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Special Edition - Offshore

BARBARA JENNINGS
DIRECTOR, OFFSHORE
+44 (0)20 7522 7429
Barbara.Jennings@ctcplc.com

ROBERT DOREY,
SYNDICATE DIRECTOR
+44 (0)20 7522 7433
Robert.Dorey@ctcplc.com

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Charles Taylor & Co. Limited
International House
1 St. Katharine's Way
London, E1W 1UT
England

Telephone: +44 (0) 20 7488 3494
Fax: +44 (0) 20 7481 9545
Emergency mobile:
+44 (0) 7932 113573
E-mail: p&i.london@ctcplc.com

standard-club.com

Please send any comments to the Editor –
Ursula.O'Donnell@ctcplc.com
Telephone: +44 (0) 20 7522 6477

Welcome to the third special Offshore edition of the *Standard Bulletin*, our largest Offshore edition to date, and we believe also the best. In this *Bulletin* we take a look at the basics of offshore cover, update you on a number of legal developments and provide an overview of the reinsurance market.

In his review of the current offshore market Mike Dean looks at the impact of recent losses, including the damage caused by hurricane Ike in the US Gulf, which may prove the trigger for some rate increases as the renewal season approaches. Mike also refers to the local insurance markets developing in other parts of the world, a topic on which we expand with a closer examination of the burgeoning market in Singapore by Tom Helleboe of Oriental Special Risk Services.

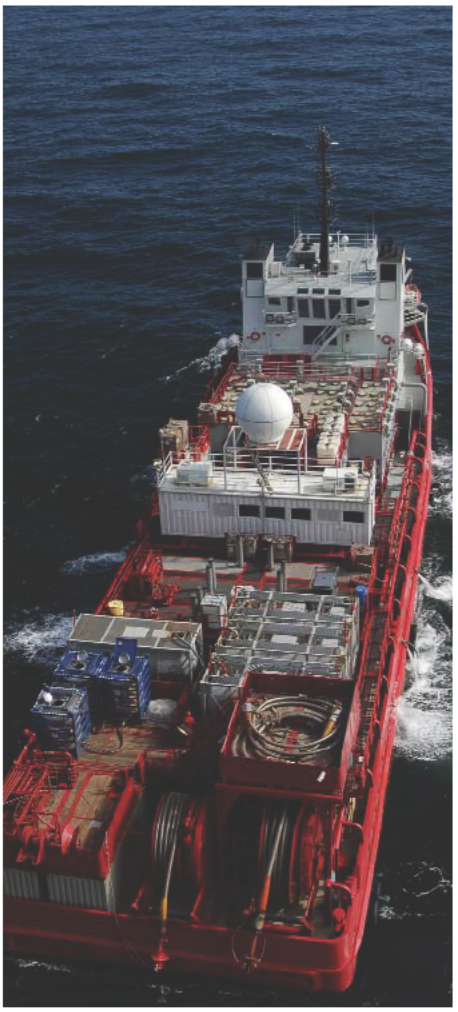
One question which frequently exercises the Club and its members is which risks can be pooled and which cannot in the context of specialist operations. The offshore industry constantly advances in its use of technology and the work which it requires its ships to undertake, and so we thought it would be timely to revisit a topic which we last looked at in depth some years ago. Robert Dorey and Sharmini Murugason examine some of the underlying principles behind poolable and non-poolable cover, and go into more detail on what exactly constitutes a specialist operation and how we can insure the risks inherent in such operations. Elsewhere, John Croucher takes a look at some of the provisions often seen in US drafted contracts which can cause problems with Club cover if incorporated unamended.

In an industry which is required to work in ever more challenging conditions the safety of the personnel involved in any operation must come before all other considerations. Unfortunately, serious accidents still occur, usually through deadly combinations of circumstances. Our Director of Loss Prevention, Chris Spencer, examines the *Bourbon Dolphin* incident and the recommendations made by the Norwegian Royal Commission which investigated the accident. Meanwhile, Hugh Williams of IMCA considers the industry's need to balance risk and cost whilst continuing to pursue the holy grail of zero injuries.

One factor which usually figures in accident reports is human error. Even if a failure to act prudently and safely does not end in injury there can nevertheless be onerous consequences for those involved, as Andrew Iyer of Ince & Co demonstrates in an examination of the legal principles governing wilful misconduct and gross negligence. We also have an examination of the *Koumala* case by David Roylance and Simon Shaddick of Holman Fenwick Willan, Melbourne, including the effects of the judgement on Club cover.

We believe we have produced an issue which you will find both interesting and illuminating and, as ever, we would be delighted to receive your feedback and your ideas for topics which you would like us to cover in the future.

In This Issue



BY MIKE DEAN,
TAYLOR RISK CONSULTING - DIRECTOR
+44 (0)20 7759 4927
Mike.Dean@ctcplc.com

Market Update

In these pages last year, we speculated about what we might see in the crystal ball, and I do not think it included $140 per barrel oil! This has led to a boom in drilling and offshore construction, although the recent drop in the oil price coupled with the credit crunch is likely to affect some projects. But what of the insurers that protect it and the buyers that support them?

We talked previously about new and increased insurance capacity coming into the market in late 2007 and 2008. This has indeed proved to be the case although new capital was delayed in its entry and was not quite as much as had been anticipated. Nevertheless, rates in most areas have softened, although they have held up more in areas exposed to natural perils or in respect of capacity risks. This follows a very good underwriting result in 2007. Although rates have fallen more rapidly in the onshore sector than they have in upstream areas, the fall in rates generally seems to be slowing despite these good last couple of underwriting years. Perhaps this is due to underwriters committing capacity earlier in the year in anticipation of rates dropping off further or the growing existence of a number of losses.

Whilst those in the offshore industry might consider themselves to exist only in isolation, insurers are in a wider world, whereby other energy-related losses impact upon their book of business. Energy losses reported in the first eight months of 2008 are somewhere around US$1.5 billion, and obviously at the time of writing, the impact of the recent hurricane season including the damage done in the US Gulf by hurricane Ike, is as yet unknown. However, mining losses, often written in the same book as energy, are currently running at well over US$3 billion so there are certainly some significant losses going through the market. Insurers maintain that the profits of the last couple of years are being wiped out or at least severely threatened by these 2008 losses. Another factor that might come back to haunt energy insurers is the fact that increased values have pushed absolute premiums upwards or at least income is being maintained, whereas rates have dropped. This all masks the fact that insurers have an ever-increasing exposure for relatively less premium.

Whilst the London market remains dominant, it is vulnerable to so called 'local' insurers, especially in the Gulf or Middle East, where those insurers are often more competitive than London and are increasingly professional. London is often accused of being 'London-centric' and it ignores what to us here are overseas competitors at our peril. These other markets, often fuelled by a petro-economy, are likely to continue growing and offer increasing capacity.

Many of Standard Offshore's members are engaged in the construction field, and there has been a definite change of attitude on the part of CAR underwriters in the course of this year. A spate of losses and, in particular, subsea losses has led to a sharpening of pens as well as increased deductibles and restricted cover. This latter aspect has been seen in particular with regard to cancellation and mob/demob costs, brought about by some specific losses.

Conventional wisdom amongst brokers used to be that another benign hurricane season, coupled by new entrants to the market, might well see rates on the slide again. Presumably, the converse is equally true. Over the last few months, as rates have started to drop, we have heard much from insurers about the need for discipline, management over underwriter controls, reduced capacity, putting the pen back in the drawer and so on, all in an effort to avoid or manage the cycle. However, such pleas seem to have always fallen on deaf ears in the past, and the peaks and troughs endured from the beginning of time look set to continue – or will they? More next year…

BY ROBERT DOREY,
SYNDICATE DIRECTOR
+44 (0)20 7522 7433
Robert.Dorey@ctcplc.com

Cover

Background to Offshore P&I Cover

Liabilities arising from offshore operations often fall outside mutual P&I cover. In this article and in Sharmini Murugason's article following, we will look at the International Group Pooling Agreement to explore and understand why some risks are able to be pooled and others are not. Whenever possible the Club will allocate risks to the mutual cover, since this gives much greater limits for proportionately lower cost, but where liabilities arise that are not covered under a poolable entry, cover can nevertheless be given by the Club under our non-pool insurance programme up to a limit of $1 billion.

P&I is founded in the traditional shipping operations of carrying goods or passengers to and from a port under a contract of carriage. Since the middle of the 19th century shipowners have been able to share these liabilities in mutual P&I clubs. In the middle of the last century the clubs got together to pool their claims and also began as a pool to buy substantial reinsurance, and control and manage their members' liability claims. Today, the P&I cover for the vast majority of the world's commercial shipowners is provided through the 13 clubs worldwide that make up the International Group of P&I clubs. Together, the clubs in the International Group can provide P&I cover for individual losses up to an estimated US$5.5 billion limit (US$1 billion in respect of oil pollution and US$3 billion in respect of passengers and seamen). They do this by sharing, or pooling, these claims between them. The document that regulates how losses are to be shared between the participating clubs is the International Group's Pooling Agreement, which sets out a method for sharing all claims in excess of US$7 million.

