



YOUR GUIDE TO
FD&D

NORTH 
SERVICE, STRENGTH, QUALITY





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Welcome...

...this guide aims to address some of the frequently asked questions about North's Freight, Demurrage and Defence (FD&D) Class; a separate class of insurance providing cover for legal costs and expenses. North has a large team of 'in-house' FD&D lawyers and the service covers a wide range of disputes which are explained in this guide.

FD&D Cover

What does FD&D cover?

FD&D cover provides Members with insurance for legal costs and expenses. It differs from P&I cover in two important respects: firstly it only provides Members with insurance against legal costs and expenses rather than the underlying claims; and secondly it is discretionary. Precisely what is meant by “discretionary” is dealt with on pages 7 to 9 of this guide. Its scope is very wide in that it covers legal costs and expenses incurred in all types of disputes falling outside the scope of P&I, Hull and Machinery, Loss of Hire and some Time Charterers’ Liability for Damage to Hull insurances. Most of the disputes referred to the FD&D team are charterparty disputes, but it also handles a large number of sale and purchase, new building contracts, repair and other disputes.

Are there any limits to FD&D cover?

With some notable exceptions, the cover is unlimited in amount but is subject to the discretion of the Members Board. There are limits on defence cover for disputes relating to new building contracts, MOAs, repair, alteration and conversion contracts. Unless a different limit is agreed with the Member, the limit on disputes arising in connection with these types of contracts will be US\$250,000 in excess of the applicable deductible.

FD&D deductibles

North’s standard FD&D deductible is 25% of all costs and expenses, subject to a minimum of US\$10,000 and a maximum of US\$150,000 per dispute. The standard deductible ensures that all Members cover the same proportion of costs incurred for claims. The minimum deductible of US\$10,000 is also important in that it is often necessary to spend a modest amount in order to assess the merits of, and evidence in support of, a Member’s claim. This goes some way to ensuring that claims of dubious merit are not pursued.

If I want FD&D cover for disputes arising under an MOA or a new building contract, do I have to enter the ship before delivery?

North’s FD&D Rules require Members wanting cover for disputes arising under new building contracts or MOAs to have entered the ship from the date of signing the agreement. Members are granted seven days from that date to submit a copy of the new building contract or purchase agreement to the FD&D Managers for approval.

How do you treat claims which concern other insurances such as P&I?

We will discuss the matter with the Member and the other insurers concerned to determine how the claim should be best handled. It is very rare that there is any disagreement as to the best course of action. Legal costs and expenses from surveyors and experts (for example), which are incurred to settle a claim to the benefit of all insurers, are usually shared pro-rata.



Benefits

of FD&D with North

In-house Service

North has a large in-house team of dedicated lawyers, all of whom specialise in handling disputes falling within the scope of FD&D cover. As most FD&D Class disputes arise under charterparties or other contracts containing London arbitration clauses, the majority of North's "in-house" team are English solicitors or barristers. In addition, North has a policy of employing lawyers from international maritime jurisdictions to ensure that North's FD&D Class Members have access 24 hours a day, seven days a week, to the best team. Unlike most defence insurers, North routinely handles London arbitrations "in-house" without resorting to external lawyers. As a result, Members are often able to pursue or defend claims which otherwise may have been uneconomical to pursue or defend.

Loss Prevention Guidance

Loss Prevention initiatives assist Members with contractual wordings and provide general guidance on how to avoid disputes. North also contributes to the work of the Chamber of Shipping and BIMCO and Intertanko Documentary Committees to revise the existing standard form contracts and to create new contracts and clauses which increase certainty and reduce the scope for unnecessary disputes.

IMB Block Membership – check before fixing

Since 1991, North's Members have had free access to the International Maritime Bureau database (a division of the International Chamber of Commerce – Commercial Crime Services). North can draw on its knowledge of previous disputes and Charterers to help Members avoid fixing ships to Charterers with a poor reputation or those who have been involved in fraudulent activity. In addition, if Members feed back their experience of poor Charterers, it makes it more difficult for unscrupulous companies to fix ships.

