THE AMERICAN CLUB

CURRENTS

ISSUE NUMBER 17 NOVEMBER 2003

PROTECTING THE OWNER

"Nothing can be more frustrating, disruptive and costly to a shipowner than having his vessel arrested for debts and liabilities incurred by a defaulting time charterer"

Story on page 3

PROTECTING THE OWNER	Page 3
MARITIME SECURITY	Page 6
BALLAST WATER MANAGEMENT	Page 8
BILLS OF LADING	Page 10
LOSS PREVENTION REVIEW	Page 12
REGULATORY REVIEW	Page 13
THE VIEW FROM PIRAEUS	Page 14

AMERICAN CLUB NEWS

Diary

November 12, 2003	Copenhagen	Hotel D' Angleterre *Reception 18:00 – 21:00*
November 13, 2003	Copenhagen	Hotel D' Angleterre *Finance & Board Meetings*
December 12, 2003	London	Trinity House *London Broker Reception*
January 8, 2004	New York	Office of the Managers *Board Meeting*
March 11, 2004	New York	Office of the Managers *Board Meeting*
June 3, 2004	Athens	Byzantine Estate Posidonia *Reception*
June 24, 2004	New York	*Annual Meeting of the Members*

Board Changes

At the Annual Meeting in New York on June 12, 2003,
the following Director was elected to the Board:

Chih-Chien Hsu Eddie Steamship Company

Earl G. Jackson, Rogelio D. Salinas, Thomas V. Van Dawark retired.

The following Officers were re-elected:

Paul Sa	Standard Shipping Inc.	Chairman
James P. Sweeney	Penn Maritime Inc	Deputy Chairman
Joseph E.M. Hughes	SCB Inc	Secretary

Management Changes

The following appointments have been made to the staff of Shipowners Claims Bureau Inc., the Managers

New York

Dr. William H. Moore	Loss Prevention & Technical Services
Scott Monahan	Accounting
Steven Ogullukian	Accounting
Cheryl Ramdial	Accounting

London

Brian Davies	Claims
Laura Chester	Administration

American Steamship Owners Mutual
Protection & Indemnity Association Inc
Shipowners Claims Bureau Inc., Manager
60 Broad Street, 37th Floor
New York, NY 10004, USA

DEDICATED TO SERVICE

The Club was able to report a successful 2002 at its Annual Meeting in New York in June. It was especially pleasing to be able to do so in light of the difficult trading conditions which had characterized the marine insurance markets over the period.

During that year, the Club made significant progress in a number of areas. There was continued growth in entered tonnage which, by February 20, 2003, had exceeded 17.5 million gross tons – a Club record.

This trend has continued into 2003. Premium volume for the current year – including, of course, the new business acquired by the Club at renewal – is expected to increase by at least the same margin as 2002 showed over 2001 – and probably more. As of September 2003, total projected premium volume for the year was likely to be about $90 million overall.

In loss-cost terms, 2002 was rather better than 2001 – particularly in light of the increase in tonnage which took place over the year. It is too early to predict how 2003 will ultimately develop, but the first six months appear to be performing much as originally expected.

Despite the fact that it is unlikely that trading conditions for the P&I clubs will much improve in the short to medium term – particularly in light of persistent geopolitical uncertainties which will continue to affect the business climate at large – the American Club remains thoroughly optimistic for the future. Among recent initiatives, it is extending its service capabilities on the safety and loss prevention front and will also be adding to human resources over the forthcoming period.

In addition, the Club is set to implement a significant upgrade in its IT capacities over the forthcoming weeks. These will assist in streamlining the manner in which the Club conducts its business and ensuring that it maintains the highest efficiencies for Members in the years to come.

Whatever the years ahead may bring, the Club will remain dedicated to providing the most accessible, effective and transparent elements of service to its Members. As the key to its continuing success, it will remain unrelenting in its application of resource to the achievement of impeccable results under examination as to any component of P&I performance.

PROTECTING THE OWNER

Two recent decisions in the US Court of Appeals have strengthened the shipowner's hand against errant charterers, writes George J. Tsimis, FD&D Manager of the American Club.

1) The "No Liens" Clause

Nothing can be more frustrating, disruptive and costly to a shipowner than having a vessel arrested for debts and liabilities incurred by a defaulting time charterer. Such situations usually result from a trail of creditors – bunker suppliers, ship agents and other necessaries providers – pursuing the vessel for months and even years, for the purpose of securing unpaid invoices issued during the period of the said time charter. When all is said and done, it is the vessel owner – the party that did not contract for or derive the benefit of such services – who ends up paying the charterer's bills, and usually only after the vessel has been arrested and costly legal proceedings have been instituted.

One particular mechanism that is available to vessel owners, as well as disponent owners in back-to-back time charter arrangements, is the inclusion of a clause prohibiting liens in the charter party. However, the simple inclusion of such a 'no liens' clause is not the alpha and the omega in this discussion. Rather, under US maritime law, the vessel owner must also take certain steps to properly enforce such a 'no liens' clause in order to enjoy its protection and to be insulated from the pitfalls that follow when a charterer defaults.

Recently, the US Court of Appeals for the Fifth Circuit, which consists of Texas, Louisiana and Mississippi, endorsed the rights of a vessel owner with respect to a 'no liens' clause vis-à-vis a stevedoring and agency services company. In *Stevens Shipping & Terminal Co. v. M/V JAPAN RAINBOW II*, Civ. Case No. 02-30627, 2003 Lexis 11686 (5th Cir: June 13, 2003), the Court affirmed the vessel owner's ability to avoid a maritime lien asserted by the plaintiff, when the owner provided actual notice of a 'no liens' clause.

In this case, the time charterer, Tokai Shipping Co. contracted with Steven Shipping & Terminal Co. for stevedore and agency services for the *JAPAN RAINBOW II.* The charter party contained a prohibition of liens clause, which provided *inter alia*: "Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the vessel." The manager of the *JAPAN RAINBOW II,* aware of Tokai's financial instability, notified Stevens via telefax of the contractual provision prohibiting the time charterer from incurring liens against the vessel and received a confirmation receipt indicating the telefax was

(continued on next page)

successfully transmitted. Four weeks later, Stevens provided services to the *JAPAN RAINBOW II* in Savannah, Georgia. Tokai failed to compensate Stevens for services rendered and Stevens alleged a maritime lien, arresting the vessel.