The insurance provided by the Club is set out in the Rules, which positively express the cover available. To be covered by the Club a claim must fall within the limits of the cover set out by the Rules; it must arise out of the operation or management of an entered ship, and out of one of the risks insured against. Nevertheless, the Rules largely mirror the language of the Pooling Agreement, so a closer look at the Pooling Agreement will assist us in identifying which liabilities fall outside the mutual cover.

The Pooling Agreement sets out:

1. the principles on which claims can be pooled

2. the types of claim which cannot be pooled

The Agreement also includes, among other things, provisions as to the calculation of clubs' pool contributions and the requirements for new applications to the pool, but it is the provisions governing poolable claims that are the subject of this article. Claims that fall within the Pooling Agreement are referred to by the clubs as being 'poolable', and claims that fall outside the Pooling Agreement as 'non–poolable'. It is also worth noting that, as a general rule, entries in the club which are principally for poolable risks, and which therefore benefit from the Group's pooling and reinsurance arrangements, are on a mutual premium basis. On the other hand, risks which are not poolable are usually underwritten on a non-mutual, fixed premium, basis.

The Pooling Agreement includes specific provisions dealing with those claims that are excluded from pooling. The three exclusions that impact the most on offshore business are framed either:

– by reference to type of work; or

– by reference to type of ship; or

– by reference to legal liabilities assumed

Type of Work

Mutuality is founded on the principle that all insured parties will be exposed to similar risks, which in the case of a typical shipping operation relate to the carriage of goods by sea. Mutuality therefore means that when owners are performing operations that are different to this, it is probable that liabilities flowing from the nature of such operations will be excluded. This is the case in respect of those operations that are described by the Pooling Agreement as 'specialist', such as cable or pipe laying, dredging, and offshore installation and maintenance work, and certain other activities. The scope of the specialist operations exclusion is dealt with in detail by Sharmini Murugason in her article on page 5.

Type of Ship

The second exclusion from poolable cover is in respect of ships that engage in drilling or production operations. This exclusion leaves little room for poolable cover to be in place, because the exclusion operates by virtue of the type of ship, in contrast to the specialist operations exclusion, which relates only to liabilities arising out of the work being carried out. Thus, liabilities arising in respect of drilling or production ships (including accommodation units that are integral to the drilling/production operations) are excluded in their entirety from poolable cover, even if the claim has nothing directly to do with the nature of the operation, if such liabilities arise out of or during drilling or production operations.

If you are unsure as to whether the ship or unit in question is poolable or non-poolable, then you should check with your underwriter who will advise you.

Legal Liabilities Assumed

Poolable cover is available for a number of contractually-assumed risks, but not for all risks arising under contracts or indemnities. In order to explain the various provisions, we shall look at them by reference to the nature of the contracts.

Services Provided to an Entered Ship

When ships enter ports or shipyards, local companies providing services to the ship will usually do so on their standard form conditions of contract. In many cases, these contracts are onerous for the shipowner in terms of allocation of liability in that the liabilities assumed are more than the shipowner would have at law. However, it is accepted that there is often little opportunity for the owner to improve the conditions of such

contracts. Accordingly these liabilities will usually be poolable but the shipowner must use his best endeavours to contract on best possible terms, and must not contractually waive the right to limit.

Services Provided by an Entered Ship

In contrast to the above, when an entered ship provides services by way of a charter or a contract for services such as carriage of cargo or supply operations, more stringent requirements have to be met in order for poolable cover to apply. This is because the Group clubs take the view that, where members are providing services, they have more opportunity to negotiate acceptable contractual terms and can always walk away if this is not possible.

There are essentially two options. The first is that the member contracts on a basis that does not expose him to liabilities that he would not otherwise incur at law, and that he retains the right to limit. The other alternative is that the member contracts on the basis of a knock-for-knock agreement, by which each party takes responsibility for his property and personnel regardless of fault.

Towage

Although towage is also normally carried out under contract, it is dealt with separately under the Pooling Agreement, although a similar distinction is drawn between towage of an entered ship and towage by an entered ship.

Towage of an entered ship

Where an entered ship is being towed, the only exclusion relates to liabilities that arise under a contract between the tug and the entered ship, although in practice all towage other than in a salvage situation will be carried out under contract. As far as liabilities incurred under a contract for towage of an entered ship are concerned, the Pooling Agreement distinguishes between "customary" and "non-customary" towage. Where the contract is in respect of towage of ships that have to be towed, such as barges, or where towage is required for harbour manoeuvres, it is understood that the member will normally have to accept the terms offered to him by the service provider. Thus, for customary towage of an entered ship, the Pooling Agreement imposes no restrictions as to the terms on which the member must contract; it is acceptable for the contract to remain silent as to liability or to state that liability will be at law, or even for the member to accept liability under the contract beyond that which he would have at law.

There is, however, a difference in respect of liabilities arising under contracts for towage of an entered ship that is not customary, such as ocean tows. Where the towage is not customary, the member must contract on knock-for-knock terms or equivalent, because the member will have more opportunity to negotiate acceptable terms. It is always important for towage contracts to be approved by the Club so that there is no doubt about the scope and extent of cover applicable.

Towage by an entered ship

It is worth highlighting that when an entered ship is towing either a ship or other floating object such as a rig, the Pooling Agreement excludes all liability in respect of loss of or damage to or wreck removal of the tow, unless such liability arises a towage contract that is either on an industry standard form or has been approved by the Club. The sole exception is towage that is undertaken for the purpose of attempting to save life or property at sea, when any liability which may arise always remains poolable.

The Pooling Agreement approaches liability arising under contracts for towage by an entered ship rather as if these were contracts for services provided by the entered ship, although the requirements in respect of towage are more stringent. The member is required, where possible, to contract with the tow on knock-for-knock terms, providing that, in practice, there is no exposure for liability for loss of or damage to or wreck removal of the tow or her cargo. The Pooling Agreement sets out a list of contracts that are approved, most, but not all, of which are knock-for-knock, and these are as follows: TOWCON, TOWHIRE, UK Standard Towage Conditions (UKSTC) and SUPPLYTIME 1989 and 2005.

The only exception is in jurisdictions that do not support knock-for-knock contracts or other contracts by which the member can avoid liability for his own negligence. In such jurisidictions the Group clubs take the view that it is better to have a less stringent contract that will be upheld by the courts than to risk a knock-for-knock contract being struck down. Therefore, in jurisdictions which do not enforce contracts on knock-for-knock or other terms purporting to allow the tugowner to avoid the consequences of his negligence, the member may contract on other terms, provided that he does not take any liability for any negligence of the owner of the tow or any other person and that his liability is limited under the contract or otherwise to no more than the maximum exposure for which the he would be liable at law.

Again, in all the examples above, it is important to refer non-standard form towage contracts to the Club and to ask the Club if there are any questions regarding the adequacy of cover.

What do I do if the Contract or Operation is Non-Poolable?

The Club offers a wide and flexible non-pool coverage programme up to limits of US$1 billion, which can be utilised where a member may incur liabilities that are non-poolable and not otherwise covered under any other insurance. The Club will review contracts and provide terms where requested for liabilities that are identified as non-poolable to ensure that members have a level of certainty and security regarding their insurance to underpin their operations.

BY SHARMINI MURUGASON,
SYNDICATE CLAIMS DIRECTOR
+44 (0)20 7522 7434
Sharmini.Murugason@ctcplc.com

Specialist Operations

All Operations are Special but some are more Special than others

All parties involved in the offshore industry have been affected by the recent boom in oilfield construction and development, which had started before, but has benefited from, the rise of the oil price, albeit that the price is now almost half what it was at its peak. With reduced availability of dedicated construction units, shipowners who have traditionally been engaged in heavylift/heavy cargo transportation are now increasingly finding their scope of works being extended beyond mere transportation from point A to point B to an involvement in installation and construction operations. As a result, they may find themselves engaged in what are, in the context of Club cover, known as specialist operations. As we have often pointed out in these pages, liabilities arising during the course of specialist operations, insofar as they relate to the specialist nature of the operations, contract works or failure to perform or proper performance, are generally excluded from poolable cover. The text of the rule is set out later in this article.

Members who perform specialist operations can buy from the Club cover to restore, or 'buy back', some of the excluded risks referred to above, but those who have not done so may find themselves in a vulnerable position.

We therefore thought it opportune to revisit the specialist operations exclusion in our Rules, which is a reflection of that in the Pooling Agreement, and to consider the extent of coverage afforded by the specialist operations 'buyback' of P&I risks, which is underpinned by the Club's own reinsurance programme. Since liability in specialist operations is invariably subject to contract, this will include a consideration of the Club's contractual requirements of members engaged in such operations.

The Specialist Operations Exclusion

Specialist operations are excluded from poolable P&I cover as the risks associated with such operations are considered to be very different from those undertaken by the majority of commercial ship owners, making them unsuitable for mutual insurance, as well as potentially being very large. Ships engaged in specialist operations became a particular concern to the Group clubs following the 1991 Chicago pile-driving incident.

The 1991 Chicago incident concerned a pile-driving ship that was working in the Chicago River. The ship accidentally punched through the bottom of the river, penetrating the underground transport system and causing severe flooding. As a result, the clubs, encouraged by our reinsurers, felt it necessary to restrict the cover provided and the wording of the then existing specialist operations exclusion was amended such that it would apply to third-party risks arising due to the specialist nature of such work. The Group clubs did continue to cover certain risks by excepting them from the exclusion, these being in respect of injury/illness/death of personnel on board, pollution from the entered ship, and wreck removal of the entered ship. These were considered 'normal' risks for commercial shipowners and therefore acceptable for mutual insurance.

