Insight Article

Protective co-insurance for offshore vessels

When Members operating offshore vessels enter into a charterparty or other contract for the employment of the vessel, the charterer often asks to be named as co-assured under the P&I policy held by the Member. The charterer may also request that the Member obtain from the Club a waiver of rights of subrogation against the charterer and his nominated parties. The Club may agree to grant such cover and waive its rights of subrogation, pursuant to the Rules. Depending on the terms of entry (e.g. the Rules for Ships or the Rules for Mobile Offshore Units) such co-insurance will be governed by Rule 78.5 or Rule 44 respectively.

Published 06 October 2009

RULES FOR SHIPS

Rule 78.5 of the Rules for Ships reads as follows: Rule 78.5 Co-assureds "The cover afforded to all other categories of Co-assured, other than those referred to in Rules 78.3 and 78.4, shall only extend insofar as such Co-assured may be found liable to pay in the first instance for loss or damage which is properly the responsibility of the Member, and nothing herein contained shall be construed as extending cover in respect of any amount which would not have been recoverable from the Association by the Member had the claim in respect of such loss or damage been made or enforced against him". Protective co-insurance is only provided for charterers of ships used in the offshore industry and similar industry clusters, and not for charterers using the vessels in other commercial trades. The rules that govern the P&I Clubs' ability to provide such co-insurance is set out in the Pooling Agreement, and contains the following special provisions. (i) The contract (e.g. the charterparty or other form of contract) must be approved by the P&I Club with which the insured vessel is entered; and (ii) The contract must provide that each party shall be similarly responsible for any loss or damage to its own (or its subcontractors') property, or loss of life or personal injury to its own (or its subcontractors') personnel. This is known as the "knock-for-knock" principle. Neither Rule 78.5 for ships nor Rule 44 for mobile offshore units (see below) afford any automatic co-insurance of the interest of a third party (e.g. the charterer). It means that the charterer may be named as a co-assured in the policy, by special agreement. This co-insurance is afforded on the assumption that it follows the customary reciprocal indemnity provisions, also known as "knock-for-knock". "Knock-for-knock" may be explained as follows: the insured member is responsible for any loss or damage to his own property and for loss of life and personal injury to his own employees, and the charterer is responsible for loss or damage to his property and for loss of life or personal injury to his employees, without any recourse whatsoever against each other. The protective co-insurance will protect the co-assured against liabilities, costs and expenses which are to be borne by the Member under the terms of the contract, provided the contract meets the qualifications set out above under items (i) and (ii) above. The protective co-insurance goes beyond the simple protection afforded under a waiver of subrogation clause.

RULES FOR MOBILE OFFSHORE UNITS

Rule 44 of the Rules for Mobile Offshore Units reads as follows: Rule 44. Protective co-insurance *"1. Where a Member enters into a charterparty or other contract for the employment of the Vessel (the "Charterparty"), the other party to the Charterparty and its co-venturers, affiliates and associates and any other interested parties may, by agreement with the Association, be co-insured under the Member's cover. 2. The co-insured party may recover from the Association any liabilities, costs and expenses which are incurred by it and which (a) are to be borne by the Member under the terms of the Charterparty; and (b) would, if borne by the Member, be recoverable by the Member from the Association. 3. The Association agrees to waive any rights of subrogation it may have against the co-insured party in respect of liabilities, costs and expenses which are to be borne by the Member under the terms of the Charterparty. 4. Co-assured shall not be entitled to Membership of the Association"*. The protective co-insurance for mobile offshore units goes beyond the co-assurance cover available under Rule 78.5 of the Association's rules for ships. When it offers protective co-insurance for mobile offshore units, Gard is not bound by the special restrictions of "The Pooling Agreement" dealing with prior approval of the contract and acceptable "knock-for-knock" conditions. The protective co-insurance for mobile offshore units is wider. It protects the co-assured for legal and contractual liabilities assumed by the insured Member, to the extent the liabilities fall within the scope of risks which are to be borne by the Member under the contract and covered under the Rules for mobile offshore units. Otherwise the principles of the protective co-insurance will follow the same provisions applicable to ships, outlined under Rule 78.5. However, as mentioned the strict "knock-for-knock" principle is not required in respect of mobile offshore units for a protective co-insurance to be granted, although it is normally considered to be a customary proviso. The reason therefore is that there should be a reciprocal benefit for both parties in order for a protective co-insurance to be effected.

PROTECTIVE CO-INSURANCE

What protection is afforded the co-assured party?

