



STANDARD BULLETIN

SETTING THE STANDARD FOR SERVICE AND SECURITY

October 2011

OFFSHORE SPECIAL EDITION



Robert Dorey: Offshore Syndicate Director
Telephone: +44 20 3320 8831
E-mail: robert.dorey@ctcplc.com

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^ Sanha LPG/FPSO

Welcome to the sixth edition of the *Standard Bulletin* offshore special edition, which follows a further year of successful development of the offshore entry which now stands at 14% of entered tonnage. The club's growth has primarily been organic, although we welcomed five new offshore members into the club to date in the 2011 policy year, we declined six times as many enquiries as we accepted.

We strive to ensure that levels of service match the expectations of our membership. With an expanding membership, we are projecting to review 540 offshore contracts in the 2011 policy year. This would represent a 25% increase from last year. To keep on course with our service commitments we are pleased to report that the offshore syndicate has strengthened in underwriting and claims. On the underwriting team we are pleased to welcome Eddy Morland who will work alongside Claire Wheeler and John Croucher as the front line underwriters. Eddy's appointment follows a three year placement in New York as a claims executive for the American membership. For the claims team, Rupert Banks and Roger Johnson have joined the club and will work with Sharmini Murugason, Fabien Lerede and Ursula O'Donnell. Both Roger and Rupert are qualified lawyers.

So our mission continues to be to provide our membership with the widest and most cost-effective cover for those risks which we can insure. Our contract review service assists members in identifying and managing exposures which fall outside of P&I cover, in addition to confirming those risks that fall within cover. Contractual allocation of liability is a key risk-management tool of our membership and we hope the articles in this edition will assist members in addressing and controlling their risk exposure. Knock-for-knock enforceability remains an area of considerable uncertainty in many jurisdictions and we look at Brazil, Mexico and the US in particular in this edition. The uncertainty and legal foundation of knock-for-knock has also been the subject of recent judicial review here in the UK and Simon Rainey QC has generously contributed his commentary on recent English case law.

Further key risk management tools of our membership are their crew and the safe operation of the ships. The club is committed to knowing our members' operations and understanding the risks. To complement this Julian Hines reflects on some of his findings from offshore surveys, and whilst *Macondo* and *Montara* still drive insurance market pricing and risk appetite we have decided to focus on some of the political and practical ramifications of these claims in this edition.

It is a truism that 'there is nothing permanent except change', and this particularly applies to the fast moving offshore industry. In this environment, members must not become complacent and assume their past contractual arrangement will protect them in the future. Contractual arrangements should be reviewed regularly and the club is able to offer advice and assistance in this regard.

We hope you find this edition helpful and illuminating and we are always grateful for your feedback.

CROSS-BORDER POLLUTION FROM OFFSHORE ACTIVITIES



Sharmini
Murugason: Syndicate Claims Director
Telephone: +44 20 3320 8832
E-mail: sharmini.murugason@ctcplc.com

The recent catastrophic oil pollution incidents of the *Montara* and the *Deepwater Horizon/Macondo* blowouts have caused some members of the international community great concern as to the adequacy of existing legal regimes to respond to both clean-up obligations and compensation for 'victims' of pollution from oil and gas exploration and exploitation.

The *Deepwater Horizon/Macondo* spill in the US Gulf of Mexico took 84 days to cap, with an estimated 50,000 to 100,000 barrels of oil spilled per day. BP's obligations for clean-up and compensation are governed by the US Oil Pollution Act 1990 (OPA 90), with unlimited liability for clean-up and limited liability for pollution damage of \$75m under the act. BP waived its right to limit its liability for pollution damage and said it will pay all proven pollution damage claims in the first instance. BP's drilling contractor, Transocean, also has obligations under OPA 90, albeit to a lesser extent.

Unfortunately, the same cannot be said of the *Montara* spill, which originated within the Australian Exclusive Economic Zone (EEZ) in the Sea of Timor, taking 74 days to cap after an estimated 400 to 1,500 barrels of oil were spilled per day. The Indonesian government claims the pollution spread into its waters and impacted its coastline. A claim of \$2.4bn has been made against the field operator, Thai state-owned company PTTEP Australasia rejected the claim on the basis that it is not supported by scientific evidence.

The *Montara* spill highlighted a further issue – that of cross-border pollution. As technology advances, the search for oil and gas will extend into international waters, possibly into more challenging environments and at greater depths and posing greater risks. There are calls for an international convention to regulate the risks and consequences of offshore oil and gas exploration and exploitation.

The Indonesian government is leading the initiative at the IMO for serious and immediate consideration to be given to developing a liability and compensation regime in respect of pollution from offshore units. We understand that the EU may be putting forward a legislative proposal this autumn. It is presently unclear what approach will be taken by the IMO and EU; but there is recognition for the need for some form of liability and compensation regime.

The purpose of this article is to identify if existing international legal regimes can respond to *Deepwater Horizon/Macondo* pollution situations, in particular to liability and compensation, and in its absence the type(s) of international regimes that are being considered.

EXISTING CONVENTIONS AND SCHEMES

The United Nations Convention on the Law of the Sea (UNCLOS) sets out the obligations for states to protect their marine environment from pollution as well as to reduce, prevent or control it. It does not include any compliance or enforcement mechanism, nor does it deal with liability or compensation. It does however promote under article 235, the development under international law, the concept of liability and adequate compensation via either compulsory insurance or compensation funds. Neighbouring countries may have either bilateral treaties or Memorandum of Understandings (MOUs) between them, requiring notification of any pollution event originating from their waters (including the EEZ) that has encroached into that adjacent state's water, as happened in the *Montara* field incident pursuant to the 1996 MOU between Indonesia and Australia. Some countries have entered into regional agreements such as the OSPAR Convention 1992 serving the North Atlantic countries, the Helsinki Convention 1992 serving the Baltic region and the Kuwait Convention 1989 serving the Persian Gulf. These conventions deal with marine environment protection, but not liability and compensation.

The two IMO conventions that specifically address oil pollution are the Civil Liability for Oil Pollution Damage 1992 (CLC 92) and the complementary International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992 (Fund Convention). They do not apply to oil rigs and arguably they do not apply to FPSOs as they essentially apply to ships carrying oil as cargo that are on a voyage. There has however been a Greek Supreme Court decision in the *Slops* case (case number 23/2006) where a permanently anchored storage unit whose propeller had been removed and engine deactivated, was found to fall within the definition of ship under CLC 92. The IOPC Fund is due to review the definition of 'ship'.

CLC 92 and the Fund Convention work successfully together to provide a civil liability and compensation regime for pollution from the transportation of oil. It is a two-tier or interactive system developed in response to pollution-related claims caused by spills of persistent oil from tankers. The first tier is the CLC 92, which channels all claims against the owner of the ship and imposes strict liability on the shipowner with very limited defences. It currently limits liability to a maximum of 89.77m SDRs, depending on the ship's tonnage. It also provides for compulsory insurance on the part of the tanker and allows claimants direct access to the tanker owner's insurer. Where the claims exceed the amount available under the CLC 92, or if there is no valid recovery under the CLC 92, the Fund Convention steps in, but its liability is capped at 203m SDRs inclusive of limits under CLC 92. The Fund Convention is financed through levies on oil companies and other entities in states receiving oil. CLC 92 applies in 124 member states, while the Fund Convention applies in 103 states.

The Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE 1977) was intended to provide adequate compensation to victims of pollution damage from offshore activities, limited to 30m SDRs. Unfortunately, the CLEE 1977 was not ratified and did not come into force. However, in May 1975 a voluntary industry compensation scheme, the Offshore Pollution Liability Agreement (OPOL), came into effect as an interim measure to CLEE 1977, providing compensation up to \$250m. The scheme is funded by specific oil companies who are parties to OPOL. Cover extends to any 'direct loss or damage by contamination which results from a discharge of oil' from an offshore facility (including the well) within the jurisdiction of any state specified in the agreement. These states presently include the UK, Denmark, Germany, France, Netherlands, Norway, the Isle of Man and the Faroe Islands. Companies in these designated countries cannot obtain a licence to operate in the offshore sector without signing up to OPOL. The scope of OPOL is similar to CLEE 1977 – it is a single-tier system funded by the oil industry.

THE CRITERIA FOR THE NEW INTERNATIONAL LIABILITY AND COMPENSATION CONVENTION FOR POLLUTION FOR OFFSHORE ACTIVITIES

The IMO and the EU have not indicated their intention in relation to the direction they intend to take with a new liability and compensation regime. Due to some reluctance from the shipping community, it is unlikely that the existing CLC 92 and Fund Conventions will be extended to include drilling rigs, production or storage units. There may be a case for FPSOs to be included as they, like tankers, store oil. Matters become more complicated however in the unlikely event of a spill from the well-side due to a catastrophic series of failures. Rather a new regime is likely to use CLC 92, the Fund Convention and /or OPOL as templates.

There are four considerations that are likely to be taken into account in any new regime, namely, the basis of liability, the parties to be held liable, the claims coverage, and the limitation of liability and financial security. We will look at each in turn.

BASIS OF LIABILITY

There are many ways for liability to be determined.

The simplest would be a strict liability regime which would avoid arguments as to whether a party was negligent and to provide legal certainty as adopted by the CLC 92 and Fund Convention.

PARTIES HELD LIABLE

A two or three-tier system with primarily the oil industry responding but extending to contractors and including governmental participation, may be more attractive than a single-tier system, such as OPOL. A new regime should reflect the contractual allocation of responsibility as well as the availability of insurance. Under the International Association of Drilling Contractors pro forma drilling contract, there is a contractual allocation of liability for pollution, between the drilling operator and the field operator/oil company. Although the drilling contractor is 'responsible' for the operation of the drilling unit, pollution claims are limited to pollution originating from above the surface of the sea and the field operator/oil company is responsible for all other pollution-related claims, including pollution from a blowout or uncontrolled flow. Should the limit of liability under a new regime reflect the contractual allocation of responsibility as well as the available insurance for the drilling operator? The risks associated with drilling are different from production, the former being riskier. Often the operator of the FPSO and field operator are the same. Should there be a separate regime for drilling only and should the CLC 92 and Fund Convention expand the definition of the ship to take into account FPSOs and other production and storage units? The latter has not been well received by the shipping community. Certainly there are many issues to be taken into account in considering the parties to be held liable and the extent of that liability.

CLAIMS COVERAGE

It is important to establish the types of losses which a new regime may apply to. This could include clean-up costs, property damage, pure economic loss, environmental damage and death or personal injury. There should be a forum and rules for dispute resolution to ensure speedy resolution of claims. OPOL applies London arbitration and ICC Rules. CLC 92 and IOPC allow for the contracting state where the pollution damage occurred, to have jurisdiction in the event of the IOPC fund's rejection of any claim.

LIMITATION OF LIABILITY AND FINANCIAL SECURITY

Unlimited liability is uninsurable and not all operators have the financial resources of BP. There is a clear argument for high limits, but limits are ultimately what the oil and gas industry and/or its insurer can reasonably afford. Claimants need financial security either via direct access to compulsory insurance, or other means of financial security like a bank guarantee or an established fund. For a new regime to therefore be of practical use, financial security must be considered prior to operations starting. It is important that both insurers and the oil industry are engaged in discussions with the IMO and EU to find a solution to providing a reasonable limitation regime.

There is support for an international legal regime to respond to pollution-related matters from oil and gas exploration and exploitation. The difficulty is in getting a consensus on a workable international regime. The arguments in support of a new regime are compelling.



^ Montara blowout

OFFSHORE SURVEYING EXPERIENCE



Julian Hines: Senior Surveyor
Telephone: +44 20 3320 8812
E-mail: julian.hines@ctopl.com

The Standard Club's safety and loss prevention department is made up of a master mariner, a chief engineer and naval architects with considerable experience in various ship types, including offshore units, and their safety management systems. The department undertakes regular condition surveys of ships and offshore units entered in the club, as well as carrying out member risk reviews for all new members in order to assess their safety management systems and ensure that the quality of ships entered in the club remains high.

The surveys are carried out by in-house club surveyors or by a network of external surveyors, all of which have been vetted prior to appointment. All in-house surveyors are accredited Lead Auditors and include the Offshore Vessel Inspection Database Inspector criteria. The use of in-house surveyors allows the club to better understand the risks and to offer advice to members to minimise both injury and damage.

Last year, 56 reviews of member safety management systems were carried out, of which 10 were offshore companies. Since February 2008, the club has surveyed over 1,000 ships with a third of these surveys completed by our in-house surveyors. Over the same period, an additional 131 condition surveys were undertaken on offshore units. Given the complexity of these units, their specialist operations and associated risks, we prefer to use our in-house surveyors where possible.

RECENT EXAMPLES OF DEFECTS

We have found offshore units generally to be in a good condition and operated to a high standard. However, defects have been found on occasion. Over the last two years these have included:

- modification of the lifeboat embarking system without approval from shore management, manufacturers or statutory authorities
- doors fixed open for ventilation in a hazardous area where an explosive gas/air mixture may occur
- a supply ship using an unapproved ship stability programme
- lack of crew/officer experience for anchor handling and towing operations
- unsafe crew practices when repositioning pontoon hatch covers
- disabled fire detection and fixed fire-fighting systems
- machinery spaces dirty, oily and considered a fire hazard
- stowage of chemicals and paints in the same locker
- restricted access to lifesaving appliances
- modification to unit operations but still relying upon original safety case
- dynamic positioning reference systems having been modified but still relying on the original Failure Mode Effect and Analysis

MAINTAINING STANDARDS

It is generally accepted in the marine offshore industry that the highly regulated North Sea sector has the highest standards for quality, safety, loss prevention and risk management. These demanding standards offer the marine offshore operator a benchmark for minimum compliance of health and safety procedures within their management system.

However, there is a great level of variation in the standards applied outside North Sea areas. In West Africa, for example, the competence of the local regulatory bodies varies considerably and often they fail to identify defects, non-conformities and/or they do not have the ability to enforce compliance.

Likewise, it is evident that not all Flag States are equipped with sufficiently experienced surveyors to carry out meaningful or effective inspections of offshore ships/units. It is therefore not enough to rely upon classification societies, Flag States or regulators to police standards of maintenance and control.

Some offshore operators have identified that whilst their unit is on location, thus not internationally trading, then IMO regulations do not apply and that they can de-class and no longer need to remain ISM-compliant. Whilst this is technically acceptable, we would expect the member to demonstrate that its in-house management systems are equivalent and robust enough to maintain the unit and evidence that independent verification is in place.

The club is constantly looking for and promoting best practice as opposed to minimum compliance. Members are therefore encouraged to adopt best practice standards across their fleet, irrespective of the particular jurisdiction where offshore operations are carried out.



^ Water discharge from production unit

LESSONS FROM THE DEEPWATER HORIZON AND MONTARA DISASTERS



Chris Spencer: Director of Loss Prevention
Telephone: +44 20 3320 8807
E-mail: chris.spencer@ctcplc.com

Fundamental safety lessons for the offshore and shipping industries can be learned by looking at the government reports that were issued after the *Macondo* well and *Montara* oil platform disasters. The Gulf of Mexico *Macondo* tragedy in April 2010 cost the lives of 11 people, and 5m barrels (bbls) of oil flowed into the waters off the US coast. The *Montara* spill in the Timor Sea in August 2009 thankfully involved no loss of life, but was a significant casualty, as the wreck removal costs of the *West Atlas* alone were estimated at more than \$140m.