The current specialist operations exclusion reads as follows:

[The Club shall not provide cover for]

Liabilities, costs and expenses incurred by a Member during the course of performing specialist operations including but not limited to dredging, blasting, pile-driving, 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 (otherwise than on the Entered Ship), (but excluding fire-fighting) to the extent that such liabilities, costs and expenses arise as a consequence of:

(i) 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

(ii) the failure to perform such specialist operations by the Member or the fitness for purpose and quality of the Member's work, products or services.

(iii) 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 Entered Ship is working, or to be used up or consumed in the completion of such project.

Provided that this exclusion shall not apply to liabilities, costs and expenses incurred by a Member in respect of:

(a) loss of life, injury or illness of crew and other personnel on board the Entered Ship;

(b) the wreck removal of the Entered Ship;

(c) oil pollution emanating from the Entered Ship or the threat thereof;

but only to the extent that such liabilities, costs and expenses are covered by the Club in accordance with these Rules.

The definition of specialist operations is intentionally non-exhaustive because of the rate at which technology advances and new operations are undertaken. This means that non-listed operations, such as vertical seismic profiling, will be caught by the exclusion if they are considered sufficiently 'specialist' and/or potentially hazardous. It is therefore important that, when members are engaged in work that goes beyond the straight carriage of cargo, they examine the nature and extent of their scope of works and, if in doubt, refer the matter to the Club for confirmation of cover.

Operation of the Exclusion

The specialist operations exclusion operates by reference to the nature of the operation and for the exclusion to 'kick in', a claim must arise during the course of performing the specialist operation. An installation ship involved in a collision whilst on its way to the site of the operation would therefore not be caught by the exclusion as she would not be in the course of carrying out specialist operations at that time. However, if the collision were caused by the ship being unable to manoeuvre because she was engaged in construction work, the exclusion would apply because the liability would have arisen out of the specialist nature of that operation. If the collision also resulted in damage to the offshore structure that the ship was installing, this would be contract works damage, which is excluded under Rule 19.11 (iii), a point which is considered further below.

The exclusion therefore does not apply during the main transportation phase of the project, i.e. the cargo voyage to the work site. However, the Pooling Agreement requires members carrying cargo to do so on certain defined terms. Cargo must be carried on Hague/ Visby Rules terms or, for on-deck cargo, on terms that permit the cargo to be carried on-deck, states that it is being so carried and exonerates the member from all liability in respect of such cargo. For members operating heavy lift, including semi-submersible, ships, cargo must be carried on BIMCO Heavycon or similar terms. Members carrying project property under contracts that expose them to wider liability will need an additional contractual cover to protect them.

Not all operations may be readily apparent to the member as being specialist operations. One such instance involved a heavy lift ship transporting jetty sections that were to be discharged onto pre-installed piles. Although in terms of the nature of the operation, this may seem very similar to normal discharge onto a jetty, it is in terms of P&I cover a specialist operation, as the member is effectively engaged in jetty construction in lifting the cargo on to the fixed piles, and construction is considered to be a specialist operation. In another instance, a semi-submersible ship was carrying a topsides module for a float-over operation on to a pre-fixed jacket, whereby the cargo would be discharged directly onto the jacket by the ship submerging to mate the module with the jacket. Since this is tantamount to construction, a floatover operation is considered to be a specialist operation. In contrast to the jetty construction operation mentioned above, this did involve a very different risk to that involved in normal discharge, since the ship needed to be positioned very carefully within the jacket during the off-loading in order to avoid damaging it and to ensure successful mating.

Whilst in each instance the members were contracting on Heavycon contracts, members should note that the Heavycon contract affords protection to the shipowner in respect of cargo damage and wreck removal of the cargo, but not necessarily in respect of third-party liability arising out of the operation. This is particularly pertinent in an installation-type operation that may involve a number of different companies, not all of which will necessarily be included within the Heavycon indemnity regime.

Furthermore, Heavycon knock-for-knock provisions may cease once the voyage comes to an end and, therefore, it is important that the contract for installation is properly worded to extend beyond discharge of the cargo.

In both cases, the member required a buy-back of the specialist operations exclusion. As mentioned earlier, the Club can offer a special limited cover for third-party liabilities arising during the course of specialist operations. This extended cover can be purchased as part of the Standard Offshore Extension, a comprehensive and unified cover for ships that carry out specialist operations offshore . Full details of the cover can be found on the Club's website. It is not a blanket cover; it essentially reinstates cover for P&I risks covered under the member's terms of entry which would otherwise be excluded under Rule 19.11(i). It will not, however, restore cover that the member would not have under his normal P&I entry, unless this is specifically agreed. For instance, a member whose P&I entry excludes cargo risks will not obtain cargo cover for a specialist operation by purchasing a specialist operations buy-back, unless the Club specifically agrees to reinstate it.

Even under the specialist operations buy-back, exclusions remain in respect of damage to contract work and liability for poor or non-performance of operations (product liability). These remain excluded because this type of exposure would normally be covered under the Construction All Risk policy (CAR), which is commonly used to cover builders' risks for big offshore projects. Contract work has been defined in Rule 19.11(iii) above, a definition which is intended to dovetail with the CAR policy wording and operates to exclude those parts of the project and project property that are insured under the CAR policy. The definition lists a number of types of project property, but the list is intentionally non-exhaustive (as indicated by the words "including, but not limited to") to take account of the various types of projects undertaken in the offshore sector.

Contractual Terms

When giving the specialist operations buy-back, the Club normally expects the member to contract on terms that exclude all liability for, and to obtain a suitable indemnity in respect of, the work that is the subject of the contract and any other property on the worksite, irrespective of the member's negligence. These may be, using the examples mentioned above, in the case of the float-over operation, the jacket and the subsea equipment, pipelines and installations in the immediate vicinity of the site, and in the case of the jetty section installation operation, the support piles and any pre-existing jetty sections. The extent of the pre-existing property in respect of which the member should ideally be indemnified can be expressly agreed with the Club. The specialist operations buyback will respond to damage to the pre-existing property in the event of the failure of a contractual indemnity, provided the contract has been preapproved by the Club, although contract work will remain excluded.

Any member who is in any doubt as to whether any operation which they are undertaking constitutes a specialist operation, or whether their existing cover is adequate or a buy-back is required, should contact the Club for advice.

BY CHRIS SPENCER,
DIRECTOR OF LOSS PREVENTION
+44 (0)20 7680 5647
Chris.Spencer@ctcplc.com

"Bourbon Dolphin"

In 1990, Lord Cullen produced his report into the North Sea disaster in which the platform Piper Alpha caught fire and 167 people lost their lives. Lord Cullen's investigation was the most profound conducted into the offshore industry and his recommendations were enacted worldwide. Almost immediately, improvements were implemented in the 'permit to work' procedures, and safety case systems were introduced for all offshore installations. These measures have over time been introduced into the maritime industry, particularly with the introduction of the ISM Code in 1998. Unfortunately, the tragic loss of the offshore anchor-handler *Bourbon Dolphin* shows that the lessons from the Cullen Report have not successfully filtered down to all operators.

Anchor-handling is one of the most challenging ship operations carried out and when carrying out such operations in deep water and in poor weather conditions, additional safety provisions are required. Anchor-handlers are built to operate as tugs, platform supply vessels (PSV) and anchor handlers (AHTS). The cargo deck space of the AHTS is reduced due to the space taken up by massive winches designed to handle the huge anchors used by offshore units such as drilling rigs and pipe-laying barges. The AHTS has a low freeboard with an open stern fitted with a stern roller. The aft deck is equipped with 'shark's jaws' for clamping or holding the wire and chain, and usually twin sets of towing pins, designed to keep the tow wire leading safely from one position out of the stern roller. As well as the normal PSV requirements of cargo tanks for the carriage of brine, liquid drilling mud, base oil, fuel oil, fresh water and dry bulk, the AHTS is fitted with rig chain lockers.

The *Bourbon Dolphin* had four winches, three 400-tonne winches and one 138-tonne (tugger) winch. The ship was equipped with four main engines, giving a total power output of 12,000 kw. Electrical power was supplied by two shaft alternators plus two diesel generators of 700 kw each, powering one tunnel thruster and an azimuth thruster forward, and two tunnel thrusters aft. The main engine output gave a bollard pull of 180 tonnes, which increased to 194 tonnes when using the azimuth thruster. She was delivered in October 2006 to Norwegian owners and was Norwegian registered.

In April 2007, the *Bourbon Dolphin* capsized whilst carrying out a routine rig anchor deployment in deep water west of the Shetland Islands, with the loss of eight of the 15 people on board. The Norwegian Government appointed a Royal Commission to investigate the accident, which reported its findings at the end of March 2008.

The Commission made a number of recommendations prior to the publication of the full report, which were immediately enacted on Norwegian-registered ships. These were, in brief, as follows:

- Ensure ship's stability when anchor-handling is available.
- Ensure that an accurate measure of bollard pull when in an operational mode is available.
- Ensure that the crew have knowledge of the winch emergency release system and when it is to be used.
- Ensure companies have comprehensive anchor-handling procedures within the ISM system, including when carrying out tandem operations.

