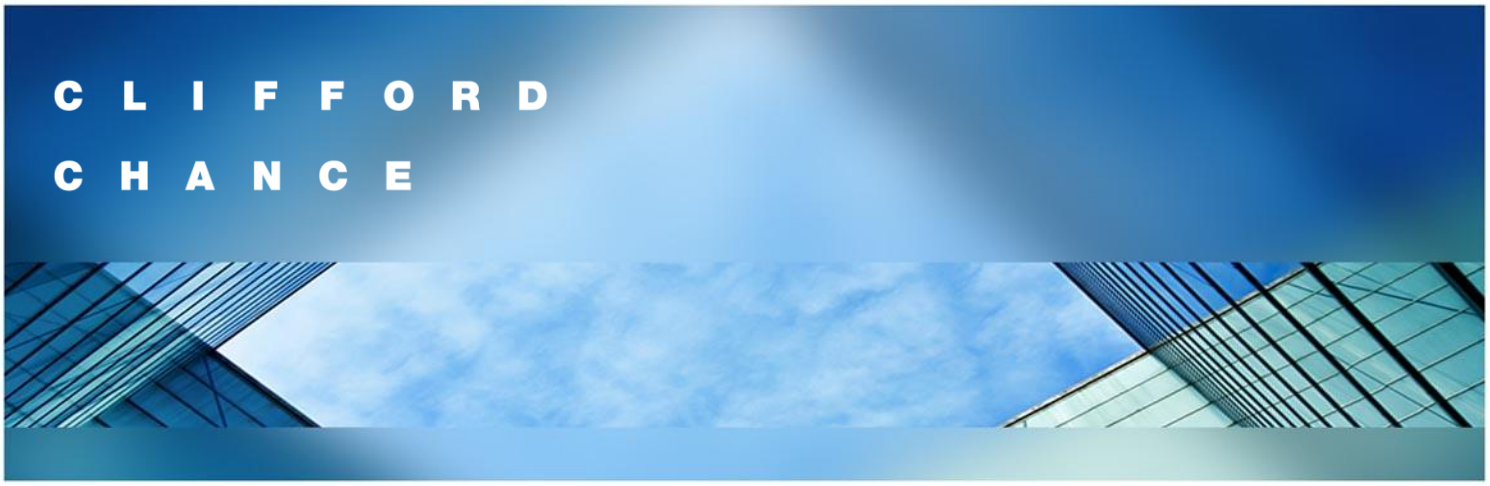

CONSTRUCTION ALL RISKS INSURANCE

November 2024

Key issues

- Construction All Risks insurance – the Court of Appeal provides an important reminder than co-insureds should carefully consider the scope of cover under policies that seek to cover multiple insureds.

In the recent Court of Appeal judgment of *Technip Saudi Arabia Limited v The Mediterranean & Gulf Insurance and Reinsurance Co*. [2024] EWCA Civ 481, the Court dismissed an appeal of the decision of Jacobs J ([2023] EWHC 1859 (Comm)), concerning a property damage insurance claim under an offshore construction project policy.

The decision provides an important reminder that co-insureds under construction policies should confirm that they are adequately covered for risks that may arise on the project site, including in particular its liabilities to its contractual counterparties. A co-insured should carefully consider the scope of what is, and is not, covered under the policy, and how that links with the contractual arrangements between the parties, to ensure that the co-insured is adequately protected for the activities it intends to undertake on the project site.

Background

The claim concerned an offshore construction insurance policy using an amended "WELCAR 2001 Offshore Construction Project Policy" wording. The WELCAR wording is the standard form for offshore construction all risks cover and widely used in the offshore industry.

Technip Saudi Arabia Limited ("**Technip**") had contracted with the Al-Khafji Joint Operation ("**KJO**") to perform construction works to offshore assets in Saudia Arabia. Technip and KJO were both insureds under the policy.

Technip chartered a vessel to perform work under the contract. The vessel collided with an unmanned wellhead platform owned by KJO, causing significant damage. Technip paid KJO USD25 million in respect of the damage, and claimed under the policy in respect of this amount.

The insurer denied liability. This was accepted by the first instance judge, who found that the exclusion in the "Existing Property Endorsement 2" of the policy applied, which essentially excluded claims for damage to property owned by (or in the custody of) the Principal Assured.

