New York Forum

Standard Club

Pooling Agreement, Specialist Ops & Contracting

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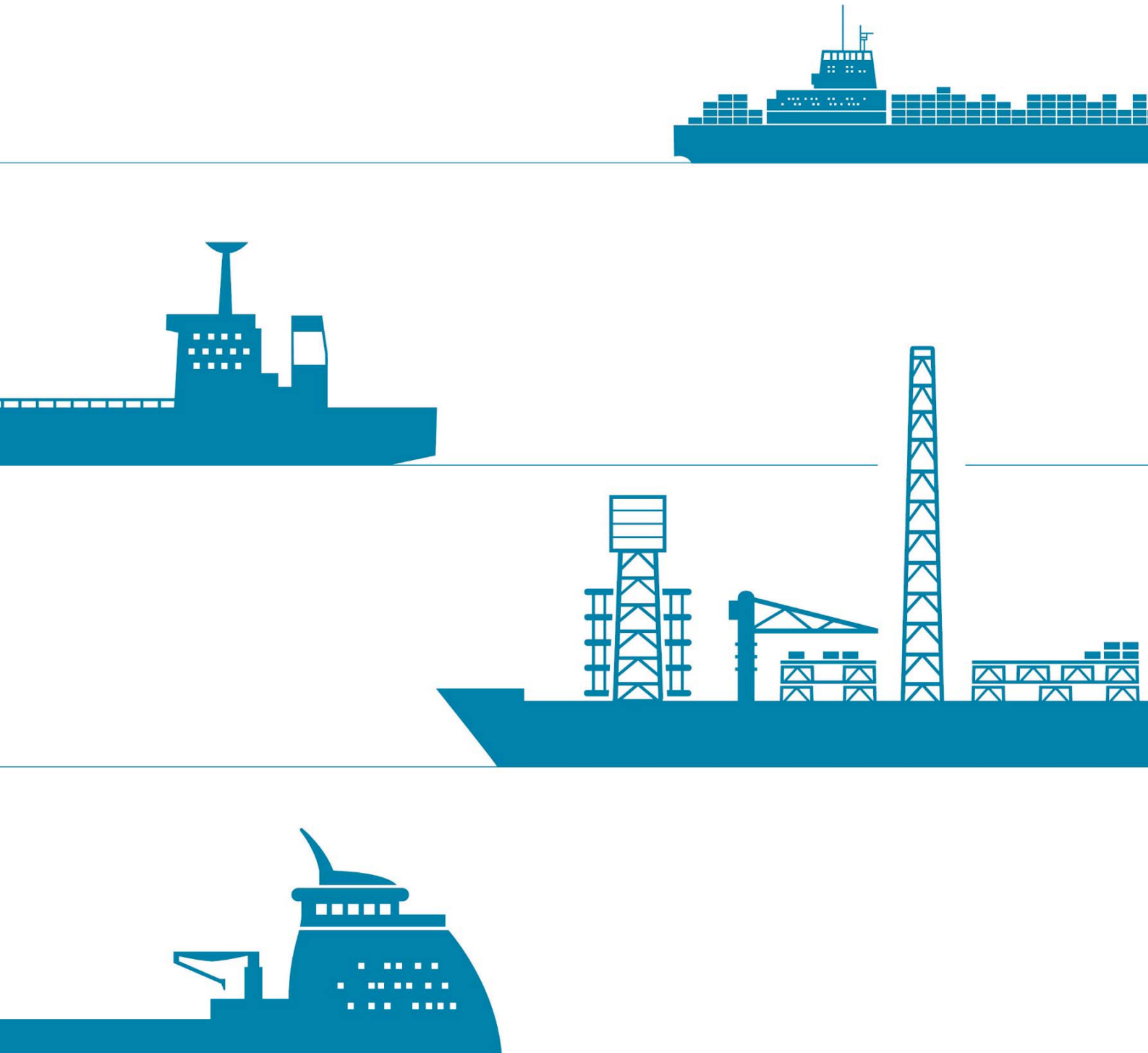

STANDARD CLUB New York Forum

7 June 2018

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4	LNG terminal conditions of use: a potential change
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Agenda item no

1

Marpol VI

Discussion of cover position and other issues surrounding Marpol VI violations.

