

Offshore Contracting Guide

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**The Standard
for service and security**



**Standard
Club**

Introduction



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As part of our service to members, the club provides individual contract reviews. Our reviews clarify how the member's P&I cover responds to liabilities under the contract or highlight where terms are particularly onerous and, as a consequence, special terms need to be applied in order to provide cover. They also identify where there are exposures that fall outside of cover. This guide is intended to be used as a single point of reference to aid members to fully understand the terms and issues raised in our reviews.

It provides a guide to:

1. the main features of P&I cover
2. common provisions and exposures assumed under contract
3. exclusions from poolable P&I cover based on: (a) type of contract; (b) type of operation; and (c) type of ship.

It will also address the P&I solutions that the club can provide. We hope this guide proves useful to insurance practitioners and also to those who are not so familiar with the details of P&I insurance.

In this edition

2	P&I Cover
3	Common contractual provisions and exposures
7	Exclusions from poolable cover



1. P&I Cover

Given the nature of offshore operations, offshore members usually require extended or alternative P&I covers. This section provides a brief overview of poolable cover and the extended and alternative covers.

Poolable cover

P&I clubs provide mutual indemnity cover to their members for liabilities arising out of the management and operation of an entered ship. P&I cover responds to a wide range of liabilities including personal injury to crew, cargo loss and damage, oil pollution, wreck removal and dock damage, etc.

Thirteen P&I clubs have combined to form the International Group of P&I Clubs (IG) and share, or pool, claims amongst themselves in agreed proportions. The Pooling Agreement sets out, amongst other things, the types of claims that can be pooled, and the types of claims that are excluded from pooling.

Poolable P&I cover responds to members' legal liabilities: that is, to liabilities that are imposed on members by law. This includes liabilities incurred by a member in tort, for example when they have been negligent, in law or statute, for example under the pollution or cargo conventions, or under acceptable contracts.

An important feature of the mutual system is that no single member unfairly subsidises, or is subsidised by, the other members. Consequently, certain activities and exposures that have been identified as outside those undertaken by mainstream shipping operators do not have the benefit of poolable P&I cover.

Extended and alternative covers

To assist our members, the club provides extensions to allow some excluded risks to be bought back.

The main coverage extensions for offshore members offered by the club up to a fixed limit are:

- 1. Contractual Extension – Members will often be forced to assume some liabilities under their contracts which they would not otherwise have had 'at law'. These contractual liabilities are therefore excluded from poolable cover. The Contractual Extension responds to contractually assumed liabilities that arise out of a P&I risk and fall within the scope of cover of the members' terms of entry.**
- 2. Specialist Operations Extension – Poolable cover excludes certain P&I liabilities arising out of specialist operations. The Specialist Operations Extension reinstates this cover.**
- 3. ROV and Divers Extensions – Poolable cover excludes liabilities arising out of the operation by the member of ROVs and other underwater vehicles, and the activities of professional and commercial divers, where the member is responsible for such operations/activities. The ROV and Divers Extensions cover third-party liabilities arising out of these operations/activities.**

Most ships can be covered under poolable terms together with one or more of the extended covers. This allows our members to have the benefit of poolable cover and limits whenever possible, as well as cover through the extensions for their non-poolable exposures. However, provision of the extended covers is subject to contract approval, so the club must approve the contract before the extended cover can be triggered.

Poolable cover excludes all liabilities incurred by ships/units carrying out drilling and production operations and accommodation units integral to such operations. These ships/units can only be covered under the Standard Offshore Rules.

The IG provides P&I cover for approximately 90% of the world's ocean-going tonnage. Each club is an independent non profit-making mutual insurance association that is controlled by its members through a member committee or board of directors.

2. Common contractual provisions and exposures

Contractual arrangements can affect access to poolable P&I cover. In this section, we will examine common contractual exposures and how P&I cover can respond.

Introduction

The club aims to proactively advise members of the effect of the contractual arrangements in terms of poolable P&I cover and of any extensions to cover that the contractual liabilities may require.

The basic principle of mutual P&I cover is that members should not assume responsibility under contract for any loss for which, under applicable law, they would not otherwise be liable, or in respect of which they would otherwise be entitled to exclude or limit liability. Poolable cover does not respond to liabilities that a member incurs voluntarily under contract, because to do so could confer a commercial advantage on one member over another.



Despite being approved for poolable cover, there are numerous ways in which these clauses can be eroded or otherwise made defective so as to place the member outside poolable P&I cover and reliant on Contractual Extension cover. The starting point for any consideration as to whether a knock-for-knock contract is poolable must be the definition of knock-for-knock in the Pooling Agreement, which requires the liability and indemnity provisions to be balanced and reciprocal in order to be poolable.

