



Module 8

Answers to sample questions

QUESTION 1

Model Answers

- a) Describe the characteristics of each of the ships in the fleet, the types of claim that might arise and the natural and non-natural hazards they might face.

Characteristics of the ships and types of claim that can arise

Ro/Pax ferry or Ro/Ro Ferry

Characteristics

Vessels that are often used on short journeys carrying either mixed vehicles (private cars and commercial freight) or vehicles and foot passengers. They can be built of materials other than steel, for example aluminium/composites and use gas turbine/waterjet propulsion in order to obtain high speeds. They should have watertight integrity of the bow and stern door.

Types of claim

- Generic claims such as grounding, collision, bunker pollution, personal injury (including passengers)
- Specific claims such as damage because of vehicles breaking free on car deck, fire in vehicles

Container vessel

Characteristics

This is a vessel with regular shaped cargo spaces and specifically designed to carry only one type of cargo, i.e. containers, although those containers could themselves contain a wide variety of different things. The accumulated value of the cargo can greatly exceed the value of the vessel.

Types of claim

- Generic claims such as grounding, collision, bunker pollution, personal injury
- More specific claims such as fire/explosion originating in the cargo
- Issues with non-declared or mis declared dangerous cargo

Product tanker

Characteristics

This type of vessel carries the products of refining of crude oil as well as other liquids. They often have specially prepared and coated tanks to ensure no damage is caused by cargo to the ship and to protect the cargo from cross contamination from previous cargoes. They can carry many different cargoes in segregated tanks rather than a single type.

Types of claim

- Generic claims such as grounding, collision, bunker pollution, personal injury
- More specific claims such as cargo contamination, pollution from cargo

Natural and non -natural hazards that might be faced

Baltic

- Ice particularly between November and March
- Freezing fog
- Freak waves

Asia

- Windstorms particularly Typhoons
- Piracy in certain areas

Europe

- Tides
- Fog

b) Explain the differences between the underwriters' ability to quote for this fleet and what they would have to do if the fleet was already entered with another IG Club

As this risk is coming from outside the International Group the IGA does not apply. The underwriter has more flexibility to quote but the provision of record from the existing insurer will not happen as it would in an IGA situation.

If the risk had already been insured within the IG, then the new Club must ask the Holding Club(s) for the claims record and terms on specified conditions of cover. Under the IGA the new Club may not quote a premium that is below the net ETC premium of the lowest rate offered by one of the owner's Holding Clubs. The new Club may not offer any inducement to the owner to move to their Club. If a new

Club were to be found to be in breach of the IGA then the sanction is a reduced pooling facility limiting their access to the IG Pooling / reinsurance arrangements.

The underwriter in this case has no requirement to speak to the previous insurers or to take any account of their premium terms and can quote freely.

c) Highlight the questions that the underwriter should be asking about this prospective new Member and the information they should obtain

The underwriter should ensure that they understand the corporate structure and exactly who is involved in each of the entities. This is for two main reasons, the first to ensure that there are no financial crime issues for the Club in offering terms and secondly to ensure that there are no sanctions issues to be considered.

Then the underwriter should consider the scope of cover required by the prospective Member, for example do they want to have all their collision cover with the Club or is it perhaps already with their hull insurers. The level of deductibles should also be considered and reviewed against the claims incurred.

Questions should be asked about the experience of the crew used on all of the vessels. Where are the crew sourced from and what turnover does the Member experience? It is important to establish the nationalities of crew and officers employed. Different nationalities of crew have different types of employment contracts and different compensation levels available in their own court systems.

The experience of the shoreside management is also important particularly in a mixed fleet of vessels in this case. The management of passenger vessels, tankers and container vessels in a small fleet is unusual and requires particular training and experience.

The underwriter should also ask about the contracts on which the Member does their business as wider contracts may not be fully indemnified under standard Club rules.

The underwriter should consider the insurance history of the owner and inquire about the current and past insurers and reasons for leaving.

Information to obtain

- The underwriter should ask for a survey to be done on the vessels over 10 years for tankers / passenger vessels and 12 for other vessels
- They could check indices such as Lloyd's Confidential, Equasis or Rightship where they can check information as varied as the corporate structure and the vessel's detention history

- They should obtain the claims record for at least the last 5 years and will be particularly focussed on those types of claims which would be covered by the Club.
- Complete details of the vessels, including age, date and place of build and vessel type
- Current and likely trading areas
- Cargoes to be carried (where relevant)
- Flag and Class details
- Confirmation of the operators and managers of each vessel as well as the beneficial ownership as that will have an impact on the level of risk, and more importantly the control of those risks. The Club will want to consider the attitude that their insured has to risk, and how their behaviour impacts on the likelihood of claims

d) Discuss what categories of membership are available, which of them might apply to any of the companies shown in the corporate structure and why

The starting point for any Member must be that they have an insurable interest in the vessel.

