

COLLISION LIABILITY – THE BOUNDARY BETWEEN H&M AND P&I COVER

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BAHR

Collision cover

- Traditional collision cover:
 - Hull & Machinery (H&M) – the Nordic Plan Chapter 13
 - 4/4^{ths} up to sum insured
 - Certain collision liabilities exempted
 - Protection & Indemnity (P&I)
 - Collision liability exceeding amount recoverable under H&M policy
 - Collision liabilities exempted under H&M policy, covered by P&I
- Common variation:
 - P&I – Running Down Clause (RDC)
 - Collision liability typically covered under H&M, covered in whole or part by P&I
- The question of the “boundary” is primarily a question of the scope of the H&M collision cover

The Nordic Marine Insurance Plan of 2013

Version 2023 Based on the Norwegian Marine Insurance Plan of 1996, Version 2010

IGP&I International Group of P&I Clubs

Why is the boundary important?

- Primarily of interest to the insurers
- Important with a clear-cut division between H&M and P&I:
 - Large and complex casualties
 - Often unclear factual circumstances in the early stages
 - Need for proactive claims handling
 - Who is to handle and defend claims, cover costs etc.

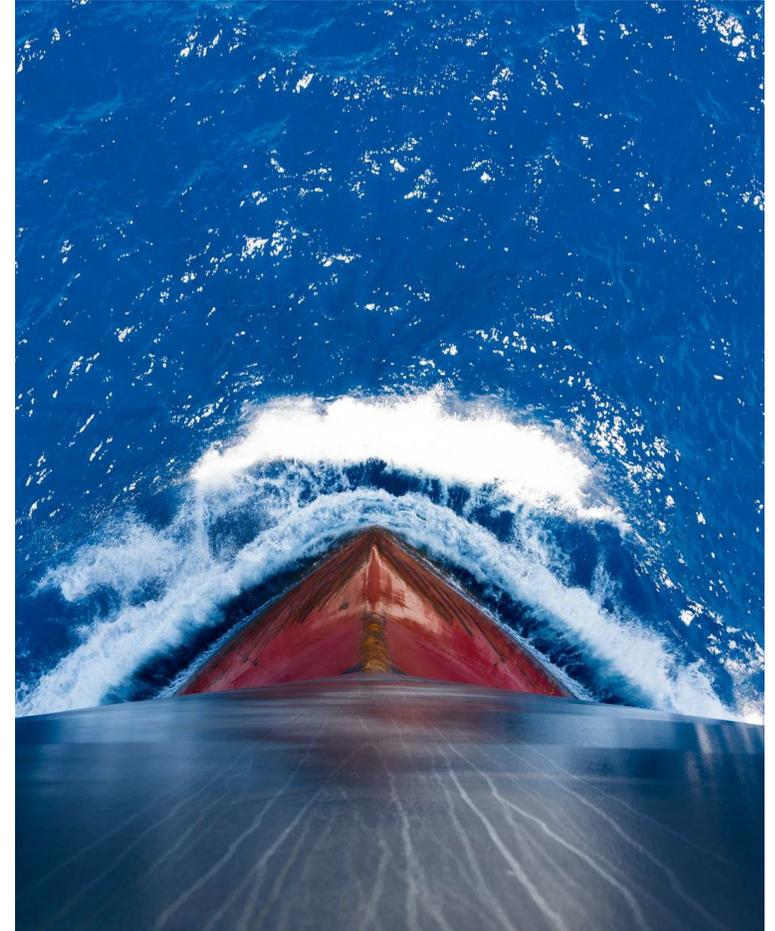


Collision cover under the Nordic Plan

- Why cover collision *liabilities* under an H&M policy?
 - Tradition
 - Practical in mutual damage scenarios
- The starting point for cover:
 - Clause 13-1(1):

The insurer will indemnify the assured for loss which is a result of liability imposed on the assured due to collision or striking by the vessel, its accessories, equipment or cargo, or by a tug used by the vessel.

