COMPULSORY INSURANCE AND BLUE CARDS

Legal framework

International laws requiring compulsory insurance of shipowners' liabilities first came into effect in 1975 with the entry into force of the Civil Liability Convention 1969 in relation to oil pollution from tankers. The same arrangements were continued for tankers under the Civil Liability Convention 1992, and until 2008 they remained the only international compulsory insurance regime applicable to ships.

Since 2008 the Bunkers Convention 2001 has been in force, and this has extended similar arrangements to much wider categories and larger numbers of vessels. From December 2012 compulsory insurance for passenger claims will apply within Europe, under the EU Passenger Liability Regulation, and this will be required internationally when the 2002 Protocol to the Athens Convention comes into force. Similar arrangements will also take effect in due course in relation to wreck removal claims when the Nairobi Convention 2008 comes into force.

The compulsory insurance arrangements of all these regimes have two essential objects in common. One is to ensure that shipowners are adequately covered against their prospective liabilities by approved financial security. It is not essential that this take the form of insurance, though in practice it does so in all but a tiny minority of cases. Another object is to create a right of direct action against the insurer or other party providing the security, thereby effectively treating it as a guarantor of the owner's liabilities.

Certification

Requirements

Ships above a certain minimum size are required to carry on board a Certificate, issued normally by the appropriate authority of their flag state, attesting that approved cover is in force. The Certificate is to be in the form of a model annexed to the relevant Convention and must contain certain particulars, including the name and address of the insurer (or other person providing financial security), and the period of cover. A copy of the Certificate is kept at the ship's registry. Ships must normally produce this certification as part of routine port entry control, and therefore cannot trade without it.

Procedure

The procedure involved in obtaining certificates under the Civil Liability Conventions has on the whole been relatively straightforward. This is because normally some 95% of tankers governed by CLC (those with a carrying capacity of 2,000 tons or more) have been covered against pollution liability risks by entry in one or other of the 13 Clubs in the International Group. Given the strength of the financial security provided by the Clubs, with their shared pooling and group reinsurance arrangements, financial approval of insurers for most of the world's tanker fleet has been relatively straightforward.

In such cases the relevant authorities have generally been willing to issue CLC certificates on the strength of confirmation from the Club that a policy of insurance is in force in relation to the particular ship as required by the

Convention. This confirmation has typically been provided in the form of a certificate issued by the insurer (which is not to be confused with the CLC certificate issued by the state authorities.) The insurer's confirmation has normally been referred to as a "Blue Card". The origin of this expression is unknown: the document is not blue, is not on card, and indeed nowadays is not usually even on paper, as most flag states are willing to accept it in electronic form. However the expression has been retained and is useful as a means of distinguishing this document from the CLC certificate issued by state authorities.

If a ship is registered in a state which is not a party to the relevant international convention, arrangements can be made for the necessary certificate to be furnished by the authorities in some other state which has ratified the regime. Authorities in the UK and certain other states have in the past been ready to fulfil this function.

Right of direct action

The right of direct action against the insurer is set out in the Convention and should be mirrored in the legislation of any contracting state where an incident occurs and claims are made. Parties claiming to have suffered loss or damage of the kind covered by the relevant regime may bring legal action directly against the insurer named in the certificate – there is no obligation on them to pursue the owner first. The insurer may rely on any defence available to the shipowner under the Convention, and he may rely on the ship's liability limit in all circumstances, even if the shipowner himself is guilty of conduct depriving him of the right to limit his own liability. However, apart from wilful misconduct, the insurer may not rely on any policy conditions or other defence he could have invoked against the shipowner.

The result of these arrangements is that an insurer who is named in a certificate may incur liability in either of two different ways – one by way of indemnity to the assured, subject to the terms of cover, and the other directly to claimants as guarantor, subject only to the limited defences allowed by the Convention. As the latter exposure is potentially wider in scope than liability to the owner under the conditions of cover, policy wordings sometimes provide for the assured to indemnify the insurer for any liability incurred as guarantor which would not have been incurred under the policy.

Termination

Once the State Certificate has been issued, the insurer can terminate his liability as guarantor only by giving three months' notice in writing to the State authorities concerned. In theory this period can be abridged if the Certificate on board the ship is retrieved, but in practice this rarely occurs. This means that if circumstances arise in which the insurer is entitled to terminate his obligations both under the policy and as guarantor, his exposure in the latter capacity will continue for a further three months despite cancellation of the policy.

Modern issues

The above is a summary of the procedure which has become established in the context of CLC as a result of the practice followed in the period between 1975 and 2008.

Since 2008 compulsory insurance arrangements have become necessary in order to comply with other regimes dealing with other types of liability. Whilst the legal form of the requirements is virtually identical to those prescribed by CLC, various factors have changed the practicalities involved. Some of these factors lie in the fact that a wider range of insurance products has been developed to cover the risks involved. Others arise from the sheer volume of work now involved in providing multiple certification to a much larger number of vessels than those comprising the tanker fleet governed by CLC. These have highlighted a need to minimise unnecessary or inefficient formalities.

As a result of these developments new issues have arisen which have added complications to the certification arrangements. Most of these have been concerned only with the requirements involved in obtaining certification, but in some cases questions have also arisen as to the scope of liability which may be incurred as a result of a Blue Card being issued.

None of these issues necessarily presents an insuperable obstacle, but a degree of uncertainty exists as to how they will ultimately be resolved. In some cases this is due to the degree of discretion allowed to state authorities in deciding the conditions on which they will provide certificates. In others it is due to the difficulty of predicting how any legal issues may be determined by the courts in any one of numerous contracting states which are parties to the relevant regimes.

