Standard Bulletin

March 2015

The Standard
for service and security

The Standard

John Reily
Director of Underwriting
+44 20 3320 8838
john.reily@ctplc.com

In this edition

2	Sulphur reduction – MARPOL Annex VI: the club's perspective
5	Synopsis of the new Wreck Removal Convention
8	Bauxite cargo liquefaction risk revisited
9	Environmental liabilities: a question of motive
11	Navigating the complex maze of sanctions
13	French supreme court upholds jurisdiction clause
14	LNG as fuel
16	Focus on FFO matters: sub-sea cables
18	Staff spotlight

Insured tonnage at the start of the 2015–16 policy year is 135m gt, representing a 3% increase over the policy year.

The Standard Club's February 2015 renewal

The club has concluded its P&I renewal for the 2015–16 policy year; it delivered its strategy as planned and has met its financial targets.

As a result, the managers are projecting, at this early stage, a breakeven result for the 2015–16 policy year. The club remains in a strong financial position which compares very favourably with other clubs in the International Group.

The club announced a 'two tier' strategy this year, in which members with a good risk profile and record would only be asked to contribute a 5% increase towards claims inflation, but that the minority of members bringing risk or cost that are out of line with their premiums would be asked to contribute more. In addition, the club announced that it would apply members' deductibles to fees and other expenses.

The club renewed the vast majority of its members and eight new members joined the club. A significant number of members increased their entry, both at 20 February and in committing tonnage as their ships are delivered during the year. As expected, the club decided not to offer renewal terms to a small number of members who did not meet the club's quality and rating criteria. Consequently, tonnage declined by a small amount (around 3mgt) at renewal. The club anticipates that its tonnage growth during the 2015-16 policy year will more than offset this reduction.

The club's London Class, which writes European coastal and inland waterway business, had another successful renewal, having announced a nil general increase. It renewed the majority of its members and added a small amount of new business. Likewise, the defence and war classes had successful renewals.

The club continues to have one of the best reinsurance facilities for business that cannot be pooled with the other International Group clubs, offering limits of up to $1bn. The club has also further developed its fixed premium facility, also now offering limits of up to $1bn.

The club has an ongoing focus on underwriting discipline, risk assessment and loss prevention, and on providing highly effective claims handling and high levels of technical advice. These efforts have all contributed to the club's underwriting performance. Following an improvement in claims in the second half of the 2014–15 financial year, the managers expect an underwriting result that is close to breakeven. Notwithstanding volatile investment conditions, a conservative investment policy and the club's investment in The Standard Syndicate at Lloyd's, the club's free reserves at 20 February 2015 are expected to have slightly increased over the previous financial year. The Standard Club is A rated by S&P.

Sulphur reduction – MARPOL Annex VI: the club's perspective

Olivia Furmston
Legal Director
+44 20 3320 8858
olivia.furmston@ctplc.com

Industry Experts:

Duncan Howard
Claims Operations Director
+44 20 3320 8946
duncan.howard@ctplc.com

Rebecca Hamra
Senior Claims Executive
+1 646 753 9022
rebecca.hamra@ctplc.com

As of 1 January 2015, ships are required to use fuel oil with a sulphur content of no more than 0.10% within designated emission control areas and no more than 3.5% outside of them.

This isn't really 'news'. After all, the shipping industry has been preparing for these stricter rules under MARPOL Annex VI since October 2008, when the International Maritime Organization (IMO) adopted amendments to the MARPOL Convention. Furthermore, since June 2014, all EU member states have been expected to implement Directive 2012/33/EU to bring European air pollution laws in line with MARPOL Annex VI.

However, it has been, and to some extent remains, an open question as to how the United States, the EU and individual maritime states will handle enforcement of MARPOL Annex VI.

MARPOL Annex VI

The Emission Control Areas (ECAs) are defined in the Annexes of MARPOL. They include the European waters of the Baltic Sea and the North Sea, as well as the North American and Canadian coastlines and the US Caribbean Sea.

Regulation 14 of Annex VI provides the limit values and the means to comply with them. Any ship that operates both outside and inside ECAs should operate on different fuel oils in order to comply with the respective limits. This means that, before entry into an ECA, the ship must change over to ECA-compliant fuel oil. Each ship in this position has to carry written procedures including instructions for:

- recording quantities of the ECA compliant fuel oils on board;
- recording the date, time and position of the ship when either completing the changeover prior to entry or commencing changeover after exit from an ECA;
- entries to be made in a logbook as prescribed by the ship's flag state (in the absence of such prescription, entries can be made in the ship's Annex I Oil Record Book);
- maintaining bunker delivery notes on board the ship for a period of three years from the date the fuel was delivered; and
- maintaining a sealed bunker sample on board, for a period of 12 months after delivery.

The first level of control under Regulation 14 is the actual sulphur content of the bunkered fuel oil. The value should be stated by the fuel supplier on the bunker delivery note and tested where necessary. The second level of control is the ship's crew, who must ensure ECA compliant fuel oils are kept separately in segregated bunker tanks and are not mixed with other oils with higher sulphur content during transfer operations.

There are several restrictions placed on the filing of a FONAR. The FONAR must be submitted to the EPA at least 96 hours before the ship enters the ECA. The FONAR must include a record of all actions taken in an attempt to achieve compliance and evidence that the ship used its 'best efforts' to obtain compliant fuel. Although the EPA encourages voluntary disclosures, it states that "the filing of a [FONAR] does not mean your ship is deemed to be in compliance...". It should also be noted that cost is not a valid justification for not using compliant fuel.

If this is not possible, the ship may use any equally effective "fitting, material, appliance or apparatus or other procedure, alternative fuel oil, or compliance methods" in terms of emissions reduction, if approved by the enforcing agency (often flag state) which is a party to MARPOL Annex VI.