However, in the offshore sector, many contracts are negotiated on knock-for-knock terms. Under a knock-for-knock contract, each party assumes responsibility and indemnifies the other party for liabilities relating to their own property and personnel, and those of their subcontractors, regardless of negligence. These contracts are considered to be industry standard in the offshore business, and are approved for poolable cover, provided that they are balanced and do not expose the member to wider liabilities than those imposed on their contractual partner, and that the member has not waived their right to limit liability under applicable law.

Where a contract is not acceptable for poolable cover, the member may purchase a fixed-limit Contractual Extension to their cover. This will cover P&I liabilities assumed by the member under the contract for which they would not otherwise have been liable 'at law'.

In order to trigger cover under the Contractual Extension, the contract must first be approved by the club. The normal provisions of P&I cover still apply under the extension: claims must arise out of the operation or management of the entered ship, and must be covered under the rules and the Certificate of Entry. Any exclusions in the rules or the Certificate of Entry will continue to apply unless excluded risks are specifically reinstated.

The following are common provisions found in offshore contracts, including amongst others, towage, construction/ installation and drilling and production

contracts, which can materially influence the member's exposure. We consider each of these provisions and examine how cover can respond.

Contractual indemnities

Knock-for-knock

There are numerous ways in which these clauses can be eroded or otherwise made defective so as to place the member outside poolable P&I cover and reliant upon Contractual Extension cover. The starting point for any consideration as to whether a knock-for-knock contract is poolable must be the definition of knock-for-knock in the Pooling Agreement. This reads as follows:

'Knock for Knock' – a provision or provisions stipulating that

- i) each party to a contract shall be similarly responsible for loss of or damage to, and/or death of or injury to, any of its own property or personnel, and/or the property or personnel of its contractors and/or of its and their sub-contractors and/or of other third parties, and that*
- ii) such responsibility shall be without recourse to the other party and arise notwithstanding any fault or neglect of any party and that*
- iii) each party shall, in respect of those losses, damages or other liabilities for which it has assumed responsibility, correspondingly indemnify the other against any liability that that party shall incur in relation thereto*

The language of the definition requires the liability and indemnity provisions to be balanced and reciprocal in order



to be poolable. In other words, if the member takes liability for their own property and personnel, and that of his own contractors and subcontractors, the other party must also take liability and give an equally wide indemnity which includes its own contractors and subcontractors. If, on the other hand, the charterer is only liable and indemnifies the member for their own personnel, the contract will still be balanced and poolable if the member's own liability and indemnity obligations are limited to the member's own personnel (albeit it is always preferable for the indemnities to encompass both parties' contractors and subcontractors).

Cover for unbalanced knock-for-knock contracts

There are a large number of contracts in which the liability and indemnity provisions are unbalanced in that the member is required to take responsibility for the property and personnel of their contractors and subcontractors, but the charterer's indemnity is limited only to their own property and personnel, and does not extend to their other contractors and subcontractors. In this case, because the provisions are not reciprocal, the contract will not be considered poolable in respect of any liabilities to which the member would not have been exposed in the absence of the contract and which are not balanced by a similar assumption of liability by the charterer in respect of their contractors and subcontractors.

In practice, the non-poolable exposure will often be limited to any non negligence-based liability for the personnel (and property, if covered by the club) of the member's contractors

and subcontractors for which the member is obliged to indemnify the charterer. Therefore, if the member employs subcontractors and has a liability to indemnify the charterer even though the liability arises out of the charterer's group's negligence, then such liability will fall outside the scope of poolable cover and the Contractual Extension would be required to respond to this non-negligent liability. This is likely to be more of an issue in contracts for offshore or subsea construction or maintenance work, where the member is more likely to employ subcontractors, than in straightforward supply boat charterparties.

Knock-for-knock provisions must incorporate indemnities and apply regardless of fault

The knock-for-knock definition in the Pooling Agreement requires the division of liability to be regardless of fault or negligence, and for each party to indemnify the other. It is not uncommon to see contracts that are defective in that they lack indemnities or do not include language that requires the parties to take liability regardless of fault.

The indemnity provisions are important because they protect the member if they are sued by a party who is not bound by the contract. For instance, the member may be sued directly by one of the charterer's employees or other contractors if they suffer injury or damage as a result of the member's negligence. The provisions in the charterparty will not be binding on other parties so as to prevent them suing the member. Without an indemnity, the member will not be able

to recover their liability to any other parties from the charterer, since the division of liability in the contract may be held to refer only to claims between the two parties to the contract. It is therefore essential for the parties to agree to fully indemnify and hold one another harmless in respect of claims for which they are liable under the contract in order to avoid the contractual division of liability being undermined by third-party claims.

