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With all due respect...you're wrong

Simon Tatham offers expert advice following a national supreme court ruling that left one company unable to take advantage of international convention to limit its liability

► Simon Tatham

In the last issue I highlighted the recent increases under the 1976 Limitation Convention which, for vessels under 2,000 grt, now takes their limitation cap protection from claims to around US$3m. The right to limit is important because otherwise the damage that can be caused by one small vessel can give rise to disproportionate liability.

However, in a recent case before the Supreme Court of Mexico, a supply vessel operated by a Bourbon Group joint venture sought to limit its liability under the convention, as applied under Mexican law, but, perversely, was not allowed to do so.

With due respect to the learned Mexican judges, their decision represents a failure to apply the compensation scheme under the convention in the way IMO and the international community intended.

The case involved a collision between a 550dwt supply vessel and a rig in the Gulf of Mexico in 2010. To protect itself against large claims, the supply vessel's owners started limitation proceedings in the Mexican courts anticipating, obviously, that they would be allowed to limit under the convention. The reasoning of the Supreme Court in rejecting this, by a majority, revolved around what might be described as the court's unusual interpretation of Article 15(5)(b).

This sub-section provides that the convention shall not apply to platforms. The court concluded – and this is the surprising bit – that accordingly it could not protect the ship that hit the platform.

When one reflects on this in the context of an oilfield situation, where a supply vessel is on a scheduled run, such a result is to be regarded as particularly harsh. Offshore contracts under Supplytime or other wider oil major service agreements regularly contain knock for knock liability regimes ensuring that damages and losses lie entirely where they fall. In a well ordered oilfield legal set-up, these and other provisions should, ideally, serve to bind rig owners and supply vessel operators alike, while having the additional benefit of avoiding litigation and reducing insurance costs.

The Mexican case is a salutary lesson to all litigants that the outcome of court proceedings is never certain until the ink has dried on the final judgment.

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Furthermore, that parties should think long and hard about what law and jurisdiction they put in their contracts or where they choose to pick their fights – that is, if they have a choice in the matter.

So what should operators do?

Here are a few suggestions, and please forgive me if they are legal rather than practical in nature, but no-one would thank me for suggesting how best to steer a vessel in close proximity to a rig.

Operators should revisit their contracts to ensure that liabilities are truly back-to-back and that any right of indemnity is preserved, to the extent possible, against the hirers in respect of rogue claims.

They should ensure, wherever possible (and I accept this is more in hope than expectation) that parent company guarantees are available in cases where the contracting party may not have a potentially sufficient deep pocket to reimburse large indemnity claims.

Where waivers of subrogation are given by the underwriters of contracting parties, they should call for these to be documented by the brokers and not rely upon the contractual undertaking to make good that arrangement.

Close attention should be given to the scope of the hirer 'group' so as to ensure all potential stakeholder companies are named or classed to minimise the risk of a claim being brought by third parties.

One also needs to stand back and ask the questions: what scope is there for tort claim from stakeholders? Are we indemnified against that, and what is the extent of our liability if not?

On a more practical level, one is bound to wonder whether decisions such as that in Mexico will tempt operators back into the habit of forming one-ship companies for their fleets: by doing so operators limit the ability of claimants to seek security for their claims, restricting ideally the scope of security to the value (or damaged value) of the vessel responsible – and as the saying goes, a marine claim is only as good as the available security.

Lastly, since these risks are typically insured on fixed premium terms by International Group Clubs or other underwriters, there is much to be said for limiting the insurance indemnity insofar as allowed under the service contract. I am not suggesting this would have helped in the