

Windfarm contracting

**Ursula O'Donnell & Rupert Banks,
Offshore Claims Directors**

Agenda

- Explain specialist operations in context P&I
- Provide overview of our Specialist Operations extended cover
- Explain how extended cover operates context wind farm installation and maintenance operations
- Review most common potential exposures from our review these contracts
- Consider trends in these contracts

Specialist Operations



Specialist Operations

- P&I cover based on mutuality - members bear similar risks i.e. transportation cargo/passengers
- Wind farm installation / maintenance / decommissioning = **Specialist Operations**
- Activities which are considered to be too specialized/too risky to be poolable
- What does this mean?
- Third party 'at law' liabilities or those assumed under contract whilst performing specialist operations are **excluded** from poolable cover
- BUT this subject to certain exceptions:
 - Pollution from entered ship or
 - Wreck removal entered ship or
 - Injury to personnel on board **ALWAYS poolable even during spec. ops.**

- What amounts to specialist operations?
 - Not defined ... “includes but not limited to **dredging**, blasting, **pile-driving**, well stimulation, **cable ... laying, construction, installation or maintenance work**, core sampling, depositing of spoil, professional oil spill response or professional oil spill response training and tank cleaning” (rule 5.11)
 - Trenching, rock installation, scour protection all considered to be specialist operations
 - Open ended definition so new activities can added as industry develops

Wind farm installation operations



Specialist Operations extended cover

- Buy-back for liabilities arising out of specialist operations (excluded under rule 5.11 (1)) under Offshore Extension
- Not a blanket cover:
 - Liabilities must arise **during** specialist operations **and** out of the **specialist nature of the operations**
 - Liabilities must be P&I risk e.g. collision, contact damage etc.
 - Not reinstate existing exclusions in member's terms of entry (unless specifically agreed)

Specialist Operations extended cover

- Absolute exclusions from cover:
 - **Contract works** which includes (rule 5.11(3))
 - Damage to contract works
 - Pollution from contract works
 - Wreck removal of contract works

AND

- **Failure to perform / fitness for purpose / quality of work** (rule 5.11 (2))

Definition of contract works

“.....including, but not limited to materials, components, parts, machinery, fixtures, equipment and any other property which is or is destined to become a part of the completed project which is the subject of the contract under which the ship is working, or to be used up or consumed in the completion of such project.”

- Depends contract's scope of work
- Defined delivery date in contract where work completed & property handed over to client
- From that point – no longer contract work
- If member damages property that has been delivered to and accepted by client = third party property or existing property NOT contract works

Construction All Risks – CAR policy

- Dovetails with P&I cover – we exclude contract work because its covered under CAR
- CAR covers damage to project property during transportation to site & whilst being installed
- We would expect our contractor members to be named on CAR policy & that u/w agreed waive their rights subrogation against them

BUT


- condition precedent for access to the CAR = Compliance with QA/QC (Quality Assurance/Quality Control) requirements in the contract (usually cascades down contracting chain)
- If member at end of contracting chain may not be named on policy

Installation of WTGs at Teeside wind farm



What does this mean?

- If property on board ship (e.g. monopile, tower, turbine etc.) damaged during **transportation** to wind farm?
 - expect covered under CAR policy but if not...
 - poolable cover can respond up to Hague/Hague-Visby limits
 - liabilities in excess this not poolable but can covered under Contractual Extension
- If this property damaged during **installation**?
 - excluded as contract work but
 - member should have benefit of indemnity under contract and named on CAR policy

During **transportation** = cargo  **poolable**

During **installation** = contract work  **excluded**

Contract work exclusion

Depends on nature of operations!

Installation operations ➡ contract works = *wind farm site*

Maintenance operations ➡ contract works more limited = *property being repaired/replaced not entire structure*

E.g. if turbine being replaced as part of maintenance operations & it is dropped and causes damage to the monopile, this would be treated as existing property & covered under Spec. Ops extended cover but damage to turbine itself would be excluded as contract work.

