CURRENTS

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International Memorial To Seafarers (cover) is a 7 meter high, 10 tonne bronze representation of the bow of a cargo ship with a lone seafarer on the deck overlooking the Thames River at the headquarters of the International Maritime Organization in London. The sculpture was unveiled in September 2001. It serves as a memorial to all seafarers who have been lost at sea and as a reminder of the pivotal role seafaring plays in world trade and development where more than 80 percent of global trade moves by sea.

American Merchant Mariners' Memorial *(on the left and page 27)*
Commissioned by the American Merchant Mariners' Memorial, Inc., this memorial was unveiled in 1998. Situated off-shore from the north end of Battery Park and just south of Pier A in New York City, the monument stands on a rebuilt stone breakwater in the harbor. The bronze figural group and boat are based on an actual historical event; during World War II, a Nazi U-boat attacked a merchant marine vessel, and while the marines clung to their sinking vessel, the Germans photographed their victims.

CURRENTS is edited by:
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designed by:
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THE AMERICAN CLUB 1917

INTRODUCTION

by: Joseph E.M. Hughes
Chairman & CEO
Shipowners Claims Bureau, Inc.

What a difference a year makes! Over recent weeks this now rather hackneyed expression has found ubiquitous use as an introduction to commentary on the present state of the investment markets by comparison with their condition twelve months ago.

And what a difference indeed! At the time of writing the Dow has just nudged over the ten thousand mark and the legendary bonus pot at Goldman Sachs is projected to be as capacious as ever, brimming over, it is said, with zillions of dollars most recently produced by some serious outperformance in bond trading. Oh to be a banker!

P&I club-manager-envy aside – it's a deadly sin, after all – there are positives to report at the American Club as we enter the early stages of the forthcoming renewal. And what a difference a year makes in our affairs as well!

While none of us connected to the shipping industry at large can be anything other than deeply concerned at the continuing weakness of world trade, there are some bright spots nonetheless on the P&I horizon.

The global slump of late 2008, engendered by the sudden paralysis of global credit and the attendant collapse of industrial production, consumer demand and financial asset values, was the closest thing to a depression the world had seen in seventy years.

Like everyone else, the P&I clubs were affected by it. In the case of the American Club, though, there was some comfort, admittedly cold, in the fact that its investment portfolio at year-end had declined overall by only 8.5%, assisted by a comparatively robust municipal bond market over the period and the strengthening of the US dollar as a currency of refuge as the crisis deepened.

Twelve months on, the Club's investment performance has substantially improved as growing confidence has spurred a strong rally in global stocks. At the end of September, the year-to-date negative 8.5% of 2008 has become a positive of more than 10%, lending momentum to growth in the Club's free reserves which reached an all-time peak in excess of $48 million at June 30, 2009. It is hoped that the surplus at the end of the third quarter will have risen yet further, buoyed by further investment earnings and moderating claims costs.

So, as we move into the renewal season with all its excitements, excursions and alarms, there are grounds for cautious optimism that the fortunes of the American Club will continue to improve over the months and years ahead. As it continues to build on its past the Club welcomes the future with increasing confidence and optimism.

Those who know us will be aware that we never confuse such optimism with complacency. We inhabit a world of risk with its many vicissitudes and uncertainties. Most importantly, as a service provider as much as an insurance carrier, the American Club will never lose sight of its overarching mission to provide uncompromising levels of excellence in all that it does in the service of its Members, particularly in these extraordinarily difficult times for the maritime industry across the world.

But, yet again, what a difference a year makes. And this observer at least of Club's current fortunes is sure that there are many more good years to come!

by: Matthew S. Miller
Claims Executive
Shipowners Claims Bureau, Inc., New York

THE STOWAWAY PROBLEM:

REVISITING THE 2002 AMENDMENTS TO THE FALL CONVENTION, 1965

INTRODUCTION

Stowaways are a serious problem faced by shipowners today. Unlike their literary reputations as rustic "swashbuckling heroes," modern stowaways are a grave nuisance—costing millions of dollars a year in fines, expenses and wasted resources. Despite the detrimental effect to maritime operations, the legislation passed by the International Maritime Organization (IMO) has done little to combat the rising tide of maritime stowaways. Indeed, the number of stowaway incidents has increased in recent years and, therefore, it is generally agreed that an international solution regarding the problem of stowaways is needed.

This article assists shipowners in three ways: Part I explains the legislative history behind the present system for handling stowaway cases. Part II exposes certain flaws within the present system that disadvantage shipowners and undermine the IMO's efforts at facilitating maritime commerce. Finally, Part III provides a number of practical recommendations to help shipowners keep their vessels free of stowaways.

PART I – LEGISLATIVE HISTORY

The earliest attempt at combating the stowaway problem came via the International Convention Relating to Stowaways, 1957 (or "Brussels Convention"). Its three primary sections (Articles 2-4) laid out the basic framework for repatriating stowaways found onboard a ship. The Brussels Convention represented a bright-line approach of allocating procedural responsibilities between the various parties involved in stowaway repatriations.

The Brussels Convention, however, received only six of the required ten signatures for ratification and, thus, has yet to enter into force and is unlikely to do so. The rejection of the Brussels Convention may have signaled the International Community's general unwillingness to accept such a formalistic, rules-based approach to handling stowaways. After all, stowaways were a complicated issue which implicated numerous competing interests. Therefore the International Community desired a more comprehensive solution.

In November 1997, the IMO adopted Resolution A.871, known as the Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases (hereinafter, the "1997 Guidelines"). Similar to the Brussels Convention, the 1997 Guidelines established a basic framework for handling stowaways, but made only "general recommendations" to member states regarding stowaway repatriations. The 1997 Guidelines distinguished themselves, therefore, in their diplomatic approach and commercial appeal by "recognizing...appreciating...and taking into account" the various complications involved in the stowaway problem.

The 1997 Guidelines also rallied support from those concerned about eliminating trade barriers to international commerce. The 1997 Guidelines, therefore, shaped by four decades of globalization, indicated a renaissance in IMO legislation. Despite their progressive stance, the 1997 Guidelines were given little effect. For almost five years, they laid as dormant as their predecessor.

However on January 11, 2002, the 1997 Guidelines were subsumed by the 2002 Amendments to the Convention on Facilitation of International Maritime Traffic, 1965 (FAL Convention). At its core, the FAL Convention sought to "prevent unnecessary delays to maritime traffic by aiding cooperation between Governments and streamlining certain procedural formalities." By amending its provisions to incorporated legislation on stowaways, the FAL Convention officially authored the implicit notion that stowaways were an economic burden on international commerce, which needed to be addressed.

Furthermore, by referencing stowaways alongside other maritime security concerns, stowaways in the post-9/11 world became recognized as evidence of a prima-facie breach in security. Thus, as the need for effective legislation intensified, the 2002 Amendments to the FAL Convention became the IMO's principle means for managing stowaways. Today, all stowaway cases occurring

between member states are governed, at least in part, by the FAL Convention and the 1997 Guidelines incorporated therein.

PART II – FLAWS WITHIN THE PRESENT SYSTEM

As stowaways continued to be a problem for shipowners, questions arose whether the FAL Convention would deliver on its objectives. In the years after the 2002 Amendments, there seemed to be little abatement in stowaway activity. In fact, research indicated the problem was only getting worse. Interestingly, the FAL Convention provided for a continual review and monitoring of its effectiveness. It is unclear whether any revisions to the appended Guidelines took place prior to their consummation within the FAL Convention.

As we approach the 12th Anniversary of the underlying 1997 Guidelines, three problems, in particular, may be cause for a review: (1) the incongruous burden carried by shipowners with respect to the maintenance and repatriation of stowaways; (2) the potential for corruption among the local authorities due to the lack of incentive and meager oversight from the IMO; and (3) the exponential growth in stowaways on account of "repeat offenders" who stowaway for financial gain and other ancillary benefits.

The Incongruous Burden Carried by Shipowners

When it comes to repatriating stowaways, shipowners have carried more than their share of the financial burden. A subtle, yet telling illustration of this is found in the revised definition of "stowaway," as one whom:

[I]s "secreted on a ship...without the consent of the shipowner or master or any other responsible person, and who is detected onboard after a ship has departed a port... and reported as a stowaway by the master to the appropriate authorities." (emphasis added)..

The italicized-portion was non-existent in original Brussels definition, but was later added under the 1997 Guidelines. In this definition, only the master and shipowner are definitively named, while "other responsible person" and "other authorities" remain ambiguous and vague. The implication which seems to follow is that "stowaways are primarily a problem for the shipowner and master, but only indirectly involve other authorities (i.e. the immigration police and port security, etc.)." This is simply untrue; the stowaway problem is not one belonging exclusively to shipowners. A shipowner is powerless against a stowaway incursion, unless in-the-port security and immigration officials also do their part. Yet, the prevailing mindset in recent years has placed an unfair burden upon vessel owners.

Until the last decade, shipowners faced the unfair obligation to bear not only the expenses of repatriating stowaways, but also the costs of maintaining the stowaways in-country while the U.S. Immigration and Naturalization Service (INS) held hearings on their asylum status. The shipowners were required to do so, even where repatriation would have occurred, but for the

(CONTINUES)

delays caused by the hearings themselves! There are many other examples of the incongruous burden carried by shipowners, and with the increasing demands placed upon vessel crews, it is simply wrong to expect shipowners to fight the stowaway problem alone. Thus, since stowaway cases implicate matters such as international human rights, port security and immigration, it is only fair that immigration and port authorities also be implicated within the ambit of the stowaway definition—thus yielding an expectation for their increased and proactive cooperation with shipowners in regard to stowaways.

The Potential for Corruption among Local Authorities due to Lack of Incentive for Cooperation and Oversight by the IMO

A second flaw, also involving the local immigration and port officials, is the lack of incentive for cooperation and meager oversight by the IMO. Diplomatic concessions perhaps needed for ratification have come at too great a cost. First, the 1997 Guidelines discarded a former provision in the Brussels Convention allowing shipowners to claim against third parties for the costs associated with handling stowaways. In doing so, the Guidelines removed a valuable check against, for instance: certain local police and immigration authorities, who create private "security companies," to profit from the repatriation of stowaways. Second, and perhaps more broadly, the 1997 Guidelines defer too greatly upon the local law and policy of the Nation receiving stowaways. While it is axiomatic that countries have a right to police their own borders, the issue of maritime stowaways is one that, due to its heightened effects on international commerce and port security, should be properly referred to the IMO. Yet, in a system predicated on member-state acquiescence, over deference to a state's subsidiary local laws may be self-defeating.

A dramatic example of this is seen in Argentina's local immigration policy, which allows authorities to detain a vessel until every stowaway has been removed from Argentinean soil. Problems arise, under this rule, when the number of stowaways exceeds the availability of flights departing the country. For example, in March 2008, one shipowner waited almost two weeks while trying to repatriate eight stowaways to West Africa. In this case, the Argentinean Coast Guard and Immigration Police charged the shipowner an outrageous US$ 100,000 for their "services."

Similarly, when one shipowner attempted to prosecute violent stowaways for their behavior onboard (which would place the stowaways into local custody) the immigration judge waited until the vessel was forced downstream by seasonal tides, and then dismissed the case for lack of jurisdiction! Therefore, without stronger oversight by the International Community and greater incentives for local cooperation, these abuses are only likely to continue to grow in their disfavor towards vessel owners, while gradually undermining the IMO's efforts at facilitating maritime commerce.

The Exponential Growth of Stowaway Numbers due to "Repeat Offenders"

In a system predisposed against shipowners and prone to local abuses, many stowaways have found a way to take advantage of the situation. The ease at which stowaways receive free medical attention, food, clothing, airfare, and "pocket money," has made a mockery of the present system which initially sought to strengthen security measures and increase the free-flow of trade. In fact, many P&I Clubs have noticed that today's stowaways are only encouraged to repeat their behavior due to the prospect of profiting from these fringe benefits. For example: stowaways have begun demanding "pocket money" to peacefully board the flight home. These demands typically arise during the most delicate moments of the stowaway's repatriation (i.e. either upon arriving to the airport, or just before boarding the plane).

