

ENVIRONMENTAL LIABILITIES

A QUESTION OF REASONABLENESS

Situations in which pollution-related costs can be recovered in general average (GA) have been discussed in our previous article, *Environmental liabilities: a question of motive*. We will now consider when the costs of cleaning up pollution in dry-dock may be covered by particular average (PA).

Case study

A vessel, sailing in ballast, suffers a serious grounding. A diver's inspection reveals extensive bottom damage, however, the water pressure is holding the bunkers in the breached bottom tanks, and there is no actual leakage. The vessel is towed to a local shipyard for repairs, and enters dry-dock. Considerable expenditure is incurred to:

1. Carry out tank-cleaning in all areas adjacent to planned hot work
2. Remove bunker residues from undamaged areas of the exterior shell plating
3. Clean the dry-dock and its pumping facilities.

We will consider each cost in turn.

Tank cleaning

There is a long standing practice stating that it is necessary to clean cargo or bunker tanks in order to do repairs, and it is now largely uncontroversial that these costs form part of the reasonable cost of repairs. The Association of Average Adjusters Rule of Practice D6 provides guidance on how these costs should be divided when both damage repairs and owners' work are being carried out. If bunkers have escaped and have formed a coating over parts of a hull, and this needs to be cleaned before hot works can be carried out, the cost of doing so would likely be recoverable as part of the cost of repairs.



Bunker residues

If undamaged areas of plating are covered with bunker residues, can the cost of removing those bunker residues be recovered? This question arose in the *Orjula* [1995] 2 Lloyd's Rep. 395, where several drums of acid began leaking because they had been badly stowed. The shipowners sought to recover from the charterers the cost of cleaning the deck of acid, whilst the charterers argued that there had been no physical damage to the vessel because the acid did not penetrate the deck material, and so the cost should fall on the shipowners. The judge decided that the ship had been damaged 'by reason of her contamination'. It follows that the cost of cleaning bunker residues from undamaged areas of exterior shell plating is likely to constitute physical damage to the ship, and may be recoverable in PA on that basis.

A question of reasonableness

The final scenario involves the cleaning of a drydock and its pumping facilities. Unlike the other examples, the damage has happened to something other than the ship itself, therefore the recovery cannot be based on damage to the ship, and we must consider what the reasonable cost of repairs is.

A very significant case which assists is the *Medina Princess* [1965] 2 Lloyd's Rep. 17. The plaintiff owners were looking to prove a constructive total loss, and much of the several-hundred page judgment concerns which costs could be brought in as part of the reasonable cost of repairs. Mr Justice Roskill stated that the correct approach to adopt when calculating the reasonable cost of repairs is to consider "what would have to be expended to put the ship right". On the facts, a cost which must be incurred to put our ship right is to put it into dry-dock. Part of the expense of putting the ship into drydock would be the cost of tugs and mooring, which would form part of the cost of repairs. Additionally, we know that the vessel has damaged tanks and that they will leak oil into the dry-dock – this is foreseeable. The oil will need to be

cleaned from the dry-dock walls and the pumping equipment. In this example, it is quite clear that the cost of cleaning the dry dock is as much a part of the cost of entering a dry-dock as the cost of tugs and mooring, and therefore forms part of the cost of repairs.

Points to note

- Whilst the above are all examples where pollution costs may be recovered in particular average the position is by no means straightforward, and each case will need to be reviewed on its own merits.
- When considering whether pollution-related costs may be allowable in particular average, regard must be had to how inextricably linked the costs are to the actual repair process, and not simply whether the costs are incurred as a consequence of the casualty.