CURRENTS

Issue Number 32 • June 2011

CURRENTS

Issue Number 32 • June 2011

To the left and page 22-23:

The Merchant Seafarer's War Memorial, Cardiff Bay, Cardiff. Designed and Sculpted by Brian Fell (1996).

One side of this sculpture is the beached hull section of a merchant ship , while the other features a human face at rest, incorporated into that same hull section. The hull rests on a circular mosaic by artists Louise Shenstone and Adrian Butler. Inscribed around the edge of the mosaic are the words:

"IN MEMORY OF THE MERCHANT SEAFARERS FROM THE PORTS OF BARRY PENARTH CARDIFF WHO DIED IN TIMES OF WAR"

MANAGEMENT CHANGES

THE FOLLOWING APPOINTMENTS HAVE BEEN MADE TO THE STAFF OF SHIPOWNERS CLAIMS BUREAU, INC., THE MANAGERS:

NEW YORK

LUCA BRUGA	Staff Surveyor
SHAUN F. CARROLL	V.P.-Legal Special Projects
SHARON A. DOYLE	Accountant
MARIO LASPISA	IT Support Specialist
CHARLEANE T. SALSTEAD	Accounts Receivable

GREECE

JOANNA KOUKOULI	Claims Executive
ALEXANDROS LAMPRINAKIS	Claims Executive

THE AMERICAN CLUB 1917

Cover Art:

The cover is a rendering of the passenger liner *SS UNITED STATES* that was entered with the American Club for more than 17 years between June 1952 and December 1969. The vessel was the last of the great passenger liners built solely in the United States.

The *SS UNITED STATES* still retains the honors of being the largest ocean liner ever constructed entirely in the U.S., and the fastest ocean liner to cross the Atlantic in either direction, retaining the Blue Riband given to passenger liners that crossed the Atlantic Ocean in regular service with the highest recorded speed.

CURRENTS is edited by:
Dr. William H. Moore

Designed by:
Mirror NYC

Illustrated by:
Mr. John Steventon

INTRODUCTION

By: Joseph E.M. Hughes
Chairman & CEO
Shipowners Claims Bureau, Inc.
New York, NY

What's in a plan?

To parody Shakespeare, the unpurposed consequences of pure serendipity might smell as sweet. Premeditation does not guarantee success. We are told that to fail to plan is to plan to fail. However, the Prussian general, von Moltke, once observed that battle plans become obsolete five minutes after a battle has commenced!

Insurers deal with essentially fortuitous events. Can planning have much impact on ultimate results, at least by comparison with, say, manufacturing industry? There the components of future success can be predicted with greater accuracy and hedged against – for example, in regard to foreign currency exposures.

In spite of the limitations intrinsic to insurance as a "plannable" business, there is virtue in having strategies to meet future business conditions. Reinsurance aside, planning might be said to have four distinct parts. Two could be described as "bottom up". Two are more "top down".

The two "bottom up" elements of P&I planning are those which relate to risk selection and price modeling. The former draws upon a club's experience of risk in the most general sense. It is also assisted by the prophylactic aims of a strong loss prevention program. Price modeling is informed by a club's experience of types of risk, overhead (such as reinsurance and administrative expenses) and the calculation of "burning cost" by reference to particular trades, crews, flags, vessel types and so on.

Each is a critical component in the assessment and proper pricing of risk. In the American Club's case, each is conducted in accordance with a set of economic matrices and controls.

The "top down" elements of planning look to the bigger picture and the global influences on club performance. They have horizons beyond the practical assessment of individual risks, and take into account the likely commercial landscape for years to come.

These "top down" elements can be divided into tactical and strategic categories. The strategic is informed by long-term influences on club positioning. Tactical elements look to specific ways of achieving goals. Action plans aimed at accomplishing the vision intrinsic to those goals are closely related and inter-connected.

The American Club has recently adopted a new "top-down" strategy in succession to former initiatives. Entitled *Partners In Progress* it has as its focus the Club's centennial in 2017.

It is predicated on a vision of the Club which, on celebrating its centennial, will remain a first-division marine insurer of a size, diversity, global reach, product range and service capability commanding universal respect within the industry. It will be distinguished by a high reputation for professional integrity, financial strength and customer care. It will be supported by transparent and effective corporate governance with a committed and energetic Board working in close and constructive cooperation with a strong and highly motivated management team.