Stowaways have learned well that they possess a certain amount of leverage and they are not afraid to use it. The shipowner, facing the threat of further delays and complications, is forced to give in to the stowaway's demands. Thus, a marketable enterprise is born and it is not surprising to see a number of stowaways repeat their behavior due to the profits gained from previous ventures. This has the affect of exponentially increasing the number of stowaways each year. For example, from 2006 to 2008, the total number of stowaway incidents rose from 244 to 494. The number of stowaways represented by these incidents, however, soared from 657 to 2052. Thus, the average number of stowaways per incident grew 35% annually, from 2.69 in 2006 to 4.15 in 2008. Under this trend, the current projection of stowaways will grow to over 5,865 in 2011.

In conclusion, it is both morally wrong and logically fallacious to place the entire stowaway burden upon shipowners. There is plenty of evidence calling for increased cooperation from local port and immigration authorities. Indeed international public policy demands for a more proactive stance from all parties involved, so that the facilitation of maritime commerce will continue, unimpeded and secure. Therefore, since the FAL Convention has not been revisited for the better part of a decade, the IMO should consider a substantive review.

> **"From 2006 to 2008, the total number of stowaway incidents rose from 244 to 494.**

PART III – PRACTICAL ADVICE FOR SHIPOWNERS

There are a number of basic precautions available to shipowners to help guard against stowaways. Below are seven practical tips for keeping one's ship stowaway-free:

- Be sure that all doors, hatches and other means of access to the ship and/or ship's holds are secured while the ship is in port.
- Reduce access points to the vessel while in port and ensure that all available means of boarding the vessel (i.e. ramp and/or gangway) are guarded with procedures in place for checking identification and logging visitors on and off.
- Pay special attention to areas seaward of the ship, such as the rudder trunk, mooring stations or pilot embarkation areas; there are many places a stowaway can board and stowaways often show up where least expected.
- Maintain a vigilant deck-watch at all times, while in port. Ships' crews should be encouraged to question any suspicious visitors and report anyone not carrying proper identification to the Master or ship's officer.
- Adequate lighting should, at all times, be maintained on deck and along the vessel's hull to detect and/or deter potential stowaways while in port or at anchor.
- Prior to departure, a thorough "stowaway search" should be conducted, according to a pre-established search plan, accounting for all engine room void-spaces, deck lockers, boatswain stores, stewards' stores, and/or external entry points inherent to ship's design.

The prevention of stowaways is not, in any way, limited to the above, but these precautions are, nevertheless, provided as a minimum standard to be employed by shipowners. Certainly there are measures which a shipowner can take which go beyond these basic precautions, and these are encouraged, provided that they are done in accordance with local and international law. Though not an exact science, with consistent effort and cooperation from local port and immigration authorities, the problem of stowaways can be greatly reduced, if not completely eliminated.

IMO UPDATE HIGHLIGHTS

GLOBAL CLIMATE CHANGE GREEN-HOUSE GAS EMISSIONS INITIATIVE

by: Dr. William Moore
Senior Vice President
Shipowners Claims Bureau, Inc. New York, USA

CLIMATE

The Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) agreed to disseminate a package of interim and voluntary technical and operational measures to reduce greenhouse gas (GHG) emissions from international shipping; and also agreed a work plan for further consideration, at future meetings, of proposed market-based instruments to provide incentives for the shipping industry.

The agreed measures are intended to be used for trial purposes until the Committee's sixtieth session (MEPC 60) in March 2010, when they will be refined, as necessary, with a view to facilitating decisions on their scope of application and enactment. The measures include:

- interim guidelines on the method of calculation, and voluntary verification, of the Energy Efficiency Design Index for new ships, which is intended to stimulate innovation and technical development of all the elements influencing the energy efficiency of a ship from its design phase; and
- guidance on the development of a Ship Energy Efficiency Management Plan, for new and existing ships, which incorporates best practices for the fuel efficient operation of ships; as well as guidelines for voluntary use of the Ship Energy Efficiency Operational Indicator for new and existing ships, which enables operators to measure the fuel efficiency of a ship.

Market-based instruments

The Committee held an in-depth discussion on market-based instruments and agreed to a work plan for its further consideration of the topic, as of its next session (MEPC 60, March 2010), to build on discussions and submissions to date, taking into account also relevant outcomes of the climate change conference (COP 15) that the United Nations is to convene in Copenhagen in December 2009. Such instruments would have purposes such as: climate change mitigation and adaptation activities; research and development; offsetting of emissions; and serving as an incentive for the industry to invest in more fuel-efficient technologies.

The Committee noted that there was a general preference for the greater part of any funds generated by a market-based instrument under the auspices of IMO to be used for climate change purposes in developing countries through existing or new funding mechanisms under the United Nations Framework Convention on Climate Change (UNFCCC) or other international organizations.

The Committee agreed that any regulatory scheme applied to GHG emissions from international shipping should be developed and enacted by IMO as the most competent international body.

Greenhouse gas study 2009

The MEPC was assisted in its deliberations by the outcome of the Second IMO GHG Study on greenhouse gas emissions from ships, 2009, which is the most comprehensive and authoritative assessment of greenhouse gas emissions from ships engaged in international trade.

The Study estimated that ships engaged in international trade in 2007 contributed about 2.7 per cent of the world's anthropogenic CO_2 emissions and also states that emission reductions are feasible through technical and operational measures as well as through the introduction of market-based reduction mechanisms.

In the absence of global policies to control greenhouse gas emissions from international shipping, the emissions may increase by between 150 and 250 per cent by the year 2050 due to the expected continued growth in international seaborne trade.

The detailed 289 page study can be found at the following website: *http://www.imo.org/includes/blastData-Only.asp/data_id%3D26047/INF-10.pdf.*

Second intersessional meeting of IMO's Working Group on Greenhouse Gas Emissions (GHG) from Ships

Major progress was made in developing measures to enhance energy efficiency in international shipping, and thereby reduce greenhouse gas emissions, when the second intersessional meeting of IMO's Working Group on Greenhouse Gas Emissions (GHG) from Ship.

The main focus was the further refinement of the Energy Efficiency Design Index (EEDI) for new ships, on the basis of experience gained through its trial application over the past six months. The EEDI is meant to stimulate innovation and technical development of all the elements influencing the energy efficiency of a ship, thus making it possible to design and build intrinsically energy efficient ships of the future.

The group also considered how to improve the Energy Efficiency Operational Index (EEOI) that will enable operators to measure the fuel efficiency of an existing ship and, therefore, to gauge the effectiveness of any measures adopted to reduce energy consumption. The EEOI has been applied by Member States and the shipping industry, on a trial basis and since 2005, to hundreds of ships in operation; it provides a figure, expressed in grams of CO_2 per tonne mile, for the efficiency of a specific ship, enabling comparison of its energy or fuel efficiency to similar ships.

The experts at the meeting debated over a draft Ship Energy Management Plan (SEMP) that has been developed by a coalition of industry organizations and agreed to forward it to MEPC 59 for further consideration. The draft SEMP incorporates guidance on best practices, which include improved voyage planning, speed and power optimization, optimized ship handling, improved fleet management and cargo handling, as well as energy management for individual ships.

The outcome of MEPC 59 will be presented to the Conference that the United Nations will convene in Copenhagen in December 2009, which is set to agree on a successor instrument to the Kyoto Protocol to the UNFCCC.

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[1] The United Nations Framework Convention on Climate Change (UNFCCC) is an international environmental treaty produced at the United Nations Conference on Environment and Development (UNCED), informally known as the "Earth Summit", held in Rio de Janeiro, Brazil from June 3-14, 1992. The objective of the treaty is to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

(L–R): Yelin Tang, Raymond Sun, and Annie Chan

As a continuation from the last *CURRENTS*, where we highlighted the Claims Department team in New York, we will feature the SCB Management Consulting Services, Ltd. in Shanghai. *CURRENTS* will feature the London and claims personnel in a following issue of *CURRENTS*.

MEET THE STAFF AT SCB MANAGEMENT CONSULTING SERVICES, LTD. IN SHANGHAI

Mr. Raymond Sun

CHIEF REPRESENTATIVE

Raymond graduated from Dalian Maritime University in 1983. He worked in the Ministry of Communications in Beijing for five years and the Chinese Embassy in London. Thereafter, he continued his studies at the World Maritime University in Sweden and received a Master's degree in 1990. After graduation, Raymond joined the Skuld P&I Club in its Hong Kong office and was the Claims Manager from 1994. In 2002, he entered private legal practice in Hong Kong. In August 2007, Raymond joined the Club and was instrumental in the opening of the Shanghai office where he continues his role as chief representative. Raymond is a qualified solicitor in HKSAR and England & Wales. He speaks Putonghua, English, Cantonese and Swedish.

Yelin Tang

CLAIMS EXECUTIVE

In 2004, Yelin received her LL.B degree in International Economic Law from the Shanghai Institute of Foreign Trade. Yelin worked for two years in a local government department before resuming her studies at the University of Oslo where she was awarded a Masters' degree in Law in 2007. In December of the same year, she joined the Club's Shanghai office as Claims Executive and is responsible for handling a variety of claims and related issues.

Ms. Annie Chan

OFFICE MANAGER

Annie was born and grew up in Beijing. After graduation from the Peking University, she worked in Hong Kong for 10 years. The following seven years, she studied and worked in Boston. She gained her MBA from Cambridge College in Boston in 2000. Annie joined SCBMCS (Shanghai) in October, 2007. She has responsibilities for the day-to-day administration management of the office and marketing with potential members. Annie is fluent in Mandarin, Cantonese and English.

by: Chester D. Hooper
Holland & Knight LLP

The Rotterdam Rules

An Overview of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

There are changes on the horizon with regards to treaties governing the carriage of goods by sea in the form of the Rotterdam Rules. This article is the first in a series of articles to be posted in *CURRENTS* introducing the Rotterdam Rules to our Members authored by Mr. Chester Hooper from Holland & Knight.

Chester Hooper practices in the Maritime Litigation Practice Group and focuses in the areas of collision, the defense of vessel interests against claims for cargo damage, multimodal carriageof cargo, and drafting bills of lading and other shipping documents.

He was navigator of the USS TRUCKEE (AO 147) while on active duty in the U.S. Navy and also sailed as a Third Mate in the United States Merchant Marine. He has tried numerous cargo cases on behalf of vessel interests as well as collision cases.

Mr. Hooper has published numerous articles on admiralty cargo issues. In addition, he has lectured on the subject of the carriage of goods at many seminars.

He was President of the Maritime Law Association of the United States from 1994 to 1996. He also served as a member of the United States delegation to the United Nations Commission on International Trade Law (UNCITRAL) working group that drafted the Rotterdam Rules, which will replace the present treaties governing the international carriage of goods that include a sea leg.

The Rotterdam Rules

The Rotterdam Rules have been described as a "maritime-plus Convention." They are very similar to the Hague/Visby Rules, and the United States Carriage of Goods by Sea Act (COGSA).

SCOPE OF COVERAGE

The Rotterdam Rules extend the Hague/Visby Rules and COGSA tackle-to-tackle scope of coverage to the complete door-to-door multi-modal carriage with some exceptions. The Rotterdam Rules require the shipowner, as do the Hague/Visby Rules and COGSA, to exercise due diligence to make the vessel seaworthy. While the Hague/Visby Rules and COGSA require the vessel interests to exercise due diligence at or before the commencement of the voyage, the Rotterdam Rules require the carrier to continue to exercise due diligence throughout the voyage. We doubt whether that extension will make a significant difference in practice.
A shipowner will not of course be able to exercise the same degree of diligence or care while the ship is at sea, away from shore side repair facilities, that the shipowner could exercise while the ship was in port.