The District Court dismissed the *in rem* claims asserted by Stevens on the basis that the vessel owner provided the plaintiff with actual notice of the 'no liens' clause governing the charter party. Stevedoring and husbanding services are necessaries, and under US law, suppliers of necessaries are entitled to assert a maritime lien against a vessel. However, parties with actual notice of a 'no liens' clause are barred from asserting a maritime lien against a vessel for services rendered *Gulf Oil Trading Co. v. M/V CARIBE MAR,* 757 F.2d 743, 749 (5th Cir. 1985). The District Court concluded that the fax confirmation receipt provided sufficient evidence that the owner served actual notice of the 'no liens' clause to the plaintiff, thus shifting the burden to the supplier to produce evidence that the telefax had not been received. In response to this argument, the plaintiff argued that the vessel manager's telefax was not sent to the appropriate department at its office and that the failure to do so by the vessel manager should not constitute proper notice. The District Court appropriately concluded that Stevens had failed to meet its burden and the arrest was therefore set aside.

Stevens appealed this decision and the Fifth Circuit Court affirmed the District Court's ruling that the vessel manager had provided Stevens with actual notice of the 'no liens' clause in the charter party. In concurring with the findings of the lower Court, the Fifth Circuit Court commented that telefax transmissions are a common, industry-wide form of communication and that "the law cannot simply permit a supplier to deny knowledge of a 'no liens' clause when it is delivered in a manner that was both customary and reliable in the shipping business."

It is significant to note that the previous standard in the Fifth Circuit regarding 'no liens' clauses did not require that actual notice be given to the supplier in order for the vessel owner to avoid such a maritime lien. Rather, the previous standard required the supplier of necessaries to conduct a due diligence inquiry into the issue of whether it should have reason to believe that the charterer ordering the bunkers or other services was authorized to bind the vessel under the charter party.

Accordingly, keeping in mind the principle derived from the *JAPAN RAINBOW II,* a vessel owner may avoid the costly and damaging consequences of having its vessel arrested and its operations interrupted due to the assertion of maritime liens against its vessel by creditors of the defaulting time charterer. Owners can avail themselves of this protection by: (1) inserting a clause in the charter party prohibiting the charterer from incurring maritime liens against the vessel; and (2) prior to the rendering of such goods or services, ensuring that the third party supplier is given (and actually receives) notice of the 'no liens' clause. This second element is crucial insofar as courts are reluctant to permit a vessel owner to insulate its liability through a 'no liens' provision, if such a clause was unknown to the supplier prior to its provision of services to the vessel. Members are therefore encouraged to follow this procedure to avoid the burden of costly vessel arrests and litigation to defend such potential liabilities as a result of an insolvent time charterer.

2) Maritime Attachment and Intermediary Banks

One of the most effective weapons in the Member's arsenal for securing claims against non-performing counterparties is the writ of maritime attachment. This procedure is codified under Supplemental Admiralty Rule B to the Federal Rules of Civil Procedure ("Rule B"). It allows a maritime claimant to attach a bank account, bunkers or other assets within a particular jurisdiction, without notice to the defending party to secure that claim, and is most effective in forcing a quick resolution to the pending dispute between the parties.

Recently, the United States Court of Appeals for the Second Circuit, which includes the State of New York where such leading intermediary banks as Bankers Trust, Chase Manhattan Bank and Bank of New York are located, issued a decision which greatly expands the ability of a maritime claimant to attach monies that are the subject of a charter party dispute, maritime debt or lien. In *Winter Storm Shipping Ltd v. TPI,* 310 F.3d 263, 2002 A.M.C. 2705 (2d Cir. November 6, 2003), the Court held that funds transferred by an individual or a company, by means of an electronic funds transfer, may be attached pursuant to Rule B when they are in the hands of an intermediary bank.

In *Winter Storm,* the plaintiff had chartered its vessel to the defendant, TPI, a Thai corporation, for a voyage from Saudi Arabia to the Far East. TPI failed to pay full freight and owed an outstanding amount of US$361,621.58. The vessel owner sought to commence a maritime attachment proceeding in the New York Federal Court to secure its claims, which were subject to London arbitration under the governing charter party. The vessel owner obtained an *ex parte* order of attachment on June 22nd and the writ of attachment was served on Bank of New York on June 28th and June 29th. Although Bank of New York did not hold any funds belonging to TPI, it placed a 'stop order' on any funds connected with TPI passing through the Bank. Subsequent to that order, TPI's bank in Thailand remitted

funds in excess of US$1,000,000, as payment of freight in connection with another unrelated fixture. These funds were earmarked for another vessel owner's account maintained at Royal Bank of Scotland in London and were transferred via Bank of New York in New York, acting as intermediary.

TPI moved the District Court to vacate the attachment held by Bank of New York in the suspense account. The District Court granted TPI's motion and held that an electronic funds transfer intercepted at an intermediary bank was not "property" that could be attached under Rule B. The District Court reasoned that neither Rule B nor Federal Court cases applying that rule defined "property" in this context and, consequently, the District Court looked to New York State law on the issue of whether funds in the possession of an intermediary bank could be the subject of an attachment or similar injunction. It ruled that New York law included a statute, N.Y. U.C.C. §4-A-503, which specifically insulated banks acting as intermediaries in a funds transfer from judicial restraint. The vessel owner appealed the decision to the Second Circuit.

After rejecting TPI's constitutional arguments, the Second Circuit turned its attention to the issue of whether the funds at Bank of New York constituted attachable property under Rule B and whether the district court properly invoked State law in its analysis of this issue. The Second Circuit concluded that New York State law should not have been consulted on this point because Federal law indeed provided clear direction on the scope of attachable property. Rule B(1) provides that a maritime plaintiff may "attach the defendant's tangible and intangible personal property." This broad language allows the plaintiff to attach tangible items such as cash or stocks, and intangible items such as debts owed to the defendant, even if such debt has not yet matured or only partially matured. In addition, a recent Federal court case allowed the seizure of funds at an intermediary bank account in connection with a civil forfeiture action brought by the government under Federal drug laws. The Second Circuit therefore concluded that the funds at Bank of New York were subject to a Rule B attachment and that the lower Court's application of State law was erroneous.