Marpol Annex VI (Air Polution)

- Aim - Progressive reduction of SOx, Nox, PM and GHG emissions
- 1 Jan 2015 – Ships trading in designated emission control areas (ECA) have to use fuel oil with sulphur content of less than 0.10%
- prior to entry into ECA - fully switch-over from HSFO to the ECA compliant fuel
- implement written procedures as to how the switch-over is undertaken
- record quantities of ECA compliant fuel oils on board at each changeover together with date, time & position
- 1 Jan 2020 – Global sulphur cap outside ECAs will be reduced from current 3.50% to 0.50%
- Enforcement has been left to individual states

Enforcement in the USA

- USCG has authority to detain vessel on MARPOL violation
- Violations under MARPOL Annex VI may result in civil or criminal penalties
- EPA may impose a civil penalty of $25,000 per violation. If the violation continues there will be an additional penalty of $25,000 per day
- Regional variations eg California waters imposes more stringent rule.
    - MARPOL does not specify the type of fuel to be used other than stipulating sulphur content less than 0.1%. California requires use of distillate fuel oil (not residual fuel oil)
    - MARPOL permits the use of alternative emission control technologies (exhaust gas scrubbers). CARB-OGV does not recognize the use of such technology

Enforcement in the EU

- EC Directive aligned with revised Annex VI
- The 0.5% limit outside EU-SECAs will apply from 1st January 2020 regardless of the outcome of the IMO fuel availability

- Strict enforcement & inspection by PSC in all EU ports (particularly by German MARPOL police)

- If non-compliance is noted then the authority may ask ship to:
  - present a record of the actions taken to attempt to achieve compliance; and
  - provide evidence that it attempted to purchase ECA compliant marine fuel

- Level of fines is yet to be ascertained but fines are specifically aimed to deprive the economic benefits derived from the infringement. Fines are to gradually increase for repeated infringements

- Pooling Agreement excludes;

"Fines and other penalties, other than:

(a) fines or other penalties imposed upon an Insured Owner (or imposed upon a third party whom the Insured Owner is legally obliged to reimburse or whom the Insured Owner reimburses with the agreement of the Association) in respect of an Insured Vessel by any court, tribunal or other authority of competent jurisdiction for or in respect of any of the following:

(i) short or over-delivery of cargo or failure to comply with regulations concerning the declaration of goods or the documentation of cargo,

(ii) breach of any immigration law or regulation,

(iii) the accidental escape or discharge of oil or any other substance or threat thereof,

(iv) smuggling or any infringement of any customs law or regulation other than in relation to cargo carried on the Insured Vessel;

(b) any other fine or penalty where the Insured Owner has satisfied the Directors of an Association that it took such steps as appear to those Directors reasonable to avoid the event giving rise to such fine or penalty."

- Club Rule 3.16.4

Mirror Pooling Agreement

- ## Testing standards

When analysing fuel oil the laboratory and test used must meet ISO standards. If test results are within the repeatability of the test method they are considered valid with no further testing necessary.

The reality is that laboratories use different test methods with varying repeatability. This leaves the possibility, as mentioned previously, of the same fuel being tested twice, with two different but completely valid results given and the prospect of the fuel being both on and off specification.

We would like to open a discussion on the matter and whether claims of this nature should be automatically covered rather than being discretionary.

Scenario:

Fines (discretionary): Non-compliant sulphur levels in bunker fuel.

Fuel stemmed in location A tested on-spec. On arrival at location B a local authority carried out a fuel test and found the fuel to be off-spec.

Laboratory results found the Sulphur level of the fuel to be above the SECA (Sulphur Emission Control Area) permitted level of 0.10%.

In line with MARPOL regulations a fine was imposed on the ship owner.