The shipowner should thus not be held to the same standards while the vessel is at sea as the shipowner would be held while the vessel is in port. An example may explain the effects of the change. Let us assume that a ship governed by COGSA loads cargo in Norfolk, Virginia, and that due diligence was exercised before the voyage commenced at Norfolk. During the voyage from Norfolk to New York, the vessel's radar failed despite the exercise of due diligence before the vessel left Norfolk.

While in New York, the owner decided not to repair the radar, loaded more cargo and sailed for European ports. During the transatlantic voyage, the vessel was in a collision, because her radar did not work. The cargo loaded in Norfolk, Virginia, would be unable to recover from the carrier, because due diligence had been exercised before the vessel sailed from Norfolk. The cargo loaded in New York would be able to recover, because due diligence was not exercised before the vessel sailed from New York. Under the Rotterdam Rules, both cargo loaded in Norfolk and cargo loaded in New York would be able to recover, because the vessel owner did not continue to exercise due diligence when the vessel was in New York.

CARRIER DEFENSES

The Rotterdam Rules have the same basic catalog of defenses as do the Hague/Visby Rules and COGSA, with three exceptions. The Rotterdam Rules do not include the error in navigation or management defense and the fire defense is somewhat weaker. Under U.S. interpretation of the COGSA fire defense, once the carrier showed the damage was caused by fire, cargo interests bore the heavy burden of proving that someone high enough in the corporate structure to be considered the "carrier" knew of an unseaworthy condition that caused the fire or failure properly to extinguish the fire. Cargo interests would not bear that burden under the Rotterdam Rules. The Rotterdam Rules have, however, added a defense for damage or loss caused by reasonable measures taken to avoid or attempt to avoid damage to the environment.

BURDEN OF PROOF

Although the carrier will not have the error of navigation defense, the burden of proof assigned to the carrier is eased in the Rotterdam Rules. Under the Hague/Visby Rules or COGSA, the burden of proof has been compared to a game of ping-pong with three volleys. In the first volley, cargo bears the burden to prove that the cargo was not in the same condition when delivered from the carrier as it was in when the cargo interests delivered it to the carrier. If cargo interests bear the burden in the first volley, the carrier in the second volley has the burden to prove that one of the exceptions in the catalog of defenses caused the damage or that the damage was not caused by the carrier's negligence. If the carrier carries its burden in the second volley, cargo has the burden in the third volley to prove that another cause for which the carrier was responsible, such as an unseaworthy condition, contributed to the loss or damage. If the cargo interests satisfy that burden, the carrier has the "insuperable burden" of proving the precise damage or loss caused by the event for which the carrier was not responsible. As a practical matter, the carrier is generally unable to meet this burden and pays 100% of the damage, even if the carrier's fault is minor as compared with the cause for which the carrier is not responsible.

Under the Rotterdam Rules, the carrier will not have that insuperable burden. Once cargo interests are able to prove that the damage was caused at least in part by an event for which the carrier was responsible, both parties will bear an equal burden in the fourth volley to prove the percentage of damage or loss for which the carrier should be liable and the percentage for which it should not be liable. This equal burden is analogous to the proof of collision fault after United States v. Reliable Transfer, 421 U.S. 397 (1975).

SHIPPER WEIGHT, LOAD, AND COUNT

Shippers' load and count clauses and shippers' weight, load, and count clauses will be upheld, if accurate, under the Rotterdam Rules. Under the U.S. courts' – incorrect,

we think – interpretation of COGSA, shippers' load and count clauses are often not upheld. U.S. courts have reasoned that a carrier is not obligated to issue a bill of lading containing the quantity of goods described in the bill of lading if the carrier has not verified the quantity. They have viewed the remedy of deleting the quantity description from the bill of lading as the carrier's sole remedy. If a carrier issues a bill of lading including the quantity of cargo said by the shipper to have been loaded, the carrier may not rely on a shipper's load and count clause to eliminate the prima facie effect of the quantity description. The quantity description will constitute prima facie evidence that the described quantity was delivered to the carrier. In some situations, the carrier may not be able to rebut that evidence even though the described quantity was never loaded.

Under the Rotterdam Rules, shippers' load and count clauses and shippers' weight, load and count clauses will be upheld if in fact the carrier did not have an opportunity to verify the quantity or if the carrier suspected the accuracy of the quantity description. If a shore tank farm determines the quantity of liquid cargo loaded into a ship, and that quantity cannot be accurately verified by ullage taken after loading or by a draft survey, the bill of lading may be claused to state that the bill of lading represents the shipper's quantity description, which could not be accurately verified by the ship. To eliminate the prima facie effect of the shore figure quantity description, the carrier would probably have to explain the degree of error of ship ullages or a draft survey.

FIOS

The Rotterdam Rules will allow the shipper and carrier to agree that the loading, handling, stowing or discharge of the goods will be performed by the shipper. In that event the carrier would not be liable for loss or damage caused by improper loading, handling or stowage, or discharge.

CHOICE OF FORUM CLAUSES

Choice of forum clauses with certain exceptions will generally not prevent cargo interests from commencing suit in one of five places. Cargo interests will have the choice of commencing suit at the place the carriage originated, the first port of loading onto a ship, the last port of discharge from a ship and the ultimate place of destination. The cargo interests may also commence suit at the domicile of the carrier. There are certain exceptions to these provisions. Because the Rotterdam Rules will not apply to charter parties, parties to charter parties may choose whatever place they wish to litigate or arbitrate disputes. Parties to a charter party may, as they may now, extend a charter party arbitration agreement to holders of a charter party bill of lading, if the bill of lading specifically incorporates by reference the charter party and the charter party arbitration clause.

Service Contracts (referenced as "Volume Contracts" in the Rotterdam Rules) will be governed by the Rotterdam Rules, but the volume contract terms may derogate to a great extent from the Rotterdam Rules. The Hague/Visby Rules or COGSA do not govern service contracts at all. At the present time, parties to service contracts have complete freedom of contract, but the industry, both carriers and cargo interests, wished volume contracts to be governed to a certain extent by the Rotterdam Rules, and they are governed to a great extent by the Rotterdam Rules. The volume contracts may, however, derogate from many terms of the Rotterdam Rules, but may not derogate from the carrier's duty to exercise due diligence to make the ship seaworthy or from safety measures set forth in the Rotterdam Rules.

Parties to volume contracts may also agree to litigate or arbitrate disputes wherever they choose. The volume contract may also extend the choice of forum or arbitration agreement in the volume contract to holders of volume contract bills of lading if certain conditions are met. The place chosen for litigation or arbitration must be one of the five places mentioned above in the choice of forum clauses section, and the holders of the bills of lading must be given notice of the choice of forum. The volume contract must also clearly state that it contains a choice of forum and in what article or clause the choice of forum is stated.

Future articles in CURRENTS will offer more detailed descriptions of the jurisdiction and arbitration provisions as well as our other aspects of the Rotterdam Rules.

by: James J. Tamulski
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LOW SULFUR FUEL REQUIREMENTS IN CALIFORNIA AND CONCERNS REGARDING RISKS TO OPERATIONS

As many Members are probably aware, the State of California recently passed legislation which required ocean going vessels to use low sulfur marine distillates in their main engines, auxiliary engines, and auxiliary boilers whenever vessels are within 24 nautical miles of California. This legislation came into effect on July 1, 2009. Since that time, both the U.S. Coast Guard (USCG) and California Bar Pilots have been tracking any problems observed which may be attributed to vessels switching to low sulfur fuels. Between July 1 and September 30, 2009, the Coast Guard has begun 15 investigations of propulsion failures, which appear to be related to fuel switching. Prior to that period, the USCG statistics show one such incident per month. Thus, there appears to be a significant increase in the number of such incidents since vessels have begun to follow the new California regulations.

In addition, the San Francisco Bar Pilots had also noted an increase in engine stoppage, engines failing to start, and problems with maneuverability and changes in speed since the regulations came into effect. Some of these observations were made on vessels other than the 15 noted in the USCG findings. The USCG is on record as stating that there is "no such thing as an insignificant increase in propulsion casualties." The Pilots have stated that they are now operating under "an increased level of risk," and others have said that even a "1% incident factor" should not be acceptable to the California Air Resources Board (CARB), the agency who issued the regulations.

As a result, the local Harbor Safety Committee (HSC), (whose members include a broad spectrum of representatives from the local marine industry), had asked the Administrator of the California Office of Spill Prevention and Response to postpone, for one year, issuance of any fines under the new regulations. The HSC proposed that additional study be made over that one year period to collect more data about the incidents noted to date, to identify and address the causes, and hopefully suggest corrective measures. Unfortunately, the CARB refused that request, noting, in part, that no significant casualty has - as yet - resulted from compliance with the regulations.

The CARB has proceeded to request that Ship Operators and Shipping Lines or Fleet Managers complete Survey forms, ("A" and "B" respectively), to assist it in gathering information on their experiences in complying with the California regulations. Those survey forms can be accessed from the CARB website at http://www.arb.ca.gov/ports/marinevess/marinevess.htm.

The CARB will use the data it collects in response to this survey to determine, in part, how it will respond to the ongoing efforts of the International Maritime Organization's efforts to reduce vessel emissions on a global basis. Thus, it is recommended that every Ship Operator, Shipping Line and Fleet Manager participate in this survey. By doing so, the maritime industry can ensure that its on-hand experiences will be considered by the CARB, and other government organizations, as they continue to regulate vessel emissions. Responses to the CARB Surveys are due on November 13, 2009. It is also recommended that Ship Operators and Managers become familiar with the regulations as they do contain a "Safety Exemption" to the regulations, and set forth fees for Noncompliance with the regulations."

The following article is an extract of a presentation entitled "Life at the Sharp En d" by John Poulson and Peter Deegan of Noble Denton New York to the October 2009 International Marine Claims Conference in Dublin, Ireland – with a slightly different approach to explaining the difficulties faced with handling today's marine heavy fuel oils.

by: John Poulson and Peter Deegan
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IT MUST BE THE FUEL!

One recently rising trend is an alarming number of claims for machinery damages alleged to have arisen from consumption of "bad fuel." Indeed of late the frequency of such claims seems to have propelled the allegation ahead of crew negligence in the league table of Owner's favourites.

"IF ALL ELSE FAILS IT MUST BE CREW NEGLIGENCE" HAS BEEN SUPPLANTED IN MANY MACHINERY CASES BY *"IF ALL ELSE FAILS IT MUST BE THE FUEL."*

There are however genuine cases of problematic fuels causing serious damage to machinery. In our opinion the current standard specification ISO 8217 is woefully inadequate. "Bad fuels" capable of damaging an engine can be within the current standards. How can that be? Why would Owners pay for such fuel?

Changes in refining procedures to produce low sulphur fuels are as a by-product producing fuels that don't want to burn. Low sulphur fuels require changes to the grade of cylinder lubricating oil being used and the scope for mistakes and negligence by crews in dealing with this lot abounds.

Fuel claims. You know, those massive claims for damages to long-suffering engines, using a product that meets a specification of sorts, and is produced by a large number of refineries, using an array of crude oils and then is delivered to ship-owners only after every other scrap of high-end i.e., valuable, goodness has been squeezed out of it?

Refineries are not set up to produce marine heavy fuel oil, per se. The idea is to extract as much as possible of the high-end products out of the crude and that means LPG, avgas, gasoline, kerosene and heating fuel, diesel oil, lube oil blend stocks and other chemical feedstock. This is where the real money is and, because of this, refinery production has improved greatly over the years. If we compare production in the 60's, in straight-run refineries, the proportion of residual fuel that was left after refining constituted about 50% of the barrel. It's now down to around 16% and it doesn't require a great deal of logic to arrive at the conclusion that the quality of the residual fuel is subsequently a lot worse that it was before.

So, the high-end products are extracted much more efficiently using vacuum distillation, catalytic cracking, visbreaking, etc. all of which has a great effect on the residual fuel oil, not only taking more of the "goodness" out of it, but leaving behind things like cat-fines, slurry and water. Even bitumen for roads is a refined product leaving whatever is left as the residual fuel oil–which is just that, residue. A thesaurus will tell you that synonyms for residue include the following: debris, dregs, dross, junk, leavings, scourings, scraps, scum, sewage, slag, surplus and trash.

