



Application of the ICCL for 'Bunker Oil Pollution Damage 2001' to offshore units

This [Client Adviser](#), from our Marine Practice's Protection and Indemnity specialists, outlines some of the problems that have arisen for offshore units and their insurers since the International Convention on the Civil Liability (ICCL) for Bunker Oil Pollution Damage 2001 came into force.

Convention recap:

The Bunker Convention 2001 came into force on 21 November 2008.

This Convention was created to fill a perceived gap in the pollution liability/compensation regimes whereby liability for pollution from oil tankers (persistent oil carried as cargo and bunker fuel spilled when the tanker was laden¹) was addressed under the Civil Liability Convention (CLC) 1969 (and the 1992 Protocol amending it) but liability for spills of bunker fuel from other vessels was not.

The Bunker Convention states that the shipowner² is liable for pollution damage from spills of bunker oil³ and costs of preventative measures within the Territorial Waters/Exclusive Economic Zone (EEZ) of a signatory state from any ship⁴ with a gross tonnage of 1,000 or more.

This Convention places the obligations of compulsory insurance and strict liability on the shipowner⁵ as well as allowing those affected by bunker spills the right of direct action against insurers.

Article 7 of the Bunkers Convention provides that the shipowner must maintain insurance to cover the



liability for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, "not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended (LLMC)". The shipowner must obtain a certificate from a State Party to the Convention confirming that he has the insurance in place, which in the vast majority of cases will be achieved by the shipowner's protection and indemnity (P&I) Club issuing a certificate of insurance, known as a 'blue card', to the relevant State Party. This 'blue card' system has been in use for many years for oil tankers under the CLC.

However, it has become apparent that the wording of Article 7 has brought about some problems for offshore units and their insurers. ▶

The Bunker Convention states that the shipowner is liable for pollution damage from spills of bunker oil and costs of preventative measures within the Territorial Waters/Exclusive Economic Zone (EEZ) of a signatory state from any ship with a gross tonnage of 1,000 or more.

¹Although in the 1992 protocol of Civil Liability Convention (CLC) this distinction between laden and unladen was done away with.

²'Shipowner' includes the registered owner, bareboat charterer, manager and operator of the ship.

³'Bunker oil' any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.

⁴Defined as "any seagoing vessel and seaborne craft, of any type whatsoever"

⁵Although compulsory insurance is only an obligation on the Registered Owner

Problems

1. Inability of offshore units to limit liability under LLMC

Although the Bunker Convention makes reference to limitation of the shipowner's liability in accordance with LLMC, LLMC itself contains a provision that the ability to limit liability does not apply to "floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof". A Floating Production, Storage and Offloading vessel (FPSO) or drilling unit can be argued to fit the very wide definition of a 'ship' under the Convention, so such units must provide insurance to cover the owner's liability for pollution damage under the Convention, but because of the 'floating platforms' exclusion, LLMC may not be applicable. As prescribed by the Bunker Convention, 'blue cards' state, "This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001". Since Article 7 paragraph 1 states that the insurance must be provided in an amount calculated in accordance with LLMC, this potentially leaves a gap in the drafting of the convention with respect to the limit applicable to the insurance for offshore units.

This presents a problem for insurers of these units in jurisdictions where the right of the shipowner to limit liability does not exist under LLMC: the insurer could, in effect, be held to have issued an unlimited certificate of insurance under the Bunker Convention against an insurance policy which naturally incorporates a limit.

2. Excluded Risks

The Bunker Convention contains no exclusions for a shipowner's liability for nuclear, bio-chemical or cyber-terrorism caused pollution events, which are risks excluded from P&I Club cover. Therefore, by issuing a 'blue card' as prescribed by the Convention the Club would be guaranteeing risks which it cannot cover.

Due to the perceived remoteness of these Excluded Risks, all the International Group P&I Clubs have agreed to treat their exposure to them (as guaranteed by the 'blue cards') in the same way as any other shipowner's liability i.e. they will retain the first USD7 million of any one claim and then pool the costs in excess of this amount with the other Clubs.

