



Wer zahlt? P&I oder H&M? oder beide? Oder keiner?

Bunker disputes as a specific case in point – (significant) H&M deductibles potentially not covered elsewhere

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\ ***Bunker disputes as part of FD&D cover***

Introduction

What is FD&D insurance – Freight, Demurrage & Defence?

- Scope of applicability wider than catchwords indicate and not limited to “defending” the Member – also includes advice and (active) support in pursuing/ asserting the Members’ own claims/ rights

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Introduction

What FD&D is not:

- Hull & Machinery cover (property insurance)/ ancillary interests such as Loss of Hire
- P&I/ third party liability insurance
- Principle of subsidiarity – no other specific cover applying

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- **Potentially uncovered exposure**

- loss/ damage beyond repairing physical damage (H&M)

- Deductibles (H&M, P&I)

- Costs: legal and otherwise (FDD)

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Definition

*“...the insurance shall cover the Member’s **reasonable costs** for **necessary legal assistance** and the Member’s liability for recoverable costs, in relation to disputes which are **directly connected to/ with the operation of the entered vessel** and which are in respect of any of the following...”*

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- FD&D cover is discretionary with regard to external costs – depending on the merits of the case and other factors, the cover picks up the legal and other costs in this regard by way of supporting the Member.
 - Lawyers
 - Forensic and other experts
 - Court/ arbitration fees
 - Opponents' costs if not successful
- FD&D cover is aligned to English procedural law and practice and granted in stages according to the development of the case and can be limited if significant changes of circumstances or assessment occur . Club must be involved at all times.
- FD&D cover does not extend to the principal amount in dispute itself (e.g. hire or freight in dispute)

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Exclusions

- Disputes between co-assured and similar conflict of interest
- Breach of Club Rules (e.g. breach of sanctions, in particular those exposing the Club as a whole) or the Member bringing the legal dispute on itself otherwise
- Other exclusions, which are within the Club's discretion
 - Poor merits and correspondingly low prospects of success and/ or enforcement (not throwing good money after bad)
 - Significant disparity between costs necessary to pursue/ defend case and the quantum in dispute

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Elements of FD&D cover – Club practice

- Advice on general matters or specific issues (e.g. c/p clauses; Club circulars etc.)
- Establishing facts/ considering evidence/ assessment of merits in either pursuing or defending claims (e.g. for charter hire or freight under a c/p) either in court or arbitration and/ or other rights and remedies (liens or arrest) – ***legal “first aid”***
- Provision of external resources (experts/ lawyers and the like)

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customary examples of dispute (T/C)

- Non or part payment of hire
- Off hire
- Speed and consumption
- Premature or delayed delivery/ redelivery
- Cleaning issues (holds/ tanks)
- Equitable estoppel
- Other disputes affecting the performance and/ or giving rise to suspension or withdrawal of the vessel

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customary examples of dispute (V/C)

- Non or part payment of freight
- Non or part payment of demurrage; laytime disputes
- Deadfreight
- Unsafe port issues

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- **Relevance/ Importance of bunkers**

- Commercial: As fuel costs are a major factor in operating a vessel considering current fuel prices and other factors influencing same (esp. environmental regulations)

- Legally: major area of dispute under C/P

- Damage to the vessel
- Speed/ performance
- Repairs
- Loss of use

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Bad bunkers are those not complying with:

- c/p specs (e.g. ISO 8217:2010)
- Specific viscosity parameters
- agreed testing routines under c/p
- MARPOL (73/ 78 Annexe VI) and other regulations, in particular increasing environmental standards, e.g. on sulphur contents
- SECA (Sulphur Emission Control Areas)
- Fitness for purpose otherwise

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c/p provisions regarding supply fuel - general

“Baltimé” and “NYPE”:

- owner to exercise due diligence in delivering the vessel *“in every way fitted for ordinary cargo services”* as envisaged under the underlying c/p , which implies a seaworthy condition and to maintain her in such a state throughout the term of the charter
- whereas a charterer has *“to pay and provide”* for fuel implying standards as to quantity and quality required under the c/p
- absolute duty of care or due diligence only?