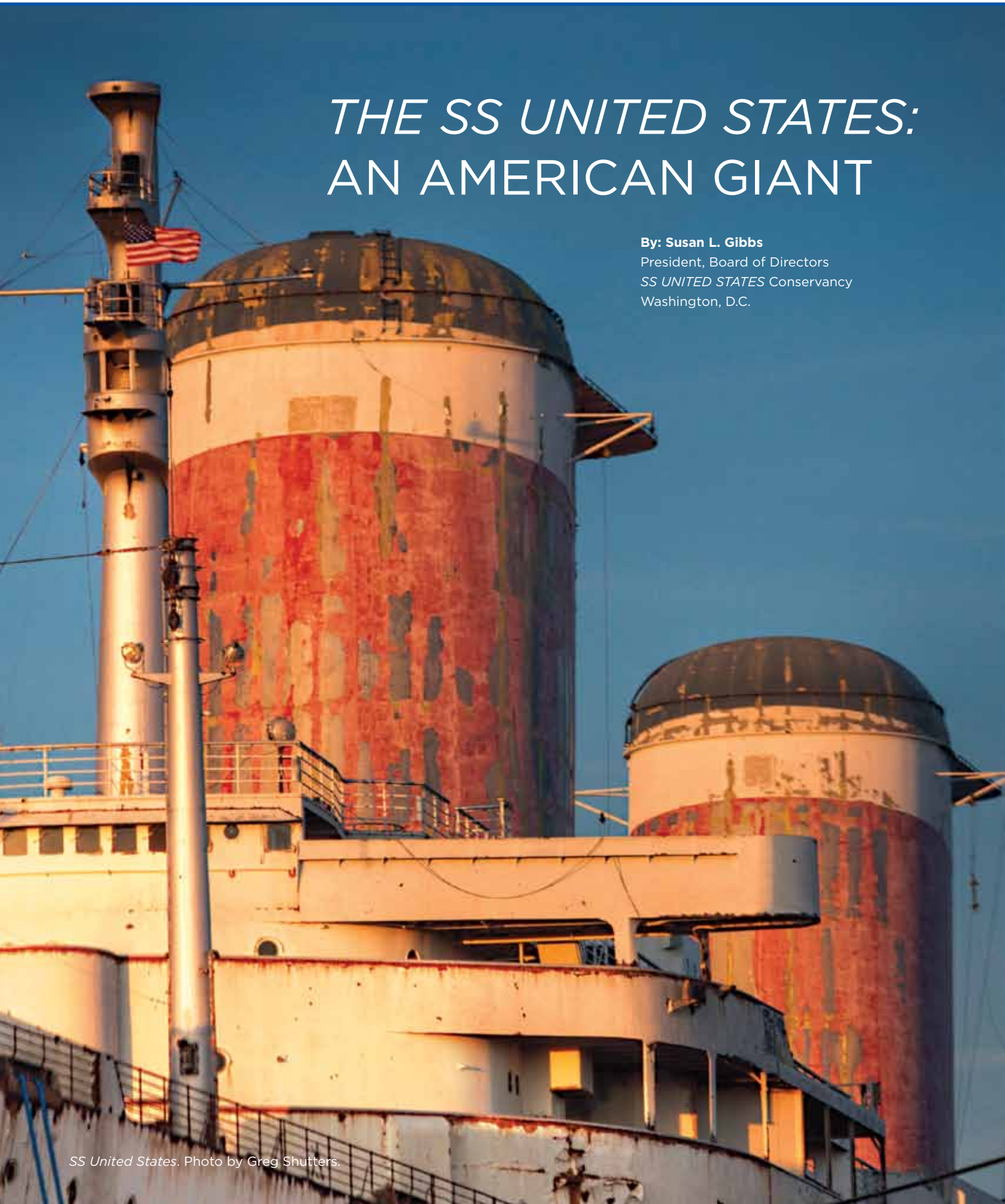
In the meantime, having experienced a solid renewal season, the American Club is now in the process of compiling its report for the twelve months to December 31, 2010. It was a very good year. Tonnage was stable. Premium rating remained firm. Retained claims declined substantially (by over 30% in comparison with the next best year of the previous five years at the same stage of development). Underwriting results continued to improve. Investments performed well (total funds up 17%, a 7.7% return achieved). Free reserves grew substantially (by 29% on a GAAP basis, fully 48% in statutory terms). Service capabilities were enhanced.

These trends have continued into the new policy year. They provide a solid platform for the future development of the Club's mission over the years ahead.

The accomplishment of this mission will entail hard work and dedication on the part of all those who serve the American Club. It will certainly not lack energy and enthusiasm. These form the enduring core of the Club's outlook. It will, however, and as always, require the continuing support of the Club's members and its many other friends throughout the world!