Unfortunately this cannot be done with offshore units. Drilling and production operations in connection with offshore oil and gas production/exploration are deemed so specialised by the International Group that liabilities arising out of these operations cannot be covered by the International Group pool. Owners/operators of units involved in these activities must therefore obtain specialist P&I insurance. This insurance is offered to the shipowner by the Clubs on a fixed rather than mutual basis and on terms that cover these operations; the Clubs then purchase reinsurance for these risks. Because the liabilities arising in respect of offshore units are not pooled within the International Group, the Clubs concerned cannot treat the Excluded Pollution risks for offshore units in the same way as for the mutually insured units.

3. Terrorism

There is a potential exposure for shipowners where a bunker spill is deemed to be caused by terrorism – a risk that is traditionally excluded from P&I but can be covered by War Risks insurance. Although there is a defence under the convention for intentional acts "wholly committed by a third party" (which arguably includes a terrorist action), the inclusion of the word "wholly" allows for some degree of uncertainty as to whether this exclusion would apply depending on the circumstances of the incident. The Clubs may therefore become liable under Bunkers 'blue cards' for liabilities arising out of acts of terrorism which would otherwise be excluded from P&I cover.

Furthermore, Bunkers 'blue cards' as prescribed by the Convention have a three month cancellation clause; however War Risks insurance traditionally has a seven day cancellation clause. If a shipowner's War Risks insurer cancelled cover, the club would potentially be guaranteeing to cover a terrorism caused pollution liability risk, which is otherwise excluded under the terms of the shipowner's P&I insurance, for the remainder of the three months notice period.

The International Group P&I Clubs have agreed that these exposures can also be pooled in excess of USD7 million subject to a requirement that each shipowner to whom a Bunkers 'blue card' is issued must indemnify his Club to the extent that such liabilities are, or would have been, recoverable under a P&I War Risks policy, and to assign to the Club all his rights under such insurance and against any third party.



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P&I Clubs underwriting offshore units

The two P&I Clubs which underwrite the vast majority of these offshore units are the Gard and Standard Club. Their approaches to this issue are markedly different and set out in summary below.

Assuranceforeningen Gard

The Gard has formed a Bermuda registered limited company called Safeguard Guarantee Company Ltd. ('SGC') to act as financial guarantor for the liabilities that P&I club members might incur under the Bunker Convention and, of particular note, SGC covers the Excluded Risks which the Clubs' own cover (and indeed any P&I Club cover) does not respond to.

It can be argued that the risk to a shipowner of a bunker spill as a result of, for example, Cyber-terrorism is remote, but the exposure exists and Gard have created a solution.

The entry premium for the Safeguard facility is anywhere between USD5,000 and USD20,000 per annum per vessel depending on gross tonnage, although this is hoped to reduce once start-up costs have been paid away. The facility is open to all shipowners (not just Gard members) who have a primary P&I entry. The limit offered is USD90 million in the aggregate plus one reinstatement⁶.

Standard Club

The Standard Club approach to these problems is to issue bunkers 'blue cards' for offshore units incorporating a limit of liability, the limit being that which the unit would have enjoyed under LLMC as amended by the '96 protocol if the exclusion of offshore units under this convention did not apply.

These bunkers 'blue cards' certify all the shipowner's liabilities under the Bunkers Convention up to this limit, including Excluded Risks and terrorism. The Club has advised its members that, by requesting a 'blue card', the shipowner is deemed to have agreed to indemnify the Club if there is an Excluded Risk or terrorism incident which is outside Club cover but which the Club, as guarantor under the 'blue card', is called upon to pay in the first instance.

The Club is not presently charging its members to issue these 'blue cards'.

Both mechanisms used to circumvent these problems are innovative and have been largely accepted by the signatory states to the Convention⁷.

It should be noted that the application of this Convention is still under review and there was a meeting of the International Maritime Organisation on this matter on Thursday 8 January 2009, the result of which was that further discussion has been tabled on a variety of aspects. It is clear that the finer points of this convention will need time to be fully agreed by all signatory states and Marsh will keep its clients updated on any developments.

⁶Safeguard terms and conditions can be viewed on <http://www.gard.no>

⁷Signatory states at time of publishing; Bahamas, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Germany, Greece, Hungary, Jamaica, Latvia, Liberia, Lithuania, Luxembourg, Marshall Islands, Norway, Poland, Samoa, Sierra Leone, Singapore, Slovenia, Spain, Tonga, United Kingdom