Compliance and documentation requirements

Annex VI, Regulation 14 does allow national administrations to approve different means of compliance, so long as they are at least as effective as the means prescribed in Regulation 14. These must be approved by the appropriate administration under IMO guidelines. Once an initial or renewal survey has taken place, and compliance with Annex VI has been verified, an International Air Pollution Prevention Certificate will be awarded to every ship over 400gt. This is subject to the ship being registered under a flag state signatory to the MARPOL Convention.

Enforcement in the EU

In line with EU Sulphur Directive 2012/33/EU, member states are required to implement "effective, proportionate and dissuasive" penalties for violating the sulphur provisions. It is anticipated that in most EU member states, the violation of the Directive's laws will result in fines. The level of these fines is currently unknown and is likely to vary between member states.

Enforcement in the USA

On 16 January 2015, the US Environmental Protection Agency (EPA) released a penalty policy for violations of MARPOL Annex VI, in respect of ships operating in the North American and US Caribbean Sea ECAs.

In the United States, the US Coast Guard (USCG) and the EPA have the authority to investigate potential MARPOL violations. If a ship is not able to comply with the new sulphur emissions limit, while transiting the North American ECA, the EPA has advised that a Fuel Oil Non-Availability Report (FONAR) must be filed.

The newly released penalty policy applies to violations under MARPOL Annex VI. According to the EPA memorandum, the EPA may impose a civil penalty of $25,000 per violation. The duties (as per above) of burning compliant fuel, maintaining written procedures, recording the fuel changeover in the log book, and retaining bunker delivery notes and samples of the fuel oil are all considered separate obligations and, thus, separate violations if breached. Crucially, each day a violation continues, a separate penalty of $25,000 is levied.

The policy letter sets forth the EPA's methodology for how violations will be reviewed and evaluated, describing the agency's plans to deter through penalties that remove the economic benefit of non-compliance and discussing the adjustment (i.e. mitigating) factors that will be taken into consideration to obtain a fair and equitable penalty. For example, the USCG and the EPA, when assessing the level of any fine or penalty, will be likely to look at the following circumstances:

1. The economic benefit obtained, through breach of MARPOL Annex VI;
2. The gravity of the non-compliance, for actual sulphur fuel violations and record-keeping violations;
3. The degree of wilfulness (or recklessness) or negligence;
4. The owner or operator's history of cooperation or non-compliance;
5. The perpetrator's ability to pay.

As previously reported, there are a variety of legal considerations and contractual allocations of risks that should be examined in the context of the sulphur emissions standards. Members are reminded that, aside from the civil penalties discussed above, non-compliance with the sulphur emissions standards can lead to increased

Members are reminded that club cover for fines arising from breaches of MARPOL, including Annex VI, is strictly discretionary and, given the well-known enforcement practices of the USA authorities especially, the huge penalties and the absolute requirement to have effective shore-side and on-board management systems, members should not expect the board to approve reimbursements of such liabilities, save in the most exceptional circumstances.

inspections/targeting by authorities, ship delays, business reputation issues and criminal penalties.

It should also be noted that the USA government will proceed against the owner, at least initially, regardless of the contractual relationship between owner and charterer. Thus, even if the charterer is responsible for arranging and purchasing bunkers under the charterparty, the owner may still face a liability for non-compliance under MARPOL. Such considerations should be at the forefront of an owner's mind, especially when entering into new time charter business.

The methodologies and goals of the EPA, which are set out in its policy letter, follow the structure of previous EPA policy letters on civil penalties under different Annexes to MARPOL.

Club cover

Shipowners and operators should already be well aware that environmental offences have a high profile and many authorities have punished MARPOL Annex I violations with harsh penalties. At present, there is no reason to believe that the EPA and USCG will take a more lenient view when it comes to Annex VI. The recent EPA penalty notice certainly indicates that the United States authorities intend to take the new regulations for low sulphur emissions very seriously.

Indeed, the club has seen a general increase, not only in the *number* of fines for MARPOL violations (largely under Annex I), but also the *level* of fines. This is especially so in the USA, where numerous Annex I fines have run into the multi-millions. In some cases, the perpetrators have even been imprisoned, including not only officers and crew directly responsible for the MARPOL violation, but also senior managers of the company.

In relation to MARPOL Annex I, often it is not the act of pollution itself that has been prosecuted, but instead the false entries made in oil record books, log books, and the false statements made by crew. Of course, an owner or operator could blame such conduct on laziness or the wilful misconduct of crew who have acted in contravention of written procedures laid down in their company rulebook. However, it is not enough for there merely to be procedures. Instead, the core culture of the company needs to give MARPOL prime importance.

The 2007 Standard Bulletin provided an outline of MARPOL best practice. This has been summarised and updated in more recent publications, the most recent being our ***Standard Safety in 2014*** where the club highlighted the need for owners and operators to ensure they have a company culture of 'zero pollution', promoted by the company CEO and senior management.

The club will continue to issue up-to-date articles and publications on MARPOL (and all its Annexes) for its members, including commentary on legal as well as safety and loss implications.

The law in this area is ever changing and The Standard Club is always on hand to assist. If a member has any questions in relation to this article, they should not hesitate to contact the author, experts or their usual club contact.

Synopsis of the new Wreck Removal Convention

John Reay
Senior Claims Executive
+44 20 3320 8826
john.reay@ctplc.com

Industry Expert:

Sam Kendall-Marsden
Syndicate Director
+44 20 3320 8876
sam.kendall-marsden@ctplc.com

The Nairobi International Convention on the Removal of Wrecks will come into force on 14 April 2015.

