Introduction of a new right to limit liability in Brazil – implications for the offshore sector

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It is important for shipowners to be able to rely upon the maritime right to limit liability, especially for those operating in the offshore sector where they can face potentially onerous financial exposures. We expect our members to rely upon the right to limit, in jurisdictions where it is available, as a condition of P&I cover.

Introduction

A new Commercial Code which will introduce the right to limit liability in Brazil is currently being considered by the Brazilian Congress. If it is introduced, it will make Brazil a more attractive market for offshore contractors and their insurers, as it will protect shipowners from unlimited exposure to liability following a casualty and provide greater legal certainty. It will also mean that Brazil is aligned with international maritime practice.

Current law

There is, in fact, already a right to limit liability in Brazil, under the 1924 Limitation Convention[1] (which is based on the principle of abandonment, i.e. the value of the vessel plus freight post-casualty), but it has very limited application as it can only be invoked by shipowners from a country which is a party to the Convention.[2]

New Commercial Code

The right to limit which will be introduced under the new Commercial Code in Brazil will be similar to the system that already applies under the 1957 Limitation Convention[3] and the 1976 Limitation Convention[4] (as amended by the 1996 Protocol), whereby the limitation figure is calculated according to the tonnage of the vessel, and the unit of measurement is the Special Drawing Right (SDR), whose value is based on a basket of international currencies. The limits that shall be applied in respect of SDRs will be similar to those provided under the 2012 amendment to the 1996 Protocol (to the 1976 Limitation Convention). This amendment increased the limits under the 1996 Protocol and came into force on 8 June 2015.

The original draft bill for the new Commercial Code, which was submitted to the Brazilian Congress for consideration, provided that shipowners shall be able to limit their liability for maritime casualties that involve loss of life/personal injury or loss/damage to cargo or other property. It also contemplates that the owners of offshore vessels such as drilling rigs and floating production storage offloading units shall be able to rely upon the right to limit. However, amendments to the bill are currently under discussion, which will mean that loss of life/personal injury is excluded from limitation. It is also evident that it will not apply to wreck removal or pollution claims. This is because both are viewed as public policy issues under Brazilian federal law, whose central aim is protection of the environment.

Environmental concerns

Although Brazil has ratified the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC), which applies to ships that carry oil in bulk as cargo and allows shipowners to limit their liability based

on the gross tonnage of the vessel, it has never been applied by the Brazilian courts. The new Brazilian Constitution dated 1988 stated that the environment was a public asset that must be preserved for present and future generations, which allowed strict environmental legislation to be passed at federal and state level. This has resulted in the '*polluter pays*' principle being applied under Brazilian civil law, i.e. anyone who contributes, even indirectly, to the occurrence of environmental damage is considered to be a polluter and consequently is liable to pay compensation for damage to the environment (Federal law no. 6.938/1981, article 3, IV). Shipowners are therefore strictly liable for any oil pollution that escapes or is discharged from their vessel. This includes the pollution clean-up costs and any property damage claims (which may include loss of income/business interruption type losses) that arise as a result.

Conclusion

Oil pollution is the most onerous potential exposure faced by our members who operate offshore Brazil in terms of the value of environmental damage claims (apart from the level of financial penalties that may be imposed by the federal or state authorities). Although the right to limit liability will offer our offshore members some level of protection, in terms of reducing their potential exposure in relation to cargo or other property damage claims, they will still face unlimited liability for pollution. At this stage, it is still unclear when the right to limit will come into effect (or if it will come into effect) and how wide-ranging it shall be in terms of the types of claims that may be subject to limitation. We must await the outcome of the deliberations of the Brazilian Congress, but hopefully Congress will decide in favour of its introduction under the new Commercial Code, which will update Brazilian maritime law and bring it in line with international practice.

1 The 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels.
2 It is still in force in Belgium, Dominican Republic, Hungary, Madagascar, Poland, Portugal and Turkey. Although these states have adopted subsequent Limitation Conventions, they have not denounced the 1924 Limitation Convention.
3 The Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957.
4 The Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 as amended by the 1996 Protocol.