On appeal, the Second Circuit reversed the District Court's ruling and held that the attachment was appropriate. In reaching this decision, the Second Circuit reviewed the history of maritime attachment and its use for hundreds of years as a procedure for providing a means to assure satisfaction if a suit was successful and to ensure a defendant's appearance in an action – "an aspect of attachment inextricably linked to a plaintiff's substantive right to recover." The Second Circuit then held that Rule B and Supplemental Rule E (which provides the defendant with the right to challenge an order of attachment) contain sufficient due process safeguards to satisfy US Constitutional requirements. It held further that when an individual or company transfers funds by means of an electronic funds transfer, those funds may be subjected to a Rule B maritime attachment in the hands of an intermediary bank without violating constitutional due process, whether or not the initiator knew which intermediary bank would be used to effect it.

The *Winter Storm* ruling has great significance. Nearly every transfer of funds to the United States, as well as electronic funds transfers outside the United States involving US-based parties, utilizes intermediary banks in New York City. Now, in the aftermath of the *Winter Storm* case, a maritime claimant seeking to secure a claim for unpaid freight, hire or demurrage pursuant to an arbitration award or court action against an overseas company, has a viable alternative to searching the globe for its defaulting counterparty's assets. Instead, the plaintiff now has the option of attaching electronically transmitted funds while they are in the custody of the intermediary bank. While the timing of the assertion of such a Rule B proceeding against the intermediary bank may be difficult, the ruling in *Winter Storm* increases considerably the options of a maritime claimant in securing unpaid debts in the future.

MARITIME SECURITY

The US Coast Guard Tightens Its Grip

On July 1, 2003, the US Coast Guard introduced a further range of security measures applicable to various categories of US flag and foreign flag vessels calling at US ports, as part of its ongoing program of maritime security initiatives. These new interim regulations also make specific reference to tugs, barges and towage facilities and thus affect the huge volume of traffic which plies America's inland waterways.

The new interim regulations broadly combine the security requirements contained in the SOLAS amendments and the International Ship and Port Facility ('ISPS') Code with existing US domestic policy. They require specific categories of vessel owners or operators to designate security officers for vessels, to perform security assessments, develop security plans and implement security measures and procedures, in order to reduce the risk - and mitigate the consequences of - an act which might threaten the security of the crew, the vessel, the port facility or the general public.

They are published as part of a new sub-chapter of the Maritime Transportation Security Act 2002 (MTSA) and comprise:

1) **National Maritime Security Initiatives**
2) **Area Maritime Security**
3) **Vessel Security**
4) **Facility Security**
5) **Offshore Continental Shelf Facility Security**
6) **Automated Identification Systems**

The main features relevant to American Club Members are described below:

US Flag Vessels

The operators of US flag vessels are required to conduct security assessments and develop Vessel Security Plans (VSPs) for submission to the US Coast Guard by December 29, 2003. Each vessel must operate in accordance with, and pursuant to, its VSP by June 30, 2004, and it must carry onboard the approved VSP and the US Coast Guard's letter approving such VSP. The US Coast Guard will issue International Ship Security Certificates (ISSCs) for US flag vessels trading internationally.

Tugs and Barges

The rules make specific reference to tugs, barges and facilities for such vessels. The responsibility for barge security lies not only with the barge owner or operator, but also with the towing vessel, fleeting facility and facility where the barge is moored. Accordingly, security plans for vessels and facilities that interface with unmanned vessels (i.e. barges) must include additional provisions to address the risk of the unmanned vessels that they will receive or handle. The security plans need to include procedures for interfacing with these other vessels and facilities, including how to transfer custody of the barge to the next facility or towing vessel.

Company Security Officer/Vessel Security Officer

Each vessel owner or operator must appoint a Company Security Officer (CSO) for their fleet of vessels or for each individual vessel that is owned or operated by that company. The CSO must have general knowledge of issues such as company security organization, relevant international laws, domestic regulations, current security threats and patterns, also in conducting audits, inspections and control procedures.

A Vessel Security Officer (VSO) is also required to implement the VSP, to ensure that the vessel's crew is adequately trained in regard to vessel security and to periodically audit and update the Vessel's Security Assessment and Vessel Security Plan.

The Vessel Security Plan

Each vessel owner or operator must develop an effective Vessel Security Plan (VSP) that incorporates detailed preparedness, prevention and response activities for each maritime security level. These maritime security levels include:

(1) security measures for access control
(2) security measures for restricted areas
(3) security measures for handling cargo
(4) security measures for delivery of stores and bunkers
(5) security measures for monitoring

The VSP is prepared in response to the Vessel Security Assessment that is performed by the vessel operator/owner. The Vessel Security Assessment identifies and evaluates in writing existing security measures, key vessel operations, the likelihood of possible threats to key vessel operations, and weaknesses. One VSP may apply to more than one vessel to the extent that those vessels share physical characteristics and operations. The VSP is a document that must be written in English and, if it is not, a vessel's entry into a US port may be delayed until the document is translated. The VSP is thereafter submitted to the US Coast Guard Marine Safety Center for its review and approval.

Foreign Flag Vessels

Foreign flag vessels calling at US ports will be expected to carry a valid International Ship Security Certificate (ISSC) and have their security plans fully implemented. The relevant provisions of the ISPS Code, part B, will be taken into account by Port State Control Officers to assess if the VSP is fully implemented, as required by the interim rules. The flag administration may also choose to provide a document or endorsement to the ISSC to verify that the VSP is based upon full compliance with the relevant provisions of the ISPS Code, part B, to assist the US Coast Guard Port State Control Officers.

Foreign flag vessels required to comply with SOLAS are not required to submit their VSPs to the US Coast Guard for approval. Pursuant to SOLAS and the ISPS Code, these plans must be approved by the flag administration or Recognized Security Organization (RSO). Approval can only be granted by the flag administration or RSO after verification that the VSP meets the requirements of SOLAS and the ISPS Code, part A, taking into account the ISPS Code, part B. The US Coast Guard will closely scrutinize a flag administration's designation of RSOs to ensure that those organizations fully meet the competencies and requirements of the ISPS Code. Vessels with ISSCs issued by RSOs that are not properly designated or do not meet the requisite qualifications, will be subject to strict control measures, including possible expulsion from port or denial of entry into US ports.

There are certain cases, however, where foreign vessels will be required to submit their VSPs to the US Coast Guard for approval. Generally, these vessels fall into three categories:

1) a commercial vessel meeting the applicability standards of these regulations from a nation that is not a signatory to SOLAS.
2) Canadian commercial vessels operating solely on the Great Lakes that are (a) greater than 100 gross register tons or (b) carry more than 12 passengers.
3) other foreign commercial vessels meeting the applicability standards of this part but below 500 gross tonnage (ITC) and above 100 gross register tons.