Now, this is what the ship owner or operator has to run his vessel on and his travails don't end there: a significant percentage of his fuel oil consists of sludge, water and other impurities and, before he can use it in his expensive engines, he has an awful lot of work to do on it.

Consider a container ship burning 30 tons of fuel oil a day at an average cost of US$ 415/ton and around 300 days at sea per year. That's a cost of US$ 3.8 million/year. With just 1.5% of the fuel lost to sludge and water, this represents almost US$ 60,000/year.

What happens when this expensive fuel oil arrives on board? Instead of telling you exactly what the operator has to do to the fuel before he can run his engine on it, I'm going to put you in his position and let you think about what it would be like to have to operate your car as if you were a ship operator.

OK, lets make this simple. You're heading off on holiday and you have the car loaded up and ready to go...

However, you need to get fuel for your trip. So, off you go to fill up and you have to attach a large tanker-trailer to your car as you have to segregate the new fuel from the old fuel. You'll soon see why.

While the fuel is flowing into your attached tanker, you have to carefully draw off a couple of samples. One will be retained by the service station and you'll keep the other one for about six months in case you have any problems with the fuel. These have to be drip-samples, carefully taken during the delivery, in order to get a representative sample. This is because the fuel will vary so much in quality over the delivery that a single sample

cannot be relied upon to be representative of the whole delivery.

Now, the fuel delivery is complete and all you're waiting for is the paperwork to be done, the Material Safety Data Sheet to be handed over and the analysis results to be completed. While you're waiting for this, you and the attendant argue briefly over the amount he claims to have delivered and the amount that you calculate you received, which is a fair amount less. The attendant asserts that the difference is due to the fact that your car isn't sitting level because all of your luggage, the family and the dog in the car.

You are handed the Lab Analysis of your newly delivered fuel and you anxiously scan the results for the 20 or so tests, noting that the Pour Point seems a little high, the Cloud Point is a bit suspect and there seems to be an alarmingly high amount of cat fines. However, they slide in just under the maximum allowed by the spec and, while you may not feel very happy about it, knowing the damage that vanadium, silicon and aluminium can do to your expensive engine, you have to just suck it up and accept it as the attendant smugly concedes that, "Yes, it's crap. But it's in-spec crap." ...and, he points out, "For a premium of just 30% over the price you've just paid, you can get the really good stuff."

So, you have your fuel and the necessary paperwork and off you go. However, you remember to turn on the heating elements in the tank of fuel so that you're able to pump it from the main tank to a settling tank (yes, you have another tank on your trailer for this purpose) where the process of de-sludging and water-separation can take place.

This will mean that, about once an hour, you'll need to pull over to drain off the water and sludge that have begun to precipitate out of the fuel (remember the 1.5%?). Naturally, on the additional trailer behind the tanker, you'll have yet another tank for the water that you drain off (you can't dump it in case it still contains fuel particles) and then you'll also have a holding tank for the sludge and a waste-oil incinerator to burn up the sludge. This, of course, must be meticulously maintained as you can't have dirty smoke emanating from it, unless you like paying hefty fines!

So, you've heated the fuel and continue to draw off and dispose of water and sludge (which you paid for as part of the fuel). What next? Well, the fuel still contains a lot of other impurities that can't be removed by the simple application of heat and the effects of gravity. You note that your car's fuel tank is running a bit low and you know that you need to get your service tank filled and ready for use. Now, you can't just transfer the fuel from your settling tank to the service tank, as your engine simply won't be able to handle the fuel in its current condition. Despite the removal of water and some sludge, you still have a way to go...

On the second trailer behind the trailer with the waste-handling kit, you have a service tank which will supply the fuel to your engine. To get fuel from your settling tank to the service tank in a state that's fit for use, you'll also need delivery pumps, pre-heaters and centrifuges.

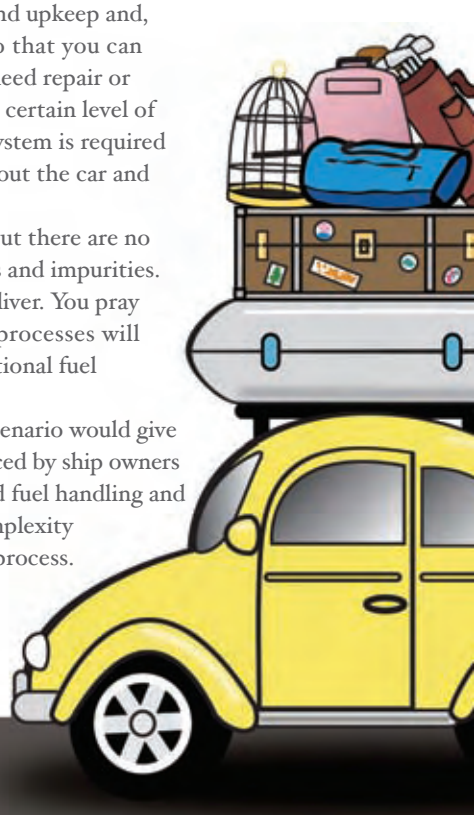
Ideally, you'll have the centrifuges set in series, with the first one as a purifier, which is a centrifuge that separates two liquids of different densities (in this case, fuel and water) and the second as a clarifier which will separate out the solid impurities. The purifier will also remove some solids and the clarifier will also remove some water.

So you've delivered your fuel from the settling tank to the service tank in a form that is now fairly OK to use in your engine. There's still a bit more work to be done on the fuel before you can use it to power your car's engine and deliver the family to the vacation site. From the service tank you'll again need delivery pumps, booster pumps, pre-heaters, viscometers, filters and, perhaps, a homogenizer. These are necessary as the fuel has to be delivered to the fuel injectors at a viscosity of 10-15 cSt, at a temperature of around 150 °C and a pressure of 800 bar.

All of these peripherals, which are expensive, need spares on hand, regular maintenance and upkeep and, in most cases, you require two sets so that you can continue to use one should the other need repair or replacement during operations. Also, a certain level of skill and experience in operating the system is required so, it's no use asking Granny to, "Hop out the car and adjust the viscometer, will you, Dear?"

Your fuel is now ready to be used, but there are no guarantees that it's free of water, solids and impurities. You have a ship to run and cargo to deliver. You pray that your rigorous fuel management processes will suffice... And you have to take on additional fuel bunkers at your next stop!

Sound familiar? We thought this scenario would give you some insight into the challenges faced by ship owners and operators with regards to on-board fuel handling and also to help you to understand the complexity of the fuel handling and management process.



The following article is the first in a series of three articles on the uses of dunnage by a representative of Brookes Bell. The first in the series is written by Mr. Charles Bliault who is an Extra Master having sailed for 13 years, progressing to chief officer, on a wide range of ships — including general cargo and refrigerated liners, bulk carriers and container vessels. He joined Brookes Bell in 1983 and his work over 26 years has included, among many other types of problem, surveys of the various kinds of damage to cargoes which resulted from poor or inappropriate stowage and poor and inappropriate use of dunnage materials.

DUNNAGE: TYPES, USES AND CARE

ARTICLE 1 IN A SERIES OF 3

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Many types of cargo, including general items, break-bulk, heavy lifts and project cargoes — including pallets, drums, cases, crates and pieces of machinery, bagged commodities such as rice, cocoa beans and sugar, the various steel products and heavier/larger pieces of cargo - cannot be safely carried at sea without the appropriate use of the correct type of dunnage. Dunnage of a wide range of types is routinely used, and is used correctly and successfully. However, it is often the case that cargo items are incorrectly/inappropriately dunnaged, that other factors take effect, including inappropriate ventilation, and that damage of some form is suffered by the cargo and that damage leads to complaint and claim from the consignees and/or receivers. Whenever and wherever dunnage is used the correct and appropriate type should be employed, it should be of the correct quality and it should be fitted in the correct manner.

In this, the first of three articles, the different types of dunnage materials and their uses will be discussed, followed by some guidance regarding the proper care of dunnage, inspections to be carried out and its safe and proper disposal. In a second article we will look at how the use of dunnage, particularly if it has a high moisture content, might lead to damage to particular types of cargo. The third article will look at the use of ventilation to limit sweat formation, particularly that resulting from over-moist dunnage.

Figure 1: **Spar ceiling in the form of strips of steel sheet fitted to the side frames.**

Figure 2: **Timber dunnage stored in an untidy and dirty forecastle store — not how it should be stored.**

TYPES OF DUNNAGE AND ITS USE

Dunnage is used variously to protect items of cargo from damage, to separate items from other cargo and ship's structures and to support cargo against movement or within a stowage. The various types of dunnage in use include the following:

- Timber in the form of flat boards, large section baulks and the full range of sizes in between.
- Plywood sheets of a range of sizes and thickness.
- Various types of paper, including reinforced and water-resistant paper.
- Polythene sheeting and other synthetic and natural fibre material sheeting.
- Various types of poles and woven mats, made and used predominantly in the Indian sub-continent and the Far East.
- Air bags in a range of sizes.

Most of the above types of dunnage have a range of functions and some can be used in more than one situation. The principal uses to which dunnage is put are as follows:

- To support and/or separate one shipment of cargo loaded on top of another; principally in the form of timber or plywood sheets.
- To separate tiers of cargo within a stowage; principally in the form of timber, plywood sheets and various types of sheeting and matting.
- To protect cargo from contact with the ship's steelwork, to avoid contact with water that might form as ship sweat or that might run down from above, for whatever reason; in the form of timber, poles, woven mats and other sheeting.
- To support cargo against sliding or tipping, variously athwartships and in the fore-and-aft line of the vessel; in the form of timber shores and buttresses (sea fastenings are not dealt with here).
- To spread the load of cargo across the hatch, deck or tanktop; in the form of timber and plywood sheets.
- To increase the friction between tiers of cargo within a stowage or between the base of a cargo item and the hatch, deck or tanktop upon which it is stowed, to assist in handling and to avoid steel-to-steel contact; in the form of timber or plywood sheets.
- To support units of cargo within a stowage in the form of airbags, timber and plywood.

DUNNAGE AS PART OF THE SHIP'S OUTFIT

Most dunnage materials are, of course, brought on board for the stowage of a particular cargo, used for that cargo and then disposed of, as appropriate, following off-loading of the cargo. However, many vessels carry some dunnage materials as part of the ship's outfit and, although some will be discarded after use because of damage or contamination, some will be suitable for re-use many times. Also, some vessels are fitted with spar ceilings, either wooden plank fitted into brackets at the ship's side, or strips of steel sheet tack-welded to the frames (see Figure 1). Those materials and fittings must, therefore, be maintained and, where appropriate, stored properly.

Figure 3: **Cartons stacked on a clean, dry pallet of sufficient strength.**

Figure 4: **Condensation can be seen on the inside of the polythene shroud of this palli-tised unit. The water came from the timber pallet which was wet.**

Dunnage materials which might be part of the ship's outfit might include flatboard timber and other lengths of timber, plywood sheets, rolls of paper and sheeting, and air bags of the size normally used on board. A list of those items should be kept, inventories should be carried out at appropriate intervals and replacements should be obtained as and when appropriate. The dunnage should be stored in a suitable clean and dry storage space, away from any chemicals and other items that might cause damage, not as seen in Figure 2.

At appropriate intervals the dunnage materials should be visually examined overall to determine whether or not any damage or contamination has been sustained. Damaged or contaminated pieces should be discarded appropriately. Whenever any of the dunnage materials are brought into use they should again be thoroughly inspected for defects and for their suitability for the intended purpose. Spar ceiling fitted in the cargo holds should also be thoroughly examined at appropriate intervals and any routine maintenance or necessary repairs should be put in hand without delay. A record of all maintenance completed with respect to spar ceiling or other dunnage materials should be kept for future examination.