ROV and Diving operations

- Liabilities arising out of operation underwater vehicles or diving operations are **excluded** from poolable cover (rule 5.14)
- We provide buy-back for these excluded liabilities under our Offshore Extension.
- Not blanket cover:
 - **Underwater vehicles extended cover**
 - Responds to P&I liabilities arising out of member's operation of underwater vehicles/ROV's etc
 - Not required if member not responsible operating ROV e.g. ship is merely platform
 - Not cover loss/damage to ROV once launched/operating
 - **Divers extended cover**
 - Responds to P&I liabilities arising out of activities of professional divers where member is responsible for these activities
 - Not cover injury, illness, death of divers

- Wind farm projects grow size & complexity and located further distances from shore
- Large accommodation vessels increasingly used (accommodate 100 plus personnel)
- Liabilities incurred iro personnel other than marine crew on board these vessels (who not employed by member) **excluded** from poolable cover unless knock-for-knock allocation of liability (rule 5.15)
- If no kfk allocation of liability, Contractual Extension can respond
 - e.g. if kfk only include Charterers contractors/subcontractors but not their client, the member will have fault based exposure iro client's personnel accommodated on board which will not poolable and can only covered under Contractual Extension
- Key issue for u/w = number & nationality of personnel who fall outside kfk

Potential scenarios

1. During loading operations wind turbine blades are damaged – **poolable**
2. Jack-up crane barge navigating within wind farm to commence installation of turbines causes contact damage to pre-installed foundation – **excluded as contract work**
3. During above scenario, crew member on crane barge suffers injury – **poolable**
4. Crane barge jacked down/pre-loaded and about to commence installation operations when leg punches through seabed causing damage to pre-installed cable – **excluded as contract work**
5. Whilst ship carrying out repairs to wind turbine, heavy weather causes ship make contact with its foundation causing damage – **covered under Spec. Ops. extended cover**
6. Monopile installed at wrong location – **excluded as arising from failure to perform**

Wind farm projects

- Offshore syndicate have reviewed installation & maintenance contracts in respect of the following wind farm projects during past year:

Offshore UK:

Greater Gabbard
London Array
North Hoyle
Rhyl flats
West of Duddon Sands


Offshore Germany:


Amrumbank West
Butendlek
EnBW Baltic 2
Gode Wind 01 & 02
Helwin 1
Sandbank
Wikinger
Windpark Baltic 2

Contracting Issues

- A large number of offshore wind projects are carried out offshore Germany
- Such contracts generally governed by German law
- Are knock-for-knock indemnities upheld under German law?

- Parties are free to contract on any terms they consider appropriate
- However, *German Unfair Terms Act* can, in some circumstances, void terms in contracts that unreasonably disadvantage one party, including knock-for-knock indemnities
- Key question is whether contract terms have been **individually negotiated** or whether contract is on a **standard form**

- If knock-for-knock indemnities have been individually negotiated they will generally be upheld
- In such circumstances, *German Unfair Terms Act* will not step-in to override them
- ‘Individually negotiated’  what does this mean?
- Relevant term needs to have been discussed and the party seeking to rely on the indemnity needs to show that, during negotiations, it was prepared to consider alternative allocation of liability if necessary

- However, if contract is on a standard form (including e.g. unamended LOGIC, BIMCO suite) there is a risk that *German Unfair Terms Act* will seek to void knock-for-knock indemnities
- Void  unless party seeking to rely on k-f-k indemnity can show that terms of standard form were negotiated or if can show that term is not unreasonably disadvantageous to other party
- Only in rare circumstances have German Courts held that unamended terms of a standard form contract were individually negotiated

- Other issues
 - K-f-k indemnities that include gross negligence
 - If contained in an individually negotiated contract, will generally be upheld
 - If contained in a standard form contract will be overridden by *German Unfair Terms Act*
 - ‘Wilful acts’ – excluded, but only when engaged in by ‘controlling mind’ of party?