THE SS UNITED STATES: AN AMERICAN GIANT

By: Susan L. Gibbs
President, Board of Directors
SS UNITED STATES Conservancy
Washington, D.C.



SS United States. Photo by Greg Shutters.

At 5:16 a.m. Greenwich Mean Time (GMT) on July 7, 1952, the *SS UNITED STATES'* whistle sounded a single, mighty blast. The sparkling new superliner had just crossed the Atlantic in three days, ten hours and forty minutes at an average speed of 35.59 knots – or 41 miles per hour – a full ten hours faster than Britain's QUEEN MARY. The USA had competed and prevailed against Europe's best. William Francis Gibbs, the ship's designer, and Commodore Harry Manning, the ship's master, were among the few on board that day who knew the truth: the *SS UNITED STATES* had achieved her record-breaking crossing using only two-thirds of her available power.

"We've done it," the Commodore said soon after the trans-Atlantic speed record was broken. When prodded by a reporter to elaborate, he added, "I feel like a pitcher who has pitched a no-hit game!"

William Francis Gibbs said simply, "I've dreamed of this for 40 years."

Press reports were euphoric, however none more gushing than the ship's own *Ocean Press* which claimed: "Not since the Phoenicians scooped out logs and converted them into boats to introduce a new mode of transportation has such a momentous occasion taken place on the seas...". The *New York Times* proclaimed the new flagship a "noble craft" and "the very acme of engineering skill."

After the *SS UNITED STATES* turned around and broke the trans-Atlantic speed record in the other direction, she embarked on a 17-year flawless service career. She carried four U.S. presidents (Truman, Eisenhower, Kennedy, and Clinton - as a student) and countless foreign heads of state, business, military, and diplomatic leaders, Hollywood celebrities, honeymooners, immigrants and tourists during 400 mishap-free voyages.

The vessel also served in the Navy Reserve Fleet as a convertible troop ship and Cold War weapon able to carry an entire army division 10,000 miles without refueling. Her top-secret defense features contributed to her unprecedented $78 million price tag, funded in part with a significant government subsidy. According to maritime historian Frank Braynard, the ship's hull and machinery insurance coverage was the largest amount ever written on any vessel, with half of the $31 million of coverage coming from the British market. The *SS UNITED STATES* became a glorious symbol of the nation's post-war preeminence on the global stage. As she dashed back and forth across the Atlantic, she showcased American determination, technological innovation and supremacy.

The *SS UNITED STATES'* engines stopped roaring back in 1969, her demise hastened by rising operating costs and competition from airplanes that reduced her dazzling trans-Atlantic sprint of three days, 10 hours and 42 minutes to just six airborne hours. After the ship was withdrawn from service, she entered a painful purgatory. First she was idled as government surplus in the James River until she was purchased in 1980 at a bankruptcy auction by Steven Hadley, a Seattle real estate developer, who planned to create "the world's greatest luxury cruise ship." His plans failed, as did those of a succession of subsequent owners. In 1992, the former Cold War weapon was towed from Turkey to an old Soviet naval base in the Ukraine for asbestos removal, branded the

Susan Gibbs is the granddaughter of William Francis Gibbs, the naval architect and marine engineer who designed the *SS UNITED STATES*. Susan serves as President of the *SS United States* Conservancy, a national nonprofit organization dedicated to preserving and restoring the *SS UNITED STATES*. She is also working on a book manuscript about the *SS UNITED STATES* and her grandfather's role in the ship's creation. Susan serves as an independent consultant who advises charitable foundations on global grantmaking strategies. She holds a masters degree from Colombia University and a bachelor's degree from Brown University. She and her husband Theodore Piccone live with their three children in Washington, D.C.

The *SS United States* during her cruising years in the late 1960s.
Photo by Nick Landiak.

SS United States Menu Card.

continued from page 5

"Ship of Death" by protesters from Greenpeace. The sea that she had once sprinted through in three and a half days took her 35 days to plod across.

In a dramatic and hopeful development, Norwegian Cruise Line (NCL) swept in and purchased the vessel in 2003 from New Jersey real estate developer Edward Cantor and announced plans to return the vessel to ocean-going service as part of the firm's new US-flagged fleet. However, these plans were soon dashed on the shoals of the global economic recession and a corporate restructuring. In 2009, the *SS UNITED STATES* was listed for sale yet again. After a year on the market, NCL and its parent company Genting Hong Kong finally took an ominous step: scrapping companies were invited to tender their bids. The demise of the nation's flagship finally seemed to be at hand.