It is also important that the contract states clearly that the division of liability and the provision of indemnities shall be regardless of fault or negligence, or breach of duty (contractual, statutory or otherwise). In many jurisdictions, including England, clear language is required before a court will uphold provisions allowing a party to avoid the consequences of its own negligence. Therefore, a simple division of liability between the parties without such language may only be effective in cases where the claim is not due to the fault of either party.

Gross negligence/wilful misconduct exceptions

An increasingly common feature in amended knock-for-knock contracts is an exception within the liability and indemnity clause for claims arising out of a party's gross negligence or wilful misconduct. These usually take the form of a wording providing that a party need not indemnify the other for claims arising out of the indemnified party's gross negligence or wilful misconduct. In addition, contractual liability caps or exclusions of liability (for example, in respect of consequential loss) will not apply in the case of gross negligence or wilful misconduct.

There is a general assumption that gross negligence must relate to something more severe than ordinary negligence, whilst wilful misconduct involves a conscious element of wrongdoing, but there is often no definition of either term in the contract. Even where there is a definition, it may be widely drafted. In addition, clauses often refer to gross negligence/wilful misconduct on the part of 'senior supervisory personnel'. In the absence of further detail, 'senior supervisory personnel' is a sufficiently vague wording to encompass the master and officers on board the ship, which would be a much less severe test.

In many instances, the decision as to exactly what constitutes gross negligence or wilful misconduct will be a matter of degree and judgement, and will involve consideration of the state of mind of the individuals concerned. This means the loss of the certainty and clarity in the allocation of liabilities, which is the great advantage of knock-for-knock regimes. Clearly, if a contract includes a gross negligence or wilful misconduct exception, there may also be a temptation on the indemnifying party to attempt to bring claims within the exception to avoid liability. If the parties themselves cannot reach agreement on the interpretation of the facts of a particular incident, they will be reliant on the courts or arbitration tribunals in the relevant jurisdiction to decide exactly what constitutes either gross negligence or wilful misconduct. This therefore means that such exceptions are more likely to lead to litigation, undermining the other advantage of knock-for-knock regimes, namely, the avoidance of time-consuming and costly disputes.

Liability that arises as a result of wilful misconduct on the part of the controlling mind of the member is excluded from cover pursuant to the Marine Insurance Act.



If members have to accept a gross negligence exception, it is important to ensure that the contract contains a definition of gross negligence which demarcates it from ordinary negligence.

Consequential losses

We would expect the parties to mutually exclude consequential losses, including loss of production, loss of profit, loss of use and loss of revenue under their contract. Poolable cover can respond to 'at law' liability for consequential losses that flow from a covered P&I risk and arise out of the operation or management of the entered ship. However, this could be a significant exposure. Therefore, preserving the right to limit liability 'at law' under the contract is crucial in order to mitigate the exposure.

Limitation of liability

The basic principle of poolable cover is that members should not assume liabilities beyond those for which they would be entitled to limit their liability nor waive such rights of limitation. Ideally, the member's right to limit liability against their contractual partner should be specifically preserved. Otherwise, the contractual partner may try to argue that the indemnities given by the member and the wording of the contract constitute an implicit waiver of the member's right to limit. In addition, liability caps inserted into a contract may amount to a waiver of the right to limit if the caps are in an amount in excess of the ship's limitation amount 'at law'.

Unless there is an express waiver of the right to limit in the contract, consideration needs to be given to whether the wording of the contract or liability caps could amount to a potential waiver of the right to limit. Poolable cover will respond up to the vessel's limitation amount 'at law' and the Contractual Extension will be required in excess (subject to the limit of cover).

Ongoing warranty of seaworthiness

Often, contracts contain an undertaking on the part of the owners to make the ship seaworthy at the commencement and throughout the period of the contract. Usually, we would only expect the owner to have an obligation to make the ship seaworthy at commencement of the charterparty and not throughout the contract. This ongoing obligation could potentially be construed as an ongoing warranty which may override the knock-for-knock indemnities.

If an ongoing warranty of seaworthiness was found to override the knock-for-knock provisions in the contract, poolable cover can still respond to any resulting 'at law' liabilities. However, the Contractual Extension would be required to provide cover beyond this and for loss of, damage to and wreck

removal of the tow and heavy-lift cargo (and property thereon) as well as accommodees. This is discussed further below.

Cargo

Poolable cover assumes that the member will carry cargo on terms no more onerous than Hague/Hague Visby terms. However, offshore contracts do not normally incorporate Hague/Hague Visby Rules. Poolable cover will respond in respect of damage/loss to cargo to the extent that the member's liability does not exceed that which would have been incurred had the liability been on Hague/Hague Visby terms. The Contractual Extension will be required to respond to liability in excess of that prescribed by the Hague/Hague Visby Rules.

