Cover for contractual liabilities

Offshore contracts are reviewed in order to establish whether the club can cover P&I liabilities arising thereunder under normal poolable P&I rules. However, the club’s review of contracts is not intended to confirm blanket cover for all liabilities arising under a contract. If a contract is approved by the club this does not mean that all liabilities incurred by the member thereunder are covered, since the normal P&I rules and the member’s terms of entry will still apply.

The club aims to proactively advise members of the effect of the contractual arrangements they have concluded in terms of normal poolable P&I cover and any extra extensions to cover which the contract liabilities may require, so that we can provide a level of comfort in terms of the member’s cover before any potential liabilities arise.

Ships carrying out oil and gas drilling and production operations are dealt with by means of a separate cover, since rule 5.12 operates to completely exclude liabilities in respect of such ships from poolable P&I cover. Such ships must be entered with the club via a fixed premium entry on the club’s Offshore P&I rules. Nevertheless, where a member covered under the Offshore P&I rules assumes liabilities under contract which he would not otherwise have incurred, the contract must still be approved by the club and many of the same provisos as for poolable cover for liabilities arising under contract will apply.

Poolable cover
In general, a member should not assume responsibility under any contract for any loss for which under applicable law he would not otherwise be liable, or in respect of which he would otherwise be entitled to exclude or limit liability. Notwithstanding this, the managers will approve for full poolable cover P&I liabilities arising under a knock-for-knock liability regime provided the member has not waived any rights of limitation. Under a knock-for-knock contract each party assumes responsibility and indemnifies the other party for liabilities relating to their own property and personnel and those of their subcontractors, regardless of negligence.

Some contracts may not be acceptable for full poolable cover, perhaps because they lack comprehensive language or the owner is required to waive his right to limit liability. In such cases, the member may purchase a fixed limit contractual extension to his cover under the club’s Contractual extension clause. This will cover P&I liabilities assumed by him under the contract for which he would not otherwise have been liable. However, again, a contractual extension does not confer blanket cover for all liabilities incurred under the contract, but rather restores the P&I cover in respect of covered claims for which the member would not have been liable in the absence of the contract.

Knock-for-knock
A knock for knock contract for the purposes of poolable P&I cover is defined as one containing a provision or provisions stipulating that each party shall be responsible for loss of, or damage to, or injury and/or death of, its own property and personnel and the property and personnel of its contractors and its and their subcontractors. The contract must also stipulate that such responsibility is without recourse to the other party and arises notwithstanding any fault or neglect of that party, and that each party shall, in respect of
those losses, damages and other liabilities for which it has assumed responsibility, correspondingly indemnify the other against any such loss, damage or liability that party may incur.

Ideally, the knock-for-knock clause should be worded to include, within the indemnity given by the member’s contractual partner, liabilities arising in respect of the property and personnel of their client and of any other parties for whose benefit the work is being carried out.

**Third party liabilities**
It is acceptable for third party liabilities to lie where they fall, i.e. there need be no mutual indemnity between the member and his contractual partner in respect of those losses. If the contract does include a mutual indemnity in respect of third party liabilities, it should be worded to make clear that it is limited to pure third party liabilities only. This is to ensure that claims from third parties relating to loss of or damage to the property of the member’s contractual partner or his client or principal do not fall under the clause.

**Limitation of liability**
The member should not assume liabilities beyond those for which he would otherwise be entitled to limit his liability nor waive such rights of limitation. Ideally, the member’s right to limit liability against his contractual partner should be specifically preserved. Otherwise, the contractual partner may argue that the indemnities given by the member constitute an implicit waiver of the member’s right to limit. The member’s contractual partner may also wish to preserve his own right to limit liability. As a result of the judgement of the Court of Appeal in the case of the CMA Djakarta, English law now allows charterers in certain circumstances to limit their liability to an owner under a charterparty. Allowing the charterer to preserve the right to limit liability may therefore prevent the member from making a full recovery under any contractual indemnity given by the charterer. In this case it may be preferable for the contract to remain silent on the right to limit.

**Co-assured**
If the contract requires the member’s contractual partner to be named on the P&I cover, the wording should make clear that the cover is restricted to liabilities which are properly the responsibility of the member under the contract. In such cases the member’s contractual partner can be named as Co-assured under rule 13, which entitles him to “misdirected arrow” cover, but not to cover for liabilities which are his responsibility under the contract.

If the contract requires the member’s insurers to waive their rights of subrogation against the member’s contractual partner or his insurers, the wording should make clear that rights of subrogation are only to be waived in respect of liabilities which are properly the responsibility of the member under the contract. Otherwise the member’s contractual partner could argue that the clause is intended to encompass all of the member’s liabilities covered by insurance, regardless of the contractual division of responsibility for such liabilities. This is not correct; the club will only give waivers of subrogation in respect of those liabilities which are properly the responsibility of the member under the contract.

**Contractual extension clause**
Where cover is given under the club’s Contractual extension clause, either as an annual cover or in respect of a specific contract, the normal provisions of P&I cover still apply; claims must arise out of the operation or management of the entered ship, and must be covered under the P&I rules and the certificate of entry. Any exclusions
in the rules or the certificate of entry will still apply unless excluded risks are specifically reinstated.

**Excluded risks**
Liabilities arising during some operations are excluded from cover under rule 5. These include specialist operations (such as construction, installation and maintenance of offshore structures, dredging, blasting, pile-driving, well stimulation, cable or pipe-laying, core sampling, and depositing of spoil etc), liabilities arising out of the operation by the member of underwater vehicles, and liabilities arising out of the activities of divers for which the member is responsible. Purchase of a contractual extension alone is insufficient to restore cover in respect of these operations, even if the club has reviewed the contract unless the member has also purchased a specific cover for the liabilities in question.

The club’s rule 5.13 excludes liability for loss of or damage to or wreck removal of cargo carried on a semi-submersible heavy-lift vessel, or any other vessel designed exclusively for carriage of heavy-lift cargo, except where such cargo is carried under a contract on BIMCO Heavycon terms or on terms approved by the managers. Heavycon is an acceptable contract for the purpose of poolable P&I cover.

**Industry standard wordings**
There are a number of industry standard contracts which are approved for full poolable International Group P&I cover for the owner’s liabilities under the contract. BIMCO Towcon and Towhire are approved contracts for the provision of towage services. BIMCO Supplytime 2005 is approved as a supply boat charterparty. In supply boat charterparties the wording of the knock-for-knock clause must embrace all of the property of the charterer and his sub-contractors, rather than just the cargo, so that, for instance, it will cover damage to a rig if the rig is in the field where the supply boat is employed to work. If towage is to be performed by a supply boat, the language of the knock-for-knock clause must cover the property of the subcontractors, and ideally the clients, of the charterer as well as of the charterer. Otherwise, there must be a separate clause stating that all towage is to be carried out on knock-for-knock terms or better. Supplytime 2005 addresses these points in addition to the other points listed above.
NB These contracts are approved for poolable P&I cover from the point of view of the owner’s insurance cover. Any member who charters a ship in on one of the Bimco forms mentioned above should contact the club regarding cover, as the charterer’s liabilities under these forms may not fall within club cover.

**Contract review**
Depending on individual member’s requirements the club reviews individual contracts, either during the negotiation process or subsequently, or may by agreement carry out a general contract audit. When the club has reviewed a contract, cover is granted on the basis that the liabilities therein will remain unchanged. Should any contract wording change substantively, either in the final signed version or by reason of addenda being agreed, the contract should be reviewed again by the club.