The co-assured will only have P&I cover for those claims (and costs incurred in defending the claim) which are properly the liability of the Member. The co-assured will thus not receive any cover against claims and liabilities which are to be borne by the co-assured himself pursuant to the terms of contract. The protection afforded the co-assured would therefore be against the typical "misdirected arrow claim", where the claimant decides to go against the co-assured, rather than the Member. Notwithstanding that the Member is ultimately responsible for the claim arising from the incident. The protective co-insurance shall not apply with respect to any obligations for which the co-insured has specifically agreed to indemnify the Member, or which otherwise follow from common law and is not regulated under the terms of the contract. The co-assured needs to take out separate insurance covering the liabilities, losses, costs and expenses he may incur himself and which he is supposed to have under the relevant contract. The co-insurance shall not give a more extensive right to the co-assured than that of the Member. This means that the Club may deduct any sums due from the insured member, before making the compensation. The Club may make objections regarding the cover to the same extent that these can be made to the insured member. The Club may also insist on its right to demand that the claim be paid by the insured member (or co-assured) before it is reimbursed by the Club.

The co-assured's rights against the insurer

As a contractual party to the insured member's certificate of entry, the co-assured will have P&I cover for those claims which should properly be brought against the Member, pursuant to the Association's rules and the Member's terms of entry. The co-assured may thus have a right to claim indemnification from the Club, regardless of whether any claim has been established against the Member. It is important, however, to note that the co-assured's cover is subject to the same limitations which govern the insured member. In other words, the co-assured's cover is limited to the amount that the Member could recover from Gard if he were liable.

WAIVER OF SUBROGATION

The Member, whether it be the contractor or the operator, is a party to a number of contracts in the course of the operations involved in offshore exploration and development projects. Such contracts frequently involve one or both of the parties thereto in an agreement not to pursue, against the other, a claim to which it would otherwise be entitled. Such entitlement might have arisen at common law, a tort having been committed by the other party; or under the contract, the other party having committed a breach of contract; or by statute, the claiming party having been vested with certain rights at law. In this context the actions, rights and liabilities of the party can usually be taken to include the actions, rights and liabilities ofthat party's employees and sub-contractors, and of any other person or company acting on his behalf. When the Club has compensated the liability or other loss of the Member, the Club may bring a subrogated claim to seek redress from other parties liable for the claim. In most offshore contracts, the insured member is obliged to contractually waive his recourse claims against the other parties. Normally, such a waiver of subrogation is not permitted under P&I cover, and the Club may reduce the compensation accordingly, unless the waiver is deemed to be "customary in the trade in question". Under the terms of entry, the Member has the right to grant a release from liability, with respect to loss of or damage to his own property and personal injury or death of his employees, provided it is met by a reciprocal indemnity from the other party, (i.e. the "knock-for-knock" principle). Such a release with a waiver of subrogation is considered to be customary in the case of most offshore charterparties and contracts. Otherwise, the "knock-for-knock" provisions in offshore contracts would make little sense, because although the Member would absorb losses in respect of his own personnel and property regardless of fault, the Club would seek recourse on the basis of fault. The effect would be to completely undermine the "knock-for-knock" principle, because the party causing the loss would be liable to the insurer for damage to or loss of the other party's property or personnel. As between the Club and the Member, the Club is bound by such a release from liability, provided the release follows the "knock-for-knock" principle, or otherwise is approved by the Club pursuant to the terms of entry. The Club is also entitled to the advantage of every right of the Member, whether such right exist in contract or in tort, or in any other right which can be exercised or has accrued. A waiver of subrogation given by the P&I Club will protect the other party from a potential redress by the Club, but will not protect the other party from those liabilities which are properly his to bear under the contract. The following example illustrates the cover: there is damage to some equipment belonging to the insured Member which was caused by the negligence of one of the other party's employees. According to the contract between the Member and the other party, there is a "knock-for-knock" clause whereby each party assumes liability for damage to its own, or its sub-contractors' property. The Member collects under his insurance policy, and normally the Club would bring a subrogated claim against the party whose negligence caused the loss. However, because of the waiver of subrogation, the Club cannot bring such a recourse claim against the other party.

CONCLUSION

The simplest, least comprehensive, form of insurance of another party's interests (for example, the charterers) consists in a waiver by the insurers of recourse claims where the other party has caused its insured a loss for which the insured Member received compensation. Thus, an insurer's waiver of recourse is in fact a type of limited liability cover for the benefit of the other party. The protective co-insurance goes beyond the simple protection afforded under a waiver of subrogation clause because protective co-insurance will also protect the co-assured against liabilities, costs and expenses which should have been borne by the insured Member under the terms of the contract, provided the contract meets the requirements for protective co-insurance cover. Neither a waiver of subrogation clause, nor a protective co-insurance clause will relieve the other party from having to arrange his own insurance for those liabilities which are properly his responsibility, for example injury to his crew or damage to his or his subcontractors equipment. The grant of protective co-insurance is not intended to and will not transform the P&I insurance into an all risk policy for all interested parties.