The semi-submersible rig *Deepwater Horizon*, drilling at the *Macondo* prospect, blew out 30 years after the *Alexander L Kielland* floating hotel for rig workers collapsed in the North Sea, with 123 lives lost. That 1980 tragedy was a grim lesson in how not understanding the risk and not fully appreciating the role of shore management can inflict a major catastrophe. Excluding the technical aspects of the disasters, the similarities with regard to management failures are striking. It is dispiriting that 30 years on, the same factors are being cited as causes of major accidents.

DEEPWATER HORIZON

US President Obama created a National Oil Spill Commission to seek the root causes of the *Deepwater Horizon* disaster. Its report and the Chief Counsel's Report are essential reading for anyone wanting to avoid a repeat of that tragedy.

The investigation makes clear that management failures, not mechanical failings, were the ultimate source of the disaster. The report lays out in detail that the following factors led to the tragedy:

- confusion
- lack of communication
- disorganisation
- inattention to crucial safety issues and test results

At the Standard Club, we have been focusing on the human element as a loss prevention area that can lead to improvements. During our condition surveys and when carrying out reviews of the safety management systems of new members, we consider these human element factors. The oil spill commission clearly thought that failures do not simply start with a rig (or ship), but relate to the practice of management ashore.

The *Macondo* disaster was not the result of a coincidental alignment of technical failures as many have suggested. Although many technical errors contributed to the blowout, the commission found that all could be traced back to management failures. The report identified the management failures associated with each technical failure.



^ *Deepwater Horizon*

The Chief Counsel's report noted the following management failures:

- ineffective leadership at critical times
- ineffective communication and 'silencing' of information
- lack of timely procedures
- poor training and supervision of employees
- ineffective management of, and oversight of, contractors
- inadequate use of technology and instrumentation
- failure to analyse and appreciate risk
- focus on time and costs rather than control of major accident risks

According to the commission, most of the events and mishaps related to the *Deepwater Horizon* disaster could be traced back to an overreaching failure of management and communication.

Documents available to the commission indicated that these areas of management were in fact considered important by BP, and the first principle of the *Macondo* operation was leadership, but the Chief Counsel's team observed conflict between managers and confusion about who was accountable for critical decisions.

In the context of leadership, the commission declared pointedly: "*Though it is understandable that no one would wish to take ownership of the well after the blowout, the Chief Counsel's team found many instances in which nobody was taking ownership before the blowout.*"

COMMUNICATION

Good management, it is said, is all about communication.

The commission said that inadequate communication and excessive compartmentalisation of information contributed to the blowout. Breakdown in the flow of communication is a contributing factor in most major accidents.

As part of its management review process, the Standard Club looks at the systems within a company that allows an organisation to learn from its mistakes. These can be simple processes such as capturing near misses, learning from effective auditing, having effective safety meetings and promulgating technical and safety notices. The *Macondo* report noted that both BP and rig owner Transocean had failed to communicate lessons learned from other wells that could have assisted decision-makers. In one instance, the rig operator failed to communicate to BP and its rig crew lessons from a similar near miss on one of its rigs in the North Sea four months before the *Macondo* blowout.

Transocean's resulting advisory note setting out anticipated amendments to its well control handbook in light of the North Sea incident was not sent to anyone on the *Deepwater Horizon*. A more extensive advisory note was issued less than a week before the *Macondo* blowout, but this was circulated only to North Sea units. Although Transocean disagreed with the Chief Counsel's assertions, his report stated:

"There is no reason why the lessons learned in the North Sea would not apply to the Gulf of Mexico or non-completion operations. Had Transocean adequately communicated the lessons from the North Sea to the crew of the Deepwater Horizon prior to April 20, events at Macondo may have unfolded differently."

The point is made that learning from our mistakes is a process that should be undertaken vigorously in a formal, structured way and should be at the centre of a company's safety management system.

PROCEDURES

The commission found that BP failed to provide its well-site leaders and the rig crew with clear, detailed and timely procedures. Instead, the evidence shows that BP's onshore *Macondo* team was rushing to design and provide procedures in order to keep up with operations on the rig.

Just three days before the blowout, there was an email exchange between managers complaining about people being upset by many last-minute changes: *"this huge level of paranoia from engineering leadership is driving chaos"* and referring to attempts *"to make sense of all the insanity"*.

According to the Chief Counsel, companies failed to provide the rig crew and well-site leaders with adequate training, information, procedures and the support to do their jobs effectively.

COMPETENCE AND SUPERVISION

The report states that BP did not supervise and support its employees as necessary to ensure safe operations. It does not appear that BP made any significant effort to ensure in managing changeovers, that certain people were qualified for the tasks they would be performing.

Personnel joining rigs or ships for the first time is a risk for organisations and needs to be managed correctly. The club focuses carefully on this type of management, during our condition surveys and management reviews.

TRAINING

The report said that some personnel were inadequately trained, including the well-site leaders when it came to conducting and interpreting a negative pressure test. Nor were crews well trained in how to respond to emergency situations such as those that occurred on the night of 20 April.

This was symptomatic of a broader inattention to end-of-well and non-drilling activities. For example, the well control manual did not contain a section on monitoring or controlling the well during temporary abandonment. This failure was also relevant to the *Montara* blowout, which occurred after production when casing cement was pumped.

The dynamic positioning officers were not trained in certain emergency procedures, including how to respond to combustible gas alarms or how to instruct the engine room to shut down the engines in those circumstances.

All companies should ensure that their emergency training includes not only the most common emergencies but also events deemed unlikely to occur.

CONTRACTOR CONTROL

When the *Deepwater Horizon* well blew out, only a handful of the 126 people on the rig worked for the operator, BP. The remainder were employed by contractors or subcontractors. Such has been the industry practice for many years. It is not necessarily a problem to use contractors, but this can create an environment where miscommunication and misunderstanding arise. The report noted that BP did not adequately supervise its contractors in several instances and most worrying was the inadequate supervision of cementing.

The report highlights other issues over the alleged quality of the cement work. It was acknowledged that BP's engineers did not review the contractors' cement work line by line and never fully used their in-house expertise. If, for example, the February 2010 test results had been properly examined, it would have been seen that the slurry had failed the foam stability test.



MONTARA

Many of the recommendations relating to the *Deepwater Horizon* casualty are relevant to the *Montara* incident.

On 21 August 2009, the *West Atlas* mobile offshore drilling unit released hydrocarbon liquids and gas from the H1-ST1 well through the *Montara* wellhead platform while carrying out a drilling and completion programme. The unit was 254 km off the northwestern Australian coast in 77 metres of water. Shortly after the initial release, the unit was evacuated. On 14 September, work began on drilling a relief well and, on 1 November, fire broke out on the wellhead platform after a relief well intercepted the leaking well. On 3 November, the fire was extinguished and the oil leak contained, but not before 400 to 1,500 bbls of oil per day had spilled into the Timor Sea. The well's blowout preventer had not yet been installed.

It is fortunate that no one was hurt as a result of the *Montara* incident. Had the blowout ignited immediately, the situation might have resembled the *Deepwater Horizon* incident. The light nature of the hydrocarbon liquids and the remote location of the well allowed the majority of the spill to disperse out to sea, although the Indonesian government has complained about the pollution impact.

Subsequent investigations, including an Australian commission, concluded that the blowout may have started with the cementing of the casing shoe at the bottom of the inner casing. It is likely that the integrity of the cement was never proven and the outcome was a 'wet shoe', with the cement contaminated by drilling or reservoir fluids. Secondary barriers ought to have been in place.