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Quality of fuel

- General standard
 - “Reasonable, general quality”
 - “Suitable for the type of engines fitted”

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- Insufficient/ not recommendable to rely on without rider clauses expressly
 - defining specific specs required for modern engines such as ISO 8217:2010
 - ❖ viscosity
 - ❖ carbon and other residues/ impurities/ sediments to stop adding waste lubes
 - ❖ water and sulphur contents
 - requiring conformity with MARPOL as otherwise potential cover issues
 - clarifying any other parameter/ value of importance

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- BIMCO Standard Bunker Fuel Sulphur Content Clause (T/Cs)
- Fuel of specs/ grades permitting vessel – at all times – to comply with max. sulphur content requirements of any emission control zone where vessel is ordered to trade
- Charterers to warrant that supply chain (suppliers, barges, surveyors) to comply with Regs 14 and 18 of MARPOL Annex VI
- Charterers to indemnify, defend and/ or hold owners harmless for any failure to comply with the above

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Fuel testing

Testing/ analysing procedures in liaison with Class

- Specific regime set out in c/p with regard to
 - Samples drawn from fresh bunkers stemmed
 - Analysing sample prior to burning of bunkers
 - Safekeeping of other samples for comparison

- Securing evidence

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- Vessel's „hardware“ technically fit to comply with ever tightening fuel emission regulations and those pertaining to ever decreasing sulphur and other contents?
- Legal Implications on long term C/Ps?
 - Ship's ability to burn bunkers eventually with a sulphur content of less than 0.1%
 - For whose account will be costs of refitting (e.g. scrubbers)
 - Charterer to comply with less stringent standards of ISO 8217 whilst ship trading in areas with tighter standards

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bad bunkers, c/p implications

- Charterers' prima facie breach of contract, liability for
 - Damage to hull (machinery),
 - repair costs,
 - removal/ disposal of bad bunkers,
 - time loss
 - other damages
 - no entitlement to off-hire/ performance claims

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bad bunkers, c/p implications

- Causation in doubt due to owners'/ masters' conduct
- BDR/ BDN and where not signed as receipt only
- Owner cannot discharge burden of proof for charterers' breach of contract
 - Insufficient terms under c/p (quality/ testing)
 - Omission to secure evidence

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charterer, contract with bunker supplier

- Specific risks for charterer:

Separate contract with supplier not binding owner

- Different jurisdiction
- Independent time bars (typically very short)
- Potential lack of recourse

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FDD cover in resolving bunker and other disputes:

- Advice on C/P (bunker specs and testing)
- Advice and support „after the event“ (bad bunkers causing loss/damage)
 - establishing facts
 - surveyor's/ expert's costs to secure evidence
 - legal fees (lawyers, arbitration/ court)
- Funding proceedings to obtain security for costs
- All of which not covered elsewhere

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Supply/ provision of bad bunkers

- **General risks Owner:** damage to the ship (main engine/ auxiliaries) adversely affecting the performance under the c/p, causing losses and/ or results in substantial costs of removal/ cleaning/ repairs resulting in commercial and potential cover issues (including conflicts between the underwriters involved).
- **General risks Charterer:** Supply of bad bunkers can result in significant liability for damaging the chartered vessel (breach of contract) and/ or removal of the bad bunkers supplied and/ or other liabilities (loss of use) - depending on circumstances - this can result in cover issues for a charterer. Potential additional risk with supplier (different legal regime, short time bars and the like)

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- **So, who pays?**

- **H&M:** limited to repair of physical damage as property insurance and in addition subject to deductibles
- **Ancillary cover like LOH:** pays compensation but subject to deductible/qualifying period
- **P&I:** third party losses but no compensation for „operational costs“
- **FDD:** no compensation for principal amounts arising out of the above but covering legal and associated, „necessary“ costs to pursue/ defend the above amounts in dispute in contentious/ non-contentious dispute resolution

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- **Prevention is better than cure**

- **As an owner:** bunker specs/ requirements for vessel and trading area as well as testing routines/ procedures as detailed as possible **PRIOR** to close a fixture to pre-empt areas of dispute and thereby loss/ costs/ expense as much as possible
- **As a charterer:** factor in the above and check on supply options in accordance with envisaged fixture
- **For both:** to avoid potentially significant liabilities and lengthy/ costly proceedings

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- **„Golden Rules“**

- 1) C/P must accurately reflect fuel requirements according to the engine maker's recommendation
- 2) ISO 8217:2010 standard (defining various maximum values) as a minimum plus any other additional specification required (e.g. on flashpoint)
- 3) Bunker supplier's paperwork to be checked and to verify that the delivery conforms in terms of specs/ quantity to c/p requirements and actual bunker order

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- „**Golden Rules**“ (continued)

- 4) Appoint independent fuel analysis contractor (e.g. LR, FOBAS, DNV etc.). Comparatively minor costs, results typically available within **36 hours** or even less
- 5) C/E to run continuous drip sample at manifold during bunker stem
- 6) When-/ where possible/ feasible: new bunkers to be placed in separate, empty tank and only used **AFTER** lab analysis approving bunkers stemmed has been received. In addition C/E to carry out compatibility test with bord means

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- **„Golden Rules“ (contiuned)**

- 7) C/E to check and monitor new bunkers (to be) stemmed for water contents with bord means (test kits)
- 8) All ship's staff concerned with bunkering must be familiar with international standards regarding bunker quality and sampling



Thank you for your time!

Any questions?

Bremen, 30 November 2012

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