Overview

The Nairobi International Convention on the Removal of Wrecks (the Convention) provides a set of standard international rules with the aim of ensuring the prompt and effective removal of a wreck located outside the territorial waters of a state party. It is the first international convention to attempt to lay down a framework for wreck removal liabilities.

The Convention has a number of important implications for shipowners, including compulsory insurance requirements. Under the Convention, state parties are able to:

- require the registered owner of a ship to report a wreck without delay;
- make the owner responsible for locating and marking the wreck, as well as its removal;
- require an owner to have in place compulsory insurance (or other financial security) to cover liabilities arising from a wreck; and
- take direct action against insurers.

Scope of application

The Convention gives state parties the power to take measures to remove any wrecks located within their Exclusive Economic Zone (EEZ) – an area 12-200 nm from the coastal baseline.

Under the Convention, a 'wreck' is defined broadly and includes a sunken or stranded ship (or any part of it) or any object lost at sea from that ship, which could include a container.

A state party may remove a wreck in the following circumstances:

- if it poses a hazard to navigation;
- if the wreck may result in harmful consequences to the marine environment;
- if the wreck may damage the coastline or other coastal interests (such as fisheries, tourism or offshore infrastructure).

The action a state party may take to remove a hazardous wreck is limited to that which is 'reasonably necessary'.

Extended geographical application

States can opt to also apply the Convention to wrecks located within their territorial waters (0-12 nm from the coastal baseline). At the time of writing, 10 of the 17 states that have ratified the Convention have applied to extend it to their coastal waters: Antigua & Barbuda, Bulgaria, Congo, Cook Islands, Denmark, Liberia, Malta, Marshall Islands, Palau and the United Kingdom. For the remaining states, domestic legislation will continue to apply to wrecks in territorial waters.

How is a wreck determined to be a hazard?

In determining whether a wreck poses a hazard under the Convention, a state party can take into account a wide

Importantly, compulsory insurance or other financial security is required for ships above 300gt that call into a country that is a party to the Convention, even if the ship is not flagged in a Convention state. The requirement applies to calls at ports in a Convention state as well as to calls at offshore facilities in the state's territorial waters.

range of criteria, including tidal range, currents, submarine topography, the proximity of shipping routes, the nature of the cargo on board, and the acoustic and magnetic profiles of the wreck.

What action can a state take in respect of a wreck in its jurisdiction?

Removal
A state party can require the registered owner of the ship to remove the wreck if it is determined that a wreck located within its EEZ is a hazard under the Convention.

Strict liability for locating, marking and removal
Strict liability is imposed on the registered owner for the costs of locating and marking the wreck, as well as for its removal.

While there are some exceptions to strict liability, they are narrowly defined under the Convention, such as where the wreck results from an act of war or where it is wholly caused by an act or omission of a third-party with intent to cause damage.

Reporting the wreck
Under the Convention, a shipowner is required to report the wreck without delay. The report must include the name and principal place of business of the registered owner, as well as:

- the precise location of the wreck;
- the type, size and construction of the wreck;
- the nature of damage to the ship and its cargo (especially hazardous cargo); and
- the amount of oil on board, including fuel and lube oil.

Compulsory insurance

The registered owner of a ship above 300gt and flying the flag of a state party is required to maintain insurance or other financial security (such as a bank guarantee) to cover liabilities under the Convention. The maximum amount of security should be equal to the limits prescribed by the Convention on Limitation of Liability for Maritime Claims 1976 (as amended) (the LLMC 1976).

Ships are to be issued with a certificate by the ship's flag state confirming that such insurance or other financial security is in place. For ships flagged in countries that are not parties to the Convention, it will be necessary for them to obtain certificates from the relevant authority in a state party.

As with other members of the International Group of P&I clubs, The Standard Club will issue members with 'Blue Cards' that comply with the requirements of the Convention and enable members to obtain the relevant Convention Certificate.

Limitation of liability

Under the Convention, provision is made for owners to limit liability in accordance with national laws or international regimes, such as the LLMC 1976.

It should be noted, however, that a number of states opted to exclude wreck removal claims from the LLMC 1976 when the LLMC 1976 was incorporated into their national law. There is therefore the possibility that owners may be unable to limit liability or that a higher limit applies in some jurisdictions.

Time limits

There are two time limits under the Convention, as follows:

1. Claims are time-barred if they are not made within **three years** of the date that the wreck is determined to be a hazard under the Convention;
2. All claims are barred if they are not brought within **six years** of the date of the marine casualty that caused the wreck.

The Convention has been adopted by the following 17 countries:

- Antigua & Barbuda+
- Bulgaria+
- Congo+
- Cook Islands+
- Denmark+
- Germany
- India
- Iran (Islamic Republic of)
- Liberia+
- Malaysia
- Malta+**
- Marshall Islands+
- Morocco
- Nigeria
- Palau+
- Tuvalu**
- United Kingdom+

+ These states have opted to apply the Convention to their territorial waters
* The Convention will come into force on 18 April 2015 due to the country's late ratification.
** The Convention will come into force on 17 May 2015 due to the country's late ratification.

Summary

The Convention comes into force on 14 April 2015 in the 17 countries listed below, with the exception of Malta where the Convention will come into force on 18 April 2015 and Tuvalu on 17 May 2015. Ten states have extended the scope of the Convention so that it applies to their territorial waters: Antigua & Barbuda, Bulgaria, Congo, Cook Islands, Denmark, Liberia, Malta, Marshall Islands, Palau and the United Kingdom.

Members should be aware that once the Convention is in force, evidence of insurance (or other financial security) will be required for all ships of 300gt or more flagged in a state party. Evidence of insurance or security is also required for ships calling at a state that has ratified the Convention, even if the ship is not flagged in a state party.