Questions:

- Deliberate pollution?
- Covered as right? Discretionary?

Agenda item no

2

Eligible Persons

Discussion of the different eligible persons set out in the Pooling Agreement Appendix I.

- ## JOINT ENTRANT (Rule 13.1, Pooling Agreement Appendix I Category 4 (A))

A joint entrant must be named on the certificate of entry (Appendix I Category 4 (A) (a)).

Only entities that are interested in the operation, management or manning of an entered ship can be eligible to be named as a joint entrant. Examples of eligible entities are:

- owners/mortgagees of the ship, including banks; and
- bareboat or demise charterers.
- technical managers;
- commercial managers;
- vessel operators;
- crew managers;
- the member's associated or affiliated companies; and
- Associated or affiliated charterers (Appendix I Category 4 (D)).

Non-affiliated charterers cannot be named as a joint entrant on the same entry as the above listed entities (Appendix I Categories 1 and 2). This is because the Pooling agreement requires each charterer to buy their own P&I cover unless they are affiliated to an insured party. (This does not apply to bareboat charterers who may be named on the same cover as the above parties).

It is important that we show each joint entrant's capacity so that we can see that they are eligible to be named on the certificate of entry.

A joint entrant has the same extent of cover as is available to the member and they have an independent right to recover (Rule 13.1, Appendix I Category 4 (A) (c)).

They are all jointly and severally liable with the member to pay calls, premium and other sums due to the club. This liability can only be waived for the US Government and US Government Agencies (Rule 13.1, Appendix I Category 4 (A) (b)).

Questions:

- Can you limit the exposure for amounts due to the club?
- What charterers can be named?
- Co-assured or joint entrant?

- ## CO-ASSURED (Rule 13.5, Pooling Agreement Appendix I Category 4 (B) and (E))

Any type of entity, even those eligible to have joint entrant status, except for non-affiliated charterers, can be named as co-assured (Rule 13.5, Appendix I Category 4 (B)). Non-affiliated charterers can only be named in certain circumstances – see below. Otherwise they must buy their own P&I cover.

The certificate must state in what capacity they have been named as co-assured "Co-assured" is not an acceptable capacity – we need to know what role the co-assured plays in in relation to the ship eg Manning agent.

A co-assured has cover that only extends insofar as they are found liable for loss or damage which is properly the responsibility of the member. This cover is often called 'misdirected arrow cover'.

Non-affiliated charterers can only be named as co-assured where the charter party has been approved by the managers and is on knock for knock terms (Rule 13.13, Appendix I Category 4 (E)). If the contract is not knock for knock the member will need contractual extension cover to afford such charterer the 'misdirected arrow cover'. When a non-affiliated charterer is named as a co-assured the certificate must include the Co-assured Offshore clause, which mirrors the position in the Pooling Agreement:-

"Where the member has entered into a charter party or other contract for the provision of services by the ship, the other party to such contract and its affiliated and associated companies, contractors, subcontractors and clients of any tier ('contractors') will be named and are covered as co-assureds in accordance with the provisions of rule 13.

Where the charterer is not affiliated to or associated with the member or a joint entrant, and has not contracted with the member or a joint entrant on knock-for-knock terms, there shall be no cover unless cover has been given under the club's **contractual extension clause 2018** and only to the limit applicable thereto."

Questions:

- Why can we not name a non-affiliated charterers?
- Can we name terminals etc?
- 'name and waive'?
- Is 'as owner' language and 'cross liability clauses' acceptable?

- ## AFFILIATED AND ASSOCIATED COMPANIES (Rule 13.17, Pooling Agreement Appendix I Category 4 (C))

  If an affiliated or associated company of the member has a claim brought against them which would have been recoverable from the club by the member they will be entitled to recover from the club to the same extent.

  This is included in the club rules, but also often mirrored on the certificate of entry.

  Such entities do not need to be named on the certificate of entry.