Against all odds, the *SS UNITED STATES* received a stunning stay of execution. In February 2011, the *SS United States* Conservancy purchased the vessel thanks to donations totaling $5.8 million from Philadelphia philanthropist H. F. "Gerry" Lenfest. In awarding grants to cover the ship's purchase price as well as operating expenses for 20 months, Mr. Lenfest stated, "She is worth keeping. This ship is an iconic part of American maritime history and if there's any chance at all that she can be saved, we should take that chance."

Lenfest is a retired Navy Reserve captain and major maritime enthusiast whose father, a naval architect, designed components of the *SS UNITED STATES*. The vessel's owners accepted the Conservancy's sales offer, declining higher bids from vessel scrappers, in order to support the Conservancy's efforts and give the *SS UNITED STATES* a chance at a dignified future.

The *SS United States* Conservancy, a national nonprofit organization dedicated to the protection and restoration of the *SS UNITED STATES,* suddenly found itself with a thrilling – if daunting – challenge: it now owned a 990-foot-long historic ocean liner. Founded in 2003 as an initiative of the *SS United States* Preservation Society, which was instrumental in placing the ship on the National Register of Historic Places in 1999, the Conservancy had worked for years to educate the public about the ship's historical importance.

The Conservancy partnered with Big Ship Films to produce an award-winning hour-long documentary film, *SS UNITED STATES: Lady in Waiting,* that aired on public television stations nationwide. The organization also assembled an extensive archive of original film and print imagery, oral histories, and vintage memorabilia. The Conservancy organized events for thousands of participants from across the country, developed notable web-based and print outreach materials and engaged in sustained advocacy on the ship's behalf.

While champagne flutes were filled upon the Conservancy's purchase of the *SS UNITED STATES,* it is crucial to point out that the vessel has not yet been saved. The Conservancy has only a short period of time to lay the groundwork for a successful public-private partnership to redevelop the ship as well as raise funds for the ship's historic preservation and a world class museum.

The Conservancy is now actively courting potential partners who see the ship as a viable, economically sustainable development. The ship offers some 650,000

In this vintage publicity photograph, passengers bid New York a festive "bon voyage!" Mark Perry Collection.

The Duke and Duchess of Windsor preferred the *SS United States*.
Photo courtesy of Charlie Anderson.

Passengers enjoy shipboard life in this vintage United States Lines publicity shot.
Mark Perry Collection.

square feet of space to develop, and she could spearhead a dynamic urban redevelopment initiative and incorporate a boutique hotel, restaurant offerings, retail and office space, residential development, as well as revitalized adjacent parkland and marina facilities. Initial indications are that the *SS UNITED STATES*' restoration costs would be comparable to a land-based development. Most importantly, the vessel could become a part of America's future promise, potentially creating thousands of jobs during and after refurbishment.

The Conservancy is also seeking funding to plan and develop renderings for a world class maritime museum and preservation plan for the priority portions of the ship. The museum, which tentatively will be located in the former first class observation lounge, will cover the history of not just the ship, but also of the golden age of the trans-Atlantic liners. Working in partnership with the Mariners' Museum of Newport News, the Smithsonian Institution, private collectors - and utilizing its own substantial holdings of archival material and memorabilia - the Conservancy plans to bring much original furniture and artwork back onboard. The bridge will also be brought back to its original condition, as will the bulk of one of the vessel's legendary high-pressure steam engine rooms.

To support these efforts, the Conservancy is in the process of ramping up its fundraising efforts, developing new marketing and outreach material and enhancing its presence in New York and Philadelphia. The Conservancy continues to benefit from generous pro bono legal support from Francis X. Nolan, III, a New York based partner in the Global Transportation Finance

Buried in the American Club's Board minutes of October 9, 1952 lies the first notice of a vessel's entry that symbolizes American ingenuity and engineering at its peak. The entry records under the section of "New Insurances" the addition of the *SS UNITED STATES* by the well known United States Lines Company. The *SS UNITED STATES* still retains the honors of being the largest ocean liner ever constructed entirely in the U.S. and the fastest ocean liner to cross the Atlantic in either direction. Retaining the Blue Riband given to passenger liners that crossed the Atlantic Ocean in regular service with the highest recorded speed. The vessel was entered with the American Club for more than 17 years going officially off cover as of December 31, 1969. The vessel, although long out of service, resides in Philadelphia under the ownership of the *SS United States* Conservancy which is committed to breathing new life into this American giant: the *SS UNITED STATES*.