Specialists from the field and the rig operator had received daily reports on the cementing work, including an account that an experienced person could have deduced as meaning that the integrity of the cement shoe was likely to have been compromised.

The operator of the field, the Thailand-based PTTEP, issued a preliminary report that examined the probable causes of the uncontrolled hydrocarbon release. Its comments included:

- company quality assurance procedures were not applied to the procurement of well materials and equipment
- poor application of the mobile unit safety case revisions by crew
- failure to implement risk-assessed changes made to the PTTEP drilling programme
- ineffective communications between PTTEP's well construction personnel onshore and drilling supervisors on the unit, and between drilling supervisors and the operator of the unit

One of the first initiatives recommended by the company was for an independent audit, including an audit of safety-critical components and management of change systems. Within a short period after the incident, PTTEP identified basic deficiencies in its safety management and training system.

— LACK OF ACTIVE SUPERVISION

One of the key failures was neglecting to install a pressure-containing cap followed by a report to onshore management that such a cap had been installed. This raises company cultural issues, including those of supervision of offshore operations.

There was confusion over the role of senior management personnel. The well construction manager told the inquiry that he expected the cap would be reinstalled once cleaning work was completed. However, when he discovered that the cap had not been reinstalled, he did not intervene because he did not want to "*teach the rig personnel their jobs*".

Some major accidents have laid bare the fact that those with responsibility for process safety are marginalised by company organisational structure.

The situation on the *Montara* field was even less satisfactory in that there was no apparently effective engineering input into well operations and no well integrity assurance function. An attitude of trial and error learning in a hazardous environment such as offshore drilling means that a serious incident is only a matter of time.

The Australian commission found that the field operator had failed to comply with its well construction standards in many areas. Individuals, both offshore and onshore, made poor decisions, which stemmed from a lack of organisational competence and capacity to manage an offshore drilling operation.



— CONCLUSION

One of the many dilemmas for insurers is the degree to which they can rely on regulators carrying out their activities in a diligent manner and without fear or favour. Experience shows that this is not always the case. It is becoming evident that there are few jurisdictions or authorities that can be recognised as bodies of quality. It has taken the *Deepwater Horizon* incident to motivate the US administration into bringing its regulatory compliance standards to a level comparable to those governing the North Sea sector. The *Piper Alpha* disaster in 1988 was the wake-up call that the North Sea industry needed, and it is surprising that it appears that authorities and companies in other jurisdiction have not learned from this.

There is a perception that if a problem were developing, there would be clear, obvious warnings. In fact, accidents occur for the most simple of reasons and sometimes warning signs are difficult to see.

There are many conclusions that can there be drawn from these accidents: just because you have not had a major incident does not mean that you will not have one. The following should be kept under constant review:

- the effectiveness of your safety management systems
- your safety culture
- your safety barriers
- your audit systems
- your inspection systems
- your process control systems
- your subcontractor relationships
- employee competence
- employee and contractor training
- effectiveness of that training
- management of communications
- management of change process

A further conclusion is; 'learn from your mistakes, and those of other people'. The *Deepwater Horizon* and *Montara* disasters could have been avoided if lessons had been learned from previous disasters.

LIMITATION OF LIABILITY FOR MARITIME CLAIMS: THE 'APL SYDNEY' CASE – A DISTINCT OCCASION



Francis Burgess: Solicitor,
Holman Fenwick Willan
Telephone: +61 3 8601 4500
E-mail: francis.burgess@hfw.com



On 18 March 2010, the Federal Court of Australia delivered a judgment in the matter of *Strong WisE Limited v Esso Australia Resources Pty Ltd* [2010] FCA 240 (APL Sydney) which raised eyebrows of many individuals engaged in international maritime commerce.

The court's interpretation on the meaning of 'a distinct occasion' which is the language used in the International Convention on Limitation of Liability for Maritime Claims, 1976 (1976 Convention), as amended by the 1996 Protocol which is given the force of law in Australia by the Limitation of Liability for Maritime Claims Act 1989 (collectively referred to as the LLMC) shall expose members, P&I clubs and other insurance underwriters to increased liability risks.

The effect on shipowners, charterers and ship-mangers is that they no longer have a definable limit of liability for maritime claims under the LLMC in Australia because those limits can now be circumvented.

FACTS

On 13 December 2008, the ship *APL Sydney* arrived at Port Phillip Bay, Melbourne, Australia on a voyage from Hong Kong and proceeded to drop anchor. The weather at the time was gale to gale force winds (34 to 47 knots) with seas of 2 to 2.5 metres. The ship's anchor dragged in the rough weather and fouled a chartered pipeline jointly owned by Esso and BHP Billiton. For a period of about 35 minutes, the ship yawed from side to side in the wind. After receiving advice from the pilot to put the engine dead slow ahead, the master ordered a series of engine movements before stopping the engine. As a result of these movements the pipeline ruptured and gas was seen to bubble to the surface of the bay, about 50 metres from the starboard bow of the ship.

The owner of the *APL Sydney* commenced proceedings in the Federal Court claiming that it was entitled to limit its liability pursuant to the LLMC. They argued that the incident amounted to one 'distinct occasion' within the meaning of the LLMC and they were therefore entitled to establish a single limitation fund to meet all claims for loss and/or damage arising from the incident. The Judge held that whether one occasion was distinct from another would depend upon whether the causes of the claims that arise from each act, neglect or default are sufficiently discrete that, as a matter of common sense, they can be said to be distinct from one another.

The court decided that there were two separate distinct occasions within the meaning of the LLMC and that the shipowner must therefore establish two separate limitation funds; one for the occasion when the anchor fouled the pipeline and one for the occasion where the pipeline was ruptured. In other words, the total limited liability exposure of the shipowner was twice the amount prescribed under the LLMC.

ISSUES WITH INTERPRETATION OF THE LLMC

Two decisions of the court were influential on the reasons given for the judgment delivered in the case:

1. the decision that the right to limit under the LLMC was not intended to have an unlimited ambit; and
2. the decision that the LLMC requires a separate fund (valued by the relevant limitation calculation) for each distinct occasion.

Significantly, these decisions were not considered by the court with regard to the rules of interpretation of conventions as required by the Vienna Convention. As a result, the reasons of the judgment delivered indicate that the court construed the overall purpose of the LLMC to be about how to value the limit of liability instead of its actual purpose, which is to confer a right to limit.

Consequently, this distortion caused the court to focus the meaning of 'a distinct occasion' based on legal concepts related to causes of legal actions which give rise to a claim that could be limited, instead of the principles used to draft the LLMC.

CONVENTION PRINCIPLES

The three main principles which are referred to throughout the development of the LLMC in the *Travaux Préparatoires* (which are the preparatory works produced during the drafting of the convention) are:

- (a) limits set by the LLMC should not be easily broken;
- (b) the limits of liability set by the LLMC should be based on insurability at reasonable costs and be within the available commercial limits of insurability; and
- (c) the limits set are a global limitation amount.

UNBREAKABLE LIMITS OF LIABILITY

The concept of unbreakable liability limits was created in the LLMC by the addition of Article 4 in the 1976 Convention.

Commentary in the *Travaux Préparatoires* state that its introduction was intended to ensure that 'the right to limitation shall not be lost unless the person liable has acted with intent or with certain recklessness'.

In keeping with the principles of the convention, Article 4 emphasises that:

1. due account should be had to the availability of insurance cover for the limits foreseen under the convention in Article 6; and
2. those limits should not easily be 'broken'.

These convention principles emphasise the importance of the unbreakable limit concept, which is integral to the limits of liability set out under the LLMC.