Notice of Arrival Requirements

The US Coast Guard's interim rule has modified the Notice of Arrival regulation insofar it requires vessels to make an advance submission of additional security-related information prior to a vessel's entry into a US port. Most of this information will be required only after the new SOLAS amendments and the ISPS Code take effect in July 2004. However, after January 1, 2004, if a foreign vessel already possesses an ISSC and an approved VSP, the US Coast Guard will require it to provide some basic information about the ISSC and declare if it is implementing the VSP.

Commentary

The starting point for the American Club's US flag Membership is to designate qualified personnel to act as CSOs and VSOs, to select appropriately qualified providers of maritime security services to assist them in conducting Ship Security Assessments, to develop VSPs, and implement them accordingly to ensure full compliance when inspected by Port State Control. For foreign flag Members, the key will be to make sure that they are fully compliant with the ISPS Code and that they understand the potential for US Coast Guard involvement if it becomes clear that the flag administration is too lenient with regard to its compliance with ISPS Code and/or RSO requirements.

(continued on next page)

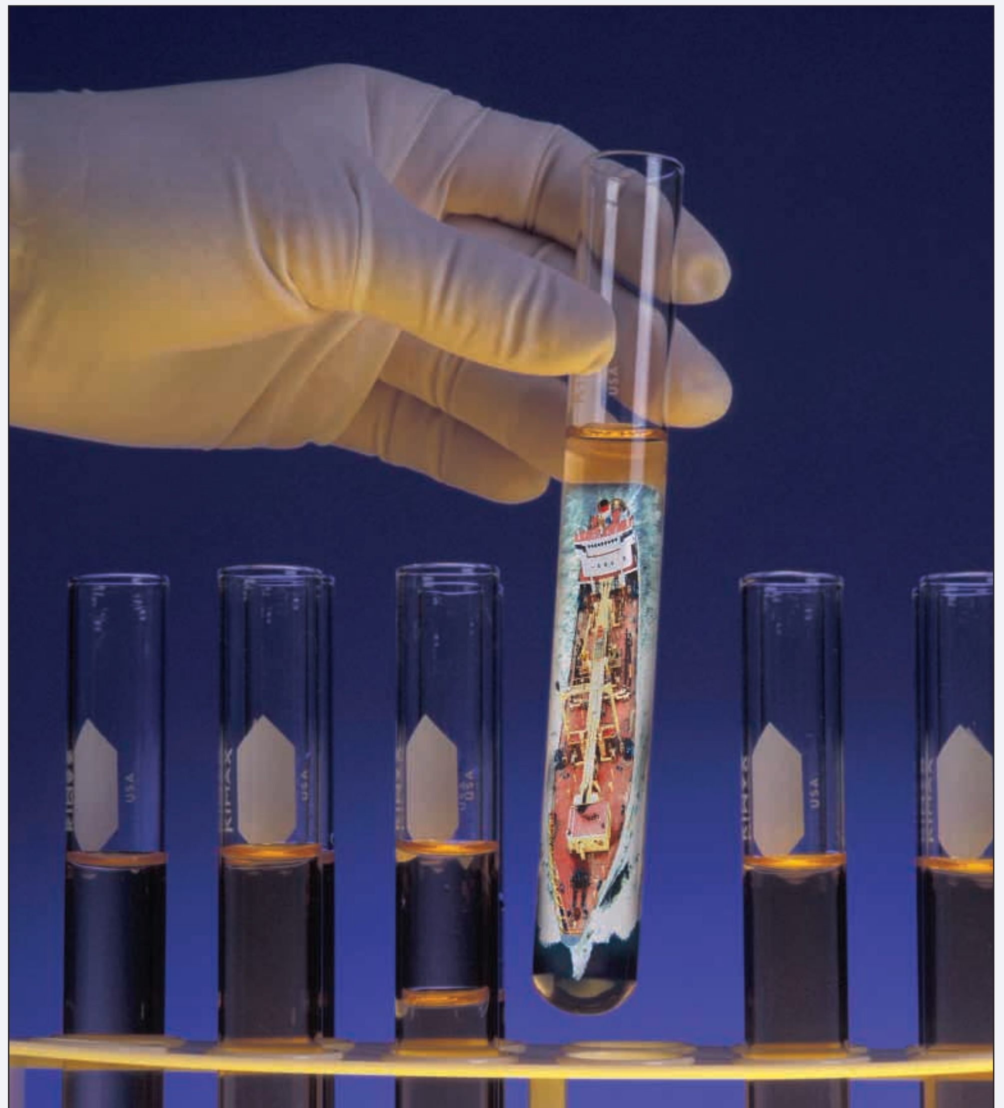
It should be noted that the US Coast Guard has received numerous comments regarding these interim regulations and it is possible that they will differ from the final regulations to be issued in November, 2003. In particular, some Members of the US House of Representatives have objected to the approval of foreign flag vessels' VSPs being delegated to their respective flag administrations or RSOs without the involvement of the US Coast Guard. However, the US Coast Guard is reported to be reluctant to adopt this approach, preferring instead to rely on a proactive stance by port authorities, who will impose stringent standards during vessel inspections. Accordingly, Members should expect to encounter a vigorous response from Port State Control when its vessels call at US ports and are asked to comply fully with these new security measures.

This is an abridged version of the American Club's Circular No. 13/03 'United States Maritime Security Initiatives' issued to Members on August 6, 2003

BALLAST WATER MANAGEMENT

Shipping's next major regulatory push

"Ballast water management will be the next major regulatory change after the ISPS Code and will have a large effect on vessel design and operations" writes Dr. William Moore, Vice President of Loss Prevention and Technical Services for the American Club.



The carriage of harmful organisms in ballast water is both of domestic and international concern. In the United States, to comply with the National Invasive Species Act of 1996, the US Coast Guard has established regulations and guidelines to control the invasion of aquatic nuisance species. These new rules amend existing regulations for the Great Lakes ecosystem and establish voluntary ballast water management guidelines for all other US waters. They provide for mandatory reporting and sampling procedures for nearly all categories of vessels entering US waters via a self-policing programme.

This ballast water management program is initially voluntary for a period of 24-30 months, outside of the Great Lakes ecosystem where it is mandatory. It is contingent upon vessel operators submitting ballast reports and an adequate rate of compliance.

