Standard Bulletin:
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The Standard
for service and security

The Standard

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In this edition

Thank you to the authors for their contributions and to Ursula O'Donnell our guest editor. We value feedback from all who read this bulletin and we are always interested in hearing your suggestions for content, as well as for next year's offshore forum in London which will take place in May.

Welcome to the ninth Offshore Special Edition of the Standard Bulletin. This year's bulletin is unique in that, with the exception of one article that has been co-authored, the articles have all been written by members of staff, demonstrating the depth of knowledge that we have at The Standard Club and our range of expertise in all sectors of the offshore business.

Innovation

The Standard Club has been providing P&I cover for offshore operators' third-party liabilities since 1975. During that time, the industry has made extraordinary advances as it searches for oil and gas in ever more challenging environments, and tackles the tricky issue of offshore construction and salvage. The Standard Club prides itself on the ability to offer members the range of tailored covers needed to operate their vessels in an ever evolving industry. As our members look to innovate, we will be doing the same.

On the subject of innovation, on 27 May 2014, the Standard Club hosted an Offshore Forum at the Fullerton Hotel in Singapore, which focussed on FLNG. The event was a success, attracting many companies from the offshore industry. Our second article by Nicholas Mavrias summarises the issues discussed at this forum.

An international view

Staying in Asia, Sharmini Murugason has written an update on legal developments in Malaysia. Constantino Salivaras, who recently relocated to the club's office in Rio de Janeiro, discusses the issue of Brazilian pollution fines, Sarah Wallace looks at legal developments in Norway concerning knock-for-knock, and finishing our world tour, LeRoy Lambert and Leanne O'Loughlin consider a recent decision in the *Deepwater Horizon* litigation that has the potential to clarify under US law the differences between negligence, gross negligence and wilful misconduct.

Contracts

Rupert Banks has contributed an article looking at a shift in the heavylift sector which has put more pressure on members to assume greater responsibility under contract for project cargoes and suggests some solutions, and Fabien Lerede considers the new Insurance Bill which is expected to be introduced under English law and its potential implication to insurance contracts, particularly with respect to the proposed amendments to the Third Parties (Rights against Insurers) Act 2010.

Technical comment

Moving on to more technical matters, Julian Hines and Johan Lønberg consider the use of LNG as bunkers and potential issues for the offshore industry, and Claire Boddy looks at dynamic positioning and common incidents.

Malaysia – recent legal developments

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- Enactment of significant IMO conventions brings Malaysia up to date ahead of its regional neighbours.
- Concerted effort to modernise Malaysia's legal infrastructure and establish its position as a regional forum for dispute resolution.

Recognising the need to update its maritime laws, on 1 March 2014 Malaysia enacted certain significant maritime conventions simultaneously. Combined with efforts to modernise its legal infrastructure, Malaysia is looking to establish itself as a regional forum for dispute resolution. This article looks in more detail at these recent legal developments.

Enactment of maritime conventions

Three significant maritime conventions have recently been enacted in Malaysia. The International Convention for Civil Liability for Oil Pollution Damage 1969 (CLC), the International Convention on the Establishment of an International Fund for Oil Pollution 1992 (The Funds Convention) and the Bunkers Convention 2001 were all enacted with effect from 1 March 2014 through the Merchant Shipping (Oil Pollution) (Amendment) Act 2011 (the Merchant Shipping Act). These conventions, which contain a strict liability regime, provide compensation in respect of oil pollution damage from trading tankers carrying oil as cargo in the case of the CLC Funds Convention and bunker pollution damage in respect of all other categories of ships. It further provides for the requirement of compulsory insurance or other financial security with a right of direct action against the insurer.

A 'ship', for the purposes of the Bunkers Convention, is defined as any seagoing vessel or seaborne craft of any type. However, as Malaysia has kept the offshore craft exclusion in its enactment of the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC), it is arguable that a floating production storage offtake unit (FPSO) and floating liquefied natural gas unit (FLNG) may not have the right to limit for bunker oil spill claims.

The Merchant Shipping Act

The Merchant Shipping Act brings into force the LLMC as amended by the 1996 Protocol, which for the time being only applies in Peninsular Malaysia (aka West Malaysia) and the Federal Territory of Labuan. The LLMC as enacted retains the Article 15 offshore craft exclusion and, as such, would exclude FPSO and FLNG units. The 1957 Limitation Convention, however, remains applicable in the States of Sabah and Sarawak (East Malaysia).

The apparent reason is the reluctance of the East Malaysian shipowners to agree to the higher limits of the LLMC as amended, despite the precarious threshold of the "*actual fault or privity of the owner*" rule in the 1957 Convention, which can quite easily prevent a shipowner from limiting his liability and thus render a claim potentially unlimited under the convention. Contrast this with the LLMC threshold of "*personal act or omission, committed with intent to cause such loss or recklessly and with knowledge*" constituting as conduct barring limitation, which makes the liability limits in the LLMC practically unbreakable.

Though provisions have been made in the enacting legislation for exclusion, Malaysia has not yet opted to exclude from limitation the wreck removal provisions of Article 2 paragraph 1 (d) and (e) of the LLMC. Presently, therefore,

a shipowner can limit in respect of wreck removal of the entered ship, her cargo and/or property on board.