POOLING AGREEMENT / SPECIALIST OPERATIONS / CONTRACTING

Agenda item no

3

General contracting principles and guidelines

Discussion of the contracting principles under the Pooling Agreement

- ## CONTRACTING PRINCIPLES (Pooling Agreement Appendix V – 11. Contracts and indemnities)

1. General

   In general, an Insured Owner should not assume responsibility, under contract or otherwise, for liability arising or loss resulting from any act or omission for which, under applicable law, the Insured Owners would otherwise be entitled to exclude or limit liability

2. "Knock for Knock"

   Notwithstanding paragraph 1 above, an Association may approve and shall be entitled to pool liabilities under a Knock for Knock agreement provided that the Insured Owner does not, under any such agreement, waive any rights of limitation otherwise available to him under applicable law

- ## KNOCK FOR KNOCK (Pooling Agreement Appendix V – 11. Contracts and indemnities)

Definition under club rules:

Knock for knock: a provision stipulating (1) that each party to a contract shall be similarly responsible for loss of or damage to, and/or death of or injury to, any of its own property or personnel, and/or the property or personnel of its contractors and/or of its or their subcontractors and/or of other third parties, and (2) that such responsibility shall be without recourse to the other party and arise notwithstanding any fault or neglect of any party and (3) that each party shall, in respect of those losses, damages or other liabilities for which it has assumed responsibility, correspondingly indemnify the other party against any liability that that party shall incur in relation thereto.

Question:

- Will poolable cover respond if the right to limit has been waived under the contract but there is no right to limit in the jurisdiction anyway?
- What if the right to limit is not upheld in a jurisdiction?

- SERVICES BY (Pooling Agreement Appendix V – 11. Contracts and indemnities)

3. Contracts under which the Insured Vessel provides transportation or other services to or on behalf of other parties

   The principles set out in paragraphs 1 and 2 above apply to the terms of any contract under which the Insured Vessel provides transportation or other services to, for or on behalf of any others.

- SERVICES TO (Pooling Agreement Appendix V – 11. Contracts and indemnities)

Examples: hull cleaning, security, terminal use, dry dock / maintenance, equipment supply

4. Contracts under which services, goods or facilities are obtained for or supplied to the Insured Vessel

   The insured Owners shall exercise best endeavours to ensure that the terms of any contract under which services, good or facilities are obtained for, supplied or made available to the Insured Vessel, comply with the principles set out under paragraphs 1 and 2 above. If the terms of any such contract do not and will not comply with the principles set out under paragraphs 1 and 2 above, liabilities arising thereunder shall nevertheless be eligible for pooling where the Association determines that the Insured Owner exercised best endeavour to ensure that the contract did so comply and approves such contract by the exercise of discretion under its Rules.

Question:

- What does ‘best endeavours’ mean?

- ACCEPTABLE CONTRACTS – ELIGIBLE FOR POOLING (Pooling Agreement Appendix V – 11. Contracts and indemnities)

- Panama canal indemnities – 5. (a) (i)
- The Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 and Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006. – 5. (a) (ii)

- EXCLUDED CONTRACTS – NOT ELIGIBLE FOR POOLING (Pooling Agreement Appendix V – 11. Contracts and indemnities)

- Panama canal indemnities – 5. (b) (i) – *'indemnities relating to chocks and bitts and those relating to the construction and fittings of the ship itself'*
- Indemnities to doctors – 5. (b) (ii) – e.g. passenger ships / cruise
- Indemnities to QIs, OSROs, other persons or contractors providing clean up services which do not comply with the IG guidelines – 5. (b) (iii)
- Indemnities in relation to LNG (unless meet certain requirements)

POOLING AGREEMENT / SPECIALIST OPERATIONS / CONTRACTING

Agenda item no

4

LNG Terminal Agreements

An IG working group has been established to carry out a review of the current provisions relating to LNG indemnities and to consider whether there remains a justification for continuing to treat such indemnities differently from other CoU indemnities where 'best endeavours' provisions apply. The working group recognise that it is an increasingly heavy workload to monitor and assess different LNG CoUs and that there may be a case for trying to simplify this by aligning the treatment with other CoU indemnities.

