



November 2016

Discretionary claims

An overview

What are discretionary claims?

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

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

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

How are discretionary claims dealt with by the club?

Following notification of a discretionary claim, the member will be responsible in respect of both the fees and claim in the first instance. They will, however, be assisted by the club in the usual way from a claims-handling perspective, unless there are privilege issues which would preclude the club's involvement, for example, in US MARPOL proceedings.

Security

Whilst, subject to the rules, security can be provided by the club in respect of discretionary claims, counter-security will be required from the member. For discretionary claims of less than \$100k, the club will require the member to provide a letter of comfort on its usual wording. For discretionary claims greater than \$100k, the club will require the member to provide either a cash deposit or first-class bank guarantee using our approved wording.

Reimbursement

Once a member's liability in respect of a discretionary claim has crystallised and all fees and expenses have been paid, a request for reimbursement should be submitted to the claims handler in the usual way. Discretionary claims will then be referred to the board for determination at its next meeting. Board meetings currently take place in January, May and October of each calendar year.

All discretionary claims are reviewed in advance of the board meeting by the discretionary claims committee and its recommendations are presented to the board by the director of claims.

Role of the board and the exercise of its discretion

The board is made up of individuals with considerable experience in the shipping field and it is their opinion when considering discretionary claims which is material.

The Pooling Agreement sets out in Appendix XI the Minimum Procedural Requirements for the treatment of the discretionary claims, namely:

- The board should act fairly, reasonably and without misdirecting itself in law.
- The member concerned shall, prior to the meeting of the board, have been given the opportunity to review the agenda note and other materials which may be placed before the board in order for that member to comment and any such comments shall be brought to the attention of the board.
- If the member concerned is represented on the board, that representative shall absent himself from the meeting whilst the board considers the exercise of its discretion.



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

Rights of redress

If a member considers that their discretionary claim has either been improperly declined or that they have been unfairly penalised, they have the right to take their claim to arbitration in accordance with the rules.

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

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

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

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