Curiously, however, the enacting legislation makes it compulsory for a ship to have in force: firstly, a contract of insurance or other financial security in respect of the ship "satisfying the requirements of the Convention" in respect of the limits of liability under the LLMC and, secondly, a contract of insurance or other financial security in an amount equal to the amount calculated pursuant to Article 6, paragraph 1(b) of the LLMC for removal of the wreck as well.

Malaysia is party to the Nairobi Wreck Removal Convention 2007, which does not come into force until 14 April 2015. In both cases, failure to have such insurance or financial security in place could lead to fines being imposed on ships when in Malaysian waters and the EEZ (ships transitting on an international voyage are exempted) in respect of the LLMC and for any ship when in Malaysian waters in respect of the wreck removal.

P&I Clubs will not issue blue cards in respect of the LLMC as amended as this is not a compensation regime; correspondingly, there is no requirement for compulsory insurance or financial security in the Convention itself, and the Wreck Removal Convention is not yet in force and, as such, P&I Clubs are not presently required[1] to issue blue cards for this liability and compensation regime, so it will be interesting to see how the authorities reconcile this anomaly. In the final analysis, the practical solution would be that the ship's P&I certificate of insurance would suffice.

Conclusion

By establishing an Admiralty Court in October 2010 with two dedicated High Court Judges to hear all admiralty and maritime related matters, Malaysia has made a push to be a desired forum for adjudication. Complementing the Admiralty Court is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) set up in 1978, the first regional centre at that time but practically dormant until 2010. In 2010, an initiative to revitalise the KLRCA, led to some 22 matters being referred to arbitration. As at 31 August 2014, this number stands at 253. The modernisation of Malaysia's legal maritime infrastructure will certainly place Malaysia on the map of regional forums for legal adjudication, including in respect of offshore energy and marine matters, complemented by the legislative changes outlined above.

1 Once the Wreck Removal Convention is in force, the Standard Club will issue certificates evidencing that insurance is in place (rule 4.5(6)) in compliance with Article 12 of the Convention.

Offshore Forum: FLNG

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In May 2014, The Standard Club hosted an Offshore Forum at the Fullerton Hotel in Singapore which focussed on FLNG technology. The event attracted many companies from the offshore industry, including oil companies, offshore marine contractors, market underwriters and service providers. This article looks at a couple of the issues discussed.

Combining onshore LNG production methodologies with offshore oil and gas development technologies, FLNG has certain technical, operational and legal challenges:

- remote locations exposed to the elements;
- scalability;
- storage (reducing sloshing, and its effects on stability);
- production;
- offloading (connection leaks, material degradation failures or brittle fractures);
- stability, structural integrity and safety are critical.

Demand for natural gas is growing rapidly worldwide, particularly in Asia. FLNG technology attempts to meet this demand by exploiting offshore gas fields that were once considered logistically and financially unviable. In 2013, offshore gas accounted for 31.3% of the total global production. This figure is set to increase significantly in the near future with the advent of numerous FLNG projects. With the Shell Prelude shortly entering service off the northwest coast of Australia, it is opportune to look at the issues at play in this area of unproven and untested technology.

Regulation

In the regions where some of the FLNG units under construction are expanded to operate there is a concerning lack of common regulation, with the ratification of international agreements varying between affected states. These issues are no more prevalent than in the Asia Pacific region (with the exception of Australia), where there are no cross-border regulatory frameworks that govern and oversee offshore activities, leading to inconsistency in the operational and safety standards required. The uncertainty is compounded when considering the interpretation of international conventions among signatory states and whether these apply to FLNGs. This has the potential to affect an operator's liabilities and ability to limit their exposure.

Cover

The Pooling Agreement has not yet expressly addressed the issue of FLNG technology, but it is envisaged that it would ultimately be approached in the same way as FPSOs. In its current drafting, such units are not eligible for inclusion when they are engaged in operations in connection with gas production under the Drilling and Production Operations exclusion.

Fortunately, the club plans to be able to provide a solution for its members under the Standard Offshore Rules (SOR) cover, much in the same way it has for FPSOs. P&I cover up to US$1bn can currently be provided under the SOR under the club's non-pool reinsurance programme. This would respond to the member's liability in connection with the operation of the unit for personal injury/death/illness, pollution, wreck removal, collision, contact damage and fines[1] as well as those liabilities assumed under contract that fall within the scope of the SOR (subject to contract approval).

If you would like any further information, please contact John Croucher, Ian Billington, Joseph Divis or Nick Taylor. Their contact details are on the Standard Club ***website***


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Brazil – pollution

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- No right to limit liability for environmental damage.
- Criminal liability in Brazil for environmental damage can be attributed to individuals as well as corporate entities.
- Unofficial statistics for fines levied in respect of oil spills over the past seven years shows an increase of approximately 105% per year.

Brazil is known for its complex regulatory framework. As such, there is great uncertainty and unpredictability surrounding its pollution liability system. This article looks at the role of the authorities in the event of a pollution incident and the increasing level of fines applied following a spill.