DUNNAGE: TYPES, USES AND CARE

Figure 5: **An example of a certificate.**

Figure 6: **Timber dunnage which has been heat treated and stamped.**

CLEANLINESS AND SUITABILITY

A large proportion of the dunnage used on board will be brought from ashore, having been supplied for use during the current voyage, and will be disposed of after the off-loading of the cargo carried, and is often referred to as one-trip dunnage.

When dunnage is brought to the vessel it should be inspected on the quay before it is taken on board. It should be inspected for its type, amount and cleanliness. The type of dunnage delivered should be that which it has been agreed is suitable for the cargo to be loaded. If it is not of the agreed type, it should be rejected, not taken on board and the supplier should be instructed to provide the correct type of material. That is to say, if it is timber or plywood it should be of the correct quality in terms of its strength, hardness/softness and size; if it is rolls of paper or other sheeting it should be of the correct quality in terms of its water resistance, strength and size of sheet, and if it is in the form of poles or matting they should be of the appropriate length and thickness for the cargo to be loaded.

The quality of timber dunnage is very important. If it is to be used to support items of cargo, particularly cases and uncased units, it should be hardwood of adequate strength which will not bow or twist. If it is to be used on the tanktop, deck or hatch, or to support and separate tiers of cargo, it should be softwood rather than hardwood, such that the upper tier of cargo is able to bite into the timber by a small amount to increase friction, but the timber used should be of an appropriate quality so that it retains the required strength and is not too soft, such that it is destroyed by chafage during the voyage. The balance between hardness and strength versus softness and a stable stowage must be considered in view of the cargo to be loaded.

The dunnage materials, whatever they are, should be clean and dry; they should not be contaminated or discoloured by anything. Any contamination is likely to affect the cargo where contact is made and claims are likely to be lodged by the consignee/receiver. The materials should be dry. Wet or even damp pieces of timber, poles or mats can cause direct wetting where contact is made with items of cargo and water given off by wet dunnage as it dries out during the voyage might lead to sweat formation which will cause wetting of cargo in the hold away from where the damage had been placed into use. Timber pallet boards are a form of dunnage and these too must be inspected for cleanliness and suitability and, indeed, their dryness, and if items of cargo are stacked upon unacceptable pallets, those units should be rejected from shipment (see Figures 3 and 4).

Another form of contamination is by insects or pests. Increasingly, the regulations of port states require the master to provide a certificate to demonstrate that any dunnage materials on board or to be landed at a discharge port have been appropriately treated, either by heat or by chemicals, to eliminate the possibility of the dunnage harbouring unwanted insects or pests and the dunnage should be stamped accordingly (see Figures 5 and 6).

Such a certificate of treatment must be obtained by the master when the dunnage materials are delivered alongside and it must be ensured that the certificate covers all of the materials delivered and that the materials have, so far as can be determined, been treated in the manner shown on the certificate and that the materials are not in any way infested. Alternatively, fumigation of the dunnage materials while in stowage on board might be carried out upon completion of loading. In such circumstances, the master must ensure that the fumigation has been carried out correctly and as required, and should retain the certificates of fumigation for presentation at the discharge port.

If it is intended that any dunnage materials are to be dumped at sea, the appropriate regulations must be followed. That is, primarily, annex V of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) - Regulations for the Prevention of Pollution by Garbage from Ships. Also, any other local requirements must also be followed.

To summarize, from the wide range of types of dunnage materials available the correct type or types should be chosen and then the necessary amount should be taken into use. The dunnage should be clean and dry and free of contamination of any form. Disposal of used dunnage should be planned and carried out in accordance with the appropriate regulations both when put ashore and when dumped at sea.

In the second article forthcoming in the next issue of *CURRENTS*, we will look at particular types of cargo and how dunnage might cause damage.

by: Captain Richard Gayton
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DUE DILIGENCE FOR HATCH COVER MAINTENANCE

Pursuant to the completion of a recent series of hatch cover seminars and workshops, conducted at the Association's Piraeus office, your Managers would like to reiterate the importance of each Member's responsibility to maintain their cargo hatch covers in good operable condition and establish an adequate inspection/maintenance program, so that due diligence may be proven in the event of a cargo claim.

Members operating vessels with known cargo hatch cover problems are not taking a risk, they are simply taking a gamble and sooner or later they will be facing a serious cargo claim. The cargo hatch covers may then become the subject of detailed scrutiny, at which point any deficiencies will be discovered, which will probably result in the defence of the claim, being compromised.

It is therefore the burden of the Member to prove that their cargo hatch covers are in "good" operable condition. Simple reliance on class/Loadline certificates and a hose testing may result in the discovery that the hatch covers are not in the condition expected. Similarly, Charterer's inspections and "on-hire" surveys may not include ultrasonic weather-tightness testing and subsequent approvals should not be considered as proof of satisfactory status.

The use of RAM-NEK tape should be avoided. There are generally two situations whereby charterers request that RAM-NEK tape be applied, that is, when the supercargo or charterers representative notice that the hatch covers are in a poor condition and that repairs might interfere with the ship's intended sailing schedule, or when it is mentioned in the Charter party that the hatch covers need to be sealed with RAM-NEK upon completion of loading operations. This may be done on the premise of an extra level of protection. The fact that charterers had asked for RAM-NEK tape to be applied would not relieve the Member from their duty, under the charter party, to present their vessel in seaworthy/cargo-worthy condition.

When charterers require that RAM-NEK tape be applied, it is recommended that the Member takes the following precautions:

1. Appoint an independent surveyor to carry out a visual inspection and ultrasonic test before applying the RAM-NEK tape.

2. Make an entry in the log book that the hatch covers were sealed with RAM-NEK tape under Charterer's instructions and cost after satisfactory inspection and testing by a survey company and to refer to the inspection/test report.

By doing so, the Member shows that they are aware of the risks of applying RAM-NEK tape and that they have taken reasonable steps to ensure that the hatch covers were in good order before the RAM-NEK tape was applied. These steps would provide useful evidence to prove due diligence and will put the Member and club in a better position in the event of a subsequent cargo claim being filed against the vessel.

Ongoing Planned Maintenance and inspection is therefore very important and it is therefore recommended that Members exercise further due diligence by incorporating regular inspections and testing by the cargo hatch cover manufacturers. Regular inspection of this type will help reveal defects at an early stage. The defects can then be dealt with without major costs or inconvenience. All manufacturer's reports should be held on file to support Members due diligence.

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AVOIDING PROBLEMS WITH PORT STATE CONTROL

Shipowners will no doubt be aware that the frequency of Port State Control (PSC) inspections has increased significantly over the past few years as have the general standards of inspections. There is now far more cooperation between PSC authorities worldwide and a more standardized approach. Most authorities use a Matrix targeting system utilizing numerical ratings. The primary arguments used are Ship management, classification society, flag State and prior PSC history. In addition, the vessel type and age are also recognized as contributing risk factors. The progress of Information Technology means that it is far simpler to track vessel histories. Major PSC authorities all publish their targeting criteria. The majority of authorities also have web-based interactive risk calculators that may be usedindependently, to assess possible risk and likelihood of being inspected. PSC authorities often conduct Concentrated Inspection Campaigns (CICs) which may greatly increase the likelihood of an inspection. These inspections are usually directed at vessels of a particular type and age.
Some additional factors that may be considered when assessing the probability of PSC inspection are:

- Has the ship been inspected by Port State Control within the last 6 months?
- Has it been more than 12 months since your ship last visited the particular Port State Control region?
- Has the ship's classification been recently suspended or withdrawn?
- Has your ship been involved in a collision, grounding or stranding prior to arrival?
- Has the ship discharged any harmful substances or effluents overboard during the voyage or has there been an alleged violation of local regulations?
- Was your ship contacted by local VTS during the voyage whilst transiting a traffic separation scheme and requested to clarify the passage plan.
- Has a pilot or a port authority official asked you about a deficiency which affects the safe navigation of the ship?
- Has the ship been previously detained and successfully completed the corrective action required and been released to sail from a previous port?

The PSC inspector will assess the following areas:

- The general condition of exposed areas and cargo handling equipment?
- Life saving appliances and fire fighting arrangements?
- Navigation and radio equipment?
- Pollution prevention equipment, procedures and function of the oily water separator (OWS)?
- Machinery spaces?
- Living and working conditions?
- Crew familiarity and training?

Remain polite and professional at all times. If there is doubt about any recommendation/ deficiency raised then don't be afraid to ask for further clarification.

Is the ship/crew prepared for a PSC inspection?

- First impressions are valuable and it is important to relay a competent and professional demeanor. Make sure that gangways are properly prepared/rigged and are free from defects. Make sure that the companies ISPS policies are being observed and that the crew is providing the proper gangway security watch and are equipped with adequate personal protection equipment.
- The inspector's ID should be checked and the inspector asked to sign the visitors list and display the appropriate pass.
- The crew should be polite, professional and helpful and direct the inspector to the duty officer.
- The crew should answer the inspector's questions in a positive manner and should not try to be evasive as this attitude will create further suspicion. If there are known areas of deficiency then they should be declared along with the corrective action intended.
- A ship that is clean and doesn't display significant signs of corrosion will provoke less negative attention.
- Make sure that ship's trading certificates are all current. The inspector will normally review certificates before proceeding on to other areas.
- Make sure that all required logs books have been kept up to date in accordance with the ship's SMS.
- The inspector will review ships bridge management system. This will include what publications are held on board and latest corrections made. The vessel should be able to demonstrate correct berth to berth Passage Planning, current compass error log, movement/bell book, radio/GMDSS log, radar operation log, and Master's standing/night orders.
- All firefighting and life saving equipment should be reviewed for defects and correct function. Common deficient areas include incorrect marking/signage, defective SCBA sets, BA bottles not charged, fireman outfits not complete or lamp batteries not charged, Muster lists not kept current, defective/missing fire hoses and nozzles, defective main and emergency fire pumps, out of date pyrotechnics, missing lifejackets, inoperative lifebuoy lights, out of date lifeboat rations/ incomplete equipment and defective lifeboat engine.
- The vessel's pollution prevention equipment should be reviewed. Common deficiencies include incomplete SOPEP supplies, save-alls with missing or temporary plugs, missing scupper plugs, missing bunker flange bolts, signage in way of bunker instructions, vents and oily water separators (OWS), incorrect operation of OWS, out of date calibration OWS sensor/ defective alarm, incorrect keeping of ORB and discrepancies with E/R fuel tank sounding log.
- Machinery spaces should be kept clean (clear of oily rags)/well lighted and machinery components free of major leakages. Oil tank site glasses should be of appropriate material and engine room sounding pipe weighted caps should not be disabled. Emergency components should be checked for correct function/operation.
- Living spaces and galley should be kept clean and tidy. Alleyways should be kept clear and signage should be appropriate. General and emergency lighting should be checked and appropriate. Smoke detectors, alarms and watertight doors (if fitted) should be operative and galley extractor vents/fans should be clean.
- Crew safety training should be well documented as per the vessel's SMS, company policy and regulatory requirements. The crew may be asked to demonstrate their understanding and knowledge of the vessel's safety functions and equipment. This may be demonstrated by general emergency drill, fire drill, man-overboard drill, boat drill and oil spill prevention drill. Crew may also be asked to demonstrate an engine room shut downs, remote trips/vents and CO_2 release, Start-up of emergency generator or fire pump, procedure and function of emergency steering and/or maneuvering.

Remain polite and professional at all times. If there is doubt about any recommendation/deficiency raised then don't be afraid to ask for further clarification. If the vessel has been detained and the deficiencies are considered unfair, then most PSC authorities have published written procedures of how to appeal against the detention.