If reports are not forthcoming from the industry, the US Coast Guard has the option of making the voluntary guidelines mandatory and imposing civil and criminal penalties for non-compliance. In making the transition to a mandatory national ballast water management, the US Coast Guard anticipates a Notice of Proposed Rulemaking being ready for government review by late 2003, with a Final Rule coming into force in mid-2004.

At the IMO (International Maritime Organization), the impact of harmful aquatic organisms in ballast water was first raised in 1988 and has been a key issue on the agenda of the Marine Environmental Protection Committee (MEPC) since 1994. Guidelines for preventing the introduction of harmful aquatic organisms in ballast water and sediment discharges were developed in the 1990s. It was agreed in 2002 that the IMO should accelerate its efforts towards establishing a Convention on ballast water management and a diplomatic conference is to be held in February 2004 in order to finalize ballast water management standards.

The current philosophy regarding the drafting of the Convention focuses on the development of:

- standards for ballast water exchange and ballast water treatment
- a two-tiered approach where Tier 1 would require vessels to meet certain basic requirements at all times world-wide and Tier 2 would contain additional measures for especially designated ballast water control areas, as designated by the contracting parties to the Convention

Ballast water exchange and ballast water treatment

It has been generally agreed that ballast water exchanges at sea should only be regarded as an interim solution and that the long-term aim should be to produce alternative safer and more effective ballast water treatment options, due to their greater efficacy in removing harmful aquatic organisms and pathogens. Ballast water exchange is the only management option currently available. For ballast water treatment, there are varying views with regard to what would constitute “acceptable ballast water” and which criteria should be applied. In addition, there is general agreement that any standard for ballast water exchange should be separate from the performance standards for ballast water treatment.

Two tier approach

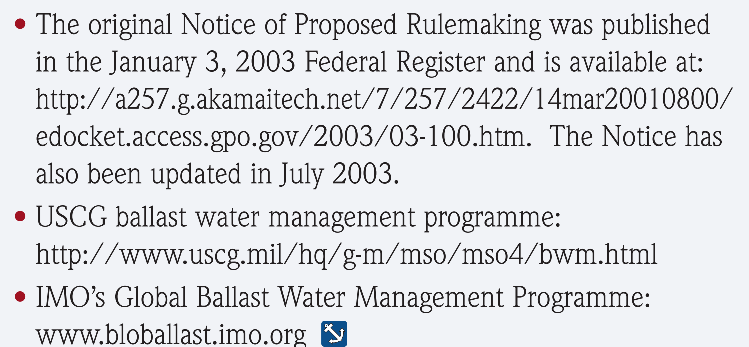
There are also differing views on the issue of the development of a two tier standard for the control of ballast water. Some delegations expressed the view that a robust Tier 1 standard would avoid the need for additional measures in the pre-defined areas. Depending upon the choice of standards, there may be a need for a single global standard, or series of standards.

Circular on design suggestions for ballast water and sediment management options in new ships

In light of the development of the upcoming Convention on ballast water management, the Maritime Safety Committee and MEPC have issued a joint circular providing advice and information, and making the shipbuilding community aware of future ballast water issues. The circular addresses ballast water management equipment, sampling, safety issues for ballast water exchange at sea, treatment systems, alternative water supplies, shore-based and mobile treatment facilities, and design considerations to enhance the management, control and operations of ballast water. This circular can be obtained via the IMO website at www.imo.org.

For more information

The following websites can be accessed for more information on USCG and IMO initiatives on ballast water management:



- The original Notice of Proposed Rulemaking was published in the January 3, 2003 Federal Register and is available at: http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/03-100.htm. The Notice has also been updated in July 2003.
- USCG ballast water management programme: http://www.uscg.mil/hq/g-m/mso/mso4/bwm.html
- IMO’s Global Ballast Water Management Programme: www.globallast.imo.org

BILLS OF LADING

Placing Commonsense above Principle

A recent decision of the House of Lords has important implications for liner operators, writes Michael Moon of London maritime lawyers Shaw & Croft.

As the demands of their customers require, shipping companies in the liner and container trades frequently charter in vessels to supplement the service offered by their own vessels. In order to ensure minimum inconvenience to their shippers such vessels are invariably chartered on terms which authorize the charterers to issue bills of lading on their own forms. But if the cargo is lost or damaged, who, as between the owners and charterers, is liable to the cargo interests? When carrying cargo on their own vessels, shipping companies had become accustomed to incorporating into the terms and conditions of their bills of lading Identity of Carrier or Demise Clauses (an "IOC Clause") identifying that the contract of carriage evidenced by the bill of lading was with the owner of the vessel and stipulating that only that owner would be liable for any loss or damage to the cargo. Not infrequently these clauses would be positioned in the midst of the small-print containing the Carrier's terms and conditions on the reverse side of the bill.

Such clauses achieved certainty. But for the regular liner operator issuing his own bills of lading on a chartered vessel they had the undesirable consequence, when cargo was lost or damaged, of obliging him either to refer his regular shipping customers to the shipowner, who could be expected to defend the claim vigorously in the absence of any commercial relationship, or otherwise to reimburse the claim himself in order to preserve the customer relationship, a gesture which was very likely to deprive him of any recovery from his insurers on the grounds that he had no legal liability.

When issuing bills of lading under the owner's authority on chartered ships, therefore, such charterers sought to identify themselves more and more closely with their bills of lading by ensuring that these included their logos and in some instances expressly identified themselves as the carrier and the party therefore liable in law in the event of cargo loss or damage.

The IOC clause was, however, to prove remarkably resilient. While charterers in the liner trades enthusiastically embraced the idea of issuing bills of lading bearing their own logos, they were much more reluctant to depart from the standard terms and conditions on the reverse side of their bills of lading.

These not invariably included an IOC clause, even though these terms were clearly more appropriate to their business requirements when issued as bills of lading on their own vessels. The seeds for confusion were sown and over the last thirty years or more courts all over the world have been required to exercise their minds in determining whether under the particular bill of lading the owner or the charterer of the vessel was to be considered the carrier of the cargo.

Jurisdictions differed in their approach, one from another. The distinguished Canadian jurist on bills of lading, Professor William Tetley, had long harangued the English legal establishment for the elevated status it gave to IOC clauses, in a series of cases dating back to 1974, which had consistently decided that the owner was the Carrier and therefore liable for damage to the cargo. Courts in the USA achieved their own consistency, by refusing to give effect to the clause. In France the clause was apparently without effect and was even, said Professor Tetley, treated with contempt (!).