The legislation that applies to pollution incidents in Brazil comprises a number of different laws and regulations. The main statute, the Lei do Oleo (Federal Law 9966/2000) was enacted in 2000 (and its Regulatory Decree in 2002) following the spill of 1.3m litres of fuel oil from a leaking pipeline at the Duque de Caixas refinery operated by Petrobras at Guanabara Bay in Rio de Janeiro. This incident caused widespread pollution damage to an environmentally sensitive area and brought about major reform to Brazil's pollution liability regime.

Authorities

Various state and federal government agencies may be involved following a pollution incident and they have varying levels of competence. Three federal authorities are responsible for dealing with pollution incidents caused by ships, platforms and pipelines, namely, Direitoria de Portos e Costas or Federal Port Authority (DPC), Instituto Brasileiro do Meio Ambiente e Recursos Renovaveis or Environmental Federal Agency (IBAMA) and National Petroleum Agency (ANP). Although these

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authorities act independently of each other, they are subject to a strict rule of co-operation. The DPC is responsible in principle for investigating pollution incidents and the imposition of fines as a matter of administrative law. However, the Brazilian courts have recognised that all three federal authorities have the right to intervene following a pollution incident in order to impose fines. This may lead to a degree of uncertainty regarding the level of fines that may be imposed.

In the event of an incident

The Lei do Oleo and its Regulatory Decree imposes a strict duty on the field operator or any party interested or involved in the operation of the field to report pollution incidents to the authorities. We advise members to immediately report any pollution incident to the three federal authorities referred to above, in order to mitigate the risk of a fine. Any delay in notifying them can be treated as an aggravating factor, which may increase the level of a fine.

The authorities in Brazil at both federal and regional level perform regular audits and inspections to check that operators comply with the required standards, with the aim of preventing oil spills.

Every pollution incident reported by an operator will be recorded in order to facilitate investigation and to try to deter future accidents.

The victim of a pollution incident (e.g. fishermen) can bring a claim for compensation under civil law for pollution damage (Federal law 7.347/1985). The wrongdoer is liable to pay compensation on a strict liability basis. Members should note that there is no right to limit their liability for environmental damage under Brazilian law.[1]

Fines

Criminal liability in Brazil for environmental damage can be attributed to individuals as well as corporate entities. Following conviction for 'crimes against the environment', fines as well as other penalties (e.g. imprisonment and community service) can be imposed.

As explained above, there is some uncertainty as to which federal authority is responsible for investigating and imposing a penalty following a pollution incident, as a matter of administrative law.[2] Fines imposed by IBAMA can be very high, not helped by the fact that no specific formula is used by it to calculate the amount. Whereas fines imposed by the DPC and ANP tend to be more modest.

An increase in the number of fines has been noted during the past five to six years. For example, reviewing DPC's 'unofficial' statistics for fines levied in respect of oil spills over the past seven years shows an increase of approximately 105% per annum. The majority of these fines were imposed on fixed platforms.

It must be stressed that the increase in the number and value of fines levied may be affected by the following factors:

- greater awareness by the Brazilian authorities of offshore units and platform operators;
- wider educational campaigns;
- increased media involvement, following pollution incidents such as the *Deepwater Horizon* incident; and
- the number of operators located offshore Brazil has increased considerably in the last few years, which has led to a greater risk of incident.

1 Although Brazil is a signatory to the Convention on Civil Liability for Oil Pollution Damage (CLC 69), there is no right to limit in respect of environmental damage.
2 Federal Law 9.605/98 and the Brazilian Criminal Code.

Knock-for-knock – recent developments in Norway

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- Norwegian courts appear to be increasingly prone to set aside clauses that regulate liability on the basis of gross negligence.
- We cannot rule out that courts in other non-UK jurisdictions would not reach the same conclusion.

In a recent decision, the Norwegian Court of Appeal has refused to uphold contractual provisions regulating liability where the party seeking to rely on such provisions has been 'grossly negligent'. This article looks at the case concerned in more detail and the potential implications.

Case study

The case involved a collision between a shuttle tanker *(Navion Hispania)* and a Floating Storage Offtake unit *(Njord Bravo,* which services the Njord field in the North Sea). The collision was caused by a reported failure of the shuttle tanker's dynamic positioning system, which resulted in oil production on the Njord field being shut down.

Statoil Petroleum AS (Statoil), as the field operator, had entered into sales agreements to purchase oil from most of the licensees of the Njord field. These agreements were on FOB terms, which meant that Statoil was responsible for arranging transportation from the field, and they contained a standard exclusion of liability for consequential losses.

Statoil chartered in shuttle tankers, including the *Navion Hispania,* to transport the oil from the Njord field and several other fields in the North Sea under a contract of affreightment (COA). The COA contained a knock-for-knock clause stating that the owner and Statoil, as charterer, would each indemnify the other for all claims in respect of damage to their own property as well as indirect and consequential losses from members in their respective owner's or charterer's group.

The licensees of the Njord field, as the owners of the *Njord Bravo*, brought an action in tort against the owner of the *Navion Hispania* for losses arising out of the collision, who in turn claimed an indemnity from Statoil under the knock-for-knock clause in the COA on the grounds that the licensees of the Njord field were included in the term "*its Licensees*" within the definition of the "Charterer's Group". Statoil argued that "*its Licensees*" referred to licensees on fields where Statoil itself was a licensee (Statoil was not itself a licensee of the Njord field when the incident occurred).