Unfortunately, the court's view in the *APL Sydney* case was that the '*Convention could not have been intended to have an unbreakable ambit*'. As a result, the court appears to have misdirected its analysis of the convention in a manner which is contrary to the view taken by the convention drafters who '*...felt that it is sufficient as inducement to adequate insurance cover that there is a limit to the total exposure to maritime claims... this [marine liability insurance – Protection and Indemnity insurance] could hardly have been done but for global limitation of liability for maritime claims.*'

THE LIMIT OF LIMITATION

At the time of drafting the 1976 Convention, the maximum marine insurable limit available in the market was identified to be in the order of \$100m per ship per incident.

This amount is referred to as the global limitation and reflects the total coverage limit because according to the *Travaux Préparatoires*, 'insurers would never provide unlimited coverage and there was, therefore, no point in creating additional exceptions to the general limitation'. Importantly, the drafters of the convention determined that the maximum liability amount should be calculated in accordance with the limit per ship per incident and not per claim or type of loss.

MEANING OF 'DISTINCT OCCASION'

Commentary in the *Travaux Préparatoires* is helpful in understanding the construction of the 1976 Convention in order to determine the meaning of 'distinct occasion'. This commentary indicates that the LLMC does not intend to prescribe individual claims which can be limited by a separate limitation fund for each claim. Instead, it prescribes the groups of liability claim types that will be limited by establishment of a single limitation fund.

A clear understanding of this subtle distinction in the LLMC is seen in the phrase 'a distinct occasion' is construed to mean the 'right to limit'.

In light of this, the *APL Sydney* case appears to have incorrectly determined the intended ordinary meaning of a 'distinct occasion', artificially inflated the recognition of an individual claim over other losses that are recoverable from the same fund and incorrectly valued the liability exposure which the shipowner ought to have had under the LLMC.

ONE FUND OR TWO?

The *APL Sydney* judgment now enables a court to permit one fund (for the value established by the relevant limit calculation) for each separate claim.

However, courts that follow the case could be establishing limitations of liability that are contrary to the principles of the LLMC because the convention only permits a single fund for all claims arising from each incident (for which the right to limit is exercised), regardless of the number of claims which arise from that incident.

Arguably the *APL Sydney* case did not find more than one incident because the judgment of the court was based on there being two distinct occasions which gave rise to separate claims, not two separate incidents.

Considering the parties have settled the *APL Sydney* case and all appeals have been discontinued, the judgement will remain an uncharted rock which should be navigated with caution until the matter has been reconsidered in another court, or the International Maritime Organisation amends the LLMC.

KNOCK-FOR-KNOCK CONTRACTS ARE ENFORCEABLE IN THE US



LeRoy Lambert: President, P&I New York
Telephone: +1 212 809 8085
E-mail: leroy.lambert@ctcplc.com



In the Standard Club's New York office, we occasionally hear from colleagues and members abroad that courts in the US will not enforce provisions in a contract that purport to relieve one party for the consequences of its fault/negligence. It is correct that courts in the US generally interpret such clauses strictly and resolve any ambiguities against the party seeking to relieve itself of liability for the consequences of its own actions. However, US courts will enforce properly worded and unambiguous commercial contracts that achieve this result, absent a statutory or judicial precedent to the contrary. This is especially the case when the language is mutual and in favour of both parties, as they are in 'knock-for-knock' agreements common in the offshore industry.

The source of this confusion relating to 'knock-for-knock' contracts in the US is not clear. It likely stems in part from judicial rulings in towage cases, which hold that a clause in a towing contract purporting to release the tug from liability for the tug's negligence is invalid and unenforceable. This remains the case in towage contracts; however, parties now invariably achieve a similar result by arranging for cross-insurance endorsements in which the tug is named as an additional insured and subrogation is waived. Courts in the US have upheld such insurance arrangements in contracts.

'Anti-indemnity' statutes passed by some states, notably Texas and Louisiana, the home of much of the offshore oil exploration industry in the US, are another source of concern. These statutes are a consequence of attempts by major oil companies to contractually require local providers of supplies and services in the oil industry to assume all liabilities, even if caused by the fault of the oil company. In effect, the oil companies were asking the local suppliers to indemnify the oil company even if the oil company's fault caused the damage. These 'anti-indemnity' statutes apply to contracts relating to oil and gas drilling activities and give rise to technical legal issues about whether they apply to maritime contracts and whether the party invoking the contract is entitled to its protection. While these statutes can doubtless be a trap for the unwary, parties active in the US offshore oil and gas industry, and their lawyers, are now well aware of them. Proper drafting and insurance arrangements can be made between parties negotiating in good faith such that a 'knock-for-knock' result can be achieved in a given case that is fair to all concerned.

Despite the *Deepwater Horizon* tragedy, the offshore oil industry in the Gulf of Mexico, and other coasts in the US for that matter, is not going away anytime soon. The world's need for oil and natural gas as well as the availability of oil and natural gas in the Gulf of Mexico and other US offshore waters is simply too large. Whatever operational concerns a member may have about operating in the US, a member need not have legal and insurance concerns. With proper advice and attention to detail, the legal and insurance risks are manageable.

KNOCK-FOR-KNOCK CLAUSES UNDER BRAZILIAN LAW



**Godofredo
Mendes Vianna:** Partner at Kincaid-Mendes
Vianna Law Firm –
Rio de Janeiro, Brazil
Telephone: +55 21 2276 6200
E-mail: godofredo@kincaid.com.br



**Juliana
Furtado Senna:** Senior Associate at Kincaid-
Mendes Vianna Law Firm –
Rio de Janeiro, Brazil
Telephone: +55 21 2276 6200
E-mail: juliana.furtado@kincaid.com.br

Knock-for-knock indemnity clauses are common in the offshore sector and are largely adopted by most international contract forms, such as BIMCO standard charter contracts. Traditional knock-for-knock indemnity principles provide certainty and make the responsibilities and liabilities of the parties clear and simple from a risk and insurance perspective. Each party will obtain insurance or self-insure the risks related to injury to its personnel and damage to its property.

COMMON CONTRACTUAL TERMS IN BRAZIL

In Brazil, there are two main contractual regimes adopted by the offshore sector. International oil companies adopt their own contract terms or the traditional standard forms (such as BIMCO), usually subject to foreign law and jurisdiction and incorporating the knock-for-knock principle. Alternatively, *Petróleo Brasileiro SA* (Petrobras), a Brazilian state oil major, adopts its own contract terms, subject to Brazilian law and jurisdiction. Petrobras represented over 95% of the chartering activities in the Brazilian offshore sector according to the 2010 statistics published by the Brazilian Waterway Transportation Agency. Petrobras contract terms do not provide for knock-for-knock indemnities, but instead, incorporate the Brazilian civil code rules subject to limited indemnity amounts and exclusion of indirect damages and loss of earnings.

BRAZILIAN CIVIL LAW

Brazilian law is based on civil rules, and indemnities are governed by the Brazilian civil code. A basic principle of Brazilian civil law is that any person who causes damage to another must indemnify the aggrieved party in a form proportional to the damage suffered. Additionally, the Brazilian civil code provides that each party shall be fully responsible for the acts of its employees and subcontractors.

Under section 927 of the Brazilian civil code, a party may be under an obligation to repair the damage, regardless of fault, in the circumstances specified by the code or when the activity that caused the damage included a risk to the environment or to third parties. By virtue of the above legal provisions, service providers may be fully liable for the damages suffered by their clients, the only exception being damages caused by an act of God.

ACCEPTANCE OF KNOCK-FOR-KNOCK?

It will be clear from the above that the principles adopted by Brazilian law are quite different from the principles set out in the standard knock-for-knock clauses. Notwithstanding this, Brazilian law accepts freedom of contract, which means that the parties are free to establish the clauses and conditions of the contracts as long as such terms and conditions do not contradict matters of public order or affect third parties' interests.