Third-party liabilities

It is acceptable for third-party liabilities to lie where they fall, ie there need be no mutual indemnity between the member and their contractual partner in respect of those losses. If the contract does include a mutual indemnity in respect of third-party liabilities, it should be based on fault: that is, the liabilities should be 'at law' and the indemnity provision should be worded to make clear that it is limited to pure third-party liabilities only. This is to ensure that claims from third parties relating to loss of or damage to the property of the member's contractual partner or their client or principal will be dealt with under the knock-for-knock clause rather than the third-party liability clause.

However, many of these provisions use language that exposes the member to wider liability than they would otherwise have. The wording may simply provide that the member will be liable and indemnify the charterer for all third-party claims without reference to negligence or the position 'at law', or may even go so far as to provide that the member will be liable for third-party claims regardless of the negligence of the charterer or their other contractors and subcontractors. Poolable cover will not respond if the member is liable under a contract for third-party claims arising out of the charterer's or any other party's negligence, so the Contractual Extension would be required to respond to such claims.

Members should also be wary of third-party liability provisions that are widely worded or unclear, such as those that provide that the member will be liable for all claims 'caused by' them or their ship. Without a specific reference to negligence, the member could be held liable for claims regardless of whether



they are negligent or not, for instance, if the ship drops an anchor on a pipeline because the charterer has given the member incorrect information. Claims arising under such provisions will not be poolable if they expose the member to claims wider than those for which they would be liable in the absence of the contract. The Contractual Extension would be required to respond to such non-negligent liability.

We also see contracts that require the member to take liability for third-party claims arising out of all work to be carried out under this charterparty and similar wordings. These are even wider in their potential effect, since there is no actual link between causation and the member's activities, and so it is open for the charterer to argue in the event of a claim that the intention of the clause is for the member to be liable even when the claim is caused by the charterer or someone for whom they are responsible. Members should remember that P&I cover is limited to claims arising out of the management or operation of the entered ship.

Mutual Hold Harmless Agreements (MHH)

In contracts in which the charterer's indemnity is limited to their own property and personnel, often liability for the property and personnel of their other contractors and subcontractors is to be dealt with by a mutual hold harmless scheme. Such schemes are intended to govern the relationships between various parties who are working simultaneously on an offshore project but who have not contracted directly with one another. Each party signs an identically worded liability and indemnity agreement (also known as a Mutual Hold Harmless Agreement or MHH), which provides that the signatory will indemnify any other signatory of the agreement for liability in respect of the first party's own property and personnel, regardless of fault or negligence. This creates an acceptable knock-for-knock scheme between the various parties who have signed up to it.

Provided that signature of the Mutual Hold Harmless Agreement is compulsory for all of the charterer's other contractors and subcontractors,

these schemes are a reasonable substitute for a comprehensive contractual knock-for-knock regime encompassing the charterer's other contractors and subcontractors. The disadvantage is that the member must look to the charterer's other contractors to abide by the mutual MHH and to indemnify them in respect of any claims, which can be a drawback since the member may not be in a position to check those parties' financial strength and insurance position. A problem arises when the charterer does not undertake to ensure that all of its other contractors and subcontractors sign up to the Mutual Hold Harmless Agreement. Contracts frequently provide that the charterer will use its best endeavours, or some such wording, to persuade its other contractors and subcontractors to sign up. In such cases, the member has no guarantee that they will sign, and no recourse if they do not. If the other contractors and subcontractors do not sign up to the MHH and do not fall within the definition of charterer's group, the member will have an 'at law' exposure towards them. This is fine, except in the case of towage and heavy-lift operations, which are discussed further below.

Another issue that can arise with MHH agreements is that often the provisions are not wide enough to encompass wreck removal of property. As set out below, this can be a problem in the case of towage and heavy-lift operations.

Pollution from the entered ship

Members' poolable P&I cover will respond to loss or damage caused by pollution from the entered ship and the costs of cleaning up such pollution, regardless of fault, provided that the member has not waived their right to limit liability.

Clauses that allow the charterer to conduct the clean-up and bill the member for the cost and for any claims arising from the pollution can, however, cause difficulty. Poolable cover can respond to costs deemed reasonable by the club. The Contractual Extension will be required to respond to any costs beyond this.

If the contract does include a mutual indemnity in respect of third-party liabilities, it should be based on fault: that is, the liabilities should be 'at law' and the indemnity provision should be worded to make clear that it is limited to pure third-party liabilities only.



In any event, the member should endeavour to retain control of costs that will ultimately be billed to them.

