

# 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.