Although the Brazilian courts could find a knock-for-knock clause to be valid if the contract was freely negotiated between the parties, the clause could contradict matters of public order or affect third parties' interests. For example, a limitation of liability clause under a contract of carriage is considered by the Brazilian courts as contrary to Brazilian law and therefore null and void.

The commercial and operational context of a contract of carriage for goods are of course quite different from the usual practice of offshore charter contracts, insofar as contracts for the carriage for goods, such as standard bills of lading, will frequently not be freely negotiated/agreed by the parties. The Brazilian courts have considered that the limitation of liability clause included in a bill of lading is onerous to the receiver and therefore not valid.

Offshore contractors and oil companies have a more even bargaining strength and despite the existence of the spot market, the charter contracts are usually fixed on a mid to long-term basis and have a more open and reciprocal capacity for negotiating the contractual conditions. It therefore appears to be unlikely that the Brazilian courts would consider an offshore contract to be unfair due to a lack of bargaining strength. It is important to note however that the Brazilian courts have never been asked to consider a knock-for-knock clause, as international offshore contracts, in which such clauses are included, usually adopt foreign law and jurisdiction regulations.

CONCLUSION

There is a significant and immediate need for offshore equipment and services in Brazil, which cannot be satisfied by domestic Brazilian companies alone. The number of foreign companies working in the Brazilian offshore market will continue to increase for the foreseeable future, bringing with them internationally recognised contractual terms that will likely include knock-for-knock liability regimes. We therefore expect that knock-for-knock clauses will be duly considered by the Brazilian courts in the future and endorsed as a valid and efficient condition to regulate offshore contracts in Brazil.

RECOGNITION OF KNOCK-FOR-KNOCK CLAUSES IN MEXICO



Fernando Escamilla: Partner of Garza Tello & Asociados
Telephone: +52 55 5424 8464
E-mail: fel@garzatello.com.mx

In Mexican law and particularly in the offshore industry, the knock-for-knock clause is recognised for use in both private and public agreements.

PRIVATE AGREEMENTS

Private agreements are mainly regulated by the principle of 'free will', whereby the parties are free to create legally binding agreements. It means that any person or entity can be bound in an agreement with another party, as long as the contract terms are not prohibited by law and are not contrary to public order rules. In this regard, individuals as well as private entities are free to agree on the scope of an indemnity arising under a contract and can obtain insurance to cover any risks or liabilities.

Based on this principle, where the parties agree to accept liability for their own losses or damages arising from any cause or circumstance, and to hold safe and harmless the other party from any claim originating from such losses or damages, the parties can agree a knock-for-knock provision, which will be recognised by Mexican law.

PUBLIC AGREEMENTS

Public contracts are regulated by Mexican public law. Usually, these contracts are standard-form agreements established unilaterally by a public governmental entity. In Mexico, the only entity allowed by the constitution to research, extract and trade oil and gas is the state-owned company Petroleos Mexicanos (PEMEX). In the Mexican offshore industry, PEMEX determines, according to its own requirements and interest, the scope of liabilities of its contractors, who are not allowed to negotiate the liability provisions that will govern the agreement.

All PEMEX contracts contain liability and indemnity provisions. An example of this wording is below:

"Damages and losses caused by any of the parties to the other and to third parties, originated by negligence, willful misconduct or bad faith, will be born the party who caused such damages. When any of the parties, either Pemex or the contractor, cause damages or losses without negligence, willful misconduct or bad faith, each party shall be responsible for its own losses; consequently both parties indemnify the other for the liability arising out of those damages and losses."

PEMEX or the contractor shall be liable under no circumstances for indirect damages of any nature neither for punitive or consequential non-immediate damages."

PEMEX and the contractors' liability are usually limited to the value of the contract. This limitation of liability is independent from PEMEX's right to claim liquidated damages under the contract, for example due to under-performance or delay.

In public contracts with PEMEX, the knock-for-knock clause is generally used in a limited manner that varies from the general principle where each party is responsible for its own losses regardless of cause. The knock-for-knock clause in PEMEX contracts is typically limited to those cases where no intention or negligence of the parties caused the loss or damage. Notwithstanding the current practice, a 'full' knock-for-knock clause could be adopted by PEMEX as it does not contravene Mexican public law.

INSURANCE

Mexican shipowners are required by law to obtain insurance with a Mexican insurance company for their ships trading in Mexican waters. However, in the case of a knock-for-knock provision in an offshore agreement, shipowners should obtain and maintain not only a civil liability policy but also a valid and adequate insurance policy covering their own property and personnel. As the knock-for-knock provision will likely limit the underwriter's subrogation right, the assured must obtain the underwriter's approval of these provisions in advance. In practice, Mexican underwriters usually accept knock-for-knock clauses.

ADDITIONAL LIABILITIES

Finally, it is important to note that, in Mexico, damages to property or injuries can lead to a criminal liability. In principle, criminal rights cannot be waived and therefore it is important to consider that when loss or damage is caused by the wilful misconduct of a party, a criminal liability could result, notwithstanding the existence of a contractual knock-for-knock provision.



TURNING TURTLE ON KNOCK-FOR-KNOCK?



Simon Rainey QC: [Quadrant Chambers](http://QuadrantChambers.com)
Telephone: +44 20 7583 4444
E-mail: simon.rainey@quadrantchambers.com

The bedrock underpinning the allocation of contractual liabilities in the offshore industry is the knock-for-knock regime under which the parties attempt to prescribe in advance which of them bears liability for what and to provide for a mutual sharing of the risk involved, usually on the broad principle that each bears its own loss. But however laudable and commercially sensible such a contractual regime may appear to the parties, it is still merely a contractual regime and subject to the ordinary rules of contract construction, as Mr Justice Flaux said (and the Court of Appeal endorsed) in *Seadrill Management v Gazprom* (2010): “The starting point is that the court must construe the contract as a whole, without preconceptions, but applying established English law principles of contract construction.”

This is by no means necessarily a bad thing for knock-for-knock, as the recent decision (also of Mr Justice Flaux) in *AstraZeneca UK Ltd v Albemarle International Corp.* (*AstraZeneca*) demonstrates.

By way of background: two particular principles of construction have come up in the recent cases on industry standard knock-for-knock clauses, which since they exclude liability, which would otherwise exist at law, are treated by the court as exemption clauses. The first supports the knock-for-knock regime. This is that there is no rule of law by which exemption clauses are to be deemed inapplicable in cases of ‘fundamental breach’ or the breach of a ‘fundamental term’: the question is simply whether the clause, on its true construction, extends to cover the obligation or liability that it is sought to exclude or restrict, and nothing prevents the parties from excluding or limiting liability for deliberate (and hence repudiatory) breaches of contract. The second principle pulls the other way. This is that an exemption clause may be so widely drawn and general in its scope that it must be restricted, since, if it were applied literally, it would defeat the main purpose of the contract that the parties had in mind and, in the court’s words, would “deprive one party’s stipulations of all contractual force” and make them “a mere declaration of intent”.

In *Internet Broadcasting Corp. v Marhedge* (2009), the court considered, in a non-offshore context, a ‘no loss of profit or consequential loss’ clause very similar in drafting to the standard BIMCO offshore contract model. It held that it was to be presumed that the clause did not apply to repudiatory breaches of the contract since it would need clear and express language to achieve that result (e.g. ‘even if due to repudiatory breach’). That aspect of the decision sounded alarm bells and seemed to be directly contrary to the first principle, especially where the modern BIMCO clauses refer to ‘any breach of contract’ (e.g. *Towcon* 2008, clause 25(c)) or to loss ‘arising out of or in connection with the performance or non-performance’ (*Supplytime* 2005, clause 14(c)).