1. *“loss which is a result of liability imposed on the assured”*
2. *“due to collision or striking”*
3. *“by the vessel, its accessories, equipment or cargo, or by a tug used by the vessel”*

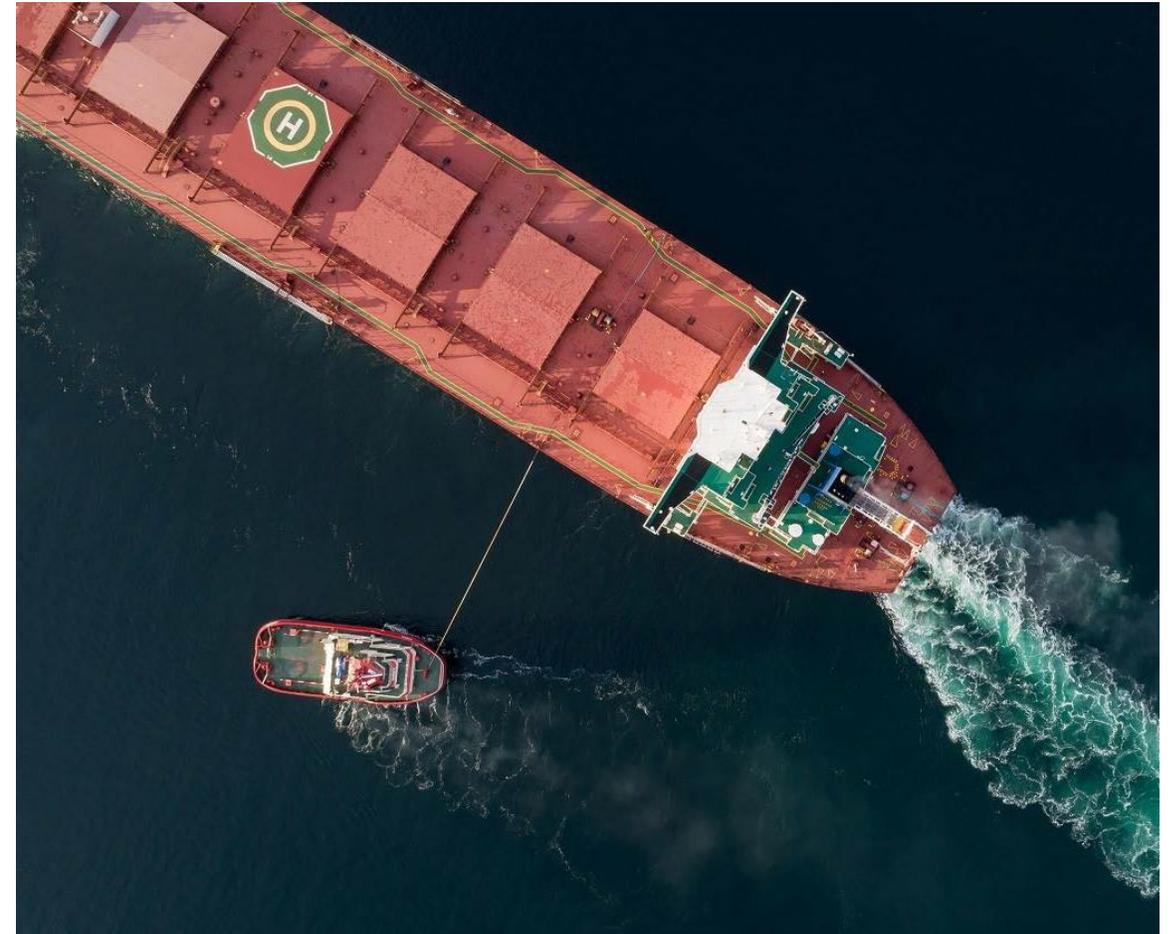


Collision cover under the Nordic Plan (cont.)