United States Lines photograph courtesy of Janette Gautier.

SS United States today. Photo by Greg Shutters.

continued from page 7

Practice at the law firm of Vedder Price P.C., and Christopher L. Bell, a Washington, D.C. based partner in the Global Environmental Practice of the law firm of Sidley Austin LLP.

Back on July 7, 1952, when the *SS UNITED STATES* smashed the trans-Atlantic speed record, many of the ship's passengers had stayed awake all night, drinking whiskey and dancing in conga lines. The orchestra burst into a lively rendition of "The Star Spangled Banner," wobbly voices joined to pay homage to broad stripes and bright stars in the early morning fog.

Then President Harry Truman's message to Commodore Manning was succinct: "I congratulate you on your wonderful voyage." Winston Churchill's was also brief and gracious: "Congratulations on your magnificent achievement." William Francis Gibbs, the vessel's designer, later wired a telegram to his staff back in New York that read in part, "The performance of the ship was excellent and passengers, officers and crew are enthusiastic... In all humility we can feel joy that this success with the aid of divine providence has been permitted to us."

With the aid of "divine providence" and generous backing from our supporters, the Conservancy hopes that the *SS UNITED STATES* will once again endure as an inspirational symbol for future generations.

To learn more about the *SS UNITED STATES* or support the *SS United States* Conservancy, please visit *www.ssusc.org* or call 888-488-7787. The Conservancy can be reached at Box 32115, Washington DC 20007 or via *info@ssusc.org*.

AMERICAN CLUB EXPANDS E-LEARNING BASED TOOL *CLEAN SEAS: COMPLYING WITH MARPOL 73/78*

New modules developed for garbage and sewage.

By: William Moore, Dr. Eng.
Senior Vice President
Shipowners Claims Bureau, Inc.
New York, NY

Members will note that, in December 2010, the American Club released two new modules of the *Clean Seas: Complying with MARPOL 73/78* web-based e-learning tool for annex IV and annex V on garbage and sewage, respectively.

The first module for Annex I (oil pollution) was released in May 2010. *Clean Seas: Complying with MARPOL 73/78* e-learning modules are specifically designed to be "user friendly" for seafarers, and are focused on the practical application of the MARPOL Convention onboard ship.

The modules are accessible anywhere there is a connection to the internet, making it easy and convenient for seafarers to study the subject matter before they join their ships. The system also includes a secure online testing facility. Members can track their seafarers' knowledge and keep up-to-date records of familiarization training in compliance with both the STCW Convention and the company's safety management system requirements under the ISM Code.

We strongly encourage all Members to make the best use of the *Clean Seas* tool to train shipboard crew in complying with the MARPOL Convention.

We will release more e-based learning tools and will inform Members accordingly. Modules that will be in development and delivered in 2011 and 2012 are for MARPOL 73/78 annexes II and III on noxious substances carried in bulk and harmful substances carried in packaged form, respectively. In addition, another training module will be delivered during this time on compliance with the U.S. Environmental Protection Agency's Vessel General Permit (VGP) requirements.

"We strongly encourage all Members to make the best use of the Clean Seas tool to train shipboard crew in complying with the MARPOL Convention."

DRUG SMUGGLING FROM COLOMBIAN PORTS

By: Guillermo Ruan
Marventura Services, Ltda.
Bogota, COLOMBIA

In order to address the issue of illegal drug smuggling from Colombian ports, one should first consider the current global situation of drug trafficking. In this respect, it may be relevant to mention that cocaine is the illegal drug primarily exported from Colombian ports as it is the most profitable substance for local drug traffickers.

A general view of the drug trafficking situation in the whole world may also assist in understanding the participation of Colombia in this illegal trade.

The United Nations World Drug Report 2010 states that "between 2000 and 2009, the area under Coca cultivation in Colombia decreased by 58%, mainly due to eradication". The same reports states that due to interdiction efforts the trafficking patterns have also changed in recent years. The report states that "as the Colombian government has taken greater control of its territory, traffickers are making more use of transit countries in the region including the Bolivarian Republic of Venezuela and Ecuador.

The UN report refers to "strong increases of Colombian overland cocaine shipments to the Bolivarian Republic of Venezuela. Cocaine transiting the Bolivarian Republic of Venezuela in route to the USA frequently departs by air from locations close to the border with Colombia ...".

The report from the UN shows how Colombian ports are not the main target of the drug traffickers nowadays as they have found other routes for their illegal trade.