The working group is continuing its review with the objective of re-drafting the current provisions and preparing a questionnaire for clubs to circulate to their LNG memberships to sound views from the sector to guide the review process.

- CURRENT POSITION (Pooling Agreement Appendix V – 11. Contracts and indemnities, 5(b)(iv))

In order to be eligible for pooling, LNG terminal contract agreements must contain:

(a) a provision allowing members to limit liability in accordance with local law, the 1976 Limitation Convention or contractually to a maximum of USD 150 million;

Note: The right to such limitation must:

(i) Not be conditional on the performance of insurance or other obligations of the member; and
(ii) In respect of any contractually agreed limitation, encompass all liabilities under the conditions of use arising from one event.

(b) an exception for the sole negligence of the terminal (unless the indemnity given is worded on a knock-for-knock basis).

Notwithstanding the above, if the liability under the indemnity relates to the vessel's crew or wreck removal of member's vessel and the contract does not comply with (a)ii and/or (b) above, that liability shall nevertheless be eligible for pooling if the club determines that the member has exercised best endeavours to ensure that the COU does comply.

Questions

- What if the member is chartering the LNG carrier?
- Why are LNG terminal COUs treated differently to other 'services to' contracts?
- Tug services?

POOLING AGREEMENT / SPECIALIST OPERATIONS / CONTRACTING

Agenda item no

5

Towage

Discussion of the different contracting requirements set out in the Pooling Agreement for towage of an entered ship and towage by an entered ship.

- WHAT IS TOWAGE?

Club rules define towage as:

“Any operation in connection with the holding, pushing, pulling moving, escorting or guiding of or standing by a ship or object”

- ## TOWAGE OF AN ENTERED SHIP

Rule 3.10.1:

Liabilities under the terms of a contract for the towage of the ship which:

(1) relate to the risks set out in the other paragraphs of rule 3;

(2) arise under a contract for towage undertaken in the ordinary course of trading for the purpose of entering, leaving or manoeuvring within a port; or

(3) arise under a contract for the towage of cargo barges; or

(4) arise under a contract which has been approved by the managers.

Customary towage:

- towage for the purposes of entering or leaving a port
- towage for the purposes of manoeuvring within the port during the vessel's ordinary course of trading
- towage of vessels, such as barges, that are habitually towed in the ordinary course of trading from place to place

Non-customary towage:

- ocean towage
- towage to a shipyard for repair
- scrap / dead ship towage

- ## TOWAGE BY AN ENTERED SHIP

Rule 3.10.2:

Liabilities under the terms of a contract for, or arising out of, the towage by the ship of any ship or object where:

(1) such liabilities relate to the risks set out in the other paragraphs of rule 3; and

(2) the towage is undertaken for the purpose of saving life or property at sea; or

(3) the ship is towing under a United Kingdom, Netherlands or Scandinavian standard towage contract, the current Lloyd's standard form of salvage agreement – no cure no pay, or other towage contract containing similar exclusions of liabilities to these market forms; or

(4) the contract is on knock-for-knock terms; or

(5) a contract on knock-for-knock terms is likely to be unlawful or unenforceable in whole or part and the contract under which the towage takes place:

a. does not impose on the member any liability to any person arising out of any act, neglect or default of the owner of the tow or any other person; and
b. limits the liability of the member, or preserves his right to limit, to the maximum extent possible by law; or

(6) the contract has been approved by the managers.