Only in 2001, when the English Court of Appeal reversed, by a majority, a decision of Mr. Justice Colman in the High Court in order to give effect to, yet again, an IOC clause in favour of other competing considerations and leave was given for an appeal to the House of Lords, did the English maritime fraternity become aware that a sea change in the law might be in the offing.

The *"STARSIN"* had sailed from the Far East for ports in Western Europe in December 1995. Amongst other cargoes she carried a number of parcels of timber and plywood, the condition of which deteriorated during the voyage because they had been negligently stowed. The vessel was on time charter to Continental Pacific Shipping ("CPS"), which at the time operated a liner service between the Far East and Western Europe, but which was later to go insolvent. The appeal, as was usual in cases of this kind, was concerned with whether the shipowner was liable under the bill of lading contract.

The face of the bill of lading contained the usual boxes into which the identity of the shippers, the cargo description and the signature had been inserted. Beyond that, however, much more prominent than any other entry on the face of the bill, was the logo and the printed words "Continental Pacific Shipping". In the bottom right-hand corner of the bill was a box with the printed heading "signature". In that box there was typed "As Agent for Continental Pacific Shipping (The Carrier)". Below these words was a rubber stamp containing the name of the company which acted as port agent for CPS at the port of loading. Across the box were what appeared to be two manuscript signatures. On the reverse side of the bill of lading the Carrier was defined as the party on whose behalf the bill of lading had been signed. On its face, therefore, the bills of lading clearly identified the Carrier as CPS, the charterer.

Arrayed against the weight of this evidence, the provisions seeking to identify the shipowner as the Carrier on the reverse side were formidable. Tucked away at Clause 33 on the reverse side of the bill of lading was an IOC clause providing:

"The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein ... and it is therefore agreed that said Shipowner only shall be liable for

any damage or loss due to any breach ... of any obligation arising out of the contract of carriage ...”

At Clause 35 there also appeared a Demise Clause reading:

“If the ocean vessel is not owned by ... the Company or Line by whom this Bill of Lading is issued ... this Bill of Lading shall take effect only as a contract of carriage with the Owners ...”

The outcome of the House of Lords’ deliberations in *Homburg Houtimport B.V. v. Agrosin Private Ltd and Others (‘The STARSIN’)* [2003] 1 Lloyd’s Rep. 570 was an overwhelming defeat for the primacy of the IOC Clause. The five Law Lords unanimously overturned the majority judgment of the Court of Appeal and upheld the decision of Mr. Justice Colman at first instance and the dissenting judgement of Lord Justice Rix in the Court of Appeal. Delivering judgment for the House, Lord Bingham of Cornhill emphasized that a business sense must be given to business documents. It was common sense that greater weight should attach to terms which the particular contracting parties had chosen to include in the contract than to pre-printed terms probably devised to cover very many situations to which the particular contracting parties had never addressed their minds.

He added that whereas the Court must construe the whole contract in its factual context, and cannot ignore the terms of the contract, it must seek to give effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen.

The Court said it could well understand that a shipper or transferee of a bill of lading would recognize the need to consult the detailed conditions of the reverse of the bill in any one of numerous contingencies which might arise. He would appreciate that the rights and obligations of the parties under the contract were regulated by those detailed conditions. However, the Court had great difficulty in accepting that a shipper would expect to have to resort to the detailed conditions on the reverse side of the bill, and to persevere in trying to read the conditions until reaching conditions 33 and 35, in order to discover the identify of his counterparty and that it would have even greater difficulty in accepting that he would expect to do so when the bill of lading contained on its face an apparently clear and unambiguous statement as to the identity of the Carrier.

Clearly, the ability of the IOC Clause in English law to override competing clauses, identifying someone other than the owner as the Carrier, has been severely curtailed. In future it would seem safe to proceed against any party expressly identified on the face of the bill of lading as the Carrier, notwithstanding the presence of an IOC Clause in the terms and conditions on the reverse side of the document. This has important implications when ensuring that proceedings are commenced against the correct party within the one-year COGSA time bar provision. However, many bills of lading continue to this day to fudge the identity of the Carrier and in those cases there seems no reason why the IOC and demise clauses should not continue to assert their influence on the question.

It only remains to remark that, for another entirely separate reason, the *“STARSIN”* is unlikely to be the end of the matter. In its judgement, an intriguing and novel argument that owners and charterers should be jointly and severally liable under the *“STARSIN”* bill of lading was apparently only dismissed by the House of Lords because it was not argued in the lower Court !

This article is a summary of a paper presented by Michael Moon in London on April 3, 2003

LOSS PREVENTION REVIEW

Carriage of Bagged Rice

The continuing incidence of contamination claims in respect of bagged rice cargoes has prompted the Association to remind Members involved in this trade of the importance of proper ventilation procedures. Damage to bagged rice from condensation occurs when the dewpoint of the outside air falls below the dewpoint of the air inside the vessel's holds. To ensure proper air circulation, bags should be stowed leaving ventilation channels of 5-6 inches at horizontal intervals of about 20 bags, with individual bags blocking the channels at intervals of 5-6 tiers to ensure vertical strength and stability. Dunnage should be used to prevent bags coming into contact with the sides of the holds, tank tops and bulkheads. To avoid condensation, the hatchcovers should be opened for a few hours to allow a thorough ventilation of the holds, weather and sea conditions permitting. Once the dewpoint of the air inside the vessel's holds has risen above the dewpoint of the external air, ventilation should be stopped.

AWO Safe Working Program

The American Waterways Operators Interregion Safety Committee has introduced a new program to promote safe working practices in darkness, targeted at the towing industry. Guidelines include the effective use of lights and VHF radios, advice on line and rigging hazards, also useful hints for improving crew communication and onboard movement at night. Copies may be obtained directly from the AWO or through the Association.

Casualty Reports

Lloyd's Underwriters Marine Intelligence Unit has reported an encouraging trend in casualty statistics measured over the last decade. From 1991-2001 there was a sustained decline in the number of ships over 500 gross tons lost each year, from over 180 in 1991 to less than 80 in 2001. During the same period, the total aggregate of gross tonnage lost each year declined from 1.75 million GT to less than 0.75 million GT. Intercargo has reported the loss of 108 bulk carriers over 10,000 dwt and 592 lives during 1993-2002, with five bulk carriers and four lives lost in 2002.