Wreck removal of the entered ship

Poolable P&I cover extends to the costs of removing the wreck of an entered ship and cargo on board when required by a competent authority or because the wreck is deemed by the club to be a hazard to navigation. Many contracts include clauses whereby the member also agrees to pay for the cost of removing the wreck of the ship if it interferes with the charterer's or their client's operations, or at the charterer's or their client's request. If there is no wreck removal order and the wreck is not causing any danger to navigation, such liability goes beyond poolable P&I cover and therefore can only be covered under the Contractual Extension.

Members should also remember that poolable P&I cover only responds to the costs of cleaning up the wreckage of the entered ship or cargo or other property thereon. For this reason, the member should avoid clauses that make reference to a general requirement for the member to clean up any wreckage or debris that is not limited to the wreck of the ship itself and its cargo, as these clauses may expose them to liability that will not be covered under P&I insurance.

Insurance provisions

The insurance provisions in a contract should always be reviewed to ensure that they underpin and support the liability and indemnity provisions. This is particularly important since courts will often look at the insurance provisions of a contract to assist them in interpreting the liability and indemnity provisions if the latter are

 Mutual hold harmless schemes are intended to govern the relationships between various parties who are working simultaneously on an offshore project but who have not contracted directly with one another. Provided that signature of the Mutual Hold Harmless Agreement is compulsory for all of the charterer's other contractors and subcontractors, these schemes are a reasonable substitute for a comprehensive contractual knock-for-knock regime encompassing the charterer's other contractors and subcontractors.

not clear. In cases where the insurance and liability provisions conflict, the courts may allocate liability to the party who ostensibly has the obligation to insure the risk concerned, even if the result conflicts with the liability provisions on a straightforward interpretation. Common issues we see in the insurance provisions of contracts include the following:

Waivers of subrogation

When a clause simply requires the member's insurers to waive their rights of subrogation in respect of the charterer or other parties without further qualification, this can allow the charterer to argue that the waiver is intended to cover all claims covered by the member's insurers and is therefore not limited only to claims that fall to the member under the contractual knock-for-knock provisions. This interpretation could severely compromise the knock-for-knock provisions, and therefore the wording of any waiver of subrogation clause should make clear that such waivers are limited to those liabilities that are to be borne by the member under the terms of the relevant contract and are not given in respect of those liabilities that are to be borne by the charterer.

Co-assurance

Most contracts require the charterer to be named as a co-assured on the member's P&I insurance; the contract may also refer to a co-insured or an additional assured, but the meaning is generally the same. A co-assured is discussed in the Pooling Agreement as a party who will be permitted to access the member's P&I cover in respect of liabilities that would have been recoverable by the member from the club if the claim in question had been brought against the member rather than the co-assured.

If the contract requires the member's contractual partner to be named on the member's P&I cover, the wording should make clear that the cover is restricted to liabilities that are properly the responsibility of the member under the contract. In such cases, the member's contractual partner can be named as a co-assured under rule 13.7, which entitles him to 'misdirected arrow' cover for claims that should fall on the member, but not to cover for liabilities that are its responsibility under the contract.

Cross Liability and 'As Owner' provisions

Charterparties concluded in the US often include provisions requiring the member's insurers to insert a Cross Liability (also known as Severability of

 Courts will often look at the insurance provisions of a contract to assist them in interpreting the liability and indemnity provisions if the latter are not clear.

Interest) clause in the policy wording and to delete any 'As Owner' language. These particular provisions are problematic and should be deleted insofar as they apply to P&I insurance.

• Cross Liability clauses

A Cross Liability clause essentially requires an insurance that covers several different parties, such as a project liability policy, to behave as if each party has their own cover with a separate policy issued to each insured. This is perfectly appropriate when the policy is intended to cover each insured party in their own right. However, charterers named as co-assureds on a member's P&I cover do not have cover in their own right but rather have the benefit of the member's cover for claims properly the responsibility of the member, which in the context of an offshore charter would mean claims for which the member is liable under the charterparty. The co-assured does not have cover in their own right, so a Cross Liability clause in this context is inappropriate and should not be accepted in respect of P&I cover. Often contracts explicitly list failure to comply with the insurance requirements as one of the termination for default events, so members may risk the contract being terminated for failure to comply with this provision.

• 'As Owner' language

'As Owner' language in insurance policies refers to policy provisions which only allow cover to a shipowner or another party acting in that capacity. Similar language is found in the club's rules, which provide that a member shall not be covered by the club for any liabilities incurred by them in a capacity other than the capacity in which they are insured by the club. This means that the member is covered only for liabilities that they incur as an owner under the charterparty. A co-assured charterer may claim on the member's cover if they have to pay for liabilities that are the responsibility of the member under the charterparty, but since the charterer is not claiming on their own insurance but accessing the member's cover to pay for claims that are properly the responsibility of the member as the owner under the charterparty, there is no need to amend the club's rules.

