negotiations with the voyage charterer.
- iii. If required, appoint and cover the costs of Gard's local correspondent to assist and provide advice locally.
- iv. If required, appoint and cover the costs of a local lawyer.
- v. If required, appoint and cover the costs of an expert lawyer from the appropriate dispute resolution jurisdiction to advise. The appointed expert lawyer will have a track record of good quality advice at a reasonable cost.
- vi. Appoint a local surveyor or, if required, appoint an expert surveyor, from, for example, London, who specialises in the area in question.

- vii. If the dispute proceeds to arbitration Gard will cover the legal costs of the Member's lawyers and those of the other party or parties to the dispute in the event the Member is unsuccessful, as well as the arbitrators' fees and the costs of any experts appointed. If required, Gard may at its discretion issue a Club letter of undertaking as security in respect of the other side's costs of defending the claim.

### 2) Owners' vessel collides with a berth. The damage falls below the Owners' Hull & Machinery deductible.\* The vessel is arrested by the Port Authorities for security

Gard's Defence Cover can respond as follows:

- i. Instruct a local Gard correspondent to provide assistance.
- ii. Instruct a suitable surveyor to advise on the damage.
- iii. Instruct a local lawyer to advise and assist vis-à-vis the Port Authorities.
- iv. Review and advise the owners on possible claims against their contractual partners.

\* Under Rule 71 1 a the deductible shall be deemed not to exceed one per cent of the vessel's insured value.

### 3) Owners have voyage chartered a vessel and having loaded the vessel are owed substantial sums in respect of freight

Gard's Defence Cover can respond as follows:

- i. Review the owners' contractual relations to ascertain what action can be taken to protect their position, e.g. exercising a lien.
- ii. Instruct a local lawyer to advise on the owner's position under local law.
- iii. Instruct the local correspondent to locate suitable warehousing facilities should it be necessary to discharge the cargo into secure premises.
- iv. Assist the owner with wording of communications with their various contractual partners.

*Cover available to  
Members insured with  
Gard*



**Further examples of disputes which may activate Gard's Defence Cover are as follows:**

- i. A charterparty is amended by the deletion of its laytime and demurrage provisions. A question then arises as to whether charterers are liable for damages for detention due to the delays in getting into berth.
- ii. A collapse of stow at sea. A dispute arises between owners and charterers as to whether the vessel is off-hire and who is liable for the costs incurred in connection with the deviation to a port of refuge.
- iii. There is a delay in the discharge of cargo. Questions are asked whether the shippers are under an implied duty to effect discharge within a reasonable time.

- iv. A vessel takes a longer route than necessary due to the Master's fear of bad weather during the hurricane season. A dispute arises as to whether or not the vessel deviated and whether or not the deviation was justified.
- v. A crane is destroyed by a vessel whilst manoeuvring into berth in bad weather. The disputes arising range from whether the vessel was responsible to whether damages should be awarded on a cost of replacement or market value basis.
- vi. Disputes as to whether services rendered by a harbour tug to a vessel whose mooring lines parted constituted salvage.
- vii.

- viii. The negotiations for the proposed sale of a ship break down. Had the negotiations resulted in a binding contract of sale?
- viii. A Port Authority delivers invoices containing errors to the owners' port agents. These errors resulted in the owner being overcharged. The port agents pay the invoices on owners' behalf and then seek reimbursement from the owners. Were the owners entitled to refuse to pay agents for the amount overcharged?

For further information on the Defence Cover, please contact your broker or Gard's Insurance Department.