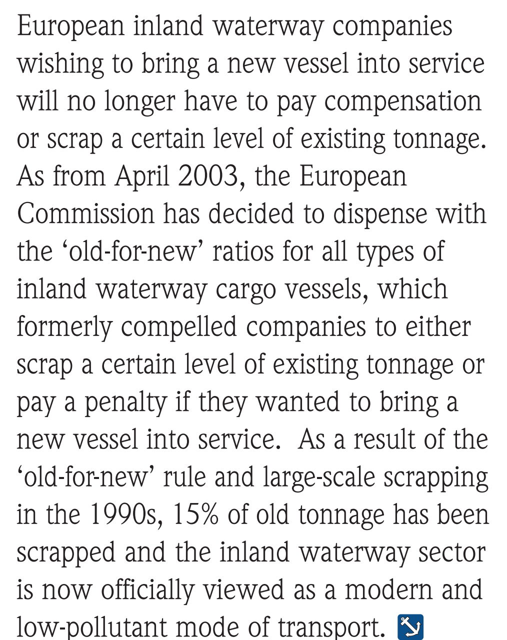
US Oil Pollution Study

In a recently published study, the US Environmental Protection Agency noted that the main source of oil pollution in US waters is shore-based and that US households improperly dispose of the equivalent of 17 *Exxon Valdez* oil spills each year. Approximately 29 million gallons of petroleum are spilled into coastal waters annually, of which more than 26 million gallons come from urban run-off, polluted rivers, fuel dumped by commercial airplanes and emissions from small watercraft. By comparison, only 2.7 million gallons are traceable to oil tankers, oil pipelines and other shipping.

Bulk Carrier Inspection Program

The Tokyo MoU Secretariat has mounted an inspection campaign on the structural safety of bulk carriers during September 1 – November 30, 2003. The campaign is being conducted by all Member States of the Tokyo MoU and is aimed at bulk carriers of more than 15,000 GT and over 12 years old. The inspections will be carried out in conjunction with routine Port State Control inspections and will focus on vessels carrying high density or corrosive cargoes. There will be a standard checklist of areas/items to be inspected, including the forepeak, upper wing ballast tanks and cargo hold spaces.

REGULATORY REVIEW



Accelerated Phase-out of Single-Hull Tankers

As from October 21, 2003, single-hull tankers built in 1980 or earlier and carrying heavy grades of oil are not allowed to call at European ports or fly a European Union country flag. In December 2003, an extra session of the IMO Marine Environmental Protection Committee (MEPC) will be convened to consider further plans for accelerating the phase-out of single-hull tankers and extended application of the Condition Assessment Scheme (CAS) for tankers. The main proposals are:

– Category 1 tankers (pre-MARPOL tankers) to be phased out by 2005, not 2007.

– Category 2 and 3 tankers (MARPOL tankers and smaller tankers) to be phased out by 2010, not 2015. Tankers of less than 20 years old in 2010 may be allowed to extend their operational life until 2015 or until the ship reaches a specified age (e.g. 20, 23 or 25 years), subject to satisfactory results from the Condition Assessment Scheme (CAS).

– The CAS to be applied to single-hull tankers of 15 years, or older, as against being applicable to all Category 1 vessels continuing to trade after 2005 and all Category 2 vessels after 2010.

– As a consequence of the above, the CAS scheme to be enhanced and to made applicable in the future, if required, to double-hull tankers or tankers carrying heated cargoes.

– Further technical discussion of proposed draft regulations on the carriage of Heavy Grades of Oil (HGO) in single-hull tankers, which would ban the carriage of HGO in single-hull tankers, and consideration of possible exemptions for tankers carrying HGO in domestic trades.

Ratification of Annex IV to MARPOL 73/78

Thirty years after it was adopted, Annex IV to MARPOL 73/78, Regulations for the Prevention of Pollution by Sewage from Ships, finally became law on September 27, 2003. This followed the recent ratification by Norway, thus ensuring compliance by Member States representing more than 50 per cent of the world's tonnage.

Annex IV to MARPOL 73/78 addresses application, survey, certification, discharge limitations, reception facilities and standard discharge connection requirements. In general, discharge of comminuted and disinfected sewage will be permitted 4 nautical miles or more offshore. Sewage that has not been comminuted or disinfected must be discharged 12 miles or more offshore.

It has been estimated that an average bulk carrier discharges approximately 300 litres of sewage daily, while a large cruise liner may discharge up to 100,000 litres. The legislation applies to new ships of over 400 GT or less than 400 GT if certified to carry more than 15 persons. For existing ships within these limits, it will apply five years after the date the Annex comes into force, namely, in September 2008.

Aegean Sovereignty Dispute

Continuing sovereignty claims by Turkey over certain islands in the Aegean Sea occupied by Greece have prompted Congressman Robert E. Andrews of New Jersey to introduce a Resolution which states that:

'the water boundaries established in the 1923 Lausanne Treaty of Peace, the 1932 Convention and Protocol between Italy and Turkey and the 1947 Paris Treaty of Peace, under which the Dodecanese Islands and adjacent islets were ceded by Italy to Greece, are the borders between Greece and Turkey in the Aegean Sea; and any party, including Turkey, objecting to these established boundaries should seek redress in the International Court of Justice at The Hague.'

The Resolution expresses the view of the House of Representatives that the boundaries between Greece and Turkey in the Aegean have been established once and for all and islands and islets on the Greek side, including the islets of Imia, are the sovereign territory of Greece.

European Inland Waterways

European inland waterway companies wishing to bring a new vessel into service will no longer have to pay compensation or scrap a certain level of existing tonnage. As from April 2003, the European Commission has decided to dispense with the 'old-for-new' ratios for all types of inland waterway cargo vessels, which formerly compelled companies to either scrap a certain level of existing tonnage or pay a penalty if they wanted to bring a new vessel into service. As a result of the 'old-for-new' rule and large-scale scrapping in the 1990s, 15% of old tonnage has been scrapped and the inland waterway sector is now officially viewed as a modern and low-pollutant mode of transport.

PIRAEUS

Pig fat washed down with vodka is one of the more unlikely treats in store for a busy P&I correspondent based at the heart of international shipping, according to Shipserve (International) Inc, the American Club's correspondents in Piraeus.