A closer examination of the causes of the accident will illustrate the reasons for these recommendations.

The *Bourbon Dolphin* was running the last of eight rig anchors to be deployed in weather that was debatably just within the limits of safe operation. However, due to a combination of factors, including the adverse weather, the strong prevailing cross current, the length of cable and chain, and hence the weight of both, the *Bourbon Dolphin* was struggling to maintain the deployment line of anchor no. 2. She had moved off line by such a significant amount that the tow master on the rig reportedly instructed her to manoeuvre to the west, away from the nearest deployed anchor to the east. Prior to this, the *Bourbon Dolphin* had been using the starboard set of towing pins, with the wire lying on the inboard pin and the ship having a port list of 5 degrees. For reasons never fully explained, the *Bourbon Dolphin* depressed the starboard set of towing pins, and the weight of the wire was therefore transferred to the port pins with some force. When the ship started to head west, the 'line of attack' of the heavy rig wire and chain changed, and became critical. Effectively with the chain now on the port pins and the ship already with a port list, the additional forces caused by the course change led to the ship's stability being overwhelmed; she was pulled over and capsized rapidly.

In the Commission's assessment, it was not possible to demonstrate that a single error, technical or human, caused the accident. The capsize occurred as a result of a number of factors that had coincided at that particular moment. This is typical of significant accidents; in nearly all cases, there is an accumulation of events and errors that lead to the accident.

The Commission's report listed these circumstances as:

- **The weather and current conditions**
  The weather was 'marginal'. The operation could have been stopped because of the weather, and this decision, had it been made, would not have been considered unusual. A larger and more powerful ship had struggled with the deployment of the previously laid anchor in similar weather, recorded as being winds of 30-plus knots with wave heights of 2-3 metres.
- **The ship's stability characteristics**
  The stability book was approved, but nevertheless, certain anchor-handling conditions challenged the ship's stability. For example, it stated that having 300 tonnes of weight on the winch was only permissible if the drag on the ship was within 0.5 metres of the centreline. By design, the use of the 'shark's jaw' required the chain or wire to be 1.7 metres from the centreline. This anomaly was not accounted for in the stability book. At the time of the incident, the wire was leading 1.7 metres from the centre line, as it was designed to.

Both the regular masters normally assigned to the ship testified that they had expected her to show better stability characteristics than she did, and that they had reservations about the stability. For example, they followed an operational 'habit' to ensure that maximum bunkers were retained on board, reducing the free surface effect and increasing bottom weight so as to improve the ship's stability.

- **Use of roll reduction tanks**
  The stability book and the company manuals did not clearly state that the anti-roll tanks (or roll-reduction tanks) should not be used when anchor-handling. They were in use at the time of the incident. Their use in certain conditions can reduce stability.

- **Use of the port towing pins**
  Even when the starboard pins were being used, the ship had an approximate 5 degree port list. When the lead of the wire was moved from the port to the starboard pins, the list would naturally increase and add to the capsizing forces. The change of the ship's heading to the west was unfavourable in relation to the direction in which the wire and chain were leading. The change in the point of attack from the weight of wire and chain caused by depressing the starboard pins and allowing the wire to lead from the port pins exacerbated the port list to a critical degree.

- **Reduced manoeuvrability due to blackout of the starboard engines**
  The lateral thrusters were operating at full power and the engineers feared they would overheat. The engineers had already informed the bridge that there was a possibility of a blackout due to the engines and thrusters being used to their maximum.

- **Lack of knowledge of the winch release system**
  The ship's crew had wrongly understood that the emergency winch release was an instant release that would cause an uncontrolled release of wire and chain. This misunderstanding may explain why this emergency measure was not taken earlier.

It was clear that it was the changed angle of pull of the chain, along with the change in the ship's heading and reduced manoeuvrability plus the influence of external forces, that together with the ship's stability characteristics caused the tragedy.

The Commission also evaluated the indirect causes of the accident and four main elements stood out:

1. Design, Construction, Certification and the Company's Operation of the Ship, Including the Manning

- Design and construction. There were weight changes in construction.
- Stability book criteria for anchor-handling was not fully described, including the guidance of anti-roll tanks use during anchor-handling operations.
- Weaknesses in the company procedures for anchor-handling, a critical operation for this ship.
- Company familiarisation procedures, particularly the induction of Masters, were inadequate. The Master was completely new to the ship, unfamiliar with the ship and crew, and had only a 90 minute handover before taking over command. In addition, he took command halfway through a rig anchor deployment operation and so had no personal formal briefing of the rig movement plan. There was also a general lack of anchor-handling experience onboard.
- The company did not have a policy or procedure for identifying training needs over and above STCW requirements.
- Defects on the implementation of the safety management system, including the preparation of risk assessments.
- Audit failure, including that of the Classification Society in not identifying the requirement to have adequate procedures for anchor-handling.
- The *Bourbon Dolphin* was certified for 180 tonnes bollard pull. On the rig's movement plan (RMP), it was stated that, at certain stages, 174 tonnes bollard pull may be required. With the full use of thrusters powered from the shaft alternators, bollard pull is reduced from a maximum of 194 tonnes to 125 tonnes.
- In the RMP, the *Bourbon Dolphin* was designated as an 'assist vessel'. For anchor no. 2, the *Bourbon Dolphin* was being used as the lead ship. The lead ship positioning anchor no. 6 had previously struggled in its deployment, in the exact same adverse weather conditions, and it was nearly twice as powerful as the Bourbon Dolphin.

2. Conditions on Board

- Insufficient understanding on the bridge that the thrusters were operating to a maximum and could overheat at any time. This fact was not relayed to the tow master. The ship chose not to abort the operation but instead asked for assistance from another ship, using a grappling hook and chain to alleviate the weight. The ship already had a 5 degree port list.
- Previous concerns regarding the ship's stability had not been acted upon.

3. Planning of the Anchor-handling Operation

- The RMP was geared towards the needs of the rig and not of the ships running the anchors. The RMP contained a number of weaknesses, including lack of risk assessments, no estimation of expected forces, nor sufficient margins to account for the static and dynamic forces.
- No clear weather criteria as to when the operation should be suspended.
- No proper assessment of ship suitability. The RMP was incomplete in its analysis of bollard pull. There was reportedly only a superficial inspection of the ship.

4. Implementation of the Rig Move

- Several rig personnel noticed that, after the crew change, more guidance was required during the operations. The operation was longer and more demanding than planned. Equipment was damaged, including rig winches requiring repair. The OIM (Offshore Installation Manager) on the rig was not continually kept informed.
- During the last phases of the operation, there were a number of failures. The drifting offline that occurred during the earlier deployment of anchor no. 6 was not relayed to the OIM. The operation was begun in marginal conditions. The operation for no. 2 anchor did not follow the written procedure. No explanation was given or requested from the rig when the ship began to drift significantly offline when deploying no. 2 anchor. The request for assistance to carry out the unsuccessful grappling of the chain and wire was granted, but no risk assessment was done and no questions were asked as to the reasons for the request. The *Bourbon Dolphin* and the assisting ship, when grappling for the wire and chain, almost collided, but this was not relayed to the rig.

Conclusion

The Commission was balanced in its conclusions, stating that improvements could be made by the crew, builders, owners and managers, flag state, class and charterers. All operators of AHTS should ensure that their conclusions are taken heed of, and a copy of the report should be on board every AHTS.

Had the correct safety barriers been in place, the capsizing of this ship may not have occurred. The Commission made two profound comments:

"It is necessary that all personnel, particularly senior personnel are alert to the possibility that an operation is developing into a dangerous situation." It is this awareness that is the primary 'safety barrier'.

and

"The master has the paramount responsibility for the safety of the vessel and the crew during maritime operations. Even if the anchor-handling manual onboard was not a perfect aid, it appeared that nothing in this manual relieved the master of his responsibility for the safety of the crew and the vessel. This involves an undisputed right and duty to halt an ongoing activity, even if the company and others, for example, were to object. The master's orders are thus the last human safety barrier for the crew and vessel."

As we strive to operate ships safely, this is a lesson that we must ensure all senior officers learn.

BY HUGH WILLIAMS,
CHIEF EXECUTIVE OF THE INTERNATIONAL
MARINE CONTRACTORS ASSOCIATION
+44 (0)20 7824 5520
hugh.williams@ctcplc.com

Balancing Risk and Cost – A Vital Role for IMCA

A word that closely aligns the insurance industry and the International Marine Contractors Association (IMCA) and its 500-plus member companies in more than 50 countries around the world is 'risk'. It is a word that is expressed by IMCA in terms of risk reduction, risk management, risk analysis, risk assessment, risk exposure, and risk and reward.

IMCA is the international trade association representing offshore, marine and underwater engineering companies that install and maintain the offshore infrastructure mostly for the oil and gas exploration and production industry. These companies are heavily involved in insurance, for example, through their hull and machinery policies and P&I clubs, and through Construction All Risks (CAR or BAR) policies.