3. Exclusions from poolable cover

The Pooling Agreement sets out certain exclusions from poolable cover. This section looks at these exclusions and the P&I solutions offered by the club to support members.

In addition to the contractual exposures set out above which limit members' access to poolable cover, the Pooling Agreement sets out that there are certain exclusions from poolable cover. These are based on the type of:

- a. contract in relation to particular activities (towage, heavy-lift and accommodation)
- b. operation (specialist, ROV and diving operations)
- c. vessel (drilling, production and integral accommodation units).

Each of these exclusion types will be considered in turn together with the P&I covers offered by the club to support members.

A. Type of contract in relation to particular activities

There are special requirements under the Pooling Agreement where owners are involved in towage and heavy-lift operations. The contract must be on acceptable terms in order for poolable cover to respond.

Towage by an entered ship

Cover for towage by an entered ship

Club cover for towage by an entered ship is provided by rule 3.10.2. In order to be acceptable for poolable cover, the towage must be performed on knock-for-knock terms or better whereby the member must have no liability for loss of or damage to, or wreck removal of a towed ship or object and/or its cargo or other property on board.

This essentially means that the club provides poolable cover for liability in respect of the tow and cargo or other property on board only when there is a towage contract in place that protects the member from such liability, but these provisions are subsequently not upheld by a court.

Where the member is exposed under contract to liability for loss of, damage to or wreck removal of the tow and property thereon, such liability can only be covered under the Contractual Extension. In order to trigger cover under the Contractual Extension, the towage contract must have been

approved in writing by the club prior to the commencement of the tow.

However, where the contract is subject to a jurisdiction in which the knock-for-knock concept is unlawful or unenforceable in whole or part, claims may be poolable provided that they do not impose on the member any liability arising out of any act, neglect or default of the owner of the tow or any other person, and that they also limit the liability of the member under the contract or otherwise to the maximum extent possible by law.

Towage contracts

The language of the liability and indemnity provisions should give the member proper protection in respect of towage. For instance, if the charterer is an oil company fixing a ship to support a well-drilling programme, it is unlikely that the drilling rig will be owned by the oil company and therefore knock-for-knock provisions that refer only to the property of the charterer will not be sufficient to protect the member. The wording should ideally provide that the owner will not be liable and the charterer will assume liabilities in respect of loss of or damage to or wreck removal of anything towed by the ship, but in the absence of such clear language, a provision extending the charterer's liability and indemnity provision to the property and personnel of their other contractors, subcontractors or client will generally be acceptable. Where the towed property falls outside of the knock-for-knock arrangement in the contract, the member must have a comprehensive Hold Harmless and Indemnity Agreement with the owner



of the towed property covering liability for loss of or damage to or wreck removal of anything towed by the ship. Otherwise, any liability the member may have for loss of or damage to or wreck removal of the tow will not be poolable and the Contractual Extension will be required to respond.

BIMCO standard contracts

There are a number of industry standard contracts that have been approved by the International Group. BIMCO Towcon, Towhire and Supplytime 2005 are approved contracts for the provision of towage services. However, members should remember when contracting under BIMCO terms that whilst these contracts are approved by the International Group, this does not mean that all liabilities incurred under BIMCO contracts will automatically be recoverable. Claims must still fall within the P&I cover to be poolable.

Heavy-lift

Rule 5.13 excludes from poolable cover all liability for loss of or damage to or wreck removal of cargo on a semi-submersible heavy-lift vessel, or any other vessel designed exclusively for the carriage of heavy-lift cargo, unless such cargo is carried under a contract on Heavycon or similar terms approved by the club's managers. Heavycon is a BIMCO contract on knock-for-knock terms in respect of the ship and cargo, and is an acceptable contract for carriage of cargo on a heavy-lift ship. This effectively means that the poolable cover only responds to the owner's liability for loss of or damage to or wreck removal of cargo on a heavy-lift ship when the carriage contract protects him from such liability. Provided the member has contracted on acceptable terms, poolable cover will respond even if the contractual provisions are not upheld by a court.

Accommodation

The Pooling Agreement excludes accommodation ships that form an



integral part of drilling or production operations. This is discussed further below. Other accommodation ships are poolable but subject to rule 5.15, which provides that liabilities in respect of accommodated (other than marine crew) on board an accommodation ship are excluded from cover unless the member has contracted on terms in which they have no liability for those accommodated. Where the member is exposed to liability for accommodated on board the ship, that liability can only be covered under the Contractual Extension.

