# Some limitations of BIMCO's Supplytime 2005 contract

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## Some limitations of BIMCO's Supplytime 2005 contract.

Bimco's Supplytime 2005 contract (Supplytime 2005) is one of the most frequently used time charterparties in the offshore sector. It was originally produced in 1975 and subsequently revised in 1989 and again in 2005, and is currently undergoing a further revision[1]. The contract was originally designed for chartering tugs and offshore supply vessels to support drilling rigs or mobile production units involved in offshore oil/gas exploration or production. However, it is sometimes used for other purposes, eg to support contractors engaged in offshore construction or decommissioning. We have found through The Standard Club's offshore contract review service that there are some limitations to the standard wording of the contract if it is being used by members who charter their vessels to assist in these types of operations.

### Scope of indemnities

The allocation of liability in Supplytime 2005 is on 'knock-for-knock' terms, whereby the owners and charterers each assume liability for damage to their own and their contractors'/subcontractors' property, and for injury to their own and their contractors'/subcontractors' personnel, regardless of which party is negligent, which is supported by reciprocal indemnities (clause 14(b)). In addition to this, the charterers assume liability for the property and personnel of their co-venturers and clients (referred to as customers in the contract) who have a direct contractual relationship with them, in respect of the job or project on which the vessel is employed. This benefits owners because charterers often hire the vessel as part of a wider project where they are not the owner of the offshore unit (ie the drilling rig, production unit or offshore installation etc) to which the chartered-in vessel is providing services.

Although charterers assume liability under the knock-for-knock in the contract in respect of entities down the contractual chain, this does not extend to all entities up the contractual chain, ie it does not include the co-venturers or other contractors/subcontractors of the charterer's client. It also does not include other clients up the chain (including their respective co-venturers and contractors/subcontractors), which may include the ultimate client of the project (ie if the charterer is acting as a subcontractor of the project's main contractor).

1 Ursula O'Donnell is a member of BIMCO's specialist subcommittee, which is currently revising the Supplytime 2005 contract.

Owners will not be protected under the contract from being exposed to potential claims in tort (for personal injury or property damage) from these other entities, as they fall outside the scope of the knock-for-knock allocation of liability. For example, the charterer is installing a platform on behalf of its oil company client and charters a vessel on unamended Supplytime 2005 terms to assist in carrying out the installation work. Whilst navigating, the vessel negligently causes damage to property owned by one of the client's other contractors. The owners will face a potential claim from them in tort, and will be unable to seek an indemnity from the charterers under the contract because this liability falls outside the scope of the knock-for-knock regime.

It is common for Mutual Hold Harmless Indemnity Arrangements (MHHIA) to be in place between the various contractors (and subcontractors) working on an offshore construction or decommissioning project, whereby they each assume liability for their own property and personnel on knock-for-knock terms. However, the contractors may not all sign up to these arrangements or it may not be possible for the owners to determine who has signed up to them. In the above example, if a claim is pursued against the owner, it may be able to rely upon the right to limit its liability (under The Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) as amended by the 1996 Protocol), which is based on the vessel's gross tonnage, but this will only apply if the project is being carried out in a jurisdiction where the right to limit applies under applicable law.

Members should therefore consider when negotiating the contract (in the absence of an appropriate MHHIA being in place) whether the definition of the Charterers Group in Supplytime 2005 is appropriate in the context of the project or whether they need to negotiate an amendment so that it is broadened to include other named entities or levels of contracting party with whom the charterers shall be engaged.

### Consequential losses

Another limitation of Supplytime 2005 is the wording of the exclusion for consequential losses (clause 14(c)). Although consequential loss is defined in the contract to include 'loss of use, loss of profits, shut-in or loss of production', as a matter of English law, this only excludes indirect losses, which means that owners face a potential exposure in respect of direct losses.

This is because the term 'consequential loss' has been given a very specific meaning under English law. Direct losses means losses that arise naturally from a breach of contract, whereas consequential losses refers to losses that are not ordinarily foreseeable and are only recoverable if special circumstances are known to the parties when they contracted[2]. For example, if a vessel chartered under Supplytime 2005 damages the charterer's group property as defined under the contract, eg the vessel's anchor drags a pipeline owned by the charterer's client, the owner shall be protected against claims for physical damage to the pipeline under the knock-for-knock regime (under clause 14(b)). However, the owner shall not be protected from consequential losses that flow naturally from the damage, which includes loss of production/loss of profit (under clause 14(c)), as these are construed to be direct losses under English law[3].

2 Hadley v Baxendale (1854) 9 Ex 341
3 Deepak Fertilisers and Petrochemical Corp v ICI Chemicals & Polymers Ltd [1999] 1 Lloyd's Rep 387

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Members should consider whether they need to negotiate amendments to the standard wording of the consequential loss clause in Supplytime 2005 to ensure that it excludes all relevant categories of direct and indirect losses in the context of the particular project for which the vessel is being used.

Under English law, very clear language must be used in exclusion clauses. This has been highlighted by the recent case of *Transocean Drilling UK Limited v Providence Resources plc*[4], which dealt with the meaning of 'loss of use' in the context of an exclusion clause for consequential loss in a drilling contract. The court held that Providence (the field operator) was not prevented from claiming damages for its spread costs against Transocean (the rig owner), ie the cost of obtaining personnel, equipment and services from third-party contractors, which were wasted as a result of Transocean's failure to maintain the rig, which led to delays. The court decided that, in this context, 'loss of use' meant the loss of expected profit derived from the use of the rig and did not encompass wasted spread costs, as the other contractors providing the 'spread' were still available. Transocean appealed against the decision and the Court of Appeal found in its favour, by deciding that the spread costs fell within the exclusion for loss of use in the consequential loss clause.

## Conclusion

The above limitations in the wording of Supplytime 2005 are currently being reviewed by the BIMCO subcommittee tasked with revising the form. In the meantime, members should consider when they contract on these terms whether they are sufficiently protected under the standard knock-for-knock allocation of liability in the contract. This will depend upon the scope of work, ie whether the vessel is engaged to carry out straightforward supply/support services or assisting construction/decommissioning operations, and if the latter, where the charterers sit in the contracting chain. If the charterers are not the main contractor for the project and/or there are insufficient MHHIAs in place in respect of the other contractors/subcontractors at the worksite, members should be aware that this may expose them to potentially onerous liabilities.

4 Transocean Drilling UK Limited v Providence Resources plc [2014] EWHC 4260 (Comm.) Arctic III and [2016] EWCA Civ 372