One of our prime roles is to strive for the highest possible standards, with a balance of risk and cost in terms of health and safety; technology; quality and efficiency; and environmental awareness and protection. This we do through a wide range of activities, including the publication of guidance documents (good practice guidelines), with virtually every one of these discussing 'risk'; position papers; safety flashes; safety statistics; and safety promotional material – all aimed at improving safety and efficiency.

On the commercial side, we have published two documents: *IMCA Contracting Principles and Identifying and Assessing Risk in Construction Contracts* plus standard contracts for some specific work. These cover insurance and, together with the guidelines, they share objectives with insurers, including risk reduction; clarity of responsibilities and cover; and avoiding overlaps and gaps.

Our annual seminar and safety seminar are opportunities for those working in the industry to get together and discuss balancing risk, cost and efficiency.

IMCA Annual Seminar

This year's seminar, the 15th in the series, is being held in Kuala Lumpur in early November, with the theme *Global Alignment in Marine Operations*, highlighting the need for common approaches worldwide. It will attract around 300 international delegates, both members and non-members. They are the people actively involved in the operations, and what they discuss will help determine the IMCA future work programme.

Self Regulation is Key

Trade associations do not regulate as legislators do. They provide guidance to members, and work to update and introduce new guidelines wherever there appears to be a need. Members working to those guidelines are 'self-regulating', rather than looking to clients or governments for regulation. Self-regulation is the logical result of action by industry participants to address a number of concerns.

If an industry does not self-regulate then some other body will impose its own regulation, either in the form of governments or through client requirements. If this happens, contractors face the prospect of each client and each government stipulating its own varying requirements, causing considerable strain to each contractor and extra, unnecessary costs. The strain includes finding out the different requirements, tendering with allowance for them and then complying with them for each project. For contractors who often work for different clients all around the world, this imposes a potentially repetitive, expensive and avoidable burden.

In a mature, responsible industry such as this, self-regulation is a reasonable approach with proven benefits for all parties – contractors, clients, governments and regulators. Of course, the spread of IMCA guidelines becomes ever greater as more members join the Association and IMCA produces more documents to meet industry needs. In addition, the penetration of the documents increases as clients increasingly require the guidelines to be used as a condition of contract.

As the industry moves into new geographical zones, where often there are few detailed government requirements for marine construction, IMCA guidelines have been used as an available, acceptable reflection of industry good practice for the government or local client to use, without having to start from a blank sheet of paper.

Ensuring Ongoing Safety Records

There is one area of pressing concern for the US$20 billion per annum offshore marine contracting industry – expansion. Sophisticated vessels are vital for the safe and efficient support of underwater and surface construction, and currently over US$17 billion worth of new vessels are in yards or in the planning and engineering phases.

In a relatively short time, some 50 new marine construction vessels and 600 offshore support vessels will be in service around the world – to say nothing of 40 floating drilling rigs and a whole new generation of dredgers and seismic vessels.

The offshore fleet is about to become physically larger (in terms both of numbers and size), and more sophisticated. If ever there was an example of the need for ensuring that risks are assessed, it is within this scenario, where skills and safety levels need to match the sophistication of this 'new-look' fleet. To operate the new fleet, the industry will recruit a wide range of new people.

Zero injuries is the human 'holy grail' of the offshore industry. Therefore, all these people must be capable of absorbing the available knowledge and taking on board industry safety objectives. Training must continue across the board to keep them safe.

Zero incidents is the goal for the new vessels. The published IMCA documents, including those on new vessel/equipment specifications, trials and auditing, will be invaluable for the vessels and people since they are well founded in the lessons learnt in the past.

'Zero risk' is so important and the industry must formulate plans to ensure the enlarged offshore fleet can operate optimally – and safely – thanks to adequate risk assessment and management.

Hugh Williams is Chief Executive of IMCA – International Marine Contractors Association (www.imca-int.com), which represents offshore marine and underwater engineering companies worldwide. The association has more than 500 company members in more than 50 countries around the globe.

He is a chartered civil engineer with 33 years' broad experience, including:

- Commercial management and business development for marine contractors Heerema,
- Commercial and engineering management with design work and marine warranty survey work for consultants Noble Denton and Global Maritime,
- Ports and harbours design office and site work with engineering consultants Rendel Palmer and Tritton.

During this time, his career gradually focused on marine operations, particularly heavy lifting and marine construction in the offshore oil and gas industry.

BY ANDREW IYER,
HEAD OF ENERGY & OFFSHORE, INCE & CO
+44 (0)20 7481 0010
Andrew.Iyer@incelaw.com

Gross Negligence, Wilful Misconduct, The MIA 1906 and The Standard's Rules

Many offshore contracts contain provisions relating to gross negligence and wilful misconduct of one or both of the parties. In the following article, Andrew Iyer of Ince & Co examines the legal principles underlying gross negligence and wilful misconduct and the effect that such provisions can have, not only on the liability and indemnity provisions in the contract, but also on the underlying P&I cover.

Andrew Iyer is a senior partner with Ince & Co in London. He has a wide marine and insurance practice and is head of the firm's Global Energy and Offshore Group.

This article is made up of three sections:

- General principles of law regarding wilful misconduct and gross negligence
- Relevant legal issues arising under knock-for-knock clauses, and
- Relevant principles of law regarding wilful misconduct in the area of Marine Insurance law.

(1) General Principles

(i) Gross negligence

Under English common law principles (other than in manslaughter cases), the term 'gross negligence' is generally construed as meaning no more than a particularly 'bad' or a 'serious' case of negligence.

In more recent years, common use of the term 'gross negligence' in varying types of contractual documents has led to a general acceptance of the term as meaning something more than simply plain 'negligence'. This difference, however, is one merely of degree rather than kind.

According to *Charlesworth & Percy on Negligence (2006 Edition)* in paras 1 to 15:

"When used in the sense of careless conduct, degrees of negligence are sometimes identified such as 'gross negligence', 'undue negligence', 'ordinary negligence' and 'slight negligence'. Strictly such distinctions are inappropriate when considering negligence as a breach of a duty to take care. When Rolfe B. said that he "could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative ephithet" [Wilson v Brett (1843) 11 M&W 113] his criticism was justified in a context where he was using 'negligence' in the sense of a breach of a duty to take care. That is not to say, however, that the expression 'gross negligence' has always the same meaning as 'negligence'. It is an expression in regular use and to deny it a meaning would be pedantic. It has some practical utility in describing a high degree of careless conduct such as where a defendant did not intend a particular consequence to happen but nevertheless must have been able to foresee its occurrence."

With regard to the relevant factors that would lead one to a conclusion that the negligence at issue was 'gross', Mance J. in *The Hellespont Ardent [1997] 2 Lloyd's Rep 547* first referred on p. 588 to the *'crassness or blatancy'* of a defendant's conduct, before going on to list the following:

"I see no difficulty in accepting that (a) the seriousness or otherwise of any injury that might arise, (b) the degree of likelihood of its arising and (c) the extent to which someone takes any care at all, are all potentially material when considering whether particular conduct should be regarded as so aberrant as to attract the epithet of "gross" negligence."……..

This cuts both ways. For example if obvious steps have been completely omitted to guard against or cater for a risk that could have very serious consequences then the fact that in many or most cases the risk was not likely to materialise would not automatically defeat a charge of gross negligence. Ultimately as it seems to me, no single factor can be determinative. All the circumstances must be weighed and balanced when considering whether acts or omissions causing damage resulted from negligence meriting the description "gross" and forfeiting the contractual immunity prima facie afforded by the clauses."

In summary, 'gross negligence' means negligence of a crass or blatant or sufficiently serious nature, which therefore constitutes something more aberrant than a simple failure to exercise a reasonable level of care and skill. No subjective or mental element is required, however, in stark contrast to the test for 'wilful misconduct'.

(ii) Wilful misconduct

'Wilful misconduct' requires a much higher threshold than 'gross negligence' as it involves a conscious decision to 'cross a certain line'. In *Forder v Great Western Railway Co [1905] 2 KB 532*, a parcel of sheepskins that had been delivered by the plaintiff to the defendants for carriage from Paddington to Winchester, arrived at their destination in a damaged condition due to the way in which they had been packed and loaded by the defendants. Having complained to the defendants, the plaintiff subsequently sent a second parcel of sheepskins from Paddington to Winchester on the terms of an 'owner's risk' note, whereby the defendants were relieved from liability for damage except upon proof of 'wilful misconduct on the part of the defendants' servants'. However, this parcel, like the first, arrived damaged due to the way it had been loaded.

In finding that the defendant's servants were guilty of wilful misconduct, Lord Alverstone adopted the following definition (first enunciated by Irish Judge Johnson J. in *Graham v Belfast and Northern Counties Railway Co [1901] 2 IR 13 at p.19):*

"Wilful misconduct … means misconduct to which the will is a party as contra-distinguished from accident and is far beyond any negligence, even gross or culpable negligence and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct

on his part in the existing circumstances to do, or to fail, or to omit to do (as the case may be) a particular thing and yet intentionally does or fails or omits to do it or persists in the act, failure, or omission regardless of the consequences."

Lord Alverstone then made the following addition to the above definition:

"the addition which I would suggest is 'or acts with reckless carelessness not caring what the results of his carelessness may be'."