A number of the Convention states have indicated that they are happy to issue certificates to ships flagged by non-Convention countries. These states include Cook Islands, Denmark, Germany, Liberia, Malta, Marshall Islands, Palau, and the United Kingdom. However, it should be noted that most of these states likely operate a priority system meaning that ships not flagged at these specific countries may encounter delays with obtaining the certificate.

The Standard Club will issue 'Blue Cards' to enable members to obtain the relevant certificate under the Convention.

Due to the geographically broad scope of the Convention and the wide definitions it incorporates, the Convention may provide states with a legal basis for ordering the removal of a wreck located in very deep water. The increased technical challenge of having a deep-water wreck removed may result in an increase in the number and value of wreck removal claims.

All information in this article is correct at time of writing.

Bauxite cargo liquefaction risk revisited

Atousa Khakpour
Claims Executive
+44 20 3320 2295
atousa.khakpour@ctplc.com

Industry Expert:

Julian Hines
Senior Surveyor
+44 20 3320 8812
julian.hines@ctplc.com

Conditions that may take bauxite outside Appendix 1 specification:

- Heavy rainfall, particularly during monsoon season, coupled with open storage conditions which prevent the cargo from drying sufficiently before it is loaded.
- The practice of using water cannons to wash bauxite fines and lumps through sieves which can increase the moisture content of the cargo by as much as 15%.
- The pre-filtering of cargo to take out particles and lumps above 100 mm in size and further crushing of particles which may be an issue if the moisture content is high.

For further information on liquefaction, the ***Standard Cargo: Liquefaction Special Edition*** is free to download.

On 1 January 2015, the bulk carrier *Bulk Jupiter* sank, resulting in the tragic loss of 18 of its 19 crew. Although the cause of the incident is unconfirmed, the vessel was carrying a cargo of bauxite loaded at Kuantan, Malaysia, leading to increased discussion of the dangers of liquefaction associated with the carriage of bauxite.

Mineral ore cargoes loaded with a high proportion of fine particles and moisture content in excess of their transportable moisture limit (TML) are prone to liquefy. This can result in cargo shifting during a voyage, with the loss of ship stability. Liquefaction has caused a number of serious casualties in recent years.

Cargo classification

Bauxite is a cargo typically consisting of lumps with relatively low moisture content and so is commonly classified as a group C cargo – cargo not liable to liquefy, as per the International Maritime Solid Bulk Cargoes (IMSBC) Code.

Appendix 1 of the IMSBC Code describes bauxite as a cargo with:

- moisture content of between 0% and 10%;
- 70%-90% lumps varying in size between 2.5 and 500 mm; and
- 10%-30% powder.

If any of the properties listed in Appendix 1 of the IMSBC Code are not met, the requirements of section 1.3 of the Code, Cargoes not listed in this Code, should be followed.

Factors affecting classification

Members should be aware of the conditions that may take bauxite outside the Appendix 1 specification, changing the properties of the cargo from a group C cargo to a group A cargo, i.e. cargo that may liquefy.

Whilst these conditions have been widely reported as affecting bauxite cargoes shipped from Malaysia, Indonesia and Brazil, they could also occur in other geographic areas and members should remain vigilant.

As Appendix 3 paragraph 2.1 of the IMSBC Code states: "Many fine-particled cargoes, if possessing sufficiently high moisture content, are liable to flow. Thus any damp or wet cargo containing a proportion of fine particles should be tested for flow characteristics prior to loading."

Preventative measures

The club recommends that members always check the shipper's cargo declaration and moisture content certificate carefully, especially noting:

- the description of the cargo;
- how it is treated under the IMSBC Code; and
- the stated moisture content.

If members have any concerns over the validity of the details provided, they should contact the club for advice and assistance. If necessary, attendance of an independent surveyor should be arranged to determine the actual condition of the cargo and its suitability for carriage before the cargo is loaded on board the ship.

Environmental liabilities: a question of motive

Benjamin Gibbs
Average Adjuster, Richards Hogg Lindley
+44 20 7015 2031
benjamin.gibbs@rhl-ct.com

Joseph Shead
Average Adjuster, Richards Hogg Lindley
+44 20 7398 5330
joseph.shead@rhl-ct.com

The liability for pollution-related costs traditionally falls within the ambit of P&I cover. However, there are some situations in which such costs can be recovered as either general average (GA) or particular average (PA) from property insurers.

This article considers the topic from a GA point of view.

Rule C (YAR 1950):

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average."

Historical development

The question of whether third-party liabilities could be considered as GA came before the English Courts in 1915. The case, *Austin Friars Steam Shipping Co. v. Spillers and Bakers*, concerned a steamer that ran aground and was then refloated. Tugs assisted her into nearby docks and during this manoeuvre, she twice made contact with the lock gates. This consequence was anticipated by both the master and pilot owing to the narrow entrance to the docks. The Court of Appeal confirmed that the liability to the lock/pier owners ($800,000 at current prices) could be allowed as GA, because it was foreseen as a natural consequence of the GA act performed for the common safety.

At the time, the York-Antwerp Rules (YAR) did not include any general principles concerning third-party liabilities. In *Australian Coastal Shipping Commission v. Green (1971),* the Court of Appeal considered whether third-party liabilities that arose out of engaging tugs were admissible in GA. The Court held that liabilities that might naturally have been contemplated as a direct consequence of the GA act (signing a towage contract) satisfied Rule C and could be allowed in GA. The fact that the GA loss was in the form of a liability rather than a sacrifice/expenditure was not in itself considered to prevent recovery in GA.