The main category of Member would be the party who will be effectively the principal insured and will often be the actual owner of the vessel. In the corporate structure it indicates that there are a number of separate companies each owning one vessel, so these individual companies would be the main Member.

As is demonstrated in this particular corporate structure, the actual owners of vessels are part of a larger organisation and there are other companies within that organisation that also may be insured under the same entry.

Here the vessels are owned by one ship companies for legal and practical reasons, but the vessels are chartered out to or managed by another company within the same wider holding group.

Also crewing and manning is performed by another organisation also within the same group.

To ensure consistency across the IG the Pooling Agreement sets out a list of eligible persons who are entitled to the benefits of Club cover and on agreed conditions of cover:

Cat 1

Those organisations who control the operation and employment of the vessel. They can be named in the entry as joint assureds or joint members as they share an

identical insurable interest. They have a joint and several liability for payment of premiums but for claims payment to one is sufficient as indemnity to all. Additionally there cannot be a claim made arising out of one joint member's liability to another joint member. The danger for the Member in this arrangement is that they stand and fall together and so conduct of one of the parties insured which is sufficient to bar the rights of recovery under the policy bars the rights of recovery of all the parties to the policy. A number of the companies in this group would be eligible for cover under this category including the one ship owning companies, the bareboat charterers and the managers

Cat 2

A category 2 Member will only be a charterer and as they do not have the same insurable interest as the owner, they cannot be a joint insured under category 1 type membership unless affiliated to the owner (see below).

Cat 3

Category 3 type membership is limited to those Members for whom the IG Clubs are effectively providing a RI of a local insurer because the IG Clubs cannot insure those shipowners directly. This is generally because of local legislation precluding external insurers. There is a list (the Grandfather list) in the Pooling Agreement of those local insurers whose risks Group Clubs are allowed to reinsure and then pool. On the information available this would not be relevant for any company in this group

Cat 4

As distinct from Cat 1 entries, the majority of Cat 4 entries involve entities who can be defined as co-insured.

Cat 4A In this particular corporate structure the holding company and the crew manager could fall into this category. The assured would need to be named in the policy and would be jointly and severally liable for the premium charged. Cover would be limited to risks and liabilities arising out of the operations and activities customarily carried out at the risk and responsibility of ship owners within the scope of cover provided in the policy.

Cat 4B is what is known as misdirected arrow cover. It arises when an organisation which has a commercial relationship with a principal insured, but not a corporate relationship finds itself receiving claims which should more properly be routed to the main insured. The companies that might be the victims of these mix-ups can be named on the entry certificates. In this case the terminal might seek to benefit from this cover as they are not eligible for other cover from the Club.

Cat 4C is a mixed concept called the affiliated companies cover. This is where a company in the same corporate group as the main insured receives claims that should have been sent to the main insured. Unlike the misdirected arrow concept, these companies are not named on the certificates usually because there are too many of them within the corporate group and it would be unwieldy to do so. As there are other companies in the corporate group this might be relevant for them. Clubs may include a clause in their policy extending cover or include a general provision in their Rules.

Cat 4D deals with the situation where the charterer is a member of the same corporate group – an affiliated or in-house charterer. In this case there is a sister company chartering vessels so this may be appropriate for that company as it has the same parent as the owner.

The category exists as otherwise the restrictions in Cat 1 and Cat 2 about naming owners and charterers on the same entry would preclude an otherwise logical grouping.

Cat 4E deals with the types of liability sharing that often arises in contractual arrangements – the so-called knock for knock arrangements. These contracts usually require that each party is named on the others insurance cover and therefore the cover will respond to claims made against a contractor which are the proper responsibility of the Member. The Cat 4 memberships do not have shared premium payment responsibilities, those remain on the main insured, whereas the joint memberships under Cat 1 do.

- e) **Analyse what issues are raised by the COA terms and draft a letter to the broker explaining whether they would be covered for liabilities which might arise due to those terms . Within that letter explain to the insured what the Club's position will be in relation to any misdelivery claims arising from the use of their non-negotiable house bills**

Dear Member

Thank you for asking us to review your COA language. We have now had the opportunity to do so and would offer the following comments regarding the wording and its potential effect on any Club cover for cargo related losses.