In Horobin v British Overseas Airways Corp [1952] 2 Lloyd's Rep 450, Barry J. gave the example of two drivers who go through a set of lights, one by virtue of going too fast and not keeping a proper look out, the other, in a hurry, deciding to ignore the lights on the basis that hardly any traffic comes out of the side road. Barry J. directed that only the second would be guilty of wrongful misconduct.

With regard to the standard of proof applicable, Barry J. instructed the jury as follows:

"In order to do that, and in order to establish wilful misconduct, the plaintiff must satisfy you, not beyond reasonable doubt, but satisfy you that the person who did the act knew that he was doing something wrong, and knew it at the time, and yet did it just the same, or alternatively that the person who did the act did it quite recklessly not caring whether he was doing the right thing or the wrong thing, quite regardless of the effect of what he was doing upon the safety of the aircraft and the passengers for which and for whom he was responsible."

(2) 'Knock for Knock' Indemnity Clauses

Knock-for-knock clauses are used frequently in construction, shipbuilding and oil and gas industries to manage and allocate risk. Essentially, the respective parties undertake responsibility for loss or damage to their own property or for injury or death to their own employees and identified parties (usually regardless of fault).

It is accepted as a general principle of English law that clear words must be used in order for such a knock-for-knock indemnity provision to cover a party's negligence (whether basic, undue, gross, etc.). It was held in *Whessoe Ltd v Shell Refining Co Ltf [1960] CA Civil Division 6 Build LR 23 that:*

"… indemnity will not lie in respect of loss due to a person's own negligence or that of his servants unless adequate and clear words are used or unless the indemnity could have no reasonable meaning or application unless so applied…" (per Sellers LJ).

A three-part test relating to exclusion clauses and negligence was first enumerated by the court in the well-known case of *Canada Steamship Lines Ltd v R [1952] 1 Lloyd's Rep 1,* i.e: (1) where a clause expressly exempts a person in whose favour it is made from the consequence of the negligence of his own servants then effect must be given to such a provision; (2) in the absence of any express reference to negligence, the court will consider whether the words in their ordinary meaning are wide enough to cover the negligence of his own servants; and (3) where the words used are wide enough for the above purposes then the court must consider whether there is another head of damage on which to base the claim other than negligence.

The case of *Caledonia North Sea Ltd v British Telecommunications PLC and others [2002] 1 Lloyd's Rep IR 261* arose out of the Piper Alpha oil platform disaster in the North Sea in 1988. At the time of the accident, the operators had hired various contractors to carry out specialist works. Each of the contractors had entered into contracts with the operators in connection with the work they had to perform, which provided that, in certain circumstances, the contractors were to indemnify the operators in the event of injury to the contractors' employees in respect of incidents occurring while they were working on the platform.

The relevant indemnity clause 15(1) provided as follows:

"15(1) Contractor's Indemnities:

Contractor shall indemnify, hold harmless and defend the company and its parent, subsidiary and affiliate corporations and Participants, and their respective officers, employees, agents and representatives from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interest, costs (including but not limited to the cost of litigation) and expenses of whatsoever kind or nature whether arising before or after completion of the work hereunder and in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, by reason of omission or negligence whether active or passive of contractor, or of anyone acting under contractor's direction, control or on contractor's behalf in connection with or incidental to the work. Provided always that the contractor's total liability arising pursuant to this indemnity shall not exceed one million pounds sterling (£1,000,000) per occurrence.

Without prejudice to the foregoing generality, the contractor shall indemnify, hold harmless and defend the company and its parent, subsidiary and affiliate corporations and participants, and their respective officers, employees, agents and representatives from and against any claim, demand, cause of action, loss, expense or liability (including but not limited to the costs of litigation) arising (whether before or after completion of the work hereunder) by reason of …

***(c) Injury to employees and damage to property of contractor: Injury to or death of persons employed by or damage to or loss or destruction of property of the* contractor or its parent, subsidiary or affiliate corporations, or the contractor's agents, sub-contractors or suppliers, irrespective of any contributory negligence, whether active or passive, of the party to be indemnified, unless such injury, death, damage, loss or destruction was caused by the sole negligence or wilful misconduct of the party which would otherwise be indemnified."**

It was found by the Court of Session at first instance that the cause of the explosion had been partly the fault of the operators and partly the fault of one of the contractors. An employee of one contractor, engaged to recalibrate a pump, had temporarily removed a pressure safety valve for that purpose and had attached blind flanges to the pipework to fill the gap. One of the flanges had not been fitted properly. An employee of the operators thereafter decided to restart the pump in ignorance of the fact that the pressure safety valve had been removed, and introduced hydrocarbons into the pump. Due to the defective fitting of the flange, there was an escape of hydrocarbon, leading to the explosion.

On appeal to the House of Lords, their Lordships held that Article 15(1)(c) required the contractors to indemnify the operators for injuries suffered by the contractors' employees *"whether or not the contractor was responsible for the loss"*. Their Lordships held that that was the plain meaning of the words used and *"reflected the practice which had developed among those undertaking offshore oil operations."* Their Lordships further held that it was understandable that the right to indemnity should be excluded where the negligence or breach of statutory duty of the party seeking indemnity was the sole cause of the death or injury, but that was the limit of the derogation from the rule that each party, operator or contractor, assumed the ultimate responsibility for compensating its own employees regardless of fault. The existence of this exception was in itself an indication that no liability on the part of the contractors was required, because *"it is hard to see how such liability could ever be consistent with the accident being attributable to the sole negligence or wilful misconduct of the operator"* (per Lord Hoffmann).

In summary, unless a clear exception is made for wilful misconduct or gross negligence on the part of the relevant party, it is possible for a knock-for-knock indemnity to operate in such circumstances, provided the clause is drafted sufficiently widely.

(3) Marine Insurance

The 2008/2009 Standard P&I Club Rules provide at Rule 2.2:
"These Rules and any contract of insurance between the Club and a Member or any other person claiming under these Rules shall be governed by and construed in accordance with English law. In particular they are subject to and incorporate the provisions of the Marine Insurance Act 1906 of the United Kingdom and any statutory modifications thereof except insofar as such Act or modification may have been excluded by these Rules or by the term of any such contract."

Section 55(2) (a) of the Marine Insurance Act 1906 provides:

"Included and excluded losses
(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular, -(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew."

Scuttling is the clearest example of loss attributable to wilful misconduct and most of the marine insurance cases that consider the term 'wilful misconduct' concern allegations of scuttling.

Colman J. held in *National Oilwell (UK) Ltd v Davy Offshore Ltd [1993] 2 Lloyd's Rep 582* on p. 622 that the *"essential elements"* of wilful misconduct in marine insurance cases were: *"that the assured intended to achieve a loss or the damage or that he was recklessly indifferent to whether such loss or damage was caused and that his immediate purpose was to claim on his insurers or that he subsequently advanced such a claim".*

Who is the 'Assured' for the Purposes of Wilful Misconduct?

With regard to the scope of the term 'assured', for the purposes of Section 55(2)(a), according to O'May on Marine Insurance on p. 112:
"In the case of companies it is the alter ego, the 'heart and mind' of the company, whose knowledge or conduct is relevant. Knowledge may include 'shut-eye' knowledge where the owner does not take an active part but merely connives at the scuttling."

Kerr J. held in The Michael [1979] 1 Lloyd's Rep. 55;
"An owner who makes it clear that he would like to see his ship at the bottom of the sea, but does not want to know anything about it, is privy to its sinking in just the same way as Henry II was privy to the murder of Thomas a Becket when he said 'who will rid me of this turbulent priest?'."

It has also been held that privity to the relevant misconduct can be inferred. The relevant financial motive is that of the assured or those interested in the insurance money, since they alone stand to gain. It was held by Neill L.J. in *The Captain Panagos [1986] 2 Lloyd's Rep 470* that once it is accepted that a casualty is deliberate, the inference that the owner was privy to the fraudulent acts and that they were not done for some private reason by crew members can properly be drawn.

Joint Assureds/ Co-Assureds

In *The Alexion Hope [1988] 1 Lloyd's Rep 311* a total loss was caused, which resulted from a fire caused by the deliberate act of the shipowner. It was held that the mortgagee of the ship, who had taken out separate insurance unconnected with the owner, could still recover his losses.

Where two parties are insured under the same policy for their separate interests, the wilful misconduct of one will not generally prejudice the claim of the other in respect of his interest. As a result, a co-owners' claim, which is otherwise recoverable, will not be barred by the wrongful act of the master, who is also a part owner.

However, under the Rules of the Standard Club, conduct that bars any Joint Entrant or Co-Assured from recovering under Club cover will bar every Joint Entrant or Co-Assured (paragraph 8.2.2, sub-paragraph (ii)). Accordingly, wilful misconduct by one Joint Entrant or Co-Assured will prevent recovery in this context by any of the others.

BY JOHN CROUCHER,
OFFSHORE LEGAL EXECUTIVE AND UNDERWRITER
+44 (0)20 7522 7566
John.Croucher@ctcplc.com

Insurance provisions in knock-for-knock contracts

Just as speakers of English in America and Britain can find themselves misunderstanding one another, so difficulties can arise during contract negotiations between American and non-American companies. Provisions that make sense in the context of the US general liability insurance market do not sit well with the P&I cover that most shipowners rely on to provide their liability insurance, and owners must often insist that their clients delete provisions that the client may consider to be standard clauses. In this article, John Croucher explains the potential problems that such clauses can create when read together with the liability and insurance provisions of a standard form knock-for-knock contract.