The following is a summary of various issues which have come to the fore.

Issue of Blue Cards in electronic form

In the last decade the normal form of Blue Cards has been brought into line with modern forms of electronic document exchange, and the vast majority of administrations now accept electronic Blue Cards as Portable Document Format (PDF) files.

So far as is known, there has been no instance of a forged Blue Card being presented in support of an application for a certificate. Nonetheless, a very small number of administrations have continued to require hard copy Blue Cards. Some have voiced concerns that Blue Cards in PDF format are less secure than original documents embossed with the Club's stamp or printed on watermark paper.

To allay these concerns, all IG Clubs have established lists of vessels on their websites from which verification can easily be obtained that a specific ship is entered with the necessary cover and that a Blue Card has been issued.

A Correspondence Group of the IMO has concluded that all States Parties should follow the practice already adopted by the vast majority, and accept Blue Cards issued by IG Clubs in electronic form, in particular when it is evident from an accompanying email that the Blue Card has been sent by the Club, or when it can be verified from the Club's website that a Blue Card has been issued.

In cases where Blue Cards are issued by or on behalf of insurers other than IG Clubs, there is a greater prospect of hard copy Blue Cards being required, unless the coverholder or other agent managing the facility establishes a database,

comparable to those maintained by IG Clubs, enabling certificating authorities to obtain independent verification that cover is in place.

Issue of Blue Cards prior to confirmation of renewal

Another complication which has arisen concerns the issue of Blue Cards prior to confirmation of renewal of cover. Like the cover itself, certification normally requires renewal on an annual basis, as it is valid only up to the expiry of the period of insurance stated in the existing certificate, and in the Blue Card on which it was based. So, for example, where cover is provided by International Group Clubs, and runs for 12 months from 20 February, this is stated in the Blue Card, and the period of validity of the State certificate ends with the expiry of cover on the following 20 February. A new Blue Card is needed for renewal of the Certificate thereafter.

Due to the time required to complete the administrative process of renewing a State certificate, and the need for this to be in place on the renewal date so that the ship can continue trading, Clubs are commonly asked to provide Blue Cards for the succeeding policy year considerably in advance of the renewal date, and at a time when negotiations for renewal of cover are still in progress. This has given rise to the following questions.

If, in the event, cover is not renewed with the same insurer, but is placed elsewhere, the original insurer may give notice terminating its liability under the certificate, but it will remain exposed to direct claims for a further three months.

In the Pooling Agreement among Clubs in the International Group provision is made for any liabilities incurred in this way to be reimbursed by any of the other Clubs to which cover for the vessel may have been transferred. In relation to tankers this system has worked well, given the high proportion of vessels in this class which are entered in International Group Clubs, and the fact that transfers of cover are therefore generally from one IG Club to another. However on the entry into force of the Bunkers Convention it was recognised that a higher proportion of non-tankers are insured outside the IG, and that a higher proportion of transfers of cover would be from an IG Club to a non-IG insurer. For these reasons it has become standard practice for Owners to be required, as a condition of the issue of a Blue Card prior to renewal, to provide the issuing Club with a Letter of Undertaking confirming that if they do not renew cover by entry in the same or another IG Club, they will indemnify the Club for any liabilities it may incur as a result of issuing the Blue Card.

Multiple insurers

A number of issues have arisen as a result of a wider range of insurers becoming more regularly involved in providing cover for P&I liabilities. This is not only because insurers other than International Group Clubs have become increasingly involved, but also because cover provided outside the Clubs is commonly underwritten by several co-insurers. The involvement of multiple insurers has given rise to the following issues:

Multiple approvals

There has been a need for flag state authorities to approve a larger number of insurers before providing certification. Whilst a single approval may be

acceptable for cover placed wholly at Lloyd's, in other cases multiple approvals may be needed. To an extent this may be a one-off exercise when a new facility is started up, but additional work may be needed if the composition of the insurance security changes at renewal, to include insurers who have not previously been approved for these purposes.

Particulars to be stated in Blue Card and Certificate

Where cover is provided by multiple co-insurers, questions have arisen as to whether each insurer needs to be named in the Blue Card, and subsequently in the certificate issued by the State authorities, and if so whether each insurer's respective share of the risk should also be stated.

Here it has to be borne in mind that the task of the certificating authority is not simply to satisfy itself that adequate cover is in force. The main reason why details of the insurer are to be stated in the certificate is to provide claimants with the information they need if they wish to bring a direct claim against the party providing financial security. The information is sufficient only if it enables them to institute properly formulated legal proceedings and serve these on the correct parties.

In practice that information would no doubt be given freely by those handling claims after an incident has occurred. However the proper interpretation of the Convention must allow for the possibility that this co-operation may not be provided. In that case claimants should be able to obtain all the information they need by inspection of the certificate on board the ship (or the copy of the certificate in the ship's registry), without the need for further enquiry.

On this basis, formulations such as "underwriters at Lloyd's" would not be sufficient. Flag states are entitled to require – and, if they exercise due diligence, are arguably bound to require – that they are provided with the full names and addresses of all individual co-insuring syndicates and/or companies.

Issue of Blue Card by agent for insurers

An impossible administrative burden would be involved if each of several co-insurers had to issue individual Blue Cards for a single ship, or even if all of them had to underwrite a single composite Blue Card relating to the ship concerned. In practice the system is workable only if a single Blue Card is issued by a single entity acting as agent on behalf of all insurers involved. This creates a need for the State certificating authority to satisfy itself that the agent has the necessary authority from each insurer to issue the Blue Card. This may involve official inspection of the marine binder or other market agreement, and/or the provision of a letter from underwriters confirming the agent's authority.