



# SHOW ME THE DAMAGE

There is often great debate around the application of policy exclusions (defects and corrosion spring to mind) when interpreting Upstream Energy policy wordings. However, a question which often receives less attention is one which goes to the crux of the question on scope of policy cover – what is the damage?

Reaching a consensus on the answer to this question at an early stage of the claims handling process certainly minimises the risk of disputes later on. The question is twofold: firstly, is there damage of the type covered by the policy trigger? This would usually mean physical loss or physical damage, sometimes required to be ‘sudden and accidental’; and, secondly, what is the extent of the damage?

Looking to English law, and in the absence of Energy Insurance specific case-law, judgments in non-energy cases have produced a pretty clear test for damage: 1) there must be change during the policy period; 2) which is physical in nature; and 3) which adversely affects the value or usefulness of the insured property.

The test is straightforward when summarised in that way and when applied to clear-cut incidents e.g. where a well blowout leads to a platform fire, it is obvious that the platform has been damaged by the fire. The ‘clear’ test becomes more difficult to apply when the damage cannot be seen with the naked eye.

Operating in the offshore sector is inherently dangerous and operators and regulators put in place parameters for operating equipment that include large elements of contingency, for example the extent of fatigue life in the legs of a jack-up rig. If something goes wrong during setup of a jack-up, which is suspected to have had an impact, albeit not visible, on the fatigue life of the legs, the question will arise whether or not this is damage, bearing



in mind the contingency element which will have been included in the design of the legs. Whether a change in fatigue life at a microscopic level constitutes ‘damage’ has not been determined as a matter of English law but case law considering microscopic damage generally (such as *Quorum v Schramm*) has shown how English judges are increasingly willing to consider complex expert evidence on this sort of issue.

A similar sort of question arises with pipeline blockages. Pipeline blockages are not uncommon, such as blockage by hydrates or pigs. In the case of blockage, there is not necessarily any change to the physical properties of the pipeline itself. Whether or not a pipeline blockage, which requires money being spent to return it to an operational state, constitutes “damage” has not yet been tested by the English Courts and the question is likely to hinge on factual questions such as the cause and extent of the blockage. This, in turn, gives rise to another inherent Offshore Energy issue regarding damage; the insured property is not easily accessible and so the relevant damage cannot often be seen in situ.

Ideally the damaged property is recovered to inspect and test it, determine root cause and construct a repair methodology. However, where the relevant property is being completely replaced or where the insured is bringing an unrepaired damage claim, it is unlikely that

the ‘damaged’ property will be recovered for visual inspection and testing, subject to ROD/ROW obligations.

The recoverability of the claim under the policy then comes down to proof, firstly whether the Insured can prove that damage has occurred and, if so, whether there is a consensus on the basis of the evidence available regarding how widespread that damage is likely to have been. Without physical evidence, expert witness input on the balance of probabilities (which is the relevant legal test) becomes crucial. This evidential point is not only relevant to the extent of the damage, it is also relevant to the classic coverage issues such as defect and corrosion mentioned above.

This shows how important it is for Insureds and Insurers to have the right experts involved from the outset of a claim in order to navigate these complicated issues that can have a large impact on the outcome of an upstream insurance claim.



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