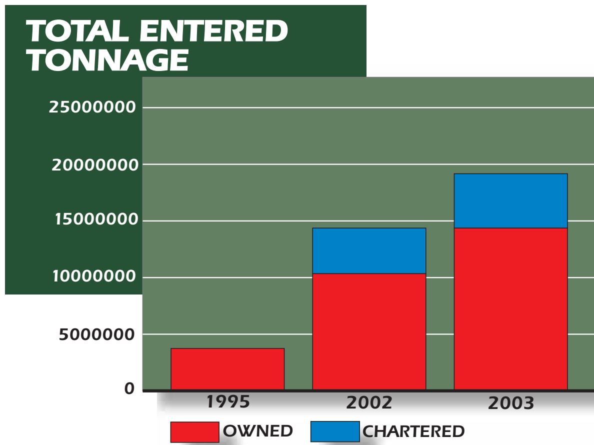
The life of a P&I correspondent in Piraeus, arguably the leading global shipping forum today, is never dull. At any time, his expert intervention may be required in a whole range of P&I and FD&D matters - crew death or injury, stowaway repatriation, cargo loss or damage, pollution, collision, fire, charterparty or bill of lading disputes, general average, salvage… and not only in Greece. The country's location at the hub of Europe, Asia and Africa also facilitates his attendance abroad on behalf of Members, in countries as diverse as Egypt, Syria, Russia, the Ukraine and Bangladesh.

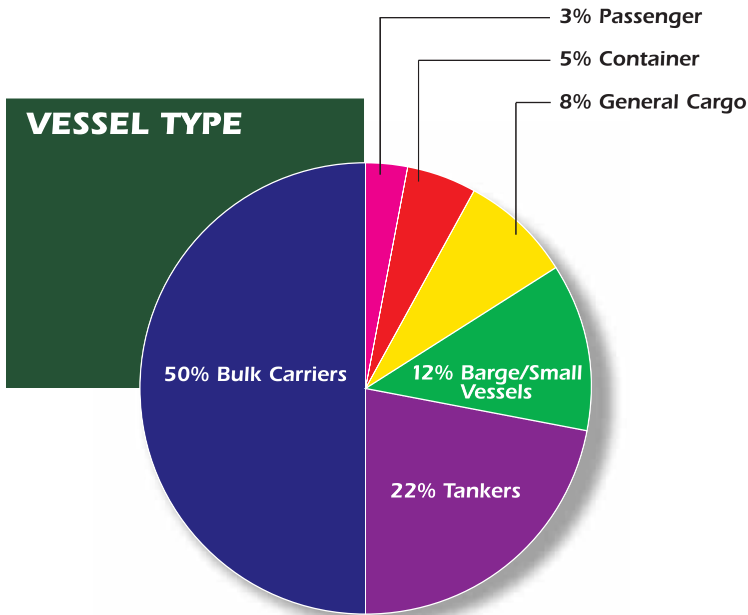
Shipserve (International) Inc has more knowledge than most of the Greek market. Expatriate Englishman Peter Jones, Shipserve's founder and current Chairman of the European P&I Correspondents network EPIC, together with his colleagues James Greene and Carlos Castaneda, can offer around 75 years of combined experience in Greece. They like to think they are the eyes and ears of their principals and, indeed, are occasionally perceived by some Members as well as by Ministry and Port officials, to be an extension of the Club itself. Flattering as this may be, Shipserve believes it does go some way in demonstrating the value of a local presence and local knowledge in equipping the Club to provide a first class service to its Greek membership. Its wide-ranging contacts with persons and organizations within Greece enable the firm to circumvent awkward and difficult situations that might otherwise obtain under given circumstances, avoiding, for example, the arrest of a ship pending the provision of security. This has proved particularly helpful in the repatriation of stowaways, an area in which Shipserve has developed considerable expertise.

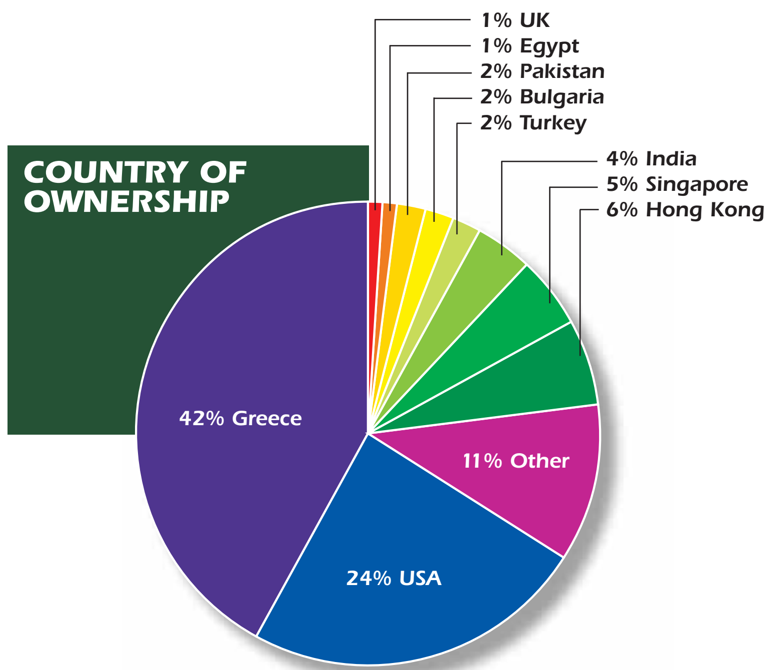
And the working day does bring its compensations. Playing with baby turtles on a beautiful sandy beach, all the while negotiating a cargo claim with Plaintiff's Counsel, remains the fond memory of one correspondent. Another recalls

with less enthusiasm the time when, in a case of mistaken identity, he was held at gunpoint in the office of an overseas Public Prosecutor facing arraignment, with the prospect of seven years in jail, while the real culprit, the Master, slipped away. As for eating copious mouthfuls of pure pig fat washed down with even more copious quantities of neat vodka - this was all in the line of duty. The discussions that followed, Shipserve reports with justifiable pride, resulted in a more than satisfactory settlement on behalf of the Member concerned!

AMERICAN CLUB FLEET 2003







The American Steamship Owners Mutual Protection & Indemnity Association, Inc.

Shipowners Claims Bureau Inc, Manager

60 Broad Street, 37th Floor
New York, NY 10004 USA
Tel: +1 212 847 4500
Fax: +1 212 847 4599
Email: info@american-club.net

3rd Floor, Latham House
16 Minories
London EC3N 1AX UK
Tel: +44 20 7709 1390
Fax: +44 20 7709 1399

Pacific Marine Associates Inc
200 Webster Street, Suite 200
Oakland, CA 94607 USA
Tel: +1 510 891 9011
Fax: +1 510 891 0275

Website: www.american-club.com