• CONTRACTING

Towage contracts are acceptable for poolable cover if:

1. Knock-for-knock terms
2. In jurisdictions where knock-for-knock not enforceable provided that the member has not waived their right to limit or accepted liability for negligence of the owner of tow
3. Approved contract

• APPROVED CONTRACTS

BIMCO Towcon/Towhire 2008

- Knock-for-knock terms whereby Charterer responsible for their people, tow and property thereon
- Knock-for-knock for all third party claims in connection with tow

BIMCO Supplytime 2005

- Knock-for-knock terms
- Charterer responsible for cargo, tow, other Charterer Group property and Charterer Group personnel

Questions:

Contract clause:

The following shall be for the sole account of the Hirer without recourse to the Tugowner, his servants or agents, whether or not the same is due to any breach of contract (including as to the seaworthiness of the Tug):

(1) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tow.
(2) Loss of or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow.
(3) Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (1) and (2) above.
(4) Any liability in respect of preventing or abating or removing pollution originating from the Tow.
(5) Except where caused by the sole negligence or any other fault on the part of the Tugowner, his servants or agents, any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tow.

- Can poolable cover respond?

- Why is liability for loss of / damage to / wreck removal of the tow (and property thereon) excluded from poolable cover?

POOLING AGREEMENT / SPECIALIST OPERATIONS / CONTRACTING

Agenda item no

6

Specialist operations

An overview of specialist operations and update on the International Group's position on the specialist operations exclusion, their agreed revised list of activities and the ongoing debate as to the manner in which they implement the definition of what is a specialist operation.

- CURRENT EXCLUSION

Rule 5.11:

Liabilities incurred during the course of performing specialist operations including but not limited to dredging, blasting, piledriving, well stimulation, cable or pipe laying, construction, installation or maintenance work, core sampling, depositing of spoil, professional oil spill response or professional oil spill response training and tank cleaning (other than on the ship), but excluding firefighting, to the extent that such liabilities arise as a consequence of:

(1) claims brought by any party for whose benefit the work has been performed, or by any third party (whether connected with any party for whose benefit the work has been performed or not), in respect of the specialist nature of the operations; or

(2) the failure to perform such specialist operations by the member or the fitness for purpose or quality of the member's work, products or services; or

(3) any loss of or damage to the contract work 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.

This exclusion does not apply to liabilities incurred in respect of:

a. injury, illness or death of any person on board the ship
b. wreck removal of the ship
c. oil pollution emanating from the ship or the threat thereof

but only to the extent that such liabilities are covered by the club in accordance with these rules.

- WHY ARE SPECIALIST OPERATIONS EXCLUDED?

- ## COVER FOR SPECIALIST OPERATIONS

Poolable:

1. Injury, illness or death of people on board
2. Wreck removal of the ship
3. Oil pollution from the ship

Non-poolable (Specialist Operations Extension):

Third party liabilities incurred:

(i) During the course of performing specialist operations
(ii) In respect of the specialist nature of the operation

Excluded:

1. Failure to perform / fitness for purpose / quality of the member's work
2. Loss of or damage to the contract work

- ## CONTRACT WORK

Definition in club rules:

"…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."

Scenario:

A construction barge is contracted to install a new bridge over the Columbia River. While installing part of the deck of the bridge, the barge crane wire fails causing the deck of the bridge to fall to the river/seabed.

This causes the following losses:

1. Damage to the deck of the bridge
2. Damage to a nearby pier
3. Injury to a crewmember who is hit by the crane wire

What covers can respond?

Revised exclusion

Liabilities, costs and expenses incurred by an Insured Owner during the course of performing specialist operations including but not limited to dredging, blasting, pile-driving, well-intervention, cable or pipe-laying, construction, installation or maintenance work, core sampling, depositing of spoil, and power generation, to the extent that such liabilities, costs and expenses arise as a consequence of:

(a) claims brought by any party for whose benefit the work has been performed, or by any third party (whether connected with any party for whose benefit the work has been performed or not), in respect of the specialist nature of the operations; or
(b) the failure to perform such specialist operations by the Insured Owner or the fitness for purpose or quality of the Insured Owner's work, products or services; or
(c) any loss of or damage to the contract work.

Provided always that this exclusion shall not apply to liabilities, costs and expenses incurred by an Insured Owner in respect of:

(i) loss of life, injury or illness of crew and other personnel on board the Insured Vessel; or
(ii) the wreck removal of the Insured Vessel; or
(iii) oil pollution emanating from the Insured Vessel or the threat thereof,

but only to the extent that the member is covered for such liabilities, costs and expenses by the relevant Association and subject to the terms and conditions applicable to cover for such liabilities, costs and expenses under the Pooling Agreement.