REASONS WHY THE PORTS ARE NO LONGER THE MAIN TARGET FOR "SHIPPING" ILLEGAL DRUGS

The main reasons why the drug traffickers are no longer targeting regular oceangoing vessels calling at the main terminals in Colombia are as follows:

1) The creation of the *"Unidad Nacional Antinarcóticos y de Interdicción Marítima – UNAIM* (National Antinarcotics and Maritime Interdiction Unit) in September 1999. This is an entity reporting directly to the Public Prosecutor's Office. This entity works closely with the Colombian Navy and Coast Guard in preventing and processing this criminal activity.
2) Most Colombian terminals in the main ports such as Buenaventura, Cartagena, Barranquilla and Santa Marta are Business Alliance for Secure Commerce (BASC) certified. The BASC seeks the implementation of a control and security system within the companies involved in international trade in order to avoid the cargo being contaminated by illegal substances. Most Colombian terminals have made an important effort over the last ten (10) years to improve their security conditions in order to comply with BASC.
3) The anti-narcotics police. This police force is present in all Colombian ports. With the assistance of trained sniffer dogs, they make good use of intelligence information to prevent drug smuggling attempts. In many occasions, the police just appear on board vessels requesting the assistance of the vessel's master and crew for random drug surveys. In other cases, particularly in the liner trade involving container ships, the police request the removal of specified containers already loaded on board which are found stuffed with drugs. In those cases it is clear that the "intelligence information" received by the antinarcotics police is reliable and at the time of boarding the ship they have very accurate information as to the "contaminated" containers.

In the 28th issue of *CURRENTS* (June 2009), we addressed the matter of risks associated with ships unknowingly transporting drugs in the Caribbean. We have received a number of recent inquiries from Members on what measures should be followed in the event of transiting ports whereby drug smuggling is a concern including Colombia. This article's focus is on drugs transported from Colombian ports but the same recommendatory guidance can be applied to many other ports worldwide.

4) Given the tight security measures implemented in most Colombian ports, the drug traffickers are using other methods to ship illegal drugs which do not involve the use of the main maritime terminals. For example, they construct crafts (submersibles) in the western jungle of Colombia facing the Pacific Ocean. These small craft are filled with the illegal drugs and later refloated at an agreed point on the high seas where the drugs are transshipped to speedboats. Speedboats also depart at night from the Colombian Pacific coastline destined mainly to countries in Central America and Mexico where the transshipment of the illegal shipment takes place.

BRIEF OVERVIEW OF COLOMBIAN LEGISLATION ON DRUG SMUGGLING

The Colombian criminal code states that any person involved in the traffic, production or carriage of illegal drugs will be subject to the penalty of imprisonment from eight (8) to twenty (20) years and a fine of between Colombian pesos (COP) 1,000 to COP 50,000 of monthly minimum wages. At the moment the monthly minimum wage in Colombia amounts to approximately US$ 297 where the 1 US$ is equivalent to approximately 1,800 COP.

The same code states (Article 377) that any person that may use or allow the use of movable goods for the production, storage or carriage of illegal drugs will be subject to the penalty of imprisonment from six (6) to twelve (12) years and a fine of between COP 1,000 to COP 50,000 of monthly minimum wages.

It is important for crew members on board vessels calling at Colombian ports to be aware of the fact that the lowest penalty they would face in Colombia in case of being found guilty of drug smuggling would be six (6) years of imprisonment.

PRACTICAL MEASURES TO TAKE IN ORDER TO AVOID THE VESSEL AND CREW BEING AFFECTED BY DRUG SMUGGLING

Although security measures have significantly increased in the main Colombian ports, vessels calling at Colombia

This soldier is at a Colombian port quayside where bags of cocaine are displayed for the authorities to make the proper accounting of the seized drugs.

This black bag was found within a vessel and it was indeed full of drugs. In this case the drugs were detected by the crew which reported the matter to the antinarcotics police which came on board and seized the drugs. Some crew members were interrogated by the UNAIM which came to the conclusion that no crew members were involved in the drug smuggling attempt and the vessel was allowed to sail without much delay.

continued from page 11

should be aware of the risk of being involved in drug smuggling and there are measures to be taken in order to prevent illegal substances gaining access to the vessel. Some practical measures shipowners should consider include:

- Before entering port, the crew should be warned as to the risk of being targeted by local drug traffickers. The crew should be fully aware of the legal consequences of being involved in drug smuggling which could result in the penalty of imprisonment in Colombia. The suspicion by the local authorities as to a crew member being involved in drug smuggling will also result in an undue and timely delay to the vessel until the investigation identifies the responsible individual(s) who will then be prosecuted under Colombian criminal law.
- Ideally, crew members should not be allowed to come ashore in order to avoid the risk of being targeted by drug traffickers.
- The Master and crew should limit access to the vessel. Only persons such as local authorities, stevedores, surveyors, agents should be allowed access to the vessel. Unless a person has been fully identified and has a specific reason to come on board, the vessel should not be allowed on board.
- Any suspicious activity around the ship, such as divers in the proximity of the ship, small boats operating close to the ship, should be immediately informed to the Master and in turn the Master should report this situation to the local authorities.
- The crew should closely watch the activities of stevedores and technicians that may come on board. In general, a close watch should be kept by the crew on every person on board which does not belong to the crew. Any suspicious activity by any of these persons should be immediately reported to the Master and thoroughly investigated.
- The crew should closely watch the activities of stevedores and technicians that may come on board. In general, a close watch should be kept

by the crew on every person on board which does not belong to the crew. Any suspicious activity by any of these persons should be immediately reported to the Master and thoroughly investigated.

- The crew should closely watch the activities of stevedores and technicians that may come on board. In general, a close watch should be kept by the crew on every person on board which does not belong to the crew. Any suspicious activity by any of these persons should be immediately reported to the Master and thoroughly investigated.
- In order to facilitate a proper watch of the activities occurring on board all areas of the vessel should be properly illuminated.
- In case the vessel is taking bunkers in Colombia we recommend the vessel contacting the local P&I correspondent in order to make local enquiries as to the bunker supplier being a reputable company with a clean record.
- Upon completion of cargo operations the crew should perform a thorough search of the entire vessel.
- In some ports in Colombia, an underwater survey of the vessel's hull before departure is compulsory. Whenever the Master has any suspicion as to the possible placing of illegal substances on the vessel's hull due to unusual activities observed close to the vessel (divers, small boats), we recommend performing an underwater survey before departing from the port.

Despite all these preventive measures, there is always the possibility of illegal substances being brought aboard the vessel.

IF ILLEGAL DRUGS FOUND ON BOARD THE VESSEL...

Needless to say the full cooperation of the Master and crew with the authorities is essential in order to dissuade any suspicions by the authorities as to the Master or crew being involved in the drug smuggling incident. The full cooperation of the Master and crew in the investigation will also avoid unnecessary delays to the vessel and will certainly constitute important evidence to the local authorities as to the vessel being innocent in the drug smuggling attempt. In case illegal drugs are found, the following recommendations should be considered:

- The drugs are should not be touched or removed.
- Several photographs of the drugs found and of the area where the drugs are found.
- The Master should immediately report the incident to the local P&I correspondent, as well as to the local authority. The P&I correspondent will immediately appoint his surveyor and a competent criminal lawyer to provide the necessary assistance to the Master and crew.

The combined work of the P&I surveyor and a criminal lawyer have proven successful as the surveyor will be able to identify how the drugs gained access to the ship and the criminal lawyer will properly deal with the interrogatory of the Master and crew to be performed by the public prosecutor from UNAIM.

CONCLUSIONS AND RECOMMENDATIONS

The joint efforts of the terminals and the authorities in improving security measures at the terminals in order to prevent drug smuggling have proven successful as the number of incidents have decreased.

The Master and crew should be fully aware before entering any port in Colombia of the possibility of the vessel being targeted by drug traffickers and proper preventive measures should be taken.

In case the vessel is affected by drug smuggling, the Master should immediately contact the P&I correspondent for advice and assistance. Full cooperation should be provided by the Master and crew to the authorities in order to facilitate and expedite the investigation of the drug smuggling attempt.

It is fair to say that at the number of drug smuggling attempts at the main ports have declined due to the joint efforts of the terminals and the authorities. However, the vessels should always take the relevant preventive measures in order to ensure the vessel is not targeted by drug traffickers.

A WORKING DAY AT THE BEACH

By: Captain Sanjive Nanda
Vice President
Shipowners Claims Bureau, Inc.
New York, NY

INTRODUCTION

It was a usual hot summer night with sizzling winds, topping speeds of more than 30 knots, whipping the surface of the sea to a constant spray of mist rising high and mighty, above the bow and over the forecastle, as if in an effort to cool the steel deck. That is to say the least of typical weather conditions usually associated with the onset of monsoon seasons in Indian Ocean.

The fury at sea lasts for nearly four months, commencing from end of May and fading away around end of September. Some of the common occurrences during this period are ships dragging their anchors and getting too close for comfort to other vessels. Worst still, they can find themselves stranded aground on a shoal or on the rocks.