1. *“loss which is a result of liability imposed on the assured”*
 - Liability – covers legal liability based on fault, strict liability or liability pursuant to agreement
 - Causation – “result” includes indirect and consequential damages provided that the assured is held legally liable for such damages

2. *“due to collision or striking”*
 - “Collision” and “striking” (one and the same)
 - Presupposes physical contact
 - Pulling (without physical contact), waves and backwash not covered

3. *“by the vessel, its accessories, equipment or cargo, or by a tug used by the vessel”*
 - “accessories” covers everything on board the vessel (irrespective of ownership)
 - “equipment” covers equipment trailing the vessel (e.g. seismic cables)
 - Must be caused by the movement of the vessel, not independent movement of accessories etc.



The exceptions to cover under Clause 13-1

- Clause 13-1 (2) – the exceptions:
 - a) Towing
 - b) Personal injury or loss of life
 - c) Other loss suffered by passengers and crew
 - d) Damage or loss of cargo, other effects or equipment
 - e) Liability to charterers or others with an interest in the insured vessel
 - f) Pollution damage etc.
 - g) Loss caused by cargo or bunkers after grounding or striking against ice
 - h) Loss caused by vessel's use of anchor, mooring and towing gear, loading and discharging appliances, gangways and the like, and liability damage to or loss of these objects**
 - i) Wreck removal

