



# Insurers' liability for mitigation costs under Norwegian law



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*Over the coming months, DLA Piper Norway's insurance team will (every other month) publish a series of briefings on the most relevant provisions of the ICA which foreign insurers should be aware of. Learn more [here](#).*

As discussed in our last briefing, the Norwegian Insurance Contracts Act (the "**ICA**") is of mandatory application to most Norwegian non-marine insurance contracts and can only be contracted out of in limited circumstances. This means that foreign insurers writing risks in Norway need to be aware of some unfamiliar provisions of Norwegian insurance law that could affect their assessment of risks in Norway. One such provision is section 6-4 of the ICA which requires an insurer to pay for an insured's mitigation or "salvage" costs (Norw. *redningsomkostninger*) incurred in preventing or limiting an insured loss. Importantly, the assessment of mitigation costs will be based on ordinary tort law principles and an insurer's liability for these costs will not be limited by the deductible or the agreed limits in the policy. A further possible consequence of section 6-4 is that an insured may be entitled to indemnification of mitigation costs which themselves might not be covered under the policy, or for which there is only limited cover.

Of course, section 6-4 is meant to incentivise the insured to prevent and limit covered claims and an insured has a duty to mitigate a loss that is covered under the insurance policy. As a result, an insured is probably unlikely to be awarded mitigation costs that exceed the policy indemnity available for the insured loss it is seeking to mitigate. However, as discussed in this briefing, there may be situations where an insured's mitigation efforts fail to prevent the insured loss and the costs of mitigation are awarded in excess of the sum insured.

To balance the interests between insurers and insureds, any claim for mitigation costs will be subject to the following cumulative conditions:

1. the insurance event must have been imminent or have already occurred;
2. the measures taken must have been intended to prevent or limit a covered loss; and
3. the measures must have been "of an extraordinary nature" and must have been justifiable.

### **Limiting or preventing a covered loss**

The insured is only entitled to costs which are incurred to limit or prevent a loss that is covered under the policy. If mitigation costs are incurred to prevent both insured and uninsured losses, the insured may only claim that proportion of costs which relates to covered losses. Also, if insurers have already paid the full insurance indemnity, the insured cannot claim further mitigation costs even if these were incurred in an attempt to continue limiting the insured's loss. This is because these costs would no longer be incurred to prevent or limit a covered loss as the limit of indemnity has been exhausted. However, it is not a precondition to insurer's liability for mitigation costs that an insured's mitigation measures have been successful. Therefore, if the measures were conducted before the limit of indemnity was exhausted, the insured could be entitled to costs over and above the policy limits even if the measures were ineffective.

### **The insurance event must have been imminent and the mitigating measure must have been "of an extraordinary nature"**

If the insured has incurred costs in preventing an insurance event, these would only be coverable if the insurance event was "imminent". In practice, these two requirements normally merge into one another: a measure will normally only be extraordinary if the risk of an insurance event is imminent. This means that ordinary maintenance and safeguards to prevent an insured loss will not be deemed mitigation costs in the sense of section 6-4 of the ICA.

Whether a measure can be considered "extraordinary" or not must be considered in light of the specific risk insured. If the imminent risk of an insured loss is normal and foreseeable, costs incurred in preventing that risk will not normally be covered as mitigation costs. This can be illustrated by the Norwegian Supreme Court's decision in Rt-1925-513 where costs in the form of damage to a car engine by the driver slamming on his brakes to avoid running over a child, were not deemed to be mitigation costs. The risk of running over a person was deemed to be an ordinary risk associated with driving. The driver slamming on his brakes was therefore not of an extraordinary nature.

### **The measures must have been justifiable to prevent or mitigate a covered loss**

Whether a measure is justifiable will be considered by reference to both the costs of the measure and its potential effect - including its probability of success. For example, if the measure incurred a cost of NOK 10 million but only had the potential to save the insurer NOK 1 million, this would clearly not be justifiable. Having said that, whether a mitigation measure is justifiable or not will be looked at from the insured's perspective and in light of the circumstances at the time. Arguments by insurers in hindsight that measures were not justifiable will carry less weight.

### **An insurer's liability is not limited to costs incurred by the insured**

Finally, insurers should note that a third party who has incurred mitigation costs in preventing or limiting a coverable claim may also be entitled to cover for these costs either because the insured has reimbursed the third party or because the third party has brought a direct claim against the insured's liability insurers. As we will come back to in a later briefing, Norwegian insurance contract law allows an injured third party to make a direct claim for compensation against an insured tortfeasor's liability insurer.

### **Uncertainty where mitigation costs are expressly covered**

The rules on mitigation costs in Norwegian insurance law are fairly complicated and there is little case law for guidance. It remains to be seen how a Norwegian court will balance the availability under section 6-4 of the ICA of potentially unlimited cover for mitigation costs against a situation where these costs are expressly covered but subject to agreed limits. This may be the case in certain products where mitigation costs cover is increasingly being offered (e.g. Financial Institutions Professional Indemnity policies) or even in cyber insurance where so-called "breach response cover" is available for costs in limiting or preventing losses arising from a cyber attack. There is a risk that unless the parties agree to contract out of section 6-4, which can only be done in limited circumstances (as discussed in our previous briefing), insurers may face liability for mitigation costs that were extraordinary and justifiable irrespective of the policy limits on such costs.

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