B. Type of operation

The Pooling Agreement provides that there are certain operations that are considered too specialised a risk to have full access to poolable P&I cover. This means that some 'at law' liabilities whilst performing these operations as well as any liabilities assumed under contract which the member would not otherwise have had 'at law' are excluded from poolable cover.

Specialist Operations

What are Specialist Operations?

Rule 5.11 contains an exclusion of liabilities, costs and expenses during and as a consequence of Specialist Operations. This term includes works such as construction, installation and maintenance of offshore structures, dredging, blasting, pile-driving, well stimulation, cable or pipe-laying, core sampling and depositing of spoil. The list of Specialist Operations is 'non-exhaustive' so clubs must consider each type of activity on its own merits against the background and intention of this exclusion.

The Specialist Operations Exclusion

The exclusion does not apply to personal injury claims in respect of personnel on board the entered ship, nor to liabilities in respect of oil pollution from the entered ship or removal of the wreck of the entered ship, since these are claims that are common to all shipping. These liabilities are therefore covered under poolable P&I cover even when the ship is performing Specialist Operations.

The Specialist Operations Exclusion is formulated in three parts:

1. Exclusion of liabilities arising out of the specialist nature of the operations. For instance, if a dredger damages a buried pipeline in the course of dredging, this would be a liability arising out of the specialist nature of the operation, because the pipeline would not have been damaged if the ship had not been dredging. An extension to cover can be purchased to cover these risks – see Cover for liabilities arising out of Specialist Operations below.
2. Exclusion of liabilities arising out of the member's failure to perform the Specialist Operation and the fitness for purpose or quality of their work, which is a commercial risk for the member to bear.
3. Exclusion of liabilities arising as a consequence of loss of or damage to the Contract Work, which will normally be covered under an All Risks policy, for example, Construction All Risks (CAR) insurance. As with the Specialist Operations exclusion, the description of contract work is



The exclusion does not apply to personal injury claims in respect of personnel on board the entered ship, nor to liabilities in respect of oil pollution from the entered ship or removal of the wreck of the entered ship, since these are claims that are common to all shipping. These liabilities are therefore covered under poolable P&I cover even when the ship is performing Specialist Operations.

deliberately non-exhaustive to take account of the fact that each project will involve different project property.

Cover for liabilities arising out of Specialist Operations

A limited extension is available to reinstate cover for claims excluded by the first limb of the Specialist Operations exclusion (rule 5.11(i)). This extension gives cover for claims arising out of the specialist nature of the operation. It does not give a blanket cover, and claims must still fall within the P&I Rules. Even if an extension has been purchased, the other two parts of the Specialist Operations exclusion (ie failure to perform and in respect of the Contract Work) will still apply.

Most Specialist Operations work is performed under contract. If a contract for Specialist Operations exposes a member to wider liabilities than would be acceptable for poolable cover, cover for these wider contractual liabilities has to be specifically agreed by the club. Cover for claims arising as a result of this contractual assumption of liability while performing specialist operations will fall under the Specialist Operations Extension rather than require a separate Contractual Extension.

Third-party liabilities during Specialist Operations

The benchmark arrangement against which contracts involving specialist operations are assessed expects members to obtain an indemnity from the Company for loss of, damage to and pollution from permanent third-

party property in the area where the ship will be performing the works.

Divers, mini-submarines and ROVs Cover for liabilities arising out of ROV operations

Poolable cover excludes liabilities arising out of the operation by the member of submarines, mini-submarines and diving bells, which includes Remote Operated Vehicles (ROVs) and other underwater vehicles (rule 5.14(1)). The exclusion will only apply if it is the member who is carrying out or is responsible for the ROV operations. When the entered ship has been chartered out as a platform for ROV operations and the underwater vehicle is being operated from the ship by another party, the exclusion will not apply.

The exclusion will apply when the member is using their own equipment or is otherwise responsible for the operation of the ROV. However, the club is able to provide a limited extension of cover in respect of the excluded liabilities. The extension will only cover third-party liabilities arising out of the operation of the underwater vehicle. It will not cover damage to or loss of the vehicle itself, but will respond to wreck removal of the vehicle.

Cover for liabilities arising out of the operations of divers

Poolable cover excludes liabilities arising out of the activities of professional or commercial divers where the member is responsible for those activities (rule 5.14(2)). When the member is not responsible

for the activities of the divers, for instance in circumstances in which the entered ship has been chartered out as a dive platform and the charterer or another party is responsible for the engagement of the divers, the exclusion will not apply. The club is able to provide an extension of cover for third-party liabilities arising out of diving activities. However, the extension does not cover liability assumed under contract for death of or injury to the divers themselves.

Third-party liabilities during ROV and diving operations

We would similarly expect members to obtain an indemnity from the Company for loss of, damage to and pollution from permanent third-party property in the area where the ROVs and/or divers will be performing the works.