The starting point in the Club rules is that our Members should always contract on terms which include exemptions from liability that are no less favourable to the carrier than those of the Hague Visby Rules. If a Member wishes to contract on any terms other than Hague Visby and be assured of cover, they must have the Club Managers' approval. Our objective is not to restrict a Member's trading activities or freedom to take on additional contractual liabilities, but rather to ensure that the potential liabilities that a Member wishes to accept remain within scope of cover provided for in the Rules or by way of additional cover.

Turning to the specific points on which you have asked our opinion:

The acceptance of liability for any delay of more than 48 hours to the scheduled arrival of a vessel at its load or discharge port, for whatever reason.

The Hague Visby Rules make no specific provision for the recovery of loss caused by delay in delivery of cargo. While Club cover will extend to liability which arises from delay resulting in the physical damage to goods, as falling within the carrier's general duty of care for handling of cargo under Hague Visby Rules it will not cover a liability for which the Member has so to speak "volunteered". The liability under the COA does not relate to actual damage to cargo but rather to the economic consequences of the delay. It falls outside Hague Visby Rules and as such will not be covered under the Rules and an additional cover, on terms and limits to be agreed, is required.

A formula for the calculation of damage and loss to any goods which is more than the Hague Visby package or weight liability.

Agreeing and paying a liability above Hague Visby will not be covered by the Club under the Rules and an additional cover, on terms and limits to be agreed, is required.

To protect the brand, any goods arriving in wet damaged or stained packaging are to be treated as a write off, even though the goods themselves may be undamaged.

As with the point above about the 48-hour delay, this liability is voluntary and therefore not covered under the Rules and an additional cover, on terms and limits to be agreed, is required

The time for the notification of claims under the COA is two years.

The Hague Visby Rules apply a one-year time bar for claims and the agreement to accept claims beyond a year will clearly be prejudicial to Club cover and treated as a non- mutual risk.

In view of these difficulties with standard P&I cover for the additional risks under the COA you may wish to consider taking additional cargo cover for the specific risks identified. Please let us know if you would like further information about what is available.

From a practical perspective, if you choose to take this additional cover then we would continue to handle the claims as normal. This provides you with seamless claims handling whether the matter falls inside Club rules, or outside (in these particular circumstances).

Additionally you asked our opinion on the use of your non-negotiable bills of lading. Notwithstanding their format, a claim for wrongful delivery of cargo will still remain a discretionary matter for the Board.

Should you have any questions concerning the matters discussed please do not hesitate to contact me.

Yours etc

50 marks overall for the question. 10% of the overall marks will be awarded for presentation

QUESTION 2

Model Answers

As the principal claims handler dealing with the incident:

a)

- Describe the information that you will need to gather about the spill,
- Who you will notify and appoint to handle the spill and to attend on scene,
- The next steps and how the day to day practicalities of handling claims arising will be dealt with.

Information

The basic information required will include the precise location of the vessel and the spill area, the name and type of vessel, and the date and time of the incident. In relation to the oil that has been spilled, the Club will need a precise description, of the bunker fuel spilled and the estimated amount spilled, and the rate of the ongoing spill. The Club will also need to know the quantity of cargo and bunkers on board the vessel at the time of the incident as well as the cargo interests' contact details.

Although it is apparent that no cargo has been lost cargo interests should be contacted and advised of the incident.

Parties to notify

ITOPF; the tanker will have been entered automatically by the Club with the International Tanker Owners' Pollution Federation (ITOPF). Immediate notice should be given to ITOPF advising them of the basic details of the casualty and the relevant contact numbers of the Member and Club claims handler. ITOPF will make a preliminary assessment of the environmental risks and begin to monitor the situation with a view to attending on site.

Club representative; the local Club correspondent and surveyor must be at the scene to liaise with the JDF and to assist the owner and the vessel. It is likely that the JDF will set up a command centre and with ITOPF and JDF advisors a plan should be formulated to deal with the oil slick and the clean up using available clean up resources.

Member; the Member will activate their emergency response plan and there should be an owners representative or agent present. In view of the nature of the casualty it is likely that a technical team will arrive to assist with necessary practical information concerning the vessel. The Club will need to arrange regular

reporting including daily on-scene situation reports with the Member and to discuss liability issues.