It perhaps goes without saying that a contract must be assessed as a whole when considering how it is intended to operate, but what is often forgotten is that onerous insurance provisions can be equally as risky as an onerous liability regime.

It has long been recognised that when discussing and agreeing the allocation of liability under a contract, clarity and simplicity are key. The recognition of a knock-for-knock regime as a starting point for contract risk management has largely reduced any ambiguity in the division of responsibility for what can be extremely complex offshore operations. Such a recognised standard allows the parties to fully assess the impact of any additional liabilities that may be assumed beyond this standard position, not only in terms of the increased costs of insurance but also whether any increased payment schedule is sufficient to merit taking on those risks.

A fact which is often overlooked is that later and additional clauses can undermine clear demarcations of risk. It is important that insurance provisions are consistent with liability and indemnity provisions, as the courts will often look at the insurance provisions to assist in assessing the correct construction of the liability clauses. In the event of a conflict, the courts may well attach liability to the party that has agreed to insure the risk as the most commercially sensible resolution to conflicting provisions. In some cases where insurance provisions are particularly onerous, the club may be unable to accommodate a member's contractual obligation to incorporate certain clauses in his contract of insurance.

Our members have often presented us with contracts to review from (typically) US based clients who require a shipowner contractor to include a Cross Liability / Severability of Interest Clause and to delete any reference to 'As Owner' language from the policy wording. Such amendments are common in non-marine liability policies, which provide cover on an all risks basis to all named parties, and are designed to ensure that all insured parties can recover. However, they are inappropriate in the context of P&I Insurance which provides cover for specific liabilities that are incurred by the member in his capacity as owner, charterer or operator of a ship, the benefit of which cover is extended to other parties on a limited basis.

Cross Liability Clauses

A standard example of such a clause may read:

"The policy shall include a cross liability clause to the effect that the insurance shall apply in the same manner as though a separate policy had been issued to each additional insured."

The effect of such a clause is clear. There is a contractual obligation on the member to ensure not only that his client is named on his P&I insurance, but also that the client has a right to claim both independently of, and irrespective of, the actions of the member.

P&I insurance does not operate in this manner. When a shipowner takes out a P&I policy, the intention is not to provide a blanket and independent cover to both the shipowner and his contractual partners, but rather to cover the owner for liabilities for which he may be responsible either at law, or under a contract which has received the Club's approval. It would not be acceptable to the Club to insure the liabilities of both sides of a contract, not least because we have not rated the risk on this basis.

We can however name such a contractual partner as co-assured under the provisions of Rule 8.2. This does not provide cover to the co-assured in their own right, but provides access to the member's cover for claims that are properly the responsibility of the member, either under contract or at law. We can give no greater cover to the co-assured than that to which the member would be entitled had the claim been directed against him and, as such, the right of the co-assured mirrors and is linked to that of the member. Should the member prejudice his own right of recovery, for example, as a result of wilful misconduct or perhaps a material non-disclosure, the rights of the co-assured will be equally prejudiced.

'As Owner' Language

An example wording of such language is:

"The phrase "as owner of vessel named herein" and all similar phrases purporting to limit the insurer's liability to that of an owner shall be deleted."

The Club cannot delete provisions in the Rules that restrict a member's rights of recovery to those claims incurred in the capacity in which he has been entered in the Club.

'As owner' language in insurance policies is essentially a provision that restricts cover to an owner or another party acting in that capacity. This language is found in proviso (ii) of the preamble to the Standard Club's Rule 20 and proviso (v) of Rule 8.

The requirement to delete such provisions shows a misunderstanding of the nature of co-assurance, and is generally based on a belief by the co-assured that he has cover in his own right. A co-assured charterer may request the deletion of "as owner" language in the belief that, since he is not the owner, he will be unable to benefit from the cover if it is restricted to those liabilities incurred by the owner of an insured ship. This is incorrect, since the intention of co-assured status is merely to allow the co-assured to access the owner's cover if the co-assured has to pay for liabilities that are the responsibility of the owner under a contract with the co-assured. Since the cover is always only for the owner's liabilities, albeit that the co-assured is entitled to benefit from it under certain circumstances, it is not appropriate to delete the provisions. To do so might allow the co-assured to claim on the member's cover for liabilities incurred in another capacity, for instance as an oil company or a charterer, which is never the intention when granting co-assured status.

Conclusion

Where there are onerous assumptions proposed in liability provisions during contract negotiations, there is typically a common understanding of the nature of the risks being passed and, equally, there is usually a clear idea of the increased overhead and profit that would be appropriate compensation for one party agreeing to assume such risks. This clarity can break down where there are concessions given that do not overtly shift risk, but that modify the nature of the access provided to the insurances underpinning those liabilities.

Our experience is that the pressure to agree such wordings is a result of the desire to avoid inconsistency between the various contracts of insurance that may attach to a project rather than of a concern that P&I cover would be inadequate in the absence of such revisions. Hopefully, an explanation of the nature of the cover that the Club can provide, and why the restrictions on it are appropriate, will be sufficient to avoid such terms being included in the final contract.

If both parties have a separate and independent access to cover without limitation to the capacity in which they can claim, some undesirable results may well follow; not only are the liability provisions undermined and litigation encouraged, but the cost of such confusion is likely to fall squarely on the member's record.

The question therefore remains, why allocate risk and still pick up the cost by including onerous insurance provisions? This is perhaps a question which is easier to answer in theory than in practice, but we would hope that addressing these problematic terms when they are proposed with a clear explanation of the nature of the cover that the Club provides will enable members to maintain clarity and consistency between the liability, indemnity and insurance provisions, and the insurance that they purchase to meet such risks.

BY DAVID ROYLANCE,
PARTNER, HOLMAN FENWICK WILLAN
+61 (0)3 8601 4514
david.roylance@hfw.com

BY SIMON SHADDICK,
HOLMAN FENWICK WILLAN
+61 (0)3 8601 4500
simon.shaddick@hfw.com

The Legal Recognition Of Towage Contracts In Australia

A recent decision by the Queensland Court of Appeal has cast doubt upon the effectiveness of exemption clauses in towage contracts in Australia. This article explains the Court's decision, its potential impact upon members' liabilities, and ways in which members can protect themselves.

The decision in *PNSL Berhad v Dalrymple Marine Services Pty Ltd* [1] arose from a collision between the bulk carrier *Pernas Arang* and the tug *Koumala* off Hay Point in Queensland, Australia.

Shortly before the *Pernas Arang* was due to berth, it was struck by the *Koumala*. The proximate cause of the collision was that the *Koumala* had sustained steering failure. The *Pernas Arang* was damaged, and its owners sued the owners and operators of the *Koumala*, claiming negligence and breach of warranty.

At first instance, Justice Helman found the collision was a consequence of the negligent operation of the tug. The case then went to the Queensland Court of Appeal.

The "Whilst Towing" Requirement

The *Koumala's* first defence concerned the interpretation of clause 4 of the United Kingdom Standard Conditions of Towage (UKSCT). UKSTC formed part of the towage contract, and clause 4 is a broadly worded exemption clause, which exempts the tug from liability for loss or damage sustained by the tow 'whilst towing'.

The effect of clause 4 was that the *Koumala* would not be liable to the *Pernas Arang* if the collision had occurred 'whilst towing', although subject to the implied warranty point. As can be assumed, the *Koumala* interests claimed the collision had occurred 'whilst towing' and the *Pernas Arang* argued that it was not 'whilst towing', so the protection of clause 4 did not apply.

In reviewing the 'whilst towing' point, the Court of Appeal considered Australian and English authorities. The Court emphasised the importance of physical proximity between tug and tow so as to satisfy the 'whilst towing' requirement as well as the requirement that the tug be ready to receive and carry out orders direct from the tow. Based on the factual matrix, the Court decided that the collision had not occurred 'whilst towing' and therefore the *Koumala* was not prima facie entitled to rely on clause 4 of the UKSCT.

[1] At trial: [2007] QSC 101, per Helman J. On appeal: [2007] QCA 429, per Williams, Muir JJA and Daubney J.

[2] The towage contract constituted a contract with a "consumer" because, pursuant to section 4B of the Act, the price of the services rendered did not exceed A$40,000.

[3] In the "Koumala" decision, Helman J awarded damages of A$583,965 against the tug

Trade Practices Act – implied warranty

Section 74(1) of the Trade Practices Act 1974 (Cth) (TPA) provides that, in every contract for the supply of services to a consumer[2], there is an implied warranty that services be rendered "with due care and skill". At first instance, Justice Helman concluded the *Koumala* had breached this warranty.

On appeal, the *Koumala* argued that the warranty did not apply to the towage contract because contracts for services provided "for or in relation to the transportation or storage of goods" are excluded from this implied warranty provision of the TPA.

The *Koumala* argued for the exclusion either on the grounds that the towage contract was a contract in relation to the transportation of "goods" (referring to the *Koumala* arrival for the purpose of loading a coal shipment) or that the towage contract itself was a contract for the transportation of "goods" (constituted by the towage of the *Pernas Arang* itself).