In *A Turtle Offshore SA v Superior Trading (A Turtle)* (2009), a case on the pre-2008 ‘*Towcon*’ form, a similar approach was taken to the standard exemption of the tugowner’s liability for damage to the tow. The judge held that the clause applied so long as the tugowner was actually performing its obligations under the contract, albeit not to the required standard, but not when he had ceased to do anything at all in the performance of its obligations. While he accepted that the wide words of clause 18 were capable of applying to all breaches (a point emphasised in the 2008 revision, which now refers to ‘any breach’), he held it did not apply to what he described as ‘*radical*’ breaches. The *A Turtle* decision also sounded alarm bells (perhaps rather louder ones given that it concerned the BIMCO regime) and the references to ‘*radical*’ breaches conflict with the first principle. But it is to be noted that the court’s reasoning also relied in part on the second principle: that if all damage to the tow was excluded, then purportedly it effectively allowed the tugowner to render no performance at all.

Mr Justice Flaux in *AstraZeneca* has firmly restored the first principle to its rightful place as the lynchpin of the modern construction of exemption clauses, be they knock-for-knock, consequential loss or otherwise. He rejected the approach taken in *Internet Broadcasting* as fundamentally misconceived and inconsistent with authority:

“the judgment ... is heterodox and regressive and does not properly represent the current state of English law. If necessary, I would decline to follow it. Even if the breach ... of its obligation to deliver ... had been a deliberate repudiatory breach ..., the question whether any liability ... for damages for that breach was limited ... would simply be one of construing the clause, albeit strictly, but without any presumption. Since it states: ‘No claims ... of any kind, whether as to the products delivered or for non-delivery of the products’ it seems to me it is sufficiently clearly worded to cover any breach of the delivery obligations, whether deliberate or otherwise.”

That approach is welcome and strongly supports a similar result under the standard BIMCO knock-for-knock clauses, especially as worded in the latest revisions from 2008 onwards. *AstraZeneca* also significantly undermines at least that part of the approach taken in the *A Turtle* that was akin to adopting a presumption against construing the clause as applying to ‘*deliberate*’ or ‘*radical*’ breaches.

However, while it removes that problem, *AstraZeneca* confirmed the second principle (and in fact applied it so as to restrict the exemption clause before it). It therefore remains open for argument whether a knock-for-knock clause, if given a literal meaning, is such as to defeat the object of the contract or render it a mere declaration of intent. That result was doubted on the old ‘*Towcon*’ clause 18, by Mr Justice Clarke in *Alexander G. Tsaviris Ltd v OIL Ltd (The Herdentor)* in 1996 (not cited to the court in the *A Turtle*), but the point plainly remains open for further argument. Watch this space!



WHAT IS A SPECIALIST OPERATION?



John Croucher: Underwriter
Telephone: +44 20 3320 8879
E-mail: john.croucher@ctcplc.com

The purpose of this article is to explain why the definition of a specialist operation is important and to provide some guidance as to the type of operations that may be considered 'specialist'.

It is the aim of the Standard Club to not only offer certainty with regard to the extent of insurance cover provided, but also to offer the widest possible cover for any particular operation, at the lowest sustainable cost. This is often achieved by providing members with access to poolable cover and non-pool covers where poolable cover will not respond.

THE POOLING AGREEMENT

All International Group (IG) clubs are able to provide P&I cover to a very high limit, currently estimated to be \$6.9bn. The breadth and high limits of this cover is achieved by a claims-sharing agreement by the IG clubs through the pooling agreement. The pooling agreement allows clubs in the IG to mutually reinsure one another by sharing all liabilities between themselves in agreed proportions, in excess of \$8m per claim and up to \$60m.

As all IG clubs pool claims amongst themselves, it is important that all of the clubs provide similar cover for poolable risks and interpret exclusions to such cover in a consistent manner. Specialist operations are excluded from poolable P&I cover as the risks associated with such operations are considered to be too different from those of the majority of commercial shipowners. These risks are therefore non-poolable.

However, given the nature of offshore operations, and the very complex contractual arrangements that frequently apply to large projects, there are often both poolable and non-poolable risks in any operation. We must therefore be clear about where the distinction between the two is drawn in order to be able to achieve the certainty of cover we aim to provide. Failure to consider whether a risk is poolable or non-poolable may result in a member having either an uninsured loss or paying unnecessary insurance costs.

SPECIALIST OPERATIONS DEFINED?

The nature of the pooling agreement is such that some of the exclusions to mutual cover could include any number of operations. This is particularly true when looking at the pooling agreement provisions relating to specialist operations, which provides a non-exhaustive list of activities that will prevent access to poolable cover for some, but not all, risks covered by the club.

Rule 5.11 defines the scope of the specialist operations exclusion as follows:

'specialist operations [include]...but [are] 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 (other than on the ship), but excluding fire-fighting...'

It is not possible to set out a definitive list of activities that would fall within the specialist operation exclusion; owing to the rate at which technology advances, new operations are undertaken and harsher environments are becoming workable. For example, vertical seismic profiling is becoming more common and decommissioning obligations are helping to develop new, innovative solutions to the removal of property that have not been seen previously. Neither of these operations is contained within the named activities in the exclusion; however, both are specialist operations.

CLARITY AND CERTAINTY

The IG's role extends beyond the purchase of reinsurance. It has an equally important role as a forum for discussion and the exchange of information. The subcommittees within the group are the vehicle for such discussions and the specialist craft subcommittee has often been asked to consider whether a particular operation is poolable or falls within the specialist operations exclusion. However, while it is undoubtedly helpful to have as a point of reference, each contract, operation and project is unique, and the club must decide whether a particular activity falls within the exclusion.

An example, is anchor-handling operations. Picking up a mooring line of a drilling unit in the middle of a developed offshore field, running the anchor out and repositioning it, may appear to be a clear case of work that would fall within the scope of the specialist operations exclusion. However, this is not the case. The IG has taken the view that this type of operation, to assist in the navigation of another unit, is not a specialist operation and provided a member contracts on knock-for-knock terms or on a fault-based allocation of liability, then poolable cover remains unprejudiced.

While traditional anchor-handling activities remain poolable, this does not mean that all operations that modern Anchor Handling Tugs (AHTs) are capable of have the benefit of poolable cover. For example, work carried out by an AHT may include the installation of anchors and anchor wires on the field prior to the arrival of, for example, an FPSO and the commencement of the anchor-handling operation. Such activities are considered by the IG to be specialist operations in their own right and therefore the liabilities that arise during the course of the installation, either directly or under contract, must be viewed in light of the exclusion.

Likewise, the carriage of property to be installed, such as anchors and anchor wires, would not be considered to be cargo for the purposes of cover under rule 3.13. During carriage of such property, we can extend cover to include:

- (a) a liability incurred in respect of damage to the property itself, where the member has given indemnities in respect of such damage. Such indemnities should be approved by the club or
- (b) a liability incurred in respect of loss of or damage to third party property arising out of carriage of the anchors and anchor wires, for example if they were dropped on loading, causing damage to a berth.

We cannot cover both types of liability arising from the carriage, as we are either treating the property as third-party equipment in respect of which we can cover liabilities for loss or damage, or we can treat the equipment as part of the entered ship and cover liabilities that arise as a result.

CONTRACT WORKS

Following on from the above example, during installation of the anchors and anchor wires, we would not cover loss of or damage to the property itself or liabilities that arise from it, as such liabilities would be excluded under the contract work proviso to the specialist operations exclusion, under rule 5.11(3).

The club defines 'contract work' as including materials, components, parts, machinery, fixtures, equipment and other property that is part of or is destined to become part of the project on which the entered ship is working, or is to be used up or consumed in the completion of the project.

The definition is designed to dovetail with the contractor all risk (CAR) policy wording most commonly used in the London market to cover construction risks for large offshore projects, since this will be the insurance policy that will cover the risk of loss or damage to these items, listed in the CAR policy as project property. As with the specialist operations exclusion, the description of 'contract work' is deliberately non-exhaustive in order to take account of the fact that each project will involve slightly different project property.