There were two main issues that were considered by the court:

1. Did the exclusion for consequential losses contained in the sales agreements protect the *Navion Hispania* on the basis that it was a subcontractor of Statoil under these agreements?
2. Were the licensees included in the term "Charterer's Group" under the COA? If so, Statoil would be obliged to indemnify the *Navion Hispania* for the claim from the licensees.

Court's decision

The court found that the owner of the *Navion Hispania* acted as Statoil's subcontractor under the sales agreements, so the exclusion for consequential losses applied. However, the court considered that they had been grossly negligent and were therefore prevented from relying upon the exclusion of liability clause.

Although gross negligence was not argued in detail during the hearing, the court placed significant weight on an internal incident report issued by the *Navion Hispania* interests following the incident. The report identified a number of deficiencies with the shuttle tanker and its procedures that the court considered amounted to a grossly negligent breach of their general duty of care.

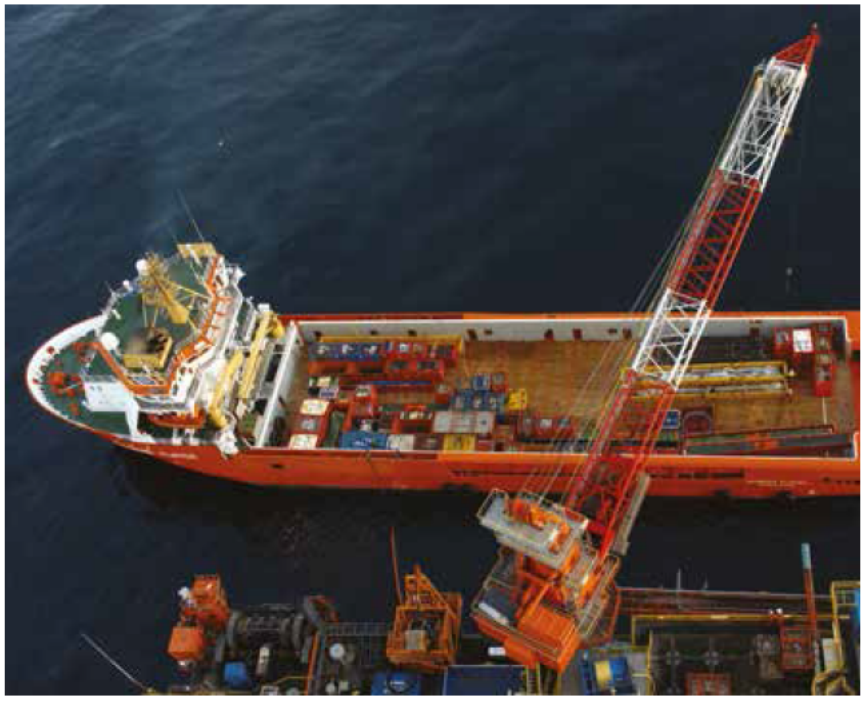
As regards the indemnity, the court found that the licensees were not part of the "Charterer's Group" on the basis that Statoil was not itself a licensee of the Njord field. Consequently, Statoil was not obliged to indemnify the *Navion Hispania* in accordance with the knock-for-knock clause.

Interestingly, the court set out that even if the licensees had been part of "Charterer's Group", the *Navion Hispania* could not have relied on the knock-for-knock because it had been grossly negligent in respect of the collision.

Implications

Norwegian courts appear to be increasingly prone to set aside clauses that regulate liability on the basis of gross negligence. We cannot rule out that courts in other non-UK jurisdictions would not reach the same conclusion.

Expressly stating that knock-for-knock indemnities will apply regardless of negligence or gross negligence will go some way to help, but the scope for knock-for-knock clauses to be overruled in the event of gross negligence remains uncertain.



Deepwater Horizon – US legal developments

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The meaning of gross negligence is an issue that arises often when contracting in the US offshore industry. This article explores a recent decision from the Eastern District of Louisiana in New Orleans arising out of the Deepwater Horizon casualty which, subject to appeal, has the potential to provide certainty to the answer to this question.

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On 20 April 2010, the mobile offshore drilling unit *Deepwater Horizon* exploded in a fireball and sank. Tragically, 11 people died. Others suffered physical and psychological injury. Oil from under the earth's crust flowed into the Gulf of Mexico for 87 days, causing untold environmental and economic damage.

Commercial parties, and their insurers, need clarity in the law in order to contract and allocate the risk of such enormous potential damages with as much certainty as is possible. The *Deepwater Horizon* catastrophe presents an opportunity for the courts to establish definitive interpretations on points of law that have not been addressed or, if addressed, have been considered by different courts in different ways with different results.

Allocation of responsibility

Most of the issues arising out of the *Deepwater Horizon* casualty are being addressed initially by Judge Barbier of the United States District Court for the Eastern District of Louisiana in New Orleans. On 4 September 2014, Judge Barbier issued a 153 page decision in which he allocated responsibility among BP, Transocean and Halliburton under the US Clean Water Act (CWA) and the general maritime law of the US. Under the general maritime law, Judge Barbier found that all three companies "engaged in conduct that was negligent or worse and a legal cause of the blowout, explosion, and oil spill" and held BP 67% at fault, Transocean 30%, and Halliburton 3%. Under the CWA, he found BP's conduct constituted gross negligence, while the conduct of Transocean and Halliburton constituted negligence. In reaching his conclusions, Judge Barbier summarised the jurisprudence in the US dealing with the differences between negligence, gross negligence and wilful misconduct.