Global Legal Navigator

Through North Online, Members can obtain answers to a wide range of commonly asked questions on a variety of legal subjects, provided by leading law firms from nearly all of the maritime jurisdictions. It provides a quick and easy guide to the most frequently asked questions, such as whether a lien can be exercised for unpaid freight.

The Writ Search Facility

Members who are covered for MOA risks are entitled, free of charge, to "writ searches" in Australia, Canada, England, Hong Kong, New Zealand, Singapore and South Africa to check, prior to purchasing a ship, whether any writs have been issued which have yet to be served. In these jurisdictions, if a writ has been issued prior to a second-hand sale (other than a judicial auction), the writ will survive the sale and can be served on the ship. The ship will then be arrested and security must be provided for the claim. This writ search facility has been designed to reduce the risk of Members purchasing ships which turn out to be subject to claims in those jurisdictions relating to the ship's previous ownership.

This popular facility has assisted a number of Members in identifying claims which, when brought to the attention of the Sellers concerned, were resolved. As most shipowning companies are single purpose companies whose sole asset is the ship, once a ship has been sold and the sale proceeds distributed, it is extremely difficult to get the Sellers to honour their obligation under the MOA to indemnify the Buyers in respect of such claims. It is no surprise, therefore, that some Members view the "writ search facility" as an integral part of their management of uninsured risks when purchasing second-hand ships. Members wanting more details about this facility should contact a member of North's FD&D team.

Maritime Lien Insurance for Second Hand Ships

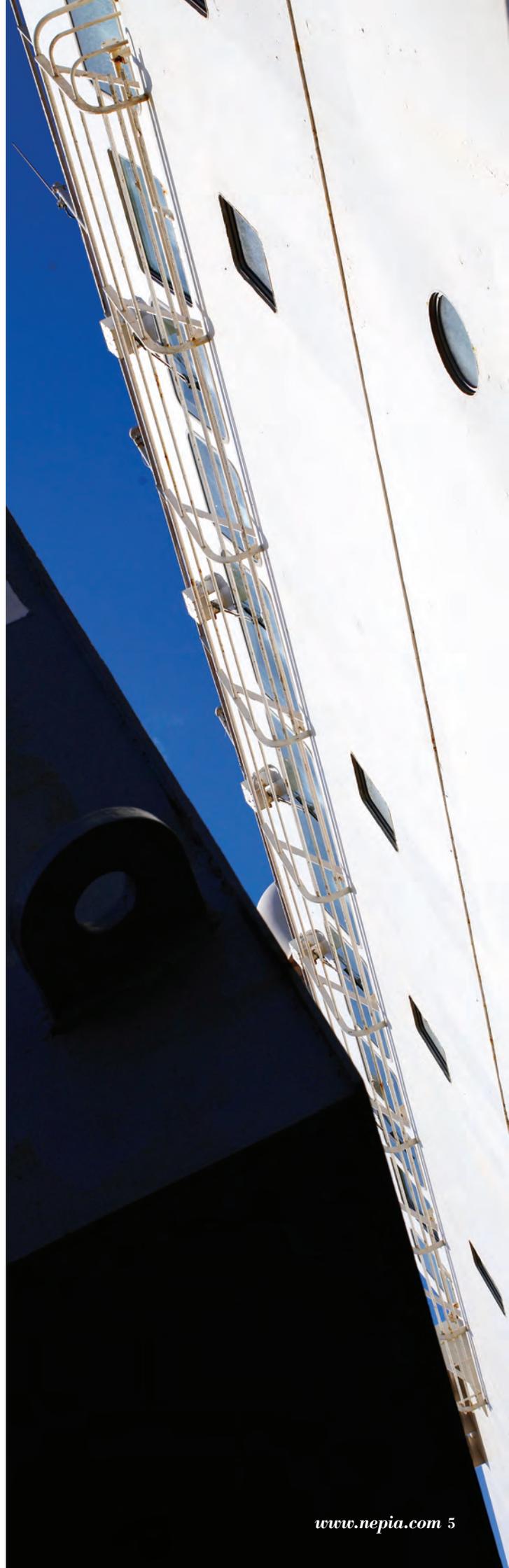
Unfortunately, there are many jurisdictions which grant various categories of claims “maritime lien” status, which is to say that the Claimant has a right against the ship itself which will survive a sale. For example, under United States law, any person furnishing “necessaries” in the United States to a ship, shall have a maritime lien on that ship. “Necessaries” has been interpreted by the US Courts to include repair services, supplies (including bunker supplies), towage, the use of dry-dock facilities, pilotage, stevedoring services and even P&I insurance premiums. In the US, as in many other jurisdictions, it is more or less impossible to find out whether a ship which is being offered for sale is subject to such claims. With this risk in mind, the FD&D team have arranged for an additional insurance for Members who wish to insure against the risk of unforeseen financial losses, as a result of claims relating to previous ownership. This additional cover is only available to North’s FD&D Members who purchase MOA risks insurance and who have carried out “writ searches” as described earlier.