Applying the principles – a simple example

A loaded tanker has run aground. As part of the salvage operation, the tanks are pressurised. As would be reasonably anticipated, the operation results in an escape of oil. Under YAR 1974, the additional costs of clean-up and liabilities arising from the escape from the pressurisation are allowable in GA together with the value of the escaped oil itself.

However, the YAR 1994 (Rule C) explicitly excludes liabilities in respect of damage to the environment in consequence of the escape or release of pollutant substances. Therefore, only the cost of the quantity of sacrificed oil would be allowed under YAR 1994. Obviously, identifying such quantities is a challenge in itself.

Rule C (YAR 1994):

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.[...]"

Rule XI (d) (YAR 1994): The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:

"(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;
(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);
(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule X(a), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;
(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average."

Taking refuge

Fortunately, the most common pollution-related costs encountered involve prevention rather than clean-up. Typically, these arise as a condition of entry into a port of refuge whereby owners must undertake measures to avoid oil pollution, such as the provision of booms. The costs associated with entering a port of refuge (when for the common safety) are broadly allowable as GA under Rule X(a). However, since there is a simultaneous risk of oil pollution, it could be argued that the cost of providing booms should fall solely on owners or their P&I club. Where the oil booms are purely precautionary, most average adjusters would be minded to charge the full costs to GA. However, where there is already a leak, the position is much less clear and will be dependent on the facts of each case.

Clearer waters

The position under the YAR 1994 rules is clarified through the inclusion of wording under Rule XI (d), which provides for (the extremely limited) circumstances where anti-pollution measures may be allowed as GA. These include those incurred as a condition of entering a port.

Littoral liabilities

As can be seen, including environmental liabilities themselves in GA is a controversial issue. As the *Exxon Valdez* demonstrated, such liabilities can exceed the property value by many times and litigation can last for years. Property insurers feel such allowances in GA mean that they are being exposed to pollution liabilities through a 'back door'. However, liability insurers (usually P&I clubs) are of the view that if something is benefiting property then property insurers should be paying. In most cases, a pragmatic compromise is required to balance the competing interests.

The advent of YAR 1994 helps to achieve this. It is therefore worth considering the incorporation of YAR 1994 (rather than earlier rules) into contracts of affreightment.

Navigating the complex maze of sanctions

Ewa Szteinduchert
Claims Executive
+44 20 7680 5657
ewa.szteinduchert@ctplc.com

Key sanctions contacts:

London:
Roger Johnson
Syndicate Claims Director
+44 20 3320 8976
roger.johnson@ctplc.com

New York:
Rebecca Hamra
Senior Claims Executive
+1 646 753 9022
rebecca.hamra@ctplc.com

Singapore:
Sharmini Murugason
Regional Offshore Claims Director
+65 6506 2867
sharmini.murugason@ctplc.com

Whether you are an owner, a charterer or involved in any kind of international business, there is no escaping the ever-present shadow of sanctions. With sanctions becoming increasingly complicated and changeable, and with sanctions regimes applying diverse or overlapping sanction regulations, companies and individuals face a real maze to navigate. This article seeks to provide some guidance for dealing with potential sanction issues.

There have been a number of high-profile cases in the press recently where severe penalties have been imposed on companies found to have breached sanctions. The consequences of breaching sanctions are significant and serious, including imprisonment, immense fines and loss of reputation. It is vitally important that companies take all steps necessary to abide by any applicable sanctions regimes.

Each company should have a sanctions compliance policy in place to enable it to comply with sanctions obligations in an effective and proportionate manner. These must be monitored to ensure they are up-to-date and that they support full compliance with sanctions requirements, and staff should be trained to recognise possible infringements of sanctions.

Due diligence

In order to satisfy themselves that they are not falling foul of any sanctions regimes, companies must carry out their own thorough due diligence. This should be both proactive and robust. When considering whether to engage in a particular trade, voyage or business opportunity, companies should ask various questions in order to reduce the risk of non-compliance with sanctions.

Some examples of due diligence questions:

- Which sanctions regimes apply?
- What is the nature of the business/transaction?
- What are the identities of all the parties involved?
- What is the corporate structure of the parties involved?
- What are the nationalities of the directors/place of incorporation of the parties involved?
- What jurisdictions are the parties subject to?
- What cargo is involved, what is its origin?
- Who is being paid?
- What currency is the payment being made in?
- Are there any restrictions under the charter/applicable contract?

By no means should companies attempt to circumvent the rules. Indeed, this is an express offence under many of the sanctions regulations. If there is any doubt, assistance should be sought immediately from specialist sanctions lawyers.

Key points to note:
- Ensure sanctions compliance procedures are up-to-date.
- Always carry out robust and proactive due diligence.
- If in doubt, seek the advice of specialist sanctions lawyers.
- Always comply with sanctions.

Charterparties

Difficulties can arise under charterparties and contracts as a result of any changes to the sanctions regimes. These can be reduced, to a certain extent, by the inclusion of a sanctions clause. There are a number of standard form clauses available, for example, the BIMCO Sanctions Clause for Time Charterparties, the BIMCO Designated Entities Clause and the Intertanko Sanctions Clause. Bespoke sanctions clauses can also be drafted by lawyers.

Insurers

Many insurers are also subject to the sanctions regulations and must abide by the sanctions rules. All International Group clubs have included, within their rules, express sanctions cover exclusions or termination provisions. The relevant Standard Club rules in respect of sanctions are:

- Sanctionable conduct exclusion – Rule 4.8
- Write-down – Rule 6.22
- Automatic cessation – Rule 17.2 (5)

The full rules are available on ***The Standard Club's*** website. Members should familiarise themselves with these rules. Breach of sanctions could result in a member's cover ceasing and its ship coming off risk if it is employed in a voyage which exposes the club to the risk of being or becoming subject to any sanction.