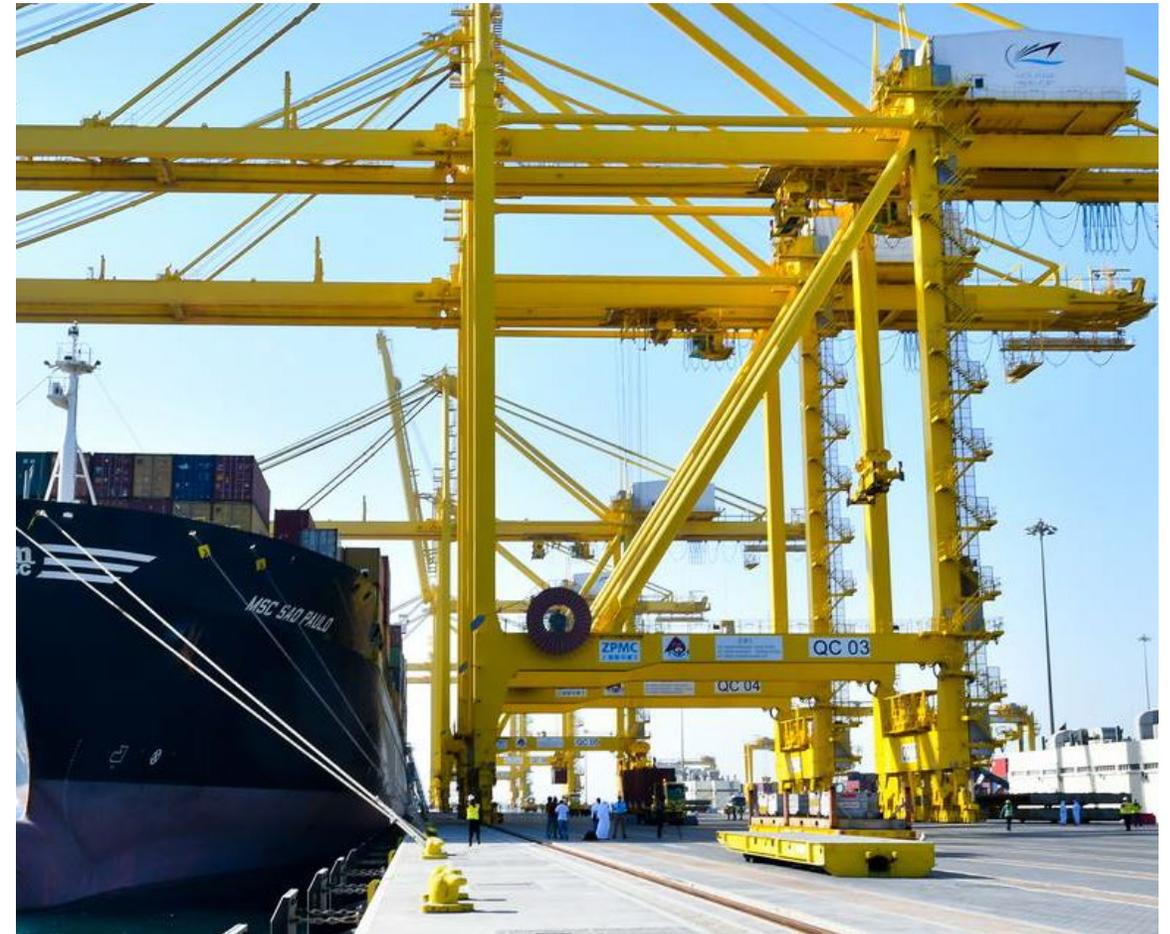


The main difficulty

- Clause 13-1(2)(h)

Loss caused by the vessel's use of anchor, mooring and towing gear, loading and discharging appliances, gangways and the like, and liability for damage to or loss of these objects

- Meant to draw a line between damages caused by the ships own movement (which are for H&M) vs. those where letter h-objects cause damage "on their own" (which are for P&I)
- Based on arbitration practice, the exception is typical of importance in relation to shoreside cranes damaged during cargo operations



An exception in two parts

- Two parts:
 - i. Loss caused by the vessel's use of anchor, mooring and towing gear, loading and discharging appliances, gangways and the like,*
 - ii. and liability for damage to or loss of these objects.*
- Two questions:
 1. In terms of part (ii); does the proviso "loss caused by the vessel's use of" in part (i) also apply?
 2. What is the causative threshold for a loss to be "caused by" the vessel's use of these objects?
- Considered in four arbitration awards



Does the proviso “*loss caused by the vessel’s use of*” also apply to part (ii)?

1. ND 1976.263 MOSPRINCE/BIAKH-arbitration (sole arbitrator, Brækhus)
 - Joint arbitration of two separate cases both concerning the understanding of (the 1964-version of) clause 13-1(2)(h)
 - MOSPRINCE:
 - The vessel approached the quay with its anchors lowered a few feet over the water
 - When attempting to drop portside anchor, the anchor got stuck, causing the vessel to collide with the quay
 - The (lowered) starboard anchor pushed the fender on the adjacent dolphin upwards so that the fender could not absorb the impact, causing the vessel to collide directly with the quay and dolphin and cause substantial damage
 - BIAKH:
 - During loading the vessel was ordered to move 5-6 meters forward
 - The loading arm of the gantry crane was lowered over the vessel and was to be moved alongside in parallel with the vessel
 - During the move one of the loading arms stopped, causing the vessel to strike and damage the loading arm



Does the proviso “*loss caused by the vessel’s use of*” also apply to part (ii)?

- MOSPRINCE primarily concerns part (i) of the exclusion and not part (ii) concerning damage to the object itself
 - However, provides guidance on when objects are in “*the vessel’s use*”:
 - The object must be in use for its intended purpose
 - The object is ‘in use’ from the time preparations for use commences and until the use is completed
 - Also referred to in the Commentary to the Plan
- The BIAKH concerned whether the “*vessel’s use*” requirement in part (i) of the exclusion also applies to part (ii), i.e. damage to the objects themselves
 - Upon analysis of the Commentary to the (1964) Plan, the arbitrator concluded that the intention was for the “*vessel’s use*” requirement in part (i) to apply similarly to part (ii)
 - Damage to the gantry crane for P&I



Does the “caused by” requirement apply to damage to the objects themselves?

- Two recent arbitrations considered whether the causation requirement in part (i) also applies to part (ii):
 - Largely similar facts
- Award (2021) – sole arbitrator, S.O. Johansson:
 - Container vessel
 - Cargo operations using two (shoreside) gantry cranes
 - Freak weather occurrence; strong winds causing the vessel's mooring lines to break, causing the vessel to move away from berth
 - As the vessel broke away two gantry cranes were damaged (the exact order of events being unclear)
 - H&M policy subject to Swedish law



Does the “caused by” requirement apply to damage to the objects themselves?