More information about this additional insurance can be found on North’s website www.nepia.com or Members can contact North’s Underwriting or FD&D teams.

Maritime Lien Insurance for Charterers’ Debts

This innovative additional policy was launched in 2002 and has been designed to provide Members with additional protection in the event of claims being made against an insured ship as a result of the insolvency of a Charterer. In addition, the policy will respond to covering the cost of bunkers, port charges, stevedoring costs and any other costs necessary for the completion of the voyage which has been commenced, prior to the insolvency of the Charterer and which would otherwise be the responsibility of the Charterer under the terms of the charterparty.

More information about this additional insurance can be found on North’s website www.nepia.com or Members can contact North’s underwriting or FD&D teams.





Discretion

Should the Club be notified before legal proceedings begin?

North should be notified before you start any legal proceedings or take any steps to incur costs which fall within the scope of the cover. North handles numerous disputes; therefore it may be possible to resolve the dispute in a Member's favour without incurring external expenses. If Members incur legal costs without the prior approval of North, these costs will be reported to the Members Board for the exercise of their discretion. When deciding whether or not to exercise their discretion in the Member's favour, the Members Board will weigh up the interests of the Member concerned against the interests of the membership as a whole.

Who decides which claims have to be reported to the Members Board for the exercise of discretion?

FD&D Class Rules 19 and 26(3) make it clear that FD&D cover is discretionary and only covers costs of enforcing proper claims and defending claims improperly brought in respect of ships entered in the Class. That is to say that a Member will only be entitled to reimbursement of legal or other costs incurred in pursuing or defending claims falling within the scope of defence cover if, in the opinion of the Members Board, such claims were "proper" to pursue or to defend. In practice, the Members Board has delegated a considerable amount of authority to the FD&D Managers to exercise the discretion on their behalf.

What claims are reported to the Members Board in practice?

Essentially the FD&D Managers apply what is referred to as the "prudent uninsured" principle. This can best be explained by the following examples:

NB: Please note, this list is not exhaustive of the circumstances which may lead to a claim being reported to the Members Board.

Doubts as to the merits or evidence in support of a claim

FD&D only covers the costs of proper claims and defending claims improperly brought in respect of an entered ship. If North has serious reservations about the merits of a claim or about the defence of a claim being brought against a Member, then these types of claims will be reported to the Members Board. The decisions taken by the Members Board will be based on the benefits to the membership as a whole. Occasionally, there are also claims where commercially the Member is undoubtedly correct in its assertions, but unfortunately, the evidence was not gathered or retained in order to prove before a court or arbitration tribunal that the Member is right. In these types of cases, it is particularly important that an assessment be made at an early stage as to the prospects of Members being able to succeed. The longer that a claim is allowed to develop and the costs to escalate, the more difficult it is to resolve such disputes.

Liability is clear, but quantum is in dispute

Occasionally, a Member accepts that it has committed a breach of contract, but feels it has been taken advantage of by the opponent who is seeking to recover compensation far exceeding the amount of loss caused by the breach. This type of scenario raises a particular problem because in many jurisdictions, a party who is found liable for breach of contract or in tort, will also be liable to pay a substantial part of the successful party's legal costs and expenses.

Accordingly, it is important to ensure that real attempts are made to settle such claims at a reasonable level. Where it is not possible to achieve a settlement at an early stage, these types of cases are often referred to the Members Board to determine to what extent, if at all, the Member concerned should be entitled to the support of the FD&D Class.