C. Type of vessel

Poolable cover excludes:

1. liabilities arising in respect of ships or units constructed or adapted for the purpose of carrying out drilling operations in connection with oil or gas exploration or production operations (rule 5.12.1).
2. liabilities incurred in respect of the ship, being any ship carrying out drilling or production operations in connection with oil or gas exploration or production, including any accommodation ship moored or positioned on site as an integral part of any such operations, to the extent that such liabilities arise out of or during drilling or production operations (rule 5.12.2).

For the purpose of these exclusions:

- a. A ship shall be deemed to be carrying out production operations if inter alia, it is a storage tanker or other ship engaged in the storage of oil, and either the oil is transferred directly from a producing well to the storage ship, or the storage ship has oil and gas separation equipment on board and gas is being separated from oil while on board the storage ship other than by natural venting (rule 5.12.3).
- b. If the ship is carrying out production operations, rule 5.12.2 shall apply from the time that a connection, whether directly or indirectly, has been established between the ship and the well pursuant to a contract under which the ship is employed until such time that the ship is finally disconnected from the well in accordance with that contract (rule 5.12.4).



The effect of the above exclusions means that there is no cover available under the pool at any time for vessels constructed or adapted for oil and gas drilling, while production units (FPSOs, FPU's and MOPUs) are only excluded while they are working or connected to the well. Accommodation units are also excluded from cover while they are moored or positioned on site as an integral part of drilling or production operations.

Production units may be entered within the club for poolable P&I cover until they enter the field, for instance while they are navigating or under tow to the field, since the risks they run during these operations are similar to those incurred by many commercial ships. If P&I cover is given for a unit that is being towed, we would expect the member to contract on knock-for-knock terms in respect of the towage.

Accommodation units can be covered under poolable cover, subject to the contractual requirements discussed earlier in this guide, unless they are moored or positioned on site as an integral part of drilling or production operations.

Floating Storage Units (FSUs) can be covered within poolable cover provided that oil is not transferred directly from a producing well and there is no oil and gas separation equipment on board. This is because they are not involved in production operations and the risks they run are not greatly different to those incurred by a trading tanker.

Standard Offshore Rules

Where poolable cover does not apply, owners of drilling, production and related accommodation units may purchase fixed premium P&I cover from the club under Standard Offshore Rules (SOR). This gives similar coverage to the normal International Group cover, but to a lower fixed limit. However, unlike poolable cover, SOR excludes cargo liabilities, and all fines are discretionary and subject to a \$50m sublimit.

SOR excludes cover for blowout, control of well expenses and pollution from reservoir

Members who are operating FPSOs or other drilling or production units will see exclusions in their club cover for risks such as blowout, seepage and pollution from reservoir, and control of well expenditure. The club does not cover these risks, which are normally insured under specialist insurances written in the commercial market and rated very differently. If the member is a contractor, their contracts should provide for

these exposures to be borne regardless of negligence by the oil company for whom they are working, since they can more appropriately be insured under the oil company's Operator's Extra Expense (OEE) or Energy Exploration and Development (EED) programme.

Offshore Liability Extension (OLE)

Notwithstanding the terms of SOR cover, the club is able to provide the OLE for a maximum limit of \$25m, which can extend to cover liability for:

- third-party property on board (it should be remembered that this is liability cover and property/ equipment held in custody for long periods should ideally be covered under the member's property insurances)
- liability for a member's personnel away from the unit, for example while attending work-related courses or working away from the entered unit on a third-party unit
- charterer's liability in relation to support vessels hired on knock-for-knock terms. Note this would not include traditional charterer's liability for Damage to Hull, which should in any event remain the responsibility of the owner under the knock-for-knock agreement
- contractual third-party liabilities and clean-up costs arising from pollution from the well or hole – this extension is sublimited to a maximum of \$10m (\$5m for drilling). This extension is not available to field operators
- debris clean-up costs following a casualty
- Sue and Labour costs incurred solely for the purpose of avoiding or minimising any liability against which the member is insured by the club.

The wording allows a short certificate to be issued which states that cover is on the Standard Offshore Conditions and includes the applicable limit. The cover and exclusions together with necessary definitions are contained in the rules themselves. Excess war risks P&I cover is normally purchased at the same time and provided under the Standard Offshore Conditions P&I War Risks Clause.

Cover provided under the non-poolable extensions, SOR cover and the OLE are provided by the club and supported with reinsurance from the commercial market.

We hope you have found the information contained in this bulletin helpful. Please remember that the information provided is intended to be used as a guide only and should not be relied upon as a substitute for specific legal advice. The club will be happy to provide further advice to members on the terms of particular contracts if required.

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**Charles
Taylor**