- Award (2021) (cont.):
 - The Commentary to the Plan considers part (i) and (ii) separately and does not discuss causal connection in relation to part (ii)
 - May suggest that there is no requirement of causal connection in terms of part (ii)
 - However, no indication of any conscious intention to disregard causation in relation to part (ii)
 - Importantly, relying on the BIAKH, the arbitrator considered that once the arbitrator in the BIAKH had applied the “vessel’s use” requirement to part (ii) the arbitrator must also have considered that the causation requirement applies to part (ii)
 - Rejected H&M insurers’ argument that market practice is that causation is not applied to damage to the objects themselves because of the need for a clear-cut principle for division of liability



Does the “caused by” requirement apply to damage to the objects themselves? (cont.)

- Lastly, the most sensible and reasonable understanding of the regulation would be that both parts of the exclusion are understood in a similar way and referred to the same insurer
- Conclusion: the “caused by” requirement also applies to part (ii)
- APL CHANGI (2022) – arbitrators Wilhelmsen (chair), Bull and Tørum:
 - Container vessel
 - Cargo operations in Tangier using six (shoreside) gantry cranes
 - Sudden wind caused mooring lines to break, the loading arm of one crane (not holding cargo) was lowered over the vessel and struck the bridge as the vessel moved, causing damage to the crane
 - Two other cranes were attached to containers on board and were pulled by the vessel and damaged (for which P&I accepted cover)
 - The arbitration was solely focused on the first crane (not holding cargo)



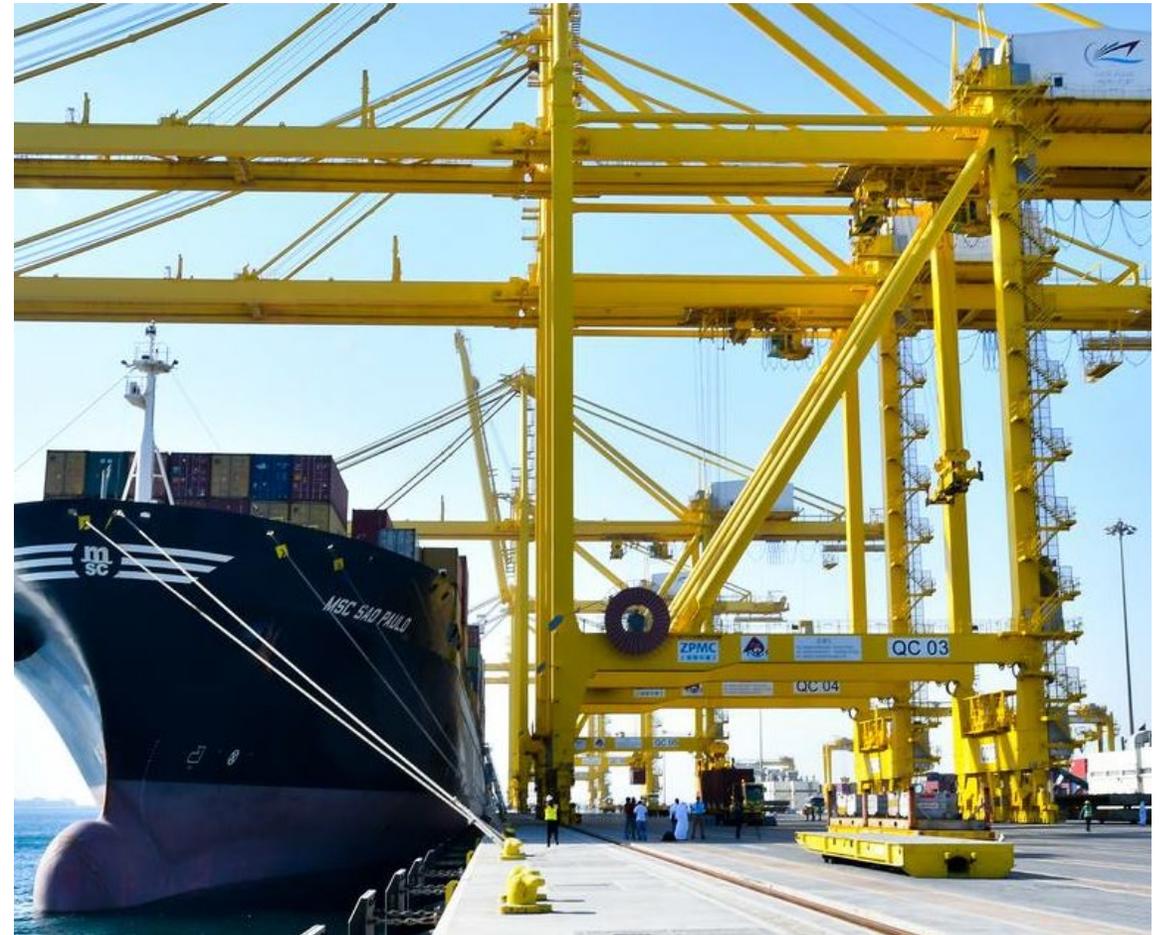
Does the “caused by” requirement apply to damage to the objects themselves?