Strictly, Judge Barbier interpreted those terms with reference to the CWA. However, it is expected that his interpretation, at least until any revisions on appeal, will be persuasive in other contexts as well, especially since the CWA did not define gross negligence and wilful misconduct in the statute, but left those terms to be applied and given meaning by judges in particular cases.

Gross negligence

Judge Barbier held that gross negligence and wilful misconduct were two separate concepts, rejecting BP's contention that the two overlapped in some instances. BP contended that gross negligence had "objective and subjective elements". According to BP, gross negligence required an extreme departure from the standard of care plus a "culpable mental state". The US, by contrast, contended gross negligence required only the objective element. After a thorough review of the existing authorities, Judge Barbier adopted the US position:

Gross negligence, like ordinary negligence, requires only objective, not subjective proof. While ordinary negligence is a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, gross negligence is an extreme departure from the care required under the circumstances or a failure to exercise even slight care.

Wilful misconduct

In reaching this definition, Judge Barbier dealt with the contentions of the parties about "recklessness", a term that was not at issue in this case, but that the parties agreed was somewhere between gross negligence and wilful misconduct. In the end, Judge Barbier held that recklessness was a species of wilful misconduct, not negligence, whether gross or ordinary.[1]

As to wilful misconduct, Judge Barbier adopted the following definition:

An act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences. If the harm results from an omission, the omission must be intentional, and the actor must either know the omission will result in damage or the circumstances surrounding the failure to act must allow an implication of a reckless disregard of the probable consequences.

Knock-for-knock

US courts will enforce knock-for-knock clauses provided they state the intent clearly and absent any statutory prohibition to the contrary. This is especially so if the clause is "mutual", as a properly drafted knock-for-knock clause is. The same holds true under English law.

English law, however, does not have the concept of "gross negligence" as US law does. As a result, when one party wishes to carve out "gross negligence" while the other does not, uncertainty results. The purpose of knock-for-knock clauses is to eliminate uncertainty and litigation risks and costs no matter how high the stakes.

Conclusion

Accordingly, if "gross negligence" is, in the end, a species of negligent act with an "objective" component only and does not require a "culpable mental state", as held by Judge Barbier, his decision endorses the potential for commercial parties and insurers contracting under US law to contract and allocate risk with more certainty than before.

Judge Barbier, his law clerks and the parties are continuing to work their way through the many legal issues that have arisen. Any appeals will be taken to the United States Court of Appeals for the Fifth Circuit, also in New Orleans. It remains to be seen whether the United States Supreme Court will review any issues arising from the *Deepwater Horizon* casualty. In the event that they do, we will report further.

1 Due to uncertainty created by a decision by the Fifth Circuit after the *Deepwater Horizon* casualty, Judge Barbier also analysed BP's actions under a recklessness standard and found BP did not meet that standard either.

A new insurance bill is in the pipeline

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- The bill will repeal the long-established duty of disclosure upon the assured and their brokers, replacing it with a duty to make a fair presentation of the risk.
- The bill codifies the current case law which provides that the insurer is not liable to pay a fraudulent claim or may recover any sum already paid in respect of that claim.
- The bill will address gaps in the Third Parties (Rights against Insurers) Act 2010 by adding all forms of administrations under the Insolvency Act 1986.

A new insurance bill is due to be introduced into Parliament in July 2015 which, if enacted, will significantly reform insurance contract law in England and Wales. The purpose of this article is to examine the key changes that will be brought about by this piece of legislation.

If enacted, the Insurance Bill (HL Bill 39) will apply to all insurance contracts worldwide that are governed by English law and could have the potential to impact upon all our members since it amends both the Marine Insurance Act 1906 (MIA) and Third Parties (Rights against Insurers) Act 2010.

Changes to the duty of disclosure

The bill will repeal the long-established duty of disclosure imposed upon the assured (section 18 MIA) and their brokers (section 19 MIA) and replace it with a duty to make a fair presentation of the risk. It will also abolish the right to avoid an insurance contract for breaching the duty of utmost good faith placed upon both parties (section 17 MIA).

This "duty to make a fair presentation of the risk" requires the assured to disclose "every material circumstance which he knows or ought to know" or in the alternative provide sufficient information to put the insurer on notice that it needs to make further enquiries for the purpose of revealing these material circumstances. It also imposes a duty not to make misrepresentations.

In many ways, the bill effectively codifies principles that have already been developed by the courts; requiring both parties to play an active role in the process that leads the insurer to decide the terms upon which it intends to insure a risk.

Remedies for breach of duty

The real change achieved with the reform is in respect of the remedies for breach of the 'duty of fair presentation of the risk'. Whereas avoidance is currently the only remedy, the bill intends to introduce a regime of proportionate remedy. If this breach of duty is deliberate or reckless, the insurer will still have the right to avoid the contract. Otherwise, its remedy will depend upon the action it would have taken had a fair presentation of the risk been made. In practice, the insurer will try to demonstrate either that it would never have entered into the contract (but return the premium) or it would have charged higher premium (thereby reducing the claim payment in proportion to the underpayment of premium).