Conclusion

Sanctions are constantly being updated and expanded. To help navigate the maze of the sanctions regimes, we would urge contacting lawyers for advice and assistance in this complex and ever-changing area. If you have any specific queries, please also feel free to contact Roger Johnson, our representative on the IG sanctions sub-committee, on *roger.johnson@ctplc.com* or your usual P&I contacts.

French Supreme Court upholds jurisdiction clause

Peter Iglikowski
Partner, Lewis & Co Paris
+33 1 7772 6421
peter.iglikowski@lewiscolaw.com

- The French Supreme Court has upheld the validity of a bill of lading jurisdiction clause
- The French courts have traditionally been hostile to such clauses
- Will the approach of the French courts change as a result of this decision?

Is it the end of the challenge to jurisdiction clauses in bills of lading by French courts or do old habits die hard?

Most bill of lading terms contain a jurisdiction clause referring all disputes to the place where the carrier has its place of business. This is an important legal question on which the English and French courts have, in the past, taken fundamentally different positions. Traditionally, French law has shown great hostility to the validity of such clauses, particularly when they require French cargo interests to sue a foreign carrier elsewhere than France.

A recent change in position?

In its decision of 12 March 2013 in a case involving CMA CGM and BNP, the Cour de Cassation – France's Supreme Court – concluded in clear terms that it is customary for bill of lading terms to include a clause stating that disputes be referred to the court of the place of business of the carrier. Maritime law is a branch of international trade. This practice is an established custom in that trade. Therefore, the clause in the bill of lading in question is perfectly valid.

By its judgment, the French Cour de Cassation was giving effect to the established principle of European Law (set out in article 23 of the EU Regulation 44/2001) that in international commerce, an agreement on jurisdiction which is in conformity with the custom of the branch of trade in question will be valid without requiring proof that the parties have actually approved the clause in question.

Reaction

It would be tempting to conclude that the matter is now settled in France, but the recent decision has been far from popular in the French legal community and in particular with French cargo interests. They would much prefer that the French courts continue to contest the validity of bill of lading jurisdiction clauses as in the past. The traditional approach of the French courts required evidence that the clause had actually been accepted by the shipper in order to be valid. This would normally involve a signature on the bill of lading from the shipper, which is difficult because shippers rarely sign bills of lading in modern times.

Conclusion

So what is the position today? Is it now accepted that, following the latest decision of the French Supreme Court, a foreign jurisdiction clause in a bill of lading will be effective? The answer is that it is still far from clear that challenges to jurisdiction clauses appearing in standard bill of lading terms have ended as old habits die hard, but the task of persuading the French courts that the jurisdiction clause should not be upheld is becoming increasingly difficult.

LNG as fuel

Julian Hines
Senior Surveyor
+44 20 3320 8812
julian.hines@ctplc.com

Our thanks for their valuable contribution to this article go to:

Johan Lønberg
Assistant Attorney/Junior Associate, Kromann Reumert
+45 38 77 44 07
jlo@kromannreumert.com

A growing number of operators have asked the club for our opinion on LNG (Liquefied Natural Gas) powered ships. This article outlines some of our considerations.

- LNG bunker fuel is a possible solution to meet the future EU regulations, directed at zero emission fuels.
- LNG bunkering could soon become commercially and economically viable for inland shipping.
- Whilst the same hazards exist for LNG as cargo and LNG as fuel, the risks associated with LNG as a fuel are not the same. Training is essential.

Introduction

Compared to road transportation, inland shipping has been considered to have a lower carbon footprint. Since January 2011, EU regulations have required low sulphur fuel for inland shipping, but the next raft of regulations is for emission reductions for nitrous oxides (NOx) and particulate matter (PM). As an interim step towards zero emission fuels, LNG has come out as a valuable solution. Coupled with investment for LNG bunkering infrastructure in North Europe, it is becoming more commercially and economically viable and the first LNG inland ships have started operating.

LNG powered ships is not new technology. The LNG tanker fleet has used boil off gas since the 1980's. LNG tankers have a good safety record and are designed and operated within established IMO regulations and recommendations: IGC – Safe Carriage by Sea of Bulk Liquefied Gasses; Resolution MSC 285(86) Interim Guidelines on Safety for Natural Gas-Fuelled Engine Installations in Ships (2009); and the recently accepted draft "International Code for Ships using Gas or other Low Flash-point Fuels" (IGF Code)

Rules and regulations

For ships operating on the European inland waterways, mostly the ARA (Amsterdam Rotterdam Antwerp) and the river Rhine with adjacent rivers and canals, IMO regulations don't apply. The relevant rules fall between the EU International Carriage of Dangerous Goods (ADN) and the Central Commission for the Navigation on the Rhine (CCNR) regulations.

These existing rules have many gaps and contradictions for carriage of low-flash point fuel as bunkers instead of cargo. ADN regulations have recently been revised and these new regulations have been formally accepted by the EU. These new regulations cover rules on ship design, operational safety and crew training for ships fuelled by LNG. Next to the ADN standards and guidelines, class societies and ISO have issued standards applicable to, inter alia, the system design and safety issues regarding LNG fuelled ships.

Technical risks

The technical risks of a LNG fuel ship, (which must have two fuel systems i.e. either a duplicated LNG system or more commonly, duel fuel MDO and LNG), can be 'designed out' by using detailed risk assessments with the aim of achieving inherent safety by controlling the hazards first before introducing mitigation. The ship design cannot be viewed in isolation: service life events such as commissioning, dry-docking and repairs should be considered. The forthcoming rules are risk assessment based rather than prescriptive; thus flag administrations and classification

One of the biggest issues for our underwriters is how to benchmark the risk for LNG fuelled ships as, at time of writing, there are less than 20 ships operating on European inland waterways. With so few ships and systems in operation there is no industry driven preference or commonality.