- Key considerations:
 - If you are the party proposing to contract on a standard form (e.g. LOGIC, BIMCO), ensure that evidence of negotiation with other party is clearly recorded and preserved in writing
 - In particular, ensure that knock-for-knock clauses of these standard form contracts are discussed and that opportunities for possible amendments are considered and recorded
 - Seek German legal advice as to whether, in the circumstances, contract will likely be deemed to be individually negotiated

Typical exposures we see in contracts (1)

- Damage to Company's property limited to CAR deductible
 - During transportation
 - Negligence based liabilities iro damage to Company's property whilst transported on board entered ship poolable up to H/HV limits.
 - Non negligence based liabilities & those in excess right to limit covered under Contractual Extension
 - During specialist operations - excluded as contract work
- Carve-out for Gross Negligence/Wilful Misconduct under kfk indemnities
 - Gross negligence is an 'at law' liability
 - During navigation poolable cover will respond to P&I risks arising from GN up to right to limit & Contractual Ext. will respond in excess this
 - Whilst performing specialist operations, the spec. ops extended cover will respond to P&I risks up to limit of cover (since has built-in Contractual Ext. cover)
 - Wilful misconduct by personnel deemed 'controlling mind' of member excluded under Marine Insurance Act

Typical exposures we see in contracts (2)

- **Wreck removal at Company's request**
 - Poolable cover will respond to wreck removal of entered ship (or other property) if results from a casualty & wreckage constitutes hazard to navigation or been ordered removed under compulsory law
 - Wreck removal at Company's request or because interferes with their operations not poolable and Contractual Ext. must respond
- **Wide exposure for environmental damage e.g. nuisance/noise or removal debris**
 - Liabilities for nuisance/noise fall outside scope of P&I
 - Removal of debris resulting from installation operations not covered
- **Waiver of right to limit e.g. capping liability at contract price**
 - Whilst navigating, poolable cover will respond to P&I risks up to right to limit & Contractual Ext. can respond in excess of this
 - During specialist ops, the Spec. Ops extended cover will respond in full (has built-in Contractual Ext.)

Contracting benchmark

- Contract on kfk terms iro people/property
- Definition of Company Group includes client/ultimate client & their joint venture partners
- No ongoing warranty of seaworthiness
- No exceptions undermining kfk indemnities e.g. GN/WM
- Off-lay liability for damage to property in vicinity
- Third party liabilities 'at law'
- No waiver of right to limit
- Wreck removal where compulsory
- Naming co-assured as per misdirected arrow
- Waiver of subrogation to follow contract terms

- We do not see many EPC contracts (single contractor responsible for design, engineering, transportation and installation)
- Usual no. of contractors involved – single contractor involved transportation/installation foundations and/or cables, another contractor involved transport/installation WTG etc.
- No standard form installation contracts – still early days...?
- Usually bespoke i.e. owners wind farms/utility companies produce own terms
- Sometimes use LOGIC or FIDIC but are they fit for purpose?
- Maintenance contracts – often on amended Bimco Supplytime 2005 terms
- New Bimco Windtime form designed for crew transfer/support operations:
 - Based Supplytime 2005 form but improvement
 - Plugs gaps e.g. kfk applies iro performance and 'non-performance' of contract
 - Exclusion for consequential losses refers to 'direct' as well as indirect losses
 - On kfk terms but excludes wilful misconduct?

- Try to maintain integrity of kfk allocation of liability
- Check insurance provisions support kfk indemnities
- Carry out due diligence i.e. check named on CAR policy
- Ensure appropriate extended covers in place if required under scope of work
 - e.g. ROV/divers etc
- Beware contracting pitfalls
- Early contract information means club can provide early input on cover
- We can also provide feedback to assist in negotiations
- Prevention is better than cure!

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