Primary judge's decision

The primary judge held that the structure of Endorsement 2 was:

- to identify all existing property as being subject to it;

- to specify property which the Principal Assured owned as being excluded; but
- then expressly to provide “buy-back” cover in respect of certain identified property, all of which was owned by KJO.

“Principal Insureds” (but not “Principal Assured” as used in Endorsement 2) was a defined term in the policy and included Technip, KJO and their affiliated companies, and others. Technip took no point on the differences between the singular and the plural, nor on the difference between “insured” and “assured”. The policy also referred to "Other Insureds" who were not included in the meaning of the "Principal Insureds".

The critical words in Endorsement 2 were “*any claim for damage to … any property [for] which the Principal Assured: 1) owns that is not otherwise provided for in this policy*”:

- Technip submitted that the words “*any property which the Principal Assured … owns*”, read in context, only excluded coverage for any property owned by the particular Principal Assured making the claim under the policy.
- The insurer argued that the words excluded coverage for any property owned by any of the many Principal Assureds. Since the platform was owned by KJO and not included in the buy-back schedule, the insurer argued, and the judge agreed, that Endorsement 2 meant that Technip's claim was excluded.

Court of Appeal's decision

Technip appealed the first instance judge's decision. The Court of Appeal agreed with the first instance judge and dismissed the appeal as:

- Technip's interpretation did far more violence to the natural meaning of the words used in Endorsement 2. Technip's interpretation involved reading Endorsement 2 as if it included the highlighted words as follows: “*any claim for damage to … any property [for] which the Principal Assured* ***[which is making the particular claim concerned]****: 1) owns that is not otherwise provided for in this policy*”. Those words are entirely absent from Endorsement 2.
- Technip was wrong to say the insurer's meaning involves any violence to the language. All it does is to read in the meaning of the “Principal Insureds” in place of “the Principal Assured”.
- Technip's meaning does not work if a claim is made under the policy by one of the “Other Insureds”, which is not a “Principal Insured”. In that event, the exclusion does not bite at all. The suggestion by Technip that Endorsement 2 does not need to work for claims by “Other Insureds” is untenable.
- The policy did not contain any consistent usage that pointed one way or another as to the proper meaning of the language of Endorsement 2.
- The insurer's meaning gives the proper structure to an “existing property” endorsement. It is intended to exclude claims for damage to property, either owned by or in the custody of the Principal Insureds, or for which the Principal Insureds are liable by operation of an indemnification or hold

harmless contractual provision, unless that coverage is specifically bought back for specific scheduled property.

- The composite nature of the policy did not affect this conclusion. If the words "the Principal Assured" mean "Technip and/or KJO and/or associated companies", they must have that same meaning in each separate insurance including Technip's separate insurance.
- The commercial rationale of the policy also supports this conclusion as (i) Technip's interpretation makes no sense as regards "Other Insureds"; (ii) the structure of Endorsement 2 also points towards a wide exclusion of the Principal Insureds' property with the opportunity for buy-back of cover for specified scheduled property; and (ii) the composite policy analysis points also in the same direction.

Key takeaways

It is very common in large construction projects for the parties to agree that it is the responsibility of one party to take out insurance for a number of entities, and that insurance is often placed using standard terms, or standard clauses (e.g. the WELCAR wording in this case). There are obvious reasons for doing this such as cost and convenience.

However, there are a number of points that should be borne in mind when this is done. In particular, the parties need to consider the risks and liabilities that they may face, and the framework for allocating liabilities between themselves. Any insurance put in place needs to reflect those liabilities, and that may require careful drafting.

In this case, the insured found itself liable to one of its co-insureds, and unable to claim under the policy as a result. This demonstrates the need to check policy wordings, and to have mechanisms in place to do so if you are not the party taking out the policy. A co-insured should carefully consider the policy to ensure that it is adequately protected for the activities that it intends to undertake on the project site (e.g. in this case, the wellhead platform should have been included in the buy-back schedule, to take into account Technip would be undertaking works near that property).

CONTACTS

Nicholas Harding
Senior Associate

T +44 207006 2651
E nicholas.harding
@cliffordchance.com

Christopher Ingham
Partner

T +44 207006 4518
E christopher.ingham
@cliffordchance.com

Philip Hill
Partner

T +44 207006 8706
E philip.hill
@cliffordchance.com

Baljit Rai
Director of Insurance Litigation

T +44 207006 8714
E baljit.rai
@cliffordchance.com