

# Anti-avoidance endorsement (AAE)

An AAE is an extension of existing cover (for adverse costs only). It ensures that the insurer cannot avoid or cancel the policy and will always pay claims up to the limit of indemnity. The motivation for purchasing this type of cover is to avoid paying money into court when the defendant is seeking security for costs. Security for costs orders can frustrate the pursuit of even the most meritorious commercial disputes as defendants seek to stifle claims by insisting on the payment of security into court that can tie up the claimant's capital. Forcing the claimant to pay money into court:

1. Could put them under financial pressure
2. Reduces the return on capital

An AAE enables the claimant to satisfy the defendant and the court that adverse costs will be paid in the event of an unsuccessful outcome. It is a more cost-effective way of providing the required security, as the premium payable would be approximately 10% of the value of the requested security. In circumstances where an insurance policy is deemed to be inadequate security, Harbour Underwriting can advise on alternatives to satisfy an order for security for costs, such as a deed of indemnity, which has been accepted as adequate security for costs in a number of common law jurisdictions.

## Case Study

The liquidator of an avionics company sought damages from its former auditors for professional negligence.

### What happened?

The challenge for the joint liquidators was that any action would be heavily defended by the auditors and their professional indemnity insurers. Harbour Underwriting provided an adverse costs policy to the liquidators. As is common to discourage claims from being made, the defendant applied for and received a security for costs order requiring the liquidator to pay a significant sum into court to cover the defendant's costs should the claimant lose. The order was for a sum significantly in excess of the limit of indemnity under the policy, putting the liquidators under financial pressure to top up the existing adverse costs policy. At the same time, the defendant made a 'low ball' offer to settle the action. If the liquidators could not address the security for costs ordered, then they would have no choice but to accept the low offer.

Harbour Underwriting agreed to more than double the limit of indemnity. In addition, we agreed to provide an anti-avoidance endorsement such that the liquidators would not need to pay the substantial security for costs into court. Instead, they paid a fraction of that by way of the anti-avoidance premium, thus overcoming the defendant's attempt to stifle the claim.

### Outcome

Once security for costs had been provided, the defendant had no choice but to focus on the merits of the claim, and eventually agreed to a mediation. At the mediation, the action was settled when the defendant offered to pay a sum which was 20 times higher than the original 'low ball' offer.

### Summary

Harbour Underwriting is experienced in providing solutions to address security for costs, and provides this security by way of an anti-avoidance endorsement and/or a deed of indemnity, which have been accepted by both opponents and courts over the years as an alternative to paying much larger amounts into court.