- ROVs AND DIVERS

Rule 5.14:

Liabilities incurred in connection with any claim arising out of:

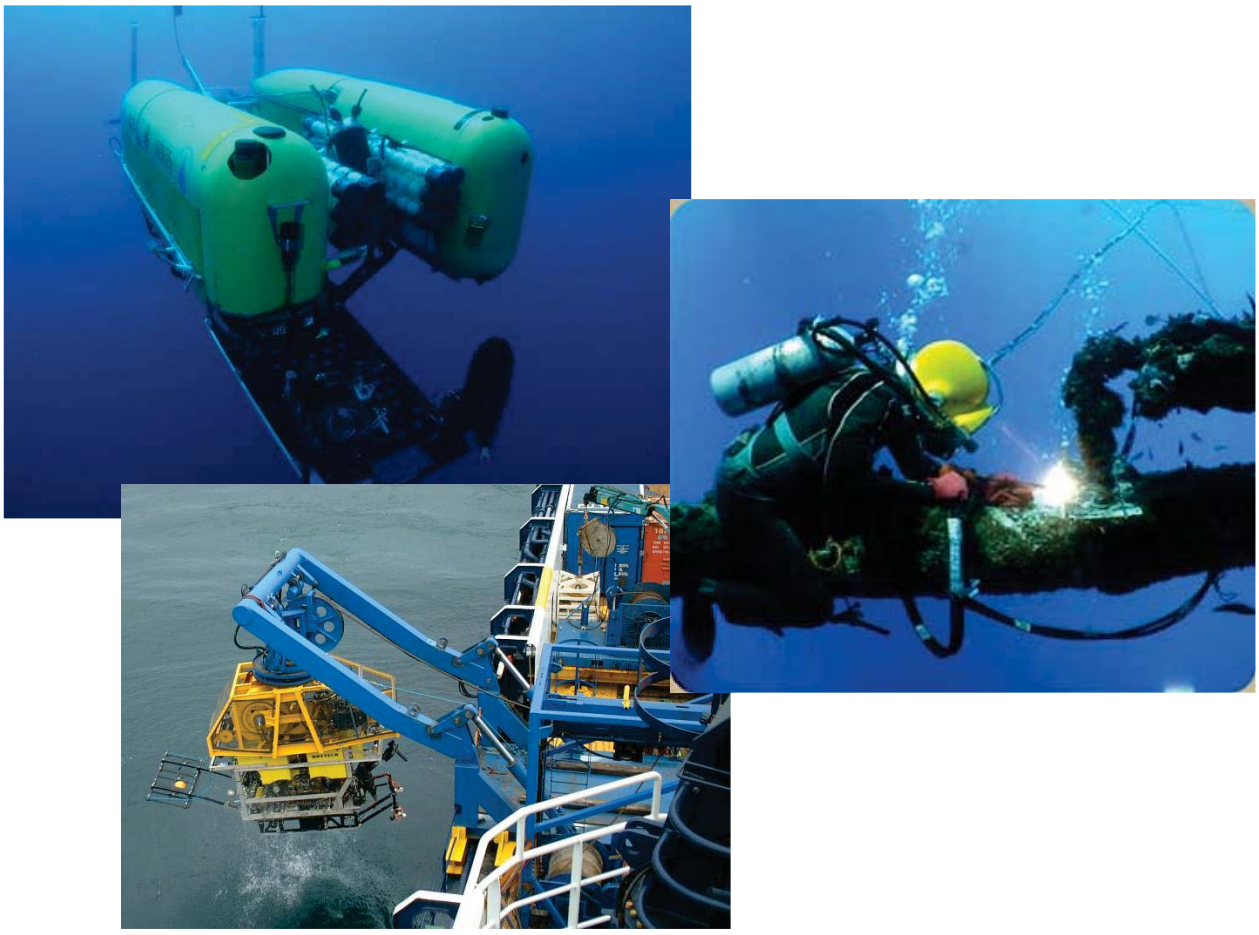
(1) the operation by the member of submarines, mini submarines or diving bells; or