The same hazards exist for LNG as cargo and LNG as fuel:

- cryogenic effects of low temperature (-163°C);
- high expansion ratio (600:1)
- low flashpoint temperature (<60°C).

However, the risks associated with LNG as a fuel are not the same. Training is essential.

societies need to be consulted early on in the design process.

From a P&I loss prevention perspective, the key risks are interactions with other ships and shore facilities; interactions with other ship board operations; the storage, handling and transfer of LNG; maintenance of LNG systems; and emergency preparedness for an accidental gas release. In other words, 'the human element'.

Bunkering

There are three principle methods for LNG bunkering: direct from shore, from truck and ship-to-ship transfer. Bunker stations and procedures should be designed to protect the ship and crew from hazards. There are several important design considerations for bunkering: safety, vapour management, filling limits, communication and emergency shut-down. When training their crew owners and operators should be aware of the interface between LNG fuelled ships and the bunkers supply link.

Training

Even though LNG shipping has good safety records, training and knowledge is essential, as dealing with LNG as bunkers is a task very different from dealing with HFO bunkers or LNG as cargo. Training requirements are mandated by the EU and implemented by Flag administrations alongside any national laws. Compliance with such requirements is cross-checked by vetting inspectors and class societies.

ADN sets out requirements on crew training, as an owner/manager is required to arrange training based on crew role and responsibilities. Training is type specific as decided by the company training manager. However, until training requirements are fully developed and adopted, the responsibility for providing sufficient training falls to individual owners and operators.

Emergency procedures also need to be developed specifically to deal with the additional hazards posed by LNG such as: fire and leakage procedures, hazardous zoning and protection, safety exclusion zones and dropped objects.

Conclusion

There are a number of considerations and hazards associated with LNG as a fuel, from ship design and life cycle through to bunker operations and crew training. The rules appear to be based on each component within the system, rather than the entire gas supply chain operation, therefore several gaps exist which owners and operators should be aware of. To implement a safe operation of LNG fuelled ships, the entire ship's operation, safety procedures and training schedules should be risk assessed and integrated as a whole, rather than bolted on to the safety management system.

Our concerns are highlighted in a report issued by the Norwegian Authorities (May 2014) following an investigation into the accidental LNG release from a hose connection during truck to ship bunkering operations of passenger ship *Bergensfjord*. The report made a number of recommendations, including bunkering not to be simultaneous with cargo operations, additional training of crew and personnel on quayside for bunkering operations, greater hazard awareness and the extension of the safety zones around the ship.

Focus on FFO matters: sub-sea cables

Brett Hosking
Claims Executive
+44 20 3320 8956
brett.hosking@ctplc.com

Our thanks for their valuable contribution to this article go to:

Mr. Xiangyong Chen
Senior Partner, Wang Jing & Co
chenxiangyong@wjnco.com

Dr. Shouzhi AN
Partner, Wang Jing & Co.
anshouzhi@wjnco.com

Nicolas White
Director, Claims, Disputes, Litigation & Shipping, London Offshore Consultants Pte. Ltd.
n.white@loc-group.com

- Club cover responds to a variety of damage to property claims, subject to any applicable coverage by hull insurers.
- When anchoring in Chinese waters, masters are urged to only drop anchor in prescribed anchorages, or seek approval from the local MSA/Port Authority before doing so.
- Under Chinese law, damage to sub-sea cables may result in civil and criminal sanctions.

Ship blamed for damage to unmarked sub-sea cable in Chinese waters

The club handles a variety of cases every year for damage to property other than another ship. This is often referred to as damage to fixed and floating objects (FFO) and cover is generally provided by P&I clubs. The purpose of this article is to highlight the difficulties in circumstances where there has been damage to a sub-sea cable, following a recent incident in China.

Club perspective

Club cover is provided under Rule 3.9 as set out below:

> Liabilities for loss of or damage to, or interference with rights in relation to, any property not being any ship or any cargo or other property therein or the cargo or other property intended to be or being or having been carried in the ship.

Typically, cover under this rule responds to damage to berths, docks, jetties, locks or other port facilities. The damage need not be fixed or floating and there does not have to be contact. Claims usually fall into two categories: physical damage and consequential losses. The local law applicable where the incident took place invariably governs liability for damage to property.

In some jurisdictions, notably in Scandinavia, Holland and Germany, hull insurers in those markets may cover part or all of the liability. It is always best to check the terms of entry and apportionment, if applicable, of risk.

Case study

A recent incident took place in China in which a member's ship dropped anchor outside of, but close to, a designated outer anchorage for a Chinese port, due to busy marine traffic and prevailing weather conditions. Unfortunately, the ship damaged a sub-sea cable on dropping anchor. No warnings relating to sub-sea cables were noted on any of the usual charts. There was also no requirement for the ship to advise the local Vessel Traffic Information System (VTIS) managed by the China Maritime Safety Administration (China MSA). It was later discovered that the cable was a military communications cable and state security prevented it from being shown on any charts.

As a result of the contact with the sub-sea cable, the member faced significant delays to its liner service and an expensive claim from the owners of the sub-sea cable. The club engaged the assistance of local lawyers and experts with suitable knowledge and experience of similar matters. Following extensive negotiations, an amicable resolution was found, with minimal delay to the ship.

Chinese law

- The Chinese Oceanic Authorities publish details of commercial sub-sea cables on an annual basis. However, military equivalent equipment will remain unmarked.
- Under Chinese law, damage to sub-sea cables may result in civil and criminal sanctions.