PR Consultant; it is likely that the owners will have access under their emergency response plan to a PR Consultant. In a situation involving extensive pollution to the Japanese coastline a PR consultant will be essential to deal with the clamour of the press and enable the owners to deal with the casualty.

IOPC Fund; given the potential impact of the spill, the International Oil Pollution Compensation Fund (IOPC) must also be informed by the Club. There is an MOU between the IG and the IOPC. It has been agreed that the P&I Clubs, ITOPF and the International Oil Pollution Compensation Fund (IOPC) will co-operate in the use of lawyers, surveyors and other experts necessary to handle clean up and evaluate claims. The aim is to minimise duplication of effort and to share costs. As the matter develops, a coordinated approach to handling the spill and clean-up will need to be taken between the Club and those organisations.

Collision; the Club will need to appoint a collision lawyer to interview the crew as soon as possible, and to capture documentary, third party witness evidence and other evidence such as VTS and AIS immediately. Consideration should be given to arranging an exchange of security with the dredger.

Further steps to be taken/day to day practicalities

Once the initial co-ordination with the Member and ITOPF has been done, and investigations started to establish the cause of the incident, it would be prudent to consider

- Whether any additional resources will be required, particularly if a large volume of claims are anticipated
- Whether it would be beneficial to establish an on-scene presence, for example a local claims office to facilitate the efficient collection and processing of information related to claims

Given the size of the claim, consideration should also be given to filing a report of the matter to the board or management of the Club if it triggers internal reporting requirements and also to the Pool via the data collection portal.

On a day to day basis the Member should be asked to arrange directly or through their on-scene team to file daily situation reports with the Club advising status and developments in conjunction with the reports being made by the Club Correspondent and ITOPF. The Member should also be made aware that he should contact the Club at any time for issues which require the Club input/consent etc.

The claims handler should arrange with Member and ITOPF regular update discussions.

From a practical perspective, in order to manage the clean-up and claims arising from the spill, in liaison with the correspondent, ITOPF and IOPC, a local claims office should be established, and a financial controller appointed to keep records and to monitor expenditure. This will ensure control is kept on the outflow of expense and that items can be validated.

Evaluating the claims

In view of the potentially large number of claims that will arise from the spill, the decision will probably be taken to set up a claims office with the IOPC using a professional claims management team. This is likely to consist of one or more maritime lawyers to ensure that the legal formalities for claims settlement and release are met, as well as other outsourced claims personnel. ITOPF's role will be to give expert advice on spill management and in the assessment and evaluation of claims.

Dealing with individual claims

Claims from fishermen will be made for direct property damage such as contamination of their fishing boat hulls, fishing gear or other shore side property. Those direct property losses are relatively straightforward to deal with, requiring validation of the value of the loss which can be done quickly by the local claims office. Such claims will probably be linked with loss of income claims which the claims office will need to verify before any payment will be made. Where hardship is evident, interim payments may be made.

Where claimants are making claims for pure economic loss, with no associated property damage, the claims office will have to investigate the proximity both economically and geographically of the alleged location of the loss to the location of the contamination/spill. Careful consideration will have to be given to claims arising out of loss of future tourist income from hotels, restaurants and other tourist attractions.

IOPC have, for example, declined claims arising out of oil spills where they consider that the location of the alleged loss is too far distant, such as after both the Braer and the Sea Empress losses, when claims were made by fish farmers.

- b) **Advise which convention applies to the spill and how compensation and clean-up costs will be paid.**

Oil spill legal liability framework

The oil spill compensation regimes differ depending on whether the spill is from a tanker or a non-tanker, whether it is of cargo and/or bunkers and whether the oil is classified as a persistent hydrocarbon. A spill from a tanker carrying a cargo of persistent oil and bunkers will fall within the strict liability provisions of the Civil

Liability Convention (CLC) which provides for compensation up to a financial limit based on the vessel's tonnage.

In this case compensation will be based on CLC 1992 and the Fund Convention 1992 which adds a second tier of compensation and is administered by the IOPC. A third tier of compensation is available under the Supplementary Fund protocol 2003 but it should not apply in this case.

In addition by reason of an agreement known as STOPIA (Small Tanker Oil Pollution Indemnification Agreement 2006) the liability of tankers of up to 29,584 gt has been increased to 20 million SDR (about US\$ 30m). STOPIA applies to incidents involving participating tankers in 1992 Fund Member States and will apply in this case.