Discretion

Continued

Members disregard recommendations from the Managers

Fortunately, this is a rare occurrence, but there have been a small number of occasions when a Member has been unwilling to follow the team's advice in relation to the gathering of evidence or obtaining security for a claim, for example. In such cases, it is fair that the ultimate decision regarding the level of support for the Member is referred to the Members Board.

Likely costs exceed amount in dispute

If in order to recover US\$10,000 it is necessary to incur US\$20,000 by way of legal costs, that is not something a "prudent uninsured" would do ordinarily. There may be circumstances whereby incurring legal costs which are greater than the amount in dispute can be justified if, for example, the dispute involves a "test case" point of law on which a number of other cases will depend. In such cases, it may well be in the interests of the membership that this point of law is clarified. Very rarely do such issues arise, not least because most claims are referred to London arbitration (which is private and confidential) and therefore there are very few test cases before the Courts which warrant this special treatment.

Sometimes there are instances where it is important to pursue small claims, notwithstanding that it may cost more to do so, because it may discourage the company concerned from making similar uncontractual deductions in the future.

Insufficient checks made prior to fixing

If a Member fixes one of its ships to a Charterer without making proper checks on its financial standing and background, and it transpires that the Charterer is known to fail to honour charterparty commitments, then this type of claim will be brought to the attention of the Members Board for the exercise of discretion. For example, if a check with the IMB's "Check Before Fixing" database would have revealed information which, in the opinion of North, would have led a reasonable Member to think twice about fixing to the company in question, then this is very much the sort of factor which is likely to be taken into account by the Members Board in exercising their discretion.

The IMB "Check Before Fixing" facility assists the membership in avoiding such fixtures and the consequent risk of financial losses. In addition to checking the IMB's database, Members are encouraged to obtain up-to-date references from the owners of other ships fixed by the Charterer, as well as brokers' or bankers' references. If the Charterer is newly established, they should be asked to provide a performance guarantee either from a first class international bank or other reliable security.

If a Member takes an obvious risk knowingly

In circumstances where a Member knowingly takes a risk, and loss or damage occurs as a result, the FD&D team will report to the Members Board to determine what the Member is entitled to. If in the opinion of the Members Board, the Member's conduct was to take a risk knowingly, then this is likely to be taken into account when they exercise their discretion.

Is the Members Board's discretion absolute?

The FD&D Class Rules (Rule 26(3)) provide that *"...the Members Board shall have entire discretion as to what actions, proceedings, defences, matters and things shall be undertaken by this Class or at its cost and expense and they have an unlimited control over every matter that may be undertaken..."*

When exercising its discretion, the Terms of Reference for the Members Board state that it must:

- act in the way it considers, in good faith, to be in the best interests of the Members as a whole;
- act in accordance with the Rules of the relevant Class, and the Articles of Association; and
- only exercise the power or discretion for the purposes for which it has been conferred; and
- exercise independent judgement; and
- exercise reasonable care, skill and diligence.

Does the Members Board give reasons for the exercise of their discretion?

It is the policy of the Members Board that reasons should not be given for the exercise of discretion, other than if the Members Board believe that the agenda note and material before them reveals some apparent dishonest conduct or serious impropriety on behalf of the Member and that the Member ought to be given an opportunity to refute any such imputation. Fortunately, this has never happened.

If a Member is unhappy with the Members Board's exercise of discretion, is there anything that can be done about it?

The "Disputes, Differences and Debt" Rule (Rule 38) of the FD&D Class Rules sets out the procedure to be followed if any difference or dispute arises. This includes disputes arising out of the exercise of discretion by the Members Board. In the first instance, this sort of difference or dispute has to be referred to the Members Board and the Rules provide that such reference *and adjudication shall be on written submissions only*. Thereafter, if the Member concerned is not happy with the decision of the Members Board, it can be referred to arbitration in London.

Conflicts of Interest

What happens if I have a dispute with another Member of North?

Disputes between Members are handled with sensitivity. The FD&D team adheres to strict guidelines governing what is termed “conflicts of interest”. There are a number of circumstances in which “conflicts of interest” arise:

1. Disputes arising between two Members of the FD&D Class – between two Owners (as a result of a collision or MOA dispute) or between an Owner and a Charterer Member, for example.
2. Where two Members of the FD&D Class are pursuing a common (solvent) debtor.
3. Where a Member of the FD&D Class is in dispute with a Member of the P&I Class who does not have FD&D cover with North.