For more detailed information the following port State inspection websites may be of assistance:

Paris MoU:
http://www.parismou.org/

Tokyo MoU:
http://www.tokyo-mou.org/

USCG:
http://homeport.uscg.mil/mycg/portal/ep/browse.do?channelId=-18371

Indian Ocean MoU:
http://www.iomou.org/inspmain.htm

Latin American Agreement on Port State Control:
http://200.45.69.62/

Caribbean MoU:
http://www.medmou.org/caribbean.html

West African MoU:
http://www.medmou.org/west_africa.html

Mediterranean MoU:
http://www.medmou.org/

by: Dr. Ranbir Singh
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Mumbai, INDIA

HEPATITIS B: GENERAL INFORMATION AND CONSIDERATION FOR VACCINATION OF SEAFARERS

Vaccinations to seafarers for hepatitis B are generally not required in the maritime industry. However, given the number of cases seen in the developing world where large numbers of seafarers are drawn from, shipowners should consider whether such vaccinations should be made prior to seafarers going aboard ship to reduce the frequency of such a dangerous and debilitating disease. This article provides guidance for ship-owners to consider on vaccinations that can reduce the incidences of attracting the disease.

Hepatitis B is a potentially life-threatening liver infection caused by the hepatitis B virus. It is a major global health problem and the most serious type of viral hepatitis.

Worldwide, an estimated two billion people have been infected with the hepatitis B virus (HBV) resulting in more than 350 million have chronic (long-term) liver infections and more than 250,000 die from liver-related disease annually. At least 15-25% of chronically HBV infected people will die due to liver disease caused by HBV. It is the most common cause of chronic liver disease, including cirrhosis of the liver and hepatocellular carcinoma.

In the developed countries HBV infection is present in less than 1% of the population. This contrasts with the situation in the developing countries of Asia and Africa, where HBV infection occurs in 5-10% of the general population and is responsible for more than 50% of chronic liver diseases. In India, nearly 3 to 4% of the population is infected by the virus. In the context of a large population and absence of a national immunization programme, HBV epidemiology in India becomes relevant because of the possibility that India may soon have the largest HBV infection pool in the world. (In 2007, 4,519 cases of acute hepatitis B in the United States were reported to the Center for Disease Control (CDC); the overall incidence of reported acute hepatitis B was 1.5 per 100,000 persons.)

HBV is transmitted by the exchange of body fluids such as blood, semen, and in some circumstances saliva – but not through casual contact. The virus incubation period is 30 to 180 days (90 days on average). HBV may be detected 30 to 60 days after infection and persist for widely variable periods of time.

Hepatitis B virus can cause an acute illness with symptoms that last several weeks, including yellowing of the skin and eyes (jaundice), dark urine, extreme fatigue, nausea, vomiting and abdominal pain. People can take several months to a year to recover from the symptoms.

HBV INFECTION HAS 2 PHASES: ACUTE AND CHRONIC

- Acute (new, short-term) hepatitis B occurs shortly after exposure to the virus. A small number of people develop a very severe, life-threatening form of acute hepatitis called fulminant hepatitis.
- Chronic (ongoing, long-term) hepatitis B is an infection with HBV lasting longer than 6 months and its development depends upon the age at which a person becomes infected. Once the infection becomes chronic, it may never go away completely. People with chronic HBV infection are called chronic carriers. About two-thirds of these people do not themselves get sick or die of the virus, but they can transmit it to other people. The remaining one third develops chronic hepatitis B, a disease of the liver that can be very serious. About 90-95% of people who are infected are able to fight off the virus so their infection never becomes chronic. Only about 5-10 percent of adults infected with HBV go on to develop chronic infection.

The hepatitis B surface antigen (HBsAg) is the first detectable viral antigen to appear during infection and is most frequently used to screen for the presence of this infection. But early in an infection, this antigen may not be present and the infectious virion contains an inner "core particle" known as hepatitis B core antigen (HbcAg) which may be the earliest marker of the disease. Shortly after the appearance of the HBsAg, another antigen named as the hepatitis Be antigen (HBeAg) appears and it is associated with much higher rates of viral replication and enhanced infectivity. In the natural history of HBV infection, the most important event is HBeAg seroconversion characterized by loss of HBeAg and development of antibody to HBeAg (Anti Hbe). This generally occurs years after replicative phase and indicates transition to a low/non replicative phase with potential for resolution of infection and improvement of necro-inflammation in the liver.

Age of acquisition of the virus, immune competence of the host and the strength of immune response to the viral antigens are some of the determinants of timing and efficiency of seroconversion. For some people, this relationship between seroconversion and suppression of viral replication does not hold true. Despite anti-HBe positivity, active viral replication persists due to emergence of mutants of HBV and has been termed as HBeAg negative hepatitis. Fluctuating disease activity with periodic ALT flares accompany viral replication that progresses indolently to chronic liver disease and is often seen in these persons. HBeAg negative hepatitis is progressively increasing in prevalence globally.

If the host is able to clear the infection, eventually the HBsAg becomes undetectable and will be followed by IgG antibodies to the hepatitis B surface antigen and core antigen, (anti-HBs and anti HBc IgG) indicating an immune status.

HEPATITIS B: GENERAL INFORMATION AND CONSIDERATION FOR VACCINATION OF SEAFARERS

Hepatitis B vaccine is 95% effective in preventing HBV infection and its chronic consequences, and is the first vaccine against a major human cancer. The vaccine has an outstanding record of safety and effectiveness. Hepatitis B vaccination should be administered to all unvaccinated seafarers traveling to areas with intermediate to high levels of endemic HBV transmission. Hepatitis B vaccines have been shown to be safe for persons of all ages. After age 40, protection following the primary vaccination series drops below 90%. At 60 years old, protective antibody levels are achieved in only 65 to 75% of those vaccinated. Protection lasts at least 20 years and is expected to be lifelong.

The vaccine is usually administered in three dosages. The second dose should be given 1 month after the first dose; the third dose should be given at least 2 months after the second dose and at least 4 months after the first dose. A three-dose series that has been started with one brand of vaccine may be completed with another brand.

Ideally, vaccination should begin at least 6 months before the seafarer goes to sea so the full vaccine series can be completed before departure. Because some protection is provided by one or two doses, the vaccine series should be initiated, if indicated, even if it cannot be completed before departure. Optimal protection, however, is not conferred until after the final vaccine dose. They should be advised to return for completion of the vaccine series.

Although not US Federal Drug Administration approved, an accelerated vaccine schedule could be used for those traveling to endemic areas at short notice and facing imminent exposure. The monovalent hepatitis B vaccines can be used at 0, 7, and 21–28 days. If an accelerated schedule is used, the patient should receive a booster dose at least 6 months after the start of the series to promote long-term immunity.

Ideally, post-vaccination testing should be performed 1-2 months after completion of the vaccine series. If anti-HBs levels are < 10 mIU/mL:

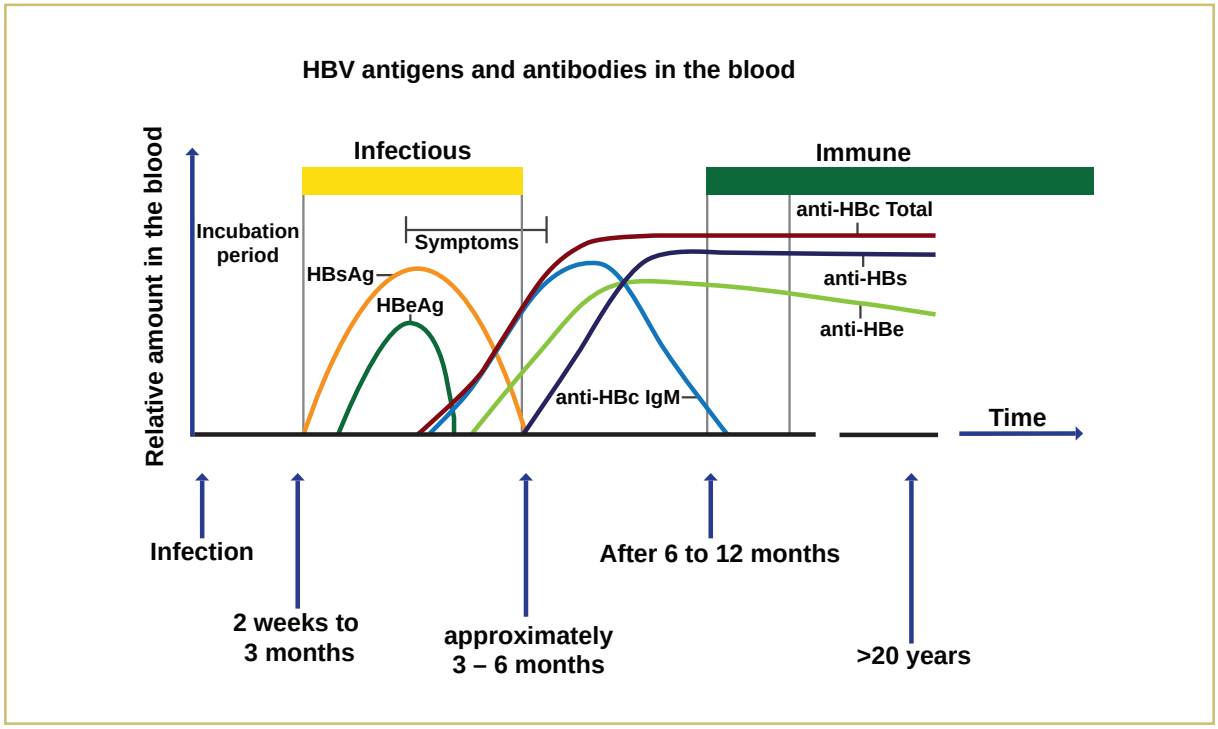
a. complete a second series of 3 doses of hepatitis B vaccine;

b. administer on the usual schedule of 0, 1, and 6 months; and

c. retest 1-2 months after completing the second series

Common side effects include soreness, swelling and redness at the injection site.

These vaccines should not be administered to persons with a history of hypersensitivity to any vaccine component, including yeast.



CORRESPONDENT PROFILE

THE VIEW FROM EGYPT:
FROM ALEXANDRIA TO THE SUEZ

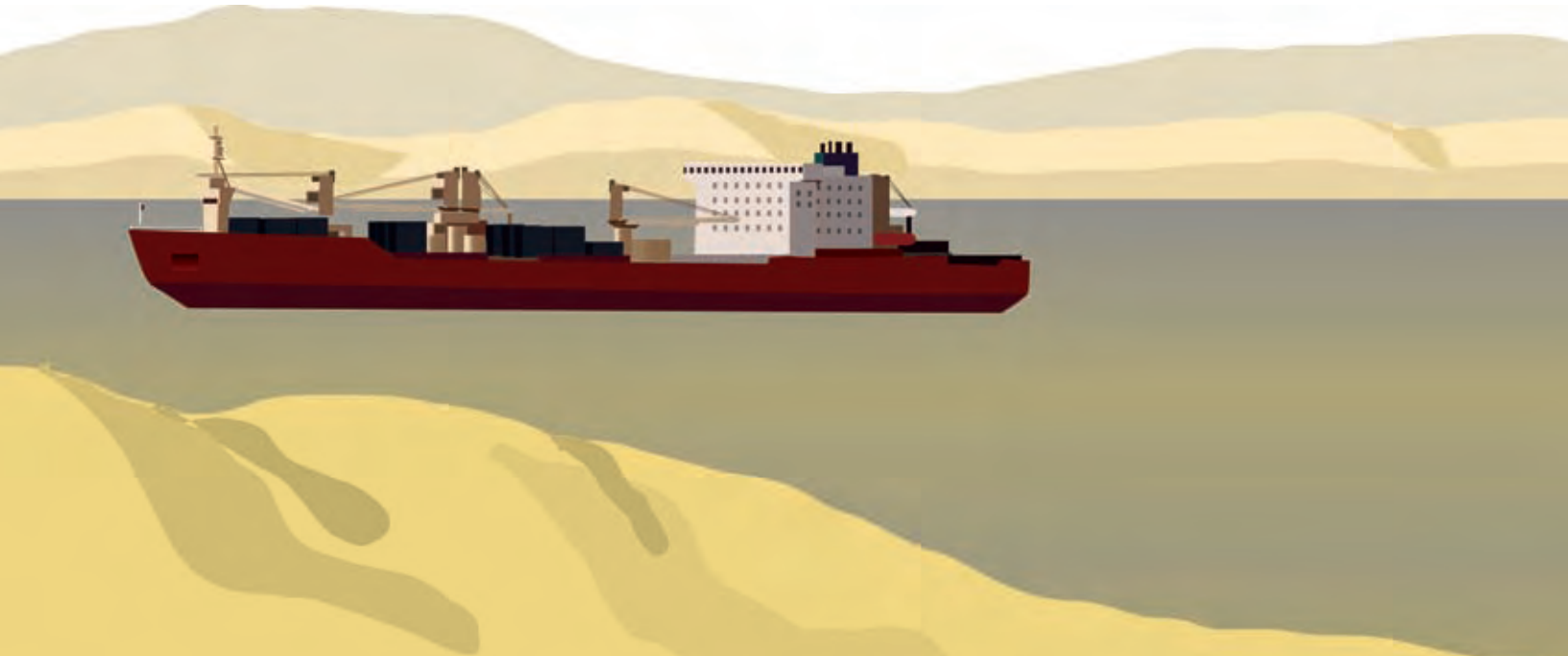
by: Ibrahim Hamza
Middle East Survey & Control Office (MESCO)
Alexandria, Egypt