In terms of the mechanism, the vessel's CLC limit is about USD 7M and the claims are likely to exceed US\$30 million the cargo interests will be contributing via the Fund Convention 1992. Because of its size the vessel will be paying a disproportionately small share of the claims as contrasted to cargo. Under STOPIA, the vessel interests via the Club will reimburse the Fund on a voluntary basis up to the US\$30 million limit. In practical terms the Fund will pay the compensation to the claimants in the first instance and then seek reimbursement of the amounts they have paid out over and above the CLC limit up to SDR 20M (about USD 30M) It would be sensible to set up a CLC limitation fund to ensure that the extent of the ship's liability is made clear as soon as possible.

In this case the LLMC limit will not apply as the CLC is applicable.

c) Discuss the importance of accurately reserving this matter and how any claim would be notified to the Pool

What estimating/reserving is

Estimating is the term used to describe the prediction or forecast made by a claims handler of the expected final cost to the Club of a P&I claim. The prediction is based on experience of the outcome of other similar claims and an awareness of litigation trends and costs. As a claim develops the estimate is likely to be adjusted as a result of intervening and often unexpected factors which influence the outcome of the claim. In consequence, an estimate may move upwards or downwards before a claim is concluded. The importance of estimating the financial outcome of a claim as accurately as possible is central to the financial stability of the Club and a strict discipline is imposed on the process.

Financial impact

The process of estimating claims enables a Club to calculate with reasonable accuracy the total liabilities they will need to meet in each policy year and to take steps to ensure that it is adequately funded to meet those liabilities. Within the mutual system, Clubs need to keep within relative narrow guidelines in their approach to estimating. An overly pessimistic view of the outcome while seemingly cautious may not serve the Club so well as it could result in excessive calls being made on Members to build claims reserves unnecessarily. Conversely, an overly optimistic view of liabilities may lead to serious under-funding and result in the unexpected need for a Club to call on its Members for additional funds.

Estimating criteria

The Pooling Agreement requires that estimates are calculated on the basis of the “likely outcome” of the potential claim. Some Clubs adopt the same phrase, others use minor variations, such as “most likely outcome”, “reasonable likely outcome” and “highest reasonable likely outcome”.

Principles of estimating

In estimating the likely outcome of a claim, the claims handler will almost never enter the actual claim amount. They will instead take into account that many claimants are tempted to inflate the amount of their losses. The claimed value of the pollution losses may be exaggerated or too remote to be actually a liability on the Member.

The facts indicate that the Member is not entirely to blame, so the estimate will take this into account. At the same time the claims handler needs to account for legal, surveying and experts costs that may be incurred in defending the claim, less any applicable deductible.

Caution needs to be adopted in assessing the likelihood of making a third-party recovery. A marine incident that gives rise to a number of claims, such as this one will be estimated on a global basis which will be the total of the net estimates for each head of claim with appropriate application of deductible.

Reporting to the Pool

A matter is eligible for reporting to the Pool if the Club has reason to believe that it might exceed the Club’s individual Club retention of USD10M. The report is made on the basis of actual incurred figures or estimates based on a “best estimate of most likely outcome” assessment.

If the claim is likely to involve the general excess of loss programme, then the figures provided must take into account the retention held under that contract.

Regular updates will have to be provided to the Pool and IG Secretariat of material changes in the claim facts and estimates. In any event, updates have to be provided twice yearly in February and August (even if there has been no change) and the other Clubs contributing to the pooled claim can ask for more information at any time.

d) Draft a letter to the Member setting out the Club's rules on instruction of lawyers and experts.

Dear Member

Contact claim dated XXX - Entered vessel "Mull of Kintyre"

Further to our recent telephone conversation, there are a number of issues that we need to bring to your attention in relation to this claim. We note that the lawyer has been specifically appointed to advise your management on this pollution matter.

This particular lawyer is not known to the Club and unfortunately does not appear to appreciate that under the Club rules the managers have the freedom to instruct on behalf of the Member, lawyers as well as surveyors and experts that are considered for the proper conduct and resolution of the claim. The managers also have the freedom to control the extent of the work done particularly where costs may be detrimental to the economic outcome overall.

In this matter where the expert is providing advice directly to your management, rather than being actively involved in the claim itself, we would respectfully point out that these costs are for your account alone and would not form part of a claim on the Club

Please do not hesitate to contact me if there are any matters that you would like to discuss in further detail

Yours etc.

50 marks overall for the question. 10% of the overall marks will be awarded for presentation