These guidelines set out procedures for:

- (a) Identifying and recording such conflict cases as soon as they arise;
- (b) Ensuring that adequate notification of the conflict of interests is given to the Member(s) concerned and giving both of the Members the option of instructing external lawyers to represent their interests;
- (c) Ensuring a physical separation between lawyers dealing with the dispute in-house;
- (d) Reporting the respective claims to different members of Management; and
- (e) Ensuring confidentiality of information obtained in the course of dealing with a dispute for each Member.

For the purpose of dealing with conflict of interest disputes, the involvement of senior management is restricted solely to the determination of issues on cover and they are not involved in the actual claims handling, legal strategy or legal advice given in relation to the claim. Where appropriate, and when both Members agree, one of North’s senior managers may act as a mediator to assist the Members in resolving their dispute.

NB: Please note, in point (b), Members are given the opportunity to instruct external lawyers as soon as they are notified that a “conflict of interest” situation has developed. More often than not, when the “conflict of interest” procedures are explained to the Members, they request that the matter continues to be handled “in-house”. Every effort is made to ensure that the trust of Members is not misplaced.





Costs

As a Member, can I appoint lawyers of my own choice?

Lawyers can be appointed and retained either by the Member or by North on the Member's behalf, in relation to legal steps or other proceedings. These may either be lawyers in private practice or lawyers employed "in-house" by North. Before lawyers are retained on behalf of the Member, the team will discuss the matter with the Member in order to agree upon an appointment.

Does North put up security for costs?

If Members are liable to an opponent to provide security for costs in relation to a claim which falls within the scope of FD&D cover and which the FD&D team is supporting, then the Managers have discretion to provide security for costs on behalf of the Member. Naturally, this discretion will only be exercised in the Member's favour if the Member concerned is fully up to date with payment of premium and other amounts due, and providing the Managers are confident that the claim is meritorious and deserves the support of the FD&D Class. More often than not, Opponents are more than happy to accept security from North in the form of a Club Letter of Undertaking as security for costs.

As a Member, am I at a disadvantage if my FD&D claim is handled "in-house", as the opponents will not be at risk of having to pay the high costs of my external lawyers?

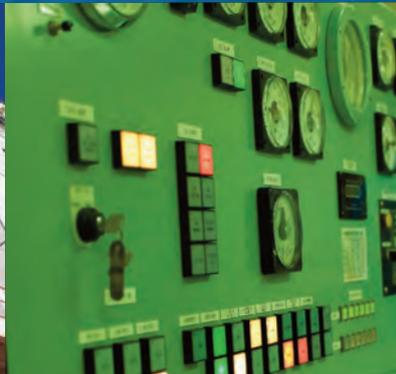
North's FD&D Class Rules have been drafted in such a way that Members whose claims are handled "in-house" are not at a disadvantage, as the opponents are indeed at risk of having to pay their "in-house" costs. The proviso to Rule 26(2) of the FD&D Class Rules reads as follows:

"PROVIDED ALWAYS THAT where legal steps or other proceedings have been, are, or will be undertaken on behalf of the Member by lawyers employed by the Association the Members Board may, at any time and in their entire discretion, whether prospectively or retrospectively, require the Member to pay the Association for such legal services (whenever such services have been, are or will be rendered) and the Member shall be under a liability to the Association in respect of the same. The amount payable shall be determined by the Managers of the Association at the conclusion of the legal steps or other proceedings. If any difference or dispute shall arise between the Member and the Association as to the reasonableness of the amount payable as determined by the Managers, such difference or dispute shall, in the first instance, be referred to an independent legal costs draughtsman to be appointed by the Association who will rule upon such dispute or difference, and determine the extent (if any) to which the amount for which the Member is liable is to be reduced. Such reference and determination shall be on written submissions only."

North's entitlement to make the recoveries for legal costs on behalf of the Member, when the Member has been successful in London arbitrations, has been upheld in a large number of arbitrations.



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