- APL CHANGI (2022) (cont.):
 - Largely similar reasoning to the arbitrator in the Swedish award
 - Nothing in the wording of the clause nor the Commentary to suggest that the causation requirement does not apply to part (ii)
 - Rejected H&M insurers' argument that the need for a clear-cut principle means that the causation requirement does not apply where the objects themselves are damaged
 - Emphasis also placed on the arbitrator in the BIAKH clearly presupposing that the causation requirement also applies to part (ii)



What is the causative threshold for a loss to be “caused by”?

- APL CHANGI (2022):
 - Parties in agreement that “caused by” means that the “vessel’s use of” the object is a *necessary condition* for the loss to have occurred
 - Disagreement however:
 - Must the object be an “active”/contributing cause of the loss; or
 - Sufficient with “passive” involvement (i.e. the object’s mere presence)?
 - The arbitral tribunal:
 - The earlier Norwegian wording of the clause (*‘voldt ved’*) suggests passive involvement is sufficient
 - The causation examples in the Commentary may suggest active involvement, but relates to part (i) (so not decisive)
 - The BIAKH case concerns part (ii) and is relied upon in the Commentary since 1996, accordingly must be attributed substantial weight
 - Passive involvement provides for the most consistent and practical solution
 - Conclusion: there is no need to show that the object was an “active” cause of the loss for the exception to apply



What is the causative threshold for a loss to be “caused by”?

- Award (2021)
 - Does not consider the threshold in the same detail as in APL CHANGI
 - However, relying on the BIAKH in a similar manner as in APL CHANGI:
 - Whilst the Commentary sets as a condition that the damage is only caused by the use when the striking was caused by or transmitted via the objects, this condition was discarded in the BIAKH in relation to damage to the objects themselves
 - As such, the BIAKH does not fully meet the conditions in the Commentary, but has still been cited with approval in the Commentary since the Plan of 1996
 - Highlights that there is uncertainty and need for clarification on this point
 - Clarification best achieved through a revision of the Plan/Commentary



Summary – Clause 13-1(2)(h)

- The exception applies:
 - When the “*anchor, mooring and towing gear, loading and discharging appliances, gangways and the like*” are in use for their intended purpose;
 - The objects are in use from the time preparations for use commences and until the use is completed;
 - The use of the objects causes loss
 - Use and causation must also be established when letter (h)-objects themselves are damaged
 - Causation established by the use of the objects being a necessary condition for the loss, but not necessary to show that it is a active/contributory cause
- APL CHANGI will likely be included in future versions of the Commentary
- Consequently; damage to letter (h)-objects will in most cases be covered by P&I insurers