The Court of Appeal rejected these arguments, holding a towage contract could not be construed as a contract "for or in relation to the transportation or storage of goods". Therefore, the implied warranty that services be rendered "with due care and skill" applied to the towage contract between the *Koumala* and the *Pernas Arang*".

Implications

In the *Koumala*, although the Court held that the collision did not occur 'whilst towing' so that the exemption in clause 4 did not apply in any event, the Court noted that even if clause 4 had applied, it would have been invalidated by section 68 of the TPA, as clause 4 would otherwise exclude the *Koumala* from liability for its breach of the TPA implied warranty of "due care and skill".

Therefore, although Australian courts will generally uphold towage contracts, including the UKSCT (subject to meeting the 'consumer' criteria), the courts in future may strike out the exemption provision where a claim arises 'whilst towing'. This risk is based on the imposition of the implied warranty of "due care and skill" in section 74 of the TPA and the effect of section 68 of the TPA invalidating any term of a contract that purports to exclude, restrict or modify a party's liability for breach of implied warranties.

Protection for Members

Even if an exemption clause is invalidated by section 68 of the TPA, section 68A permits liability for breach of an implied warranty to be *limited* to either supplying the services again or to the payment of the cost of having the services supplied again.

Clearly, it is desirable to contract in line with section 68A. Thus, while an exemption clause could otherwise be invalid due to section 68, an appropriately worded limitation text could have the effect of reducing a member's liability from potentially significant sums[3] to the comparatively small cost of the towage services.

BY TOM HELLEBOE,
MANAGING DIRECTOR
ORIENTAL SPECIAL RISK SERVICES PTE. LTD, SINGAPORE
+65 6224 9970
tom.helleboe@osrs.sg

It follows that all providers of towage services and similar or associated marine operations that are subject to Australian jurisdiction should include appropriate text incorporating the effect of section 68A in their standard terms.

Impact on Coverage

Previously, it was unclear whether a modification to the UKSCT, by way of such a limitation clause, would affect a ship's coverage under the Standard Club's rules in respect of the relevant towage services. However, a recent review of the rules has resulted in a change in the wording for coverage of towage by an entered ship. The proposed 2009/10 rules now cover liability relating to towage where (Rule 3.10.2(5)) the towage contract is likely to be unenforceable in whole or in part[4], but where the towage contract:

(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.

Accordingly, the addition of an appropriate limitation clause to members' standard terms is likely to reduce a member's liability in circumstances where the TPA applies and should not affect the member's coverage under the 2009/10 Club rules, although specific changes should be referred to the Club's managers prior to being adopted in standard terms.

[4]For example, by reason of section 68 of the Trade Practices Act.

Singapore – Marine Cluster Expanding

Against the backdrop of a Singapore offshore energy market, where the construction industry has had a leading edge for many years, we now see the development of a maritime cluster that spans way beyond the traditional operators. The Singapore Shipping Association has never seen more members, the ship-broking industry is larger than ever, the legal and ship-financing sector continues to grow, and not least, the number of ship and rig-owning companies setting up in Singapore outnumber probably even the Singapore Government's projections.

From an insurance perspective, we see the growing number of Lloyd's syndicates writing energy and offshore risks out of their One George Street offices, an increasing number of P&I Clubs setting up offices in Singapore, with the latest additions being North of England, Skuld and Nordisk Defence Club, and with SOP setting up an office in the early part of next year. Who will be next?

The local insurers are closer to their ultimate clients, and have shifted their London and Scandinavian models to service an ever-increasing market in South-East Asia and, indeed, also Greater China. In particular, the London insurers have seen a paradigm shift in their operations, whereas they operate in ways very much similar to the Scandinavian model of client engagement, hands-on claims servicing, and in-depth understanding of their risks. We also see that the buyers who are frequently shifting decision-making powers to the region prefer to deal with insurers within their own time zone.

We note the clouds on the horizon with the ever-hardening credit environment and a drop in the oil price, albeit it was not long ago when US$100 per barrel was 'unreachable'. We also see escalating costs for offshore services, a considerable lack of qualified personnel, both offshore and marine, and a rising temperature, literally, in the yards industry, both with reference to availability, steel prices and, not least, the contractual environment.

The high level of activity linked with the above challenges surfaces in the insurance industry both in the physical damage, business interruption and liability classes. We see a higher number of disputes under contract, but also physical/BI damages related to installation and operation of offshore assets in the Asia region, where the level of development of marginal fields probably has been higher than in other areas of the world.

In such an environment, it is increasingly desirable for insureds to have access to as much expertise as possible when mitigating risk via insurance. The input that can be obtained through your brokers, and from the Club and physical damage insurers, is of vital importance in your risk management adventure.

As an example, let us look into the FPSO side, and highlight a few areas where you can minimise your risks and avoid some of the exposures commonly associated with conversion, deployment and operation.

Conversion

- Ensure that the contract with the yard is checked by your club and that you buy defence cover for yard disputes.
- Ensure that you keep P&I cover in force and that you include crew and office personnel whilst at the yard.
- Buy CAR policies that include owner's supplied items in any premises outside the yard. Include towage/steaming to the yard and then to the operational site.
- You should seek to be a co-assured under the yard's own insurance policies.
- Look into the cost of insuring refund guarantees.
- Check the cost of delay and non-delivery of the FPSO should physical damage occur whilst at the yard or during sea trials.
- There are also political risk exposures that you might want to explore, depending on the area of deployment and where the construction is taking place.

Deployment/Operation

- Ensure that you specify values of your sub-sea equipment and that installation and reinstallation costs are included.
- Be aware of the difference between P&I and hull insurance as to when their underwriters commonly expect the vessel to transfer from the conversion and mutual cover phase to becoming an operational FPSO. Hull insurers would commonly attach their operating policy upon Ready for Startup or at first oil, whilst the fixed premium P&I cover for mobile offshore units will mostly attach upon hook-up to the installation when the specialist operations start. If in doubt, discuss with your club and underwriters.
- Cover for loss of hire, and even contingent loss of income should the field shut down due to an insured event, should be considered in the light of your contract off-hire clauses.
- Remember to arrange for the P&I cover to extend to MOB/workboat vessels or enter them on a separate mutual basis, in particular, during conversion if they are not part of the FPSO or operate as independent units.
- If you operate or contract ROVs or divers, you should ensure that your exposures are reviewed by the club and that you also explore your liability on the physical damage side, including wreck removal.
- Pollution exposures need to be carefully discussed with your club so as to ensure that it knows exactly where and when your exposure starts and stops, and that you are clear on the cover that it provides.
- Most FPSO operators will also have to buy a Comprehensive General Liability policy (CGL), which could either be bought in the offshore insurance market or, to a more limited extent, via your club under an Offshore Liability Extension (OLE). Be aware of the distinction between these covers and ensure that you do not assume contractual risks under the P&I/OLE entry that are not related to the operation of the vessel, unless this is specifically agreed by your club.
- If you charter any vessels, you must ensure they carry proper P&I cover and that you buy Charterers Liability and FDD insurance.
- Ensure that you look into the claims handling routines and that you appoint an adjuster under your hull insurances.

The Offshore Team

The Offshore Syndicate

ROBERT DOREY
SYNDICATE HEAD
ROBERT DOREY
+44 (0)20 7522 7433
Robert.Dorey@ctcplc.com

SHARMINI MURUGASON
SYNDICATE CLAIMS DIRECTOR
+44 (0)20 7522 7434
Sharmini.Murugason@ctcplc.com

CLAIRE BEARD
UNDERWRITER
+44 (0)20 7522 7567
Claire.Beard@ctcplc.com

JOHN CROUCHER
OFFSHORE LEGAL EXECUTIVE
+44 (0)20 7522 7566
John.Croucher@ctcplc.com

LAURA REILLY
DEPUTY UNDERWRITER
+44 (0)20 7680 5622
Laura.Reilly@ctcplc.com

VERENA DI CARLI
DEPUTY UNDERWRITER
+44 (0)20 7522 7510
Verena.Dicarli@ctcplc.com

FABIEN LEREDE
CLAIMS EXECUTIVE
+44 (0)20 7522 7490
Fabien.Lerede@ctcplc.com

JONATHAN DINSDALE
CLAIMS EXECUTIVE
+44 (0)20 7522 7463
Jonathan.Dinsdale@ctcplc.com

Standard Asia

ROBERT DRUMMOND
GENERAL MANAGER / UNDERWRITER
+65 6506 2896
Robert.Drummond@ctcplc.com

WENDY NG
CLAIMS DIRECTOR
+65 6506 2896
Wendy.Ng@ctcplc.com

Executive Management

BARBARA JENNINGS
DIRECTOR, OFFSHORE
+44 (0)20 7522 7429
Barbara.Jennings@ctcplc.com

BRIAN GLOVER
DIRECTOR OF CLAIMS
+44 (0)20 7522 7417
Brian.Glover@ctcplc.com

JOHN WHITE-THOMSON
LEGAL DIRECTOR
+44 (0)20 7522 7479
John.White-thomson@ctcplc.com

WILLIAM ROBINSON
UNDERWRITING TECHNICAL DIRECTOR
+44 (0)20 7522 7497
William.Robinson@ctcplc.com

KIERON MOORE
SYNDICATE HEAD
+44 (0)20 7522 7483
Kieron.Moore@ctcplc.com