An Introduction to MESCO

MESCO was founded in 1960 by the ex-undersecretary of shipping of Egypt, Mr. Hamdy El Sabbagh, and has been in the market for a much longer time than most realize. Consequently, this is critical by giving us an edge in the knowledge of the local market to the benefit of shipowners when we are needed. Under the leadership of Mr. Ashraf El-Sabbagh we now represent almost all of the mutual clubs as well as the fixed premium ones. The pain-staking task of achieving this has come from the hard work of the team at MESCO (both our claim handling team as well as our legal team) as each individual contributes to the standard of services we hope to provide to each club. We pride ourselves on presenting the facts—no matter how bleak they may be— to club claim handlers who rely heavily on our opinion, background and knowledge to make critical decisions on behalf of their Members.

At times it can be quite difficult to explain some of the reasoning behind some of our advice due to the difference in the nature of cultures and how tricky it is to elucidate some of the decisions that we recommend. But in the end we have found that through transparent communications, we have gained the trust of those who work with us.

We have gained most of our experience through the offering of various services that compliment that of a P&I correspondent. However, we have expanded services including conducting P&I and hull & machinery condition surveys which has enabled us to be more aware of the requirements of any club and the scope and limitations of both P&I and hull & machinery coverage.We have also gained extensive experience over the years by representing Richards Hogg Lindley for the better part of forty years.



Egypt, being right in the middle of the world's maritime routes and with the presence of the Suez Canal, has seen its share of complicated claims and arrests. It is understandable that many would see this particular area as quite a difficult area in which to trade or have a claim due to the stringent rules and laws as well as the cultural prohibitions that hinder the application of some of the worldlier accepted rules. However, it is with our local knowledge and expertise that we try to overcome such fears and beliefs in trying to pave the way to a more acceptable solution as well as dealing with the local barriers at the same time.

Like any other service we are not solely dependent on our own expertise but rely on both surveyors and lawyers alike, as needed. Consequently, we have expanded our network of surveyors in Egyptian ports while carefully choosing the right surveyors with the specified expertise needed for the characteristics of the survey being performed.

THE SUEZ CANAL

The Suez Canal is an artificial sea-level waterway in Egypt, connecting the Mediterranean Sea with the Red Sea. Opened on November 1869, it allows water transportation between Europe and Asia without navigating around Africa. The northern terminus is Port Said and the southern terminus is Port Tawfik at the city of Suez.

The canal is 192 km (119 mi) long with Ismailia, on the west bank, 3 km (1.9 mi) north of the half-way point. It consists of the northern access channel of 19.5 km/12.1 mi, the canal itself of 162.25 km/100.82 mi and of the southern access channel of 8.5 km/5.3 mi. It is single-lane with passing places in Ballah By-Pass and in the Great Bitter Lake. It contains no locks; seawater flows freely through the canal into the Great Bitter Lake from both the Mediterranean Sea in the north and the Red Sea in the south.

CORRESPONDENT PROFILE

New Rules of Navigation for the Suez Canal

New Rules of Navigation that constitute an improvement on the older ones were passed by the board of directors of the Suez Canal Authority (SCA) to organize vessels' and tankers' transit that came into force as of 1 January, 2008.

The most important amendments to the Rules include allowing vessels with 62 ft draught to transit and increasing the allowed breadth from 32m up to 40m following improvement operations, as well as imposing a fine on vessels using divers without permission from outside the SCA inside the canal boundaries.

The amendments also allow vessels loaded with dangerous cargo, such as radioactive or inflammable materials, to transit after conforming to the latest amendments provided by international conventions.

The SCA will also have the right to determine the number of tugs required to assist warships transiting the Canal to achieve the highest degree of safety during transit. The vast canal can handle more ship traffic and larger ships than its main competitor, the Panama Canal.

The canal is owned and maintained by the Suez Canal Authority (SCA) of the Arab Republic of Egypt. The SCA has a Rule Book (The SCA Rules of Navigation) that is considered to be a contract of adhesion due to the rights it gives the SCA.

In recent years there have been many incidents where many owners have had problems with the Suez Canal region, especially when it comes to "Buoys" and the claims that have generated from same, although the Suez Canal adopts a policy of strict liability and holds bonds for the Transit Agents that these amounts are automatically deducted from they have in many cases refunded these amounts once they had found that the vessels are not at fault, even though this is not an easy task.

The Suez Canal and Red Sea region is currently facing many problems due to the current outbreak of the pirates operating out of the Somali coast which has led to a fear of crossing the canal and with the current world economic prices and the daily hire of vessels becoming very low and has forced some owners to consider going thru the alternative route.

Ports

Egypt has several ports on its Mediterranean coast, the most famous of which are Alexandria, Damietta and Port Said. In recent years, Damietta has begun to replace Alexandria in the attraction of many of the key lines due to its more appropriate position as well as the quality of services that it offers. Although a government organization, as all other major ports in Egypt, Damietta still has its difficulties.

On the Red Sea side, the most famous ports are Suez and Safaga. The relatively new private sector ports of El Sukhna (operated by DP World) and the Suez Canal Container Terminal (operated by A.P. Møller Terminals) are becoming more and more important in the containerized cargo.

Main Difficulties Facing the International Trade in Egypt

Due to its position Egypt is considered as a very strategic country in terms of worldwide sea-going transportation, as well as the huge reliance on imported commodities in addition to exporting commodities. Yet, there are problems that ship owners face in Egypt given the antiquated methods of discharging which have led to notably large shortage claims.

In addition, problems arise from receivers not accepting any kind of guarantees and favoring only cash settlements. Periodically, MESCO faces situations where the claimants have refused either Bank Letter of Guarantees or a club Letter of Undertaking and insisted on a cash settlement regardless of the amount.

Legal System

The legal system, like in most of the developing world, is quite slow and might not always be understood to many of the developed countries due to the old laws that are still applicable to this day and are not always up to date with current developments in world trade.

EGYPT

Covering an area of about 1,010,000 square kilometers (390,000 sq mi), Egypt is bordered by the Mediterranean Sea to the north, Palestine to the northeast, the Red Sea to the east, Sudan to the south and Libya to the west.

Egypt is one of the most populous countries in Africa and Western Asia. The great majority of its estimated 76 million live near the banks of the Nile River, in an area of about 40,000 square kilometers.

Egypt is famous for its ancient civilization and some of the world's most famous monuments, including the Giza pyramid complex and its Great Sphinx. Egypt possesses one of the most developed economies in the Middle East, with sectors such as tourism, agriculture, industry and service at almost equal rates in national production. Consequently, the Egyptian economy is rapidly developing, due in part to legislation aimed at luring investments, coupled with both internal and political stability, along with recent trade and market liberalization.

FD&D CORNER

by: Parker Harrison, Esq.
Vice President and FD&D Manager
New York

IT'S THE END OF RULE B AS WE KNOW IT... DO YOU FEEL FINE?

As the Membership is well aware, the decision of the Second Circuit Court of Appeals in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.2d 263 (2d Cir. 2002), opened the floodgates to Rule B attachments in New York as the preferred method of obtaining security for maritime claims. In that case, the Second Circuit held that electronic funds transfers (EFTs) were property subject to attachment under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, even if the funds were only temporarily in the hands of intermediary banks in New York, and even if the funds were destined for accounts outside the U.S. In the wake of *Winter Storm*, Rule B became an invaluable tool for maritime creditors to secure claims that might otherwise fail for lack of enforceability, such as where the judgment debtor is a shell company with no concrete assets.

Since the *Winter Storm* decision was handed down, both the Southern District of New York and Second Circuit Court of Appeals have struggled to better define the contours of Rule B's application in the context of EFTs. The Managers have traced the development of this case law in prior issues of *CURRENTS* and have commented on the proliferation of Rule B actions in this jurisdiction. Because banks in New York process up to 95% of all US dollar fund transfers worldwide, Rule B afforded a cost-effective and relatively straightforward means of obtaining security. This tool has become all the more valuable during the market downturn of the last 18 months.

But as their caseload of Rule B applications mushroomed, some federal court judges in New York began to devise increasingly stringent limitations on the use of this procedure. The Managers have outlined the evolution of these restrictions in prior editions of FD&D Corner; in *STX Pan Ocean (UK) Co. Ltd. v. Glory Wealth Shipping Pte. Ltd.,* 560 F.3d 127 (2d Cir. 2009), for instance, the Second Circuit held that a defendant that is registered to do business in New York State and appoints an agent for service of legal process within the court's jurisdiction is "found" within the district and thus immune to Rule B attachments. In *Cala Rosa Marine Co. v. Sucres et Deneres Group,* 613 F.Supp.2d 426, 2009 AMC 410 (S.D.N.Y. Feb. 4, 2009), the district court refused to order the garnishee banks to treat the attachment papers as having been continuously and repeatedly served. Other Rule B rulings permitted an intermediary bank to charge fees to screen their EFTs and to comply with the writ of attachment. The Managers have even heard tales of Rule B applications on which the district court judge had failed to take action, by either granting or denying the attachment order, for many months. With such inconsistency in approach and, in some cases, an evident hostility toward the use of Rule B to attach EFTs, creditors, debtors, and lawyers in the maritime world began to wonder if the bonanza might be coming to an end.

On Friday, October 16, 2009, the Rule B train came to a screeching halt when the Second Circuit issued its opinion in *Shipping Corp of India, Ltd., v. Jaldhi Overseas Pte. Ltd*. To the dismay of vessel owners and other maritime creditors the world over, the Second Circuit has reversed its decision in *Winter Storm* and ruled that, under New York law, EFTs are not property subject to Rule B attachment. The Court cited a host of policy reasons why EFTs should not be subject to attachment, including chiefly the increased burden on both the district courts and the garnishee banks, a supposed threat to the usefulness of the U.S. dollar in international transactions, and potential damage to New York's standing as an international banking center.

Against the backdrop of these pressing policy considerations, the Court rejected *Winter Storm*, finding in particular that that decision had erroneously been based on the attachability of EFTs under a federal forfeiture statute. Rule B permits attachment of "the defendant's tangible or intangible personal property"; the propriety of the attachment, and therefore the court's jurisdiction, depends on the defendant's ownership of the property sought to be restrained. Under the forfeiture statute, however, the only predicate to seizure is a link between the funds to be restrained and criminal activity – ownership of the funds is irrelevant. The Court reversed *Winter Storm* and then proceeded to examine New York property law to determine the ownership of EFTs passing through intermediary banks.