Changes to law on warranties

The bill prohibits 'basis of contract' clauses inserted into an insurance policy that purport to convert all representations made by the assured in connection with a proposal of insurance or a proposed variation of the policy into warranties.

The bill will not prevent an insurer from inserting warranties into the policy as long as it has been expressly agreed with the assured. However, it will change the position with regard to the remedy in the event of breach of a warranty. Whereas the law currently operates to discharge any liability that the insurer may have from the moment

of the breach, the new law will suspend the insurer's liability from the moment of the breach up until the breach has been remedied. As such warranties are viewed as a risk control measure, this is actually in line with the current practice of the club.

Changes to insurers' remedies for fraudulent claims

Practically, the bill codifies the current case law, which provides that the insurer is not liable to pay a fraudulent claim or may recover any sum already paid in respect of that claim. It will also allow the insurer to treat the contract as having been terminated with effect from the time of the fraudulent act. At this juncture, it is important to highlight that, from a P&I perspective, the bill will not apply in the event that a third party commits a fraud against the member who then seeks reimbursement from the club. For example, a crew member receives compensation from a member for an injury which is reimbursed by the club, but it later transpires that the crew member had committed a fraud.

Contracting out

As far as non-consumer insurance is concerned, the insurers will be allowed to contract out of these new provisions provided that they have taken sufficient steps to draw any 'disadvantageous term' to the assured's attention.

Amendments to the Third Parties (Rights against Insurers) Act 2010.

The Third Parties (Rights against Insurers) Act 2010, which received Royal Assent over four years ago, was intended to make it easier for a third party to pursue a claim directly against the liability insurers where the insured is insolvent. However, it has not come into force because it failed to include a wide range of possible administrations under the Insolvency Act 1986 and to take account of recent developments in insolvency law.

The bill will address these gaps by adding all forms of administrations under the Insolvency Act 1986 and accommodating future changes in the law, which will ensure that third parties can recover compensation directly from insurers. From a P&I point of view, the bill should have no real impact since the 'pay to be paid' defence currently available to P&I clubs will survive. The only circumstances where clubs will no longer be able to rely on the defence of prior payment are in respect of crew death or personal injury.

Next steps

The Insurance Bill is likely to be enacted into law before the next general election in May 2015. The progress of the bill and possible amendments to the draft can be monitored on the ***UK Parliamentary website***. We will report any possible amendments to the bill as it goes through Parliament on our ***website***.

Contracting issues in the heavylift market

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Through the club's offshore contract review service, we see a range of heavylift contracts, from those concerning the regular carriage of project cargoes for petrochemical or power plants through to complex transport and installation (T&I) contracts for large-scale offshore energy developments.

As project cargoes, particularly in the offshore oil and gas sector, become physically larger and of higher value, heavylift operators are facing more onerous contractual liability regimes. In this article, we highlight current trends in heavylift contracting and the implications that these have for heavylift members and their clients.

Increasingly onerous liabilities

Whilst the BIMCO HEAVYCON and HEAVYLIFTVOY charterparty forms continue to be the industry standard for the carriage of super-heavylift cargoes and mid-sized project cargoes respectively, it is in transport and installation (T&I) contracts for offshore energy projects that we are seeing increasingly onerous liabilities being placed upon members involved in the heavylift sector.

Heavylift operators that carry and install high-value topsides, modules and other components for oil companies and EPIC (Engineering Procurement Installation and Commissioning) contractors have generally always been expected by their clients to bear some exposure, i.e. have some 'skin in the game' regarding the loss of or damage to the objects that they are carrying and installing offshore. Pure knock-for-knock contracts, whilst representing the benchmark, have traditionally been relatively rare for such operations and certain narrow carve-outs under the liability regime are customary. It is not uncommon, for example, to see heavylift members being exposed under T&I contracts to liability for loss of or damage to and/or the wreck removal of the cargo arising out of their negligence up to a specified limit (usually between $250,000 and $1m), which generally corresponds to the deductible that their client bears under their Construction All Risks policy. The client would then provide the member with an indemnity under their contract for any liability in excess of this. In such a scenario, heavylift contractors bear some potential exposure to a claim but they can take measures to adequately manage this risk.

'Gross negligence'

However, recently, it has become increasingly frequent for heavylift members to be required under contract to assume all liability for the cargo, irrespective of whether there is any negligence on the member's part or not, up to higher and higher limits (commonly up to around $10 – $20m, but with some reaching values of $250m). Furthermore, whilst members will generally have the benefit of a contractual indemnity from their client for liability in excess of this cap, we are increasingly seeing this indemnity being eroded under the allocation of liability by exceptions for 'gross negligence' or 'wilful misconduct' and the right to limit their liability under applicable law being waived. Gross negligence and wilful misconduct have no common legal meaning across jurisdictions and are usually defined terms in the contract. Our particular concern is that these terms are regularly expressed in T&I contracts to specifically include conduct on the part of shipboard personnel. This will increase the risk of litigation as in the event of a casualty, it's likely that

members' clients shall argue that it was caused by the gross negligence or wilful misconduct of the member's personnel.

