

# Repair Time?

## *Eyes Wide Open: Know The Cause & Effect Of Shipyard Repair & Insurance Contracts*

By Matthew J. Valcourt



'Tis the season where owners and charterers bring their vessels in for repair and overhaul and renew insurance policies and go through P&I Club renewals. There are several traps for the unwary or as underwriters may refer to them as "then soon to be uninsured for that horrible loss" that owners, shipyards and repairers should be aware of.

### **BOILER PLATES**

Boiler plates – not the real ones which provide intimate details of steam boiler pressure, manufacturer, and capacity – seemingly innocuous and tiny clauses in repair and insurance contracts can leave an owner or repair yard high and dry and damage the working relationship between a yard and its customers.

A typical scenario is when an owner signs a ship repair contract with an indemnity and hold harmless provision and during hotwork, the vessel is lost to a fire and an employee or contractor of another party is injured and sues everyone.

The shipyard would then direct the lawsuit to the owner who has agreed to indemnify, hold harmless and defend shipyard from any action arising out of the repair of the vessel (Even if the loss is not the vessel owner's fault.) The vessel owner would then inform his insurer and if owner did not have the additional endorsements or waivers pre-loss, the insurer would deny the claim.

While some of the consequences of these boilerplate terms are not intentional, they are difficult to reconcile without an owner, shipyard and their insurers being fully informed of the risk and risk shifting between the parties. The law allows parties to a contract to allocate risk and risk of loss by the terms of a contract as long as they are not over reaching or obtained by fraud or misrepresentation.

### **INDEMNIFICATION**

Clauses in a repair contract may require a party to "Indemnify, Hold Harmless and/or Defend anyone for claims of any sort arising out of the repair of a vessel and waiver of certain claims or causes of action." Typically, shipyard repair contracts will have this type of language. They are usually designated as Hold Harmless, Defend and Indemnify; Adding Shipyard as Additional Insured, Waiver of Rights of Subrogation; and Limitation of Liability. There are also clear exclusions for hotwork without an additional endorsement.

An owner or customer may also require the same type of reciprocal indemnity agreement from a shipyard. In ship chartering parlance this type of clause is referred to as a "Knock-for-Knock" Clause. In basic terms, the parties agree not to sue each other for their own negligence. No problem – an owner or shipyard may think – "I have insurance!" Instead, you may have just contracted out of your liability or hull insurance.

The insurance contract is also an allocation of certain risks and responsibilities between the insurer/underwriters and then insured. Insurers want to be fully informed of what risks they are underwriting and do not want to be fettered with side agreements that its insured may undertake without additional premium for that risk or the opportunity to turn the risk down. This is especially true when an insured vessel owner or repairer or yard limits by contract the insurer's rights of subrogation in any way. Shipyards sometimes request to be listed as an additional insured under a vessel policy. This can cause additional problems.

Insurers generally will not subrogate against a party with a named interest in the insurance policy such as additional insured's. Adding the shipyard may remove the ability of the insurer to recover from the shipyard if the shipyard causes damage to a vessel. In some cases, if a party promises to list the other as an additional insured and fails to

procure the insurance, they can be deemed the de facto insurer and be liable directly for failure to provide insurance while simultaneously voiding their own policy. Adding the shipyard and holding it harmless also may limit the amount of insurance available by all parties in the case of a catastrophic loss in excess of a vessel policy.

#### HIGH RISK FOR EVERYONE

Shipyards are a time of higher risk for vessels, crews, owners, shipyard employees and technicians. Hot work, gas freeing, work in enclosed spaces, trip hazards, sand blasting and asbestos removal, welding and cutting, crane and heavy machinery work and the use of subcontractors are just a few of the risks involved.

Marine insurers may utilize the American Institute of Marine Underwriters (AIMU) Hull and P&I Forms, which could include or exclude shipyard repairs. However, the typical P&I form may exclude coverage for liability assumed under a shipyard repair contract or Knock-for-Knock clause. The AIMU form states: "Notwithstanding anything to the contrary elsewhere herein the Underwriters will not indemnify the Assured in respect of any of the following matters: (A) Any liability assumed under contract or otherwise." Similar language can be found in the ship repairer's policy.

Most Commercial General Liability, Property, Workers Compensation, Hull Insurance and P&I Club Rules have a right of subrogation and/or no waiver of subrogation type language. When an insurer decides to pay a claim, they have a right to go after those at fault to get reimbursed. Most insurers and P&I

Clubs have a provision in the insurance contract that a claim may be excluded if the insured give away or limits the insurer's right to recover against third parties. A typical P&I Club rule may read:

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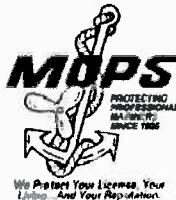


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## LEGAL

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Most land based insurers write general liability insurance on ISO Commercial General Liability (CGL) Form CG 00 01. A typical CGL policy grants insurer's the legal right to subrogation and requires the insured to cooperate with the insurer in its efforts to subrogate. A CGL policy may allow an insured to waive recovery against a third party prior to loss. There is a specific form for waiver of subrogation endorsement named "Waiver of Transfer of Rights of Recovery Against Others to Us". Closely related to ISO CG2404 is the Waiver of Transfer of Rights of Recovery Against Others to Us (CG 29 88) Endorsement, which is attached to an Owners and Contractors Protective (OCP) Liability Policy which allows a waiver of subrogation.

### WHAT'S THE BOTTOM LINE?

Shipyards, repairers and their insurers surely want to limit their risks to what they typically control. Shipyards do not want to be sued for or be indemnifying or holding harmless owners for owner's crew injuries or contractor's injuries or hull and machinery losses. They want to allocate that risk to the vessel owners and their insurers via contract, which is allowed. Likewise, vessel owners and insurers do not want to underwrite every risk of everyone in the shipyard and want to get paid for a loss incurred as a result of the negligence of a yard or their agents.

### INFORMED CONSENT RECONCILIATION

The shipyard or repairer's contract can peacefully coexist with the marine hull and P&I insurance contracts if the insurers are well informed and consent to the language in the repair contract. This will typically require purchase of additional endorsements as previously noted. The vessel insurer will try to limit the scope of the waiver and may require review of the shipyard or repairer's insurance agreements. Insurers typically will not endorse unlimited open ended risks.

Prior to entering into any contract, the shipyard's and vessel owner's insurance broker and insurer should get involved to obtain the informed consent for properly allocating and covering the anticipated risks through con-

tract language and additional endorsements. Otherwise, an owner may contract out of coverage for a loss and the shipyard may do the same, or the shipyard may lose a valuable customer for a loss that should have properly been covered by insurance. This is not the intent of the shipyard or the owner. If the vessel insurer will not consent or endorse additional cover, then the shipyard is faced with a business decision to remove the indemnity provisions to get the work. They are cautioned to also obtain consent of their insurers before removing and risk shifting clauses in any preapproved contracts. Informed consent can help prevent the loss of coverage and maintain a healthy customer relationship for more trips to the repair yard.

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