When negotiating contracts where the scope of work may include specialist operations, there are several points to be aware of. General terms such as 'project works', 'contract works', 'facilities' and 'pre-existing property', do not have any specific meaning in law. We recommend members should therefore ensure that these terms are defined, preferably in the contract by reference to the particular items or structures that are part of the project property, including any items on which they are working or which are in close proximity to the worksite.

It is recommended that members do not rely on a blanket exclusion of their contracting partner's property, as they may not own the property in question. Ideally, the oil company/ultimate client of the project should clearly fall within the definition of the 'company group' so as to ensure that the oil company's property and personnel, and those of their other contractors and subcontractors, are covered by the indemnities that are given under the contract. However, if this is not possible, it becomes particularly important to ensure that there is a clear indemnity provided for property on which members are installing, removing or working.

CONCLUSION

The type of works that would be considered to be specialist operations can never be exhaustively defined. Most offshore operations are unique to a particular project. We need to be able to take a view as to what types of work would be considered to be a specialist operation for the purposes of club cover in order to be able to offer maximum access to poolable cover and provide options for extending cover where this is not possible.

We frequently consider the point at which the specialist operation commences and whether property in the field would be considered to be 'contract works' or if it would be considered to be 'existing property'. This is important in order to be able to provide certainty between that which can be covered to the high limits of the pool and that which can be covered under a non-poolable extension to a fixed limit (which we can offer to a maximum of \$1bn).

The club is also able to advise what is not capable of being covered under a member's P&I policy. The member can then make an informed decision to either look for alternative insurances that are designed to deal with those risks or possibly retain the exposure against their own balance sheet.

If there is any doubt regarding the extent to which cover would respond to losses arising from a particular operation, members should contact the club for advice.

SINGAPORE ARBITRATION



Samantha Lee: Claims Director
Telephone: +65 6506 2857
E-mail: samantha.lee@ctcplc.com



Chan Leng Sun, SC: Principal
Baker & McKenzie
Wong & Leow
Telephone: +65 6338 1888
E-mail: leng.sun.chan@bakermckenzie.com

In the October 2009 offshore special edition of the *Standard Bulletin*, we reviewed one vehicle for settling disputes in Singapore, namely the Singapore Chamber of Maritime Arbitration (SCMA).

In this article, we review the developments that have helped to position Singapore as a regional leader in arbitration. A developed legal infrastructure, modern facilities and focused support from all branches of the government and arbitration practitioners (local and foreign) are some of the key factors in Singapore becoming a regional arbitration centre.

The international arbitration regime in Singapore is governed by the International Arbitration Act (IAA), which gives the force of law to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) with some modifications. The IAA also gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

The domestic arbitration regime is governed by the Arbitration Act (AA). The AA was revised in 2002 so as to harmonise the laws on domestic and international arbitrations. The AA operates as the default regime if an arbitration in Singapore falls outside the reach of the IAA or parties opt out of the IAA. One difference between the IAA and the AA is that the AA permits referral of a question of law to be determined by the courts instead of the tribunal in the course of the arbitration.

Singapore demonstrates its support for arbitration in several ways, as illustrated by the tests developed on arbitration-related applications:

- stay of court actions for arbitration. This is compulsory for international arbitration. It is discretionary for domestic arbitration, but the burden is on the one resisting arbitration to demonstrate sufficient cause to disregard the arbitration agreement
- Singapore recognises the concept of 'kompetenz-kompetenz', i.e. the tribunal can rule on its own jurisdiction
- finality of the award. There is no right of appeal for international arbitration. There is a limited right of appeal in domestic arbitrations on a question of law, but the tribunal's decision must be obviously wrong or, on a point of general public importance, at least open to serious doubt. Setting aside or resisting enforcement is allowed only on specific grounds, consistent with

CONTINUED ON NEXT PAGE

SINGAPORE ARBITRATION CONTINUED

international standards laid down in the Model Law and the New York Convention

- limited judicial intervention. The court will not usurp the role of the tribunal and will only intervene sparingly and in very narrow circumstances, for example where the arbitral tribunal has no jurisdiction to grant the relief sought (Court of Appeal decision in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5).

Where the dispute is an admiralty claim within the High Court (Admiralty Jurisdiction) Act, a ship arrest is permitted for the purpose of obtaining security for an arbitration, wherever the arbitration is seated. The plaintiff is entitled to such amount of security that would cover his reasonably best arguable case: *The Arkis Fighter* [2001] 3 SLR 394. A recent and comprehensive review of Singapore law on ship arrest can be found in the judgment of Belinda Ang J in *The Bunga Melati 5* [2011] SGHC 195.

In terms of supporting infrastructure, a dedicated arbitration centre was opened in 2010. Maxwell Chambers is an integrated dispute resolution centre with fully equipped hearing facilities. It is home to the major arbitration dispute and resolution institutions such as the Singapore International Arbitration Centre (SIAC) and the Singapore Chamber of Maritime Arbitration (SCMA) as well as organisations such as the Singapore Institute of Arbitrators (SIArb). Some leading London sets of counsel have also established Singapore offices at Maxwell Chambers.

The SIAC was established in 1991 and provides an institutional model for arbitration. A SIAC arbitration is an administered arbitration, similar to an ICC arbitration. As an institution helping to administer arbitrations, SIAC helps parties to appoint arbitrators when they cannot agree on an appointment and manage the financial and other practical aspects of the arbitration. The arbitrators' fees are fixed on a scale based on the sums in dispute. The Queen Mary survey has identified a shift in preference towards SIAC over other international institutions.

The SCMA was established in 2004 and is modelled on party autonomy. A SCMA arbitration is a non-administered arbitration (similar to a LMAA arbitration). It does not manage the arbitration so there is no management fee payable and parties are free to appoint whom they want to be arbitrators and to agree on the arbitrators' fees. Since our previous article on the SCMA in the 2009 *Offshore Bulletin*, the SCMA has seen growth in the volume and types of cases registered with the chamber, ranging from shipping to commodity disputes, with a significant proportion of cases involving non-Singapore claimants and/or respondents. Its panel of arbitrators has also grown and features many prominent local and international practitioners who have had to demonstrate their specialty, experience and expertise in the maritime sector before being granted admission. The SCMA has also reported a growing number of enquiries for applications by established overseas practitioners.

In conclusion, the arbitration scene in Singapore has seen significant and exciting developments in recent years. A recent and ground-breaking initiative was the introduction in January 2011 by the Singapore Maritime Foundation of the Singapore Sale Form (SSF) as an alternative to the widely used Norwegian Sale Form. An important feature of the SSF is the refinement and incorporation of many of the essential rider clauses to older printed forms into formal clauses within the SSF. A key aspect of the SSF is the inclusion of SCMA arbitration as the default arbitration clause with an option for contracting parties to choose other seats or models of arbitration. In May 2011, the Asian Shipowners Forum formally adopted the SSF as its official Sale and Purchase document for its members and usage of the SSF is on the rise. Developments such as this and the continued efforts and initiatives in the public and private sectors in Singapore to provide an arbitration-friendly jurisdiction have established and will continue to position Singapore as a premier centre for international arbitration.



The Standard Bulletin is published by the managers' London agents:

Charles Taylor & Co. Limited

Standard House, 12/13 Essex Street,
London, WC2R 3AA, England

Telephone: +44 20 3320 8888
Fax: +44 20 3320 8800
Emergency mobile: +44 7932 113573
E-mail: p&i.london@ctcplc.com
Website: www.standard-club.com

Please send any comments to the editor:
Michael Steer

E-mail: michael.steer@ctcplc.com
Telephone: +44 20 3320 8833

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