Concluding thoughts

This is a worrying trend for heavylift operators and their insurers as such onerous liability regimes bear no correlation with members' risk-reward ratios. Whilst no doubt these recent contracting trends reflect clients' desire to ensure that high standards are maintained in the carriage and installation of such high-value cargoes, this can be adequately achieved by selecting only high calibre operators who frequently perform such operations as part of their core business and who therefore have strong incentives to maintain the high standards that they have already implemented. If members' clients are not willing to contract on pure knock-for-knock terms for T&I services then, at most, negligence-based exposures in respect of the cargo up to manageable liability limits that provide sufficient motivation to maintain high standards should be more than sufficient to allay any quality concerns that clients could have.

Requiring T&I heavylift operators to assume all risk in respect of cargo, irrespective of fault, up to exceptionally high liability limits does not incentivise them in any way – it merely drives up insurance costs unnecessarily in an environment where adequate, effective and efficient insurance arrangements are usually already in place. These increased insurance costs ultimately lead to higher lump sum prices or day rates charged to clients for T&I services.

The club assists heavylift members in providing insurance solutions to exposures they face in traditional heavylift carriage and in T&I operations. However, insurance can only go so far. A fair and reasonable allocation of liabilities that accurately reflects the risk-reward ratio encountered by heavylift operators should be one of the core objectives of both sides of the table in a T&I contract negotiation.

LNG as fuel

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A growing number of offshore operators have asked the club for our opinion on LNG (Liquefied Natural Gas) powered ships. This article outlines some of our considerations.

- LNG bunker fuel is a solution to meet the future IMO MARPOL, Annex VI, regulations for nitrous oxides and sulphur oxides emissions
- LNG bunkering could soon become commercially and economically viable for offshore support ships
- Whilst the same hazards exist for LNG as cargo and LNG as fuel, the associated risks are not the same

LNG powered ships is not new technology; the LNG tanker fleet has used boil-off gas since 1982. LNG tankers have a good safety record and are designed and operated within established IMO regulations and recommendations: IGC – Safe Carriage by Sea of Bulk Liquefied Gasses; Resolution MSC 285(86) Interim Guidelines on Safety for Natural Gas-Fuelled Engine Installations in Ships (2009); international classification rules for the Carriage of Liquefied Gasses in Bulk and Classification of Natural Gas Fuelled Ships.

It is clear that LNG bunker fuel is a solution to meet the future IMO MARPOL, Annex VI, regulations for nitrous oxides (NOx) and sulphur oxides (SOx) emissions, especially for ships that operate in emission control areas (ECA), such as the North Sea. Coupled with investment for LNG bunkering infrastructure in North Europe, it is becoming more commercially and economically viable for offshore support ships to operate using LNG as fuel.

Rules and regulations

At present, there are no statutory rules and regulations for LNG powered ships. In September 2014, the IMO formally accepted the draft International Code for Ships using Gas or other Low Flash-point Fuels (IGF Code), to establish statutory rules on ship design, operational safety and crew training for ships fuelled by LNG. The IGF Code is expected to be adopted in 2016 or 2017. Until then, IMO's Resolution MSC 285(86) (as referred to above) serves as non-binding guidance for LNG fuelled ships. Next to the IMO standards and guidelines, class societies and NGOs such as SIGTTO, IEC and ISO have issued standards applicable to *inter alia* the system design and safety issues regarding LNG powered ships.

Technical risks

The technical risks of a LNG powered ship (which must have two fuel systems, i.e. either a duplicated LNG system or more commonly, duel fuel MDO and LNG) can be 'designed out' by using detailed risk assessments with the aim of achieving inherent safety by controlling the hazards first before introducing mitigation. The ship design cannot be viewed in isolation: service life events such as commissioning, dry-docking and repairs should be considered. The forthcoming rules are risk assessment based rather than prescriptive; thus flag administrations and classification societies need to be consulted early in the design process.

From a P&I loss prevention perspective, the key risks are: interactions with other ships and shore facilities; interactions with other shipboard operations; the storage, handling and transfer of LNG; maintenance of LNG systems; and emergency preparedness for an accidental gas release. In other words, 'the human element'.

One of the biggest issues for our underwriters is how to benchmark the risk for LNG powered ships as, at time of writing, there are less than 50 ships operating worldwide. With so few ships and systems in operation, there is no industry driven preference or commonality.

The same hazards exist for LNG as cargo and LNG as fuel:

- cryogenic effects of low temperature (-163°C);
- high expansion ratio (600:1);
- low flashpoint temperature (<60°C).

However, the risks associated with LNG as a fuel are not the same.

Bunkering

There are three principle methods for LNG bunkering: direct from shore, from truck and ship-to-ship transfer. Bunker stations and procedures should be designed to protect the ship and crew from hazards. There are several important design considerations for bunkering: safety, vapour management, filling limits, communication and emergency shut-down. Regrettably, the IGF Code doesn't address the interface between LNG powered ships and the bunker's supply link, and this appears to be a gap that owners and operators should be aware of when training their crew.

Training

Even though LNG shipping has good safety records, training and knowledge are essential, as dealing with LNG as bunkers is a task very different from dealing with HFO bunkers or LNG as cargo. Training requirements are mandated by the IMO and implemented by Flag administration alongside any national laws. Compliance with requirements is cross-checked by port state control, vetting inspectors and class societies. For crew on a gas carrier, they require a 'tanker familiarisation with liquefied gas' endorsement, whereas there are no statutory requirements for crew training on LNG powered ships.