(2) the activities of professional or commercial divers where the member is responsible for such activities, other than:

a. activities arising out of salvage operations being conducted by the ship where the divers form part of the crew of that ship (or of diving bells or other similar equipment or craft operating from the ship) and where the member is responsible for the activities of such divers; and

b. incidental diving operations carried out in relation to the inspection, repair or maintenance of the ship or in relation to damage caused by the ship; and

c. recreational diving activities.



- COVER

ROV/Underwater Vehicles Extension reinstates cover excluded under 5.14(1) to an agreed limit in respect of:

- P&I liabilities arising out of operation by the member of underwater vehicles including submarines, ROVs and diving bells; but
- Not loss/damage to underwater vehicles themselves

Divers Extension reinstates cover excluded under 5.14(2) to an agreed limit in respect of:

- P&I liabilities arising out of the activities of prof/commercial divers; but
- Not injury, illness or death of divers where the member's liability arises under a contract and would not have arisen in the absence of such contract

Question

- A diver has been contracted to inspect the hull of the ship. The diver snags a subsea cable while carrying out this work. Would the Divers Extension have been required to cover this?

POOLING AGREEMENT / SPECIALIST OPERATIONS / CONTRACTING

Agenda item no

7

Accommodation units

Discussion of the current International Group position on cover for accommodation units and proposed revisions extending access to poolable cover.

- CURRENT EXCLUSIONS FROM POOLING AGREEMENT

1. Drilling and production operations

"Liabilities, costs and expenses incurred in respect of an insured Vessel carrying out drilling or production operations in connection with oil or gas exploration or production, **including any accommodation unit moored or positioned on site as an integral part of any such operations, to the extent that such liabilities, costs or expenses arise out of or during drilling or production operations**."

2. Non-marine personnel

"Liabilities, costs and expenses incurred by an Insured Owner of an Insured Vessel in respect of any of the following:-

personnel (other than marine crew) on board the Insured Vessel (being an accommodation vessel) employed otherwise than by the Insured Owner where there has not been a contractual allocation of risks as between the Insured Owner and the employer of the personnel which has been approved by the Association* with which the Insured Vessel is entered"

*we would currently only approve a knock for knock contract in respect of accommodees

Current considerations are therefore:

(1) is the vessel an accommodation unit – we would take the view that any ship or unit, regardless of design (semi-submersible with integrated gangway, barge, jack up, multirole support ship with or without leased Ampleman gangway or equivalent) would be deemed to be an accommodation unit where they are predominantly providing such services under contract

(2) is the vessel integral to an ongoing drilling or production operation – we would review case by case but generally any ship or unit permanently moored within 500m exclusion zone would be integral. Ships navigating in an out of the exclusion zone would not be.

(3) if the unit is providing accommodation services and is integral then SOR cover would be required.

(4) If this is not the case Poolable cover would apply subject to the member contracting on knock for knock terms in respect of accommodees, otherwise a contractual extension would be required.

- ## PROPOSED REVISION TO POOLING AGREEMENT

Accommodation units will no longer be included within the production and drilling exclusion and the non-marine personnel exclusion will be extended to exclude accommodees absolutely where the vessel or unit integral to an oil or gas exploration or production operation.

Therefore:

(1) Accommodation units will be poolable and will not require SOR cover, but contractual cover required for non knock-for-knock contracts

(2) If the ship or unit is integral – there is no poolable cover for Accommodees even where knock for knock terms have been achieved, but all other risk will be poolable.

The only outstanding point before this position is formally adopted is how to define what being integral to a drilling or production operation means. This question has been referred back to the production and specialist craft subcommittee, although there is a current proposal of a 200m exclusion zone.