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# Provisions are litigation time-bomb

► *Simon Tatham*

## Regular columnist Simon Tatham looks at what he describes as the alarming trend of taking advantage of the prolonged soft market to throw risk on to the shipowner

**There is one good reason why there are many more solicitors dealing with marine claims than in the offshore and energy sectors. In traditional shipping the parties are frequently in dog-fights over damage to cargo, demurrage, unpaid or disputed hire, general average and, of course, the occasional unexpected bump, towage or salvage. All good stuff to keep the legal community adequately fed and watered, and on our toes keeping up to date with the constant flow of new case law.**

Conversely, offshore and energy-related contracts contain liability and indemnity provisions (commonly known as knock-for-knock) which broadly provide that the losses lie where they fall, irrespective of fault, along with provisions that protect against lawsuits from or against related parties (often referred to as owners' or charterers' groups). With operators often working in the same oilfield controlled by a government or oil major utilising high value assets, this not only brought down the cost of insurance, in particular liability insurance, but also reduced substantially the scope for litigation.

The English courts have upheld these contractual protections as expedient, although giving rise to some odd results when exonerating negligent behaviour.

These provisions were gradually adopted by BIMCO and found their way into HEAVYCON, SUPPLYTIME, TOWCON and TOWHIRE.

Recently, however, there has been an alarming trend, which is gathering pace, for the buyer or end user, taking advantage of a prolonged soft market, to throw risk on to the hapless shipowner. P&I Clubs are doing the same with wreck removal contracts, depriving the contractor not only of the change of circumstance provision, but forcing them to take on, and thus insure, risks that by rights, some would say, should remain with the party whose ship or unit has foundered.

Some of these provisions seen in the OSV and heavy-lift sectors create potentially very serious issues that are frequently not well considered. For example you might find a standard SUPPLYTIME 2005 with an un-amended clause 14, however supplemented by an additional clause providing that despite the knock-for-knock provisions the owners shall be liable for a sizeable first tranche of any loss suffered by the property or personnel of the charterers' group for each and every incident.

If that figure is, say, US$250,000, it might well be intended to reflect a charterers' group's own insurance deductible. Charterers will have to bring a claim for breach of contract or negligence in circumstances where the duty of care is not well defined, simply because it has until now not been necessary to do so because of the existence of knock-for-knock. Contrast this with the generally balanced provisions under the Hague Visby Rules for the carriage of cargo, or not dissimilar seaworthiness provisions found in charter-parties. Another example might be the imposition of terms that override the knock-for-knock provisions in the event of the gross negligence of the contractor. English law does not make a distinction between ordinary and gross negligence so the existence of such a provision in a contract, subject to London arbitration or the High Court, will create a challenge for the parties' advisors and the competent tribunal. An alternative extension of this might be to deprive the contractor of protection in the event of the gross negligence, not of his vessel crew but of the shore side management or supervisory personnel. As one offshore operator remarked to me the other day, such provisions are a litigation time-bomb waiting to explode, reminiscent of the complex litigation that used to take place in the context of proving or disproving 'fault and privity' before the limitation of liability regime eventually changed pursuant to the 1976 Limitation Convention.

Under the standard provisions a party is to be protected from claims arising from his act, neglect or default. In the same vein there is a temptation for parties to seek to deprive the contractor of that protection in the event of his wilful or criminal misconduct. Some may find this logical, at least until one reflects upon the alacrity with which coastal authorities will nowadays prosecute seafarers involved in marine accidents.

Finally, the rules of most P&I clubs do not tolerate meddling with the standard BIMCO regimes and their members therefore risk excluding themselves from cover where, without the club's approval, they have entered into 'unusually burdensome terms'.

Returning to the rather odd concept of gross negligence, as I understood this to be a concept recognised in Scandinavia, I once asked a Norwegian lawyer to explain how this differed from ordinary negligence. His answer was: "Well Simon, you see the difference is that when you encounter ordinary negligence you nod your head as you recognise a human being's mistake; however when confronted with gross negligence, you know this very well because you simply have to shake your head in disbelief." I am looking forward to an opportunity to explain that to an English judge.

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