The IGF Code sets out requirements on crew training: a shipowner/manager is required to arrange training based on crew roles and responsibilities. For those directly involved with LNG bunkering, i.e. deck officers and engine officers, training is type specific as decided by the company training manager. However, until these training requirements are adopted and fully developed, the responsibility for providing sufficient training falls to shipowners and operators.

Emergency procedures also need to be developed specifically to deal with the additional hazards posed by LNG such as: fire and leakage procedures; hazardous zoning and protection; safety exclusion zones and dropped objects.

Conclusion

There are a number of considerations and hazards associated with LNG as a fuel, from ship design and life cycle through to bunker operations and crew training. The rules appear to be based on each component within the system, rather than the entire gas supply chain operation. Therefore, several gaps exist which owners and operators should be aware of. To implement a safe operation of LNG powered ships, the entire ship's operation, safety procedures and training schedules should be risk assessed and integrated as a whole rather than bolted on to the safety management system.

Our concerns are highlighted in a report issued by the Norwegian Authorities (May 2014) following an investigation into the accidental LNG release from a hose connection during truck to ship bunkering operations of passenger ship *Bergensfjord*. The report made a number of recommendations, including bunkering not to be simultaneous with cargo operations, additional training of crew and personnel on quayside for bunkering operations, greater hazard awareness and the extension of the safety zones around the ship.

Dynamic positioning – common incidents and mitigation

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Dynamic positioning systems are becoming more advanced and more common, as are the failures that arise when they are not managed correctly. This article looks at some recent incidents involving DP ships and how they would have been mitigated.

- Despite technological advances, we continue to see a number of DP related claims due to human error.
- DP systems used on board need to be fully integrated with training and simulation so that when faced with apparent conflicting information, the operators have proven options available to them.

Dynamic positioning (DP) utilises a computer-based control system to automatically maintain a ship's position and heading using data fed from the operator, environmental sensors and GPS. Recent advances in DP control systems, propulsion units, power generation and reference systems have enabled greater accuracy and reliability. DP enabled drilling ships can now hold position over a well with pin point accuracy, pipelayers can lay quicker and flotel units can move away from a site in the event of safety concerns.

Despite technological advances, we continue to see a number of DP related claims. DP systems are complex, their failure modes are difficult to identify, and they require active power and thrust to be available at all times. Reported incidents typically involve a near miss or actual contact with fixed or floating units, arising due to a loss of position or a drive-off situation.

Common incidents

A DP system, like all computer-based systems, is susceptible to failure, either through weather conditions masking a signal or because of an unnoticed software error. The human element is also a regular contributing factor.

In one recent case, a DP ship made contact with an offshore unit due to signal interference in the reference equipment. Between a fortnightly shuttle tanker service, a new lifeboat was fitted on an FPSO. During the next offtake, the shuttle tanker went into drive-off mode. It was later discovered that reflective tape on the lifeboat had interfered with the fanbeam signals.

Other incidents arise where a DP operator suspects a disparity between their visual assessment of the unit's position and the reference point when compared to the DP display. If an operator considers that the system is not functioning properly, attempts are made to gain manual control. The operator's reaction can be to apply 100% power, resulting in full thrust to force the ship into a manoeuvre. If uncontrolled, this can create excessive power demands on the DP equipment, leading to thrusters and generators being tripped and with a resulting loss of power or potential blackout.

Training and mitigation

As DP develops, the systems will continue to test their operators. We understand the importance of technically robust DP systems, but we also need to see these fully integrated with training and simulation, tailored to the as-built DP system on a particular vessel so that when faced with apparent conflicting information, the operators have proven options available to them. DP technology logs actions, similar to a ship's voyage data recorder, which could be effective in reducing incidents by enabling root cause analysis and allowing operators to train on real incident data.

Conclusion

The demand for DP operators is running at a premium and until systems become fully intuitive, intelligent and have adaptive functionality, the need for highly trained operators is paramount. DP may not be child's play yet, but our members and the industry as a whole recognise that at the core of DP systems must be the user.

Staff news

As our business continues to grow, we have recruited to meet our members' needs. During the course of the last 12 months, we have been pleased to welcome Ian Billington and Farah Tiderman into the Offshore syndicate as Underwriting Director and Underwriter respectively, Alice Wakeley as Underwriting Assistant and Nicholas Mavrias as Claims Executive, supporting Sharmini Murugason in the club's Singapore office.

Congratulations go to Tom Williams who was promoted to Deputy Underwriter with effect from 1 July.

After more than seven years as Director of the Offshore Syndicate, Robert Dorey stepped down as Syndicate Director in April to concentrate fully on the club's project to set up a marine and energy syndicate at Lloyd's. Robert will be joined in early November by Hannah Day.

James Bean has taken over as Director of the Offshore Syndicate. If you would like more information about The Standard Syndicate at Lloyd's please contact Robert Dorey, James Bean or your usual club contact directly.

Finally, it is thank you and farewell to Claire Boddy who will be leaving us in November to take up a new role in Copenhagen.

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Charles Taylor