Under Articles 5 and 6 of Provisions on the Protection of Submarine Cables and Pipelines, owners of sub-sea cables should register their routes and locations with the Oceanic Administration Authorities (OAA) within 90 days of cable laying. Once the cable is marked on nautical charts, ships shall not anchor or conduct similar actions within the protected area of the cable, around 500 metres from the cable on both sides in open water, 100 metres in narrow water, or 50 metres in a port. Failure to adhere to these requirements will result in a fine and liability for compensation for the loss and damage suffered by the cable.

Meanwhile, in relation to military equivalent sub-sea cables, article 15 of *Measures of Chinese People's Liberation Army for the Implementation of the Administrative Provisions Governing the Laying of Submarine Cables and Pipelines* is applicable. This sets out that for certain categories of sub-sea cables, including border and security defences, the cables cannot be marked on charts. When a military sub-sea cable is marked on charts, then the protection area will be two nautical miles from the cable on either side, or 100 metres when in the port.

Civil liability

According to Chinese tort law, in a sub-sea cable damage case, a ship will usually be found liable for loss and damage. If neither the owner of the cable nor the ship has fault, the court may apportion liability according to the principle of fairness, for example, each party will bear 50% liability.

Further, the owner of the cable (whether commercial or military) is entitled to claim for:

a) direct economic loss caused by the block of communication channels;
b) expenses for repairing the damaged submarine cables; and
c) expenses for investigating the damage caused by the accident and other expenses therefrom.

Criminal responsibility

According to Article 369 of Chinese Criminal Law, any person who damages military installations or military telecommunications and causes serious consequences due to negligence shall be sentenced to fixed-term imprisonment of no more than three years or criminal detention; if the consequences are extremely serious, he shall be sentenced to fixed-term imprisonment of between three and seven years.

Conclusion

Members trading in China who may drop anchor off port limits in Chinese waters should be aware of the potential dangers highlighted in this article. Masters are urged to only drop anchor in prescribed anchorages, or seek approval from the local MSA/ Port Authority before doing so.

Should members face any difficulties, they can always contact their usual claims contact for more information and guidance.

Staff spotlight

Richard Stevens
Claims Director, Mediterranean Syndicate
+44 20 3320 8825
richard.stevens@ctplc.com

What was your first job in the industry?
I first worked as a trainee solicitor with Thomas Cooper & Stibbard (now Thomas Cooper) in 2001. After qualifying in 2003, I remained at the firm until joining The Standard Club in September 2012.

What was it that interested you in P&I?
Whilst working in private practice, I was frequently instructed by P&I clubs and therefore had very regular dealings with individuals working at clubs and the manner in which they address claims. I was also fortunate to be able to undertake a six-month secondment with another club in the International Group, which gave me a greater insight into the workings of clubs. It was obvious to me that clubs sought to assist and advise their members on a far more commercial basis, and it was primarily this ethos that attracted me to working within a P&I club.

What is your current job and how does it differ from your first job in the industry?
I am currently a Claims Director within the Mediterranean Syndicate, which is a world away from where I started as a trainee solicitor in private practice! Although the same principles of 'client care' and being able to provide sound advice apply to both a P&I club and a law firm, I feel that I have a much closer relationship with members at the club than I had in private practice. As such, I am able to work with them to bring about results which have real consequences for the member's business.

What is the most important thing a club can do for its members?
Listen to them. Members are the club's most important commodity and it is important that we listen to their concerns and views. Members often have very clear opinions in respect of claims and the manner in which they wish these to be resolved. I will always seek to take account of those opinions when handling any claim or dispute on a member's behalf.

What is the highlight of your career?
The highlight of my career has been acting on behalf of a large multinational oil major faced with a significant claim where the claimant was seeking a seven-figure sum for injury arising from the alleged inhalation of toxic fumes. The claim was evidentially complex and culminated in a seven-day trial at the High Court in London, with multiple experts and witnesses, in which my client was successful. The claim was subsequently reported in the legal press. I am very proud of the result and delighted that my client was found not liable.

How do you think the industry has changed since you started working in it?
It has been very interesting to see the entire legal and P&I industry significantly shift over the last decade to being far more cost conscious and seeking to give better value services without compromising on quality. Whilst that may reflect the relatively difficult economic times that many are experiencing, from the perspective of P&I clubs and our members, the processes of streamlining and good financial governance will ultimately benefit members. They should expect to receive the same quality service they have come to expect from the club whilst knowing that we are working hard to provide this in a cost-effective manner.


HEEREN

Web alerts The Standard Club issues a variety of publications and web alerts on topical issues and club updates. Keep up-to-date by visiting the News section on our website www.standard-club.com

@StandardPandI
The Standard P&I Club

This Standard Bulletin is published on behalf of
The Standard Club Ltd by the managers' London agents:
Charles Taylor & Co. Limited Standard House,
12–13 Essex Street, London, WC2R 3AA, UK
Registered in England No. 2561548

Telephone: +44 20 3320 8888 Emergency mobile:
+44 7932 113573 E-mail: pandi.london@ctplc.com
Website: www.standard-club.com

Please send any comments to the editor, Ewa Szteinduchert
E-mail: ewa.szteinduchert@ctplc.com
Telephone: +44 20 7680 5657

The Standard Club Ltd is regulated by the Bermuda Monetary Authority. The Standard Club Ltd is the holding company of the Standard Club Europe Ltd and the Standard Club Asia Ltd. The Standard Club Europe Ltd is authorised by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and the Prudential Regulation Authority.
The Standard Club Asia Ltd is regulated by
the Monetary Authority of Singapore.

Charles Taylor