Under New York law, the Court held, EFTs that are momentarily in the hands of intermediary banks do not belong to either the originator or the intended recipient. Because Rule B only permits attachment of tangible or intangible property belonging to the defendant, the Court concluded that EFTs in the hands of intermediary banks in New York are not subject to Rule B attachment.

Rule B practice will now return to its pre-2002 procedure, which only permitted attachment of funds held in accounts actually maintained in the district of the particular court, physical freight or hire payments present in the district, or other seizable property like cargo and bunkers.

Shipping Corporation of India is likely the last word on this issue in the Second Circuit. Curiously, the decision was made in a "mini *en banc*" procedure in which the three-judge panel circulated its decision to all of the active Second Circuit judges for comment. Because none of the other judges objected to the decision, it has the effect of an *en banc* ruling, which is usually required for one panel of judges in an appellate court to overturn a prior decision from another panel within the same court. Given this procedure, it is unlikely that the decision will be the subject of further substantive review. Review by the United States Supreme Court is possible but extremely unlikely, because appeals to this Court in civil matters are not a matter of right. Instead, the aggrieved party must convince the Court that the case merits their consideration. Absent any constitutional issues or a conflict with decisions of other Circuit Courts of Appeal, there is virtually no chance that the Supreme Court will grant review.

What is clear in the aftermath of this decision is that no federal district courts in New York will issue writs of attachment to restrain EFTs. What is not clear is how this ruling will affect existing Rule B attachments. No doubt defendants in these pending actions, particularly those in which funds have already been restrained, will apply to the district court to vacate its attachment order and release any seized funds. There is an argument that the *Shipping Corporation of India* decision should not be applied retroactively because funds attached in already-pending cases were restrained in accordance with the law as it existed when the attachment order was issued, but the success of such an argument remains to be seen.

The Managers are keenly aware that a number of Members have pending Rule B actions in which funds have been seized as security for claims. The Managers are working closely with New York counsel on the best way forward to preserve any such security if at all possible and will revert in individual cases with our recommendations.

In the meantime, both Members and the Managers will have to reassess methods of securing claims, whether by vessel arrests, attachments, and other methods in the U.S. or other available jurisdictions. These procedures are both more costly and time-consuming than Rule B attachments had been, but maritime creditors must now rely on these alternative mechanisms as their primary weapons for securing claims. Members are encouraged to be more cautious about the companies with which they do business and, should a need for security arise, the Managers stand ready to advise and assist the Membership with any such inquiries.

JUDGMENT ENFORCEMENT IN NEW YORK MADE EASY: CANARY IN A *KOEHLER* MINE

In early June 2009, the New York Court of Appeals issued a decision that may potentially soften the blow of the *Shipping Corporation of India* decision that eliminated Rule B attachments of EFTs. In *Koehler v. The Bank of Bermuda,* 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (N.Y. June 4, 2009), the New York Court of Appeals – New York State's highest court – answered a question certified to it by the Second Circuit Court of Appeals. (A certified question is basically a request from a federal court to the highest court in a particular state to issue an opinion on an unsettled or *res novo* issue of that state's law.) The Second Circuit asked the Court of Appeals whether a New York court is empowered to order a garnishee bank subject to its jurisdiction to surrender to a judgment creditor property belonging to a judgment debtor, even when that property is located outside the state. To the dismay of judgment debtors everywhere, the Court of Appeals ruled that the answer under New York law is "yes."

Consider the implications. Under *Koehler*, any entity holding an as-yet-unsatisfied arbitration award or court judgment can potentially enforce that award or judgment in New York by obtaining a turnover order against the debtor's New York bank. Subject to any defenses that the bank itself might have, the bank will be ordered to surrender the judgment debtor's funds – even if the customer's account is at the bank's overseas location. Consider also that the rule is not limited to maritime claims, so any judgment or award, regardless of where issued, and regardless of the subject matter of the underlying dispute, can be the basis of a New York enforcement action under the right circumstances.

Personal jurisdiction over the judgment debtor may not even be necessary. So long as the garnishee bank is subject to the court's jurisdiction and is also a subsidiary of and agent for its foreign parent, the "turnover order" can reach overseas assets. In *Koehler*, for instance, the judgment debtor was not present in New York and thus was not subject to personal jurisdiction in New York courts. But because the judgment creditor had obtained

CONTINUED FROM PAGE 33

a default judgment against the debtor in Maryland, the New York court was obligated to give that judgment "full faith and credit" as required by the U.S. Constitution; moreover, the garnishee bank was subject to personal jurisdiction in New York.

Of course, foreign companies that are "present" in New York, such as by being registered to do business here, are unquestionably subject to jurisdiction in New York courts. After the Second Circuit's *Glory Wealth* decision precluding Rule B attachments where the defendant is registered to do business in New York, many companies rushed to register with the New York Secretary of State. The *Koehler* decision vividly illustrates one of the unintended side effects of registering here. Under *Koehler*, whenever a creditor obtains a judgment in New York against such a registered foreign entity, whether by filing suit in the first instance in New York or by bringing a foreign judgment or arbitration award to New York for recognition, that debtor itself can be ordered to bring out-of-state assets into this state to satisfy the judgment because the debtor is subject to the court's jurisdiction. Now that the Second Circuit has eliminated Rule B attachments of EFTs, however, the Managers anticipate that most such foreign defendants will de-register with New York State to avoid the *Koehler* trap.

The *Koehler* case is still working its way through the federal court system, so it is not yet clear whether we have heard the final word on this controversial ruling. The dissenting judges of the Court of Appeals voiced grave concerns regarding competing priorities, jurisdictions, and courts, as well as a legitimate constitutional issue concerning the scope of the decision. Because *Koehler* represents the final word of New York's highest court on the issue, however, the only hope for a reversal would be in the United States Supreme Court. Given the potential constitutional implications, and given that the Rule B tide has turned decisively in favor of debtors, this decision could be the next *Winter Storm* on the horizon. Watch this space for further developments.

YOU CAN WITHDRAW ANY TIME YOU LIKE, BUT YOU CAN NEVER LEAVE!

When a shipowner withdraws its vessel from a time charterer, it would of course be easier for the parties to go their separate ways if at the time of withdrawal the vessel is unladen. If there is cargo aboard, there may be some question as to who pays the cost of completing the voyage and discharging the cargo. Even where the receiver is responsible for paying the costs of discharge, it may still be uncertain who pays for the time necessary to conclude the voyage and discharge the cargo.

In the recent case of *ENE Kos v. Petroleo Brasiliero S.A.,* [2009] EWHC 1843 (Comm), the vessel was on a Shelltime 3 charter during which the Charterers ordered the vessel to Angra dos Reis, Brazil, to load cargo and take on bunkers. Only one of the two cargo parcels was loaded and, after Charterers failed to pay hire, the Owners gave notice of withdrawal. After some negotiations, the Charterers agreed to take back the loaded parcel, but later that same day alleged that the notice of withdrawal was wrongful and demanded that Owners provide US$ 18 million in security for Charterers' alleged damages.

The Owners posted a bank guarantee, but also claimed hire for the 2.64 days (amounting to US$ 410,274) that were required to discharge the cargo, plus bunkers consumed during this time (US$ 40,415).

The two critical provisions of the charter party included Clause 13, which provided that the Master should be under the order and direction of the Charterers and that they were liable to indemnify the Owners against consequences or liabilities that might arise from Owners complying with those orders. Clause 14 included the customary provision that the Charterers should accept and pay for the bunkers on board at the time of delivery and that the Owners should, at the conclusion of the charter party period, pay for all bunker oil remaining on board at the actual purchase price.

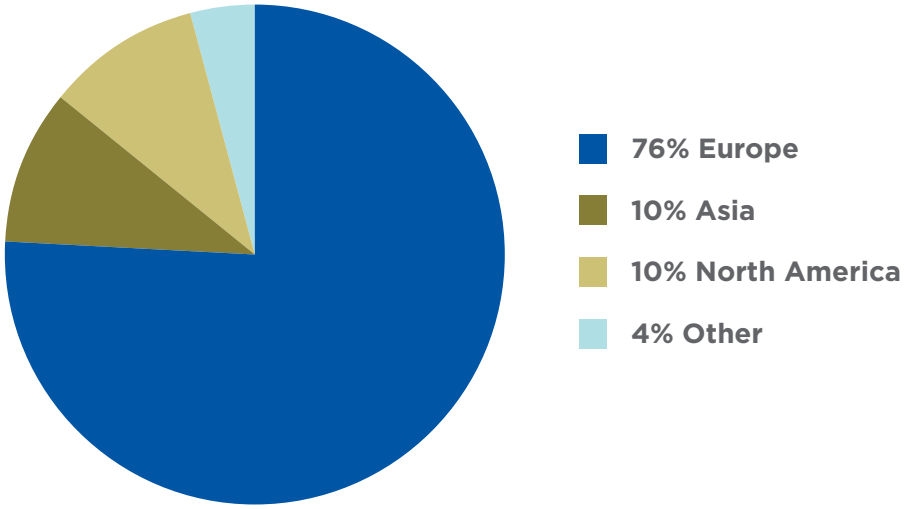
The Commercial Court rejected all of the Owners' arguments based on Clauses 13 and 14 of the charter party, and held that the Owners' losses were attributable not to Charterers' orders or conduct, but instead to Owners' withdrawal of the vessel. The Court similarly rejected Owners' contention that the charter party contained an implied term obligating Charterers to pay hire, pay for bunkers, and make arrangements to discharge any cargo on board following a valid withdrawal of the vessel.

What the Court did accept, however, was the Owners' bailment argument. Because Charterers had benefited from the Owners' services as bailee, the Charterers were obligated to pay for those services. Under this ruling, therefore, an Owner who continues to perform a voyage and discharges cargo on board after validly withdrawing the vessel from the Charterer's service may recover the value of the time taken to do so, along with any expenses incurred. Reference to a particular provision of the charter party is therefore unnecessary.

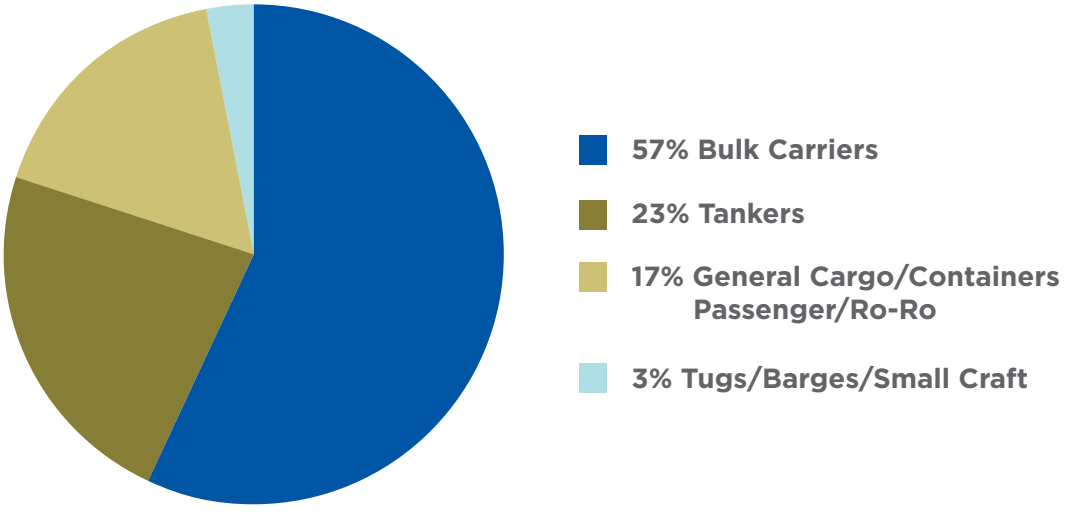
Perhaps most surprisingly, the Court held that the provision of security was incidental to the claim and that Owners' expenses associated with posting the bank guarantee might be recoverable as costs under the Supreme Court Act 1981.

ALL CLASS GT BREAKDOWN

GT BREAKDOWN BY REGION



GT BREAKDOWN BY VESSEL GROUP



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