This is a story of this article's author who attended one such casualty. You can imagine the range of thoughts that enter one's mind on such occasions: some thoughts are momentous while others are quite light hearted.

Spectators on the beach for a grand viewing of ship aground.

It was around past midnight, at dead of night while the worst nightmare for any Master out at sea turned to reality as the phone in Master's cabin rang off the hook. I could visualize a feeble voice on other end of the phone line muttering: "Sir, perhaps we are on the rocks". Against the best efforts of the Master, officers and throttle on the engine by the Chief Engineer, the vessel was no match to the fury of the seas. Eventually, she was dragged few miles closer to shore, settled and left stranded barely a short walk from the nearest beach. The thinly clad bathers on the beach were of course taken by surprise by this monstrous spectacle. A lone dog roaming the beach, barked at ship and then soon gave up as the visitor did not budge!

As the morning sun lifted the haze from the horizon, it became clear to the people throughout the local sea side town that the ghostlike image they had seen through the mist, was indeed an ocean going vessel that had the misfortune of being stranded. So near to land was the vessel that one could simply walk to the ship had the seas been calm enough to do so.

The children were overjoyed, and the town's people flocked to the beach to have a closer glimpse of this leviathan, as the sleepy little town had no recollection of any such other attraction in their living memory. Likewise, the ice cream man and the candy man were not far behind as they sensed a good business opportunity. Soon, there was fair on the beach, every day, from sunrise to sunset.

THE SALVAGE TEAM

In the meantime, the salvage team, and other interested parties involved with the casualty, were huddled in a meeting room inside the only 'inhabitable hotel' in town, creating a plan to have the vessel re-floated. The delight in the eyes of hotel's manager could not be hidden. Never before had the 25-room hotel been sold out much less all rooms being booked solid for two weeks in a row!

The daily routine called for meeting between the salvage team, the vessel owner's representative and the American Club's representative. The cooperative exchange of ideas and innovations in dealing with situations was a recipe for success. Following the morning meeting, over cups of simmering tea and biscuits, the

team's next stop would be at the beach to put our agreed innovative idea to the test.

Yes, off to "work" at the beach! Boarding the vessel would be a challenge. Although we were in close proximity and in plain sight of the stranded vessel being only a short swim away; I could not imagine one fighting the barracudas. Therefore, we had to consider a more innovative approach to sending people on board the ship. The idea was to use an old and condemned mooring winch procured from a ship recycling (breaking) yard nearby and rig a rope from the ship's bow to the mooring winch ashore.

This system allowed us to heave a man sitting on a wood plank to be hauled on board the vessel and soon the team of salvage experts was landed on the vessel. They had been tasked to find and isolate/seal the leaking sections of ship's hull. In the meantime, a local helicopter was hired to make a daredevil approach to the vessel by positioning itself between ship's derricks (barely meters gap from the derricks) to lower essential supplies like pumps etc. The entire spectacle could well have inspired a James Bond movie!

Soon it was time for the team that had been stationed on the beach to 'enjoy' a lunch break. Enjoying a hot lunch unsheltered under a sweltering 100 degree Fahrenheit sun was not an easy task even for the most accustomed faces. The only way one could keep cool from the heat was by consuming glasses of yogurt thinned out with water. Unfortunately, the cold *Bud Light* we dreamed of was never close to a reality!

A typical day would wrap up at 1900 hours at the hotel. There we would take notes of the day's work and plan for the following day's activities. This process lasted for nearly three weeks. By then every member of the team had been tanned beyond recognition, exhausted and waited for the outcome.

FINALLY... "D-DAY"!

Eventually, "D-Day" arrived. The salvors reported that all leaks had either been plugged or isolated. Tanks were ballasted and naval architect verified the stability calculations to ensure that the ship would remain stable after being pulled off of the rocks.

Arrangements being rigged for transporting men on to vessel.

A local enthusiast rendering a helping hand.

Offloading fuel oil from vessel through makeshift floating pipeline and on to trucks.

A successful photo opportunity. Captain Nanda (third from left) with owners and other salvage teammates enjoying the success of the refloating.

continued from page 15

On the day of reckoning, everyone from the team gathered at the beach. The traditional prayers were offered in the morning. After the prayer ceremony, it was back to work, for one final check and review to ensure that all would go according to the plan. With the checklist completed and the adrenaline shooting to highest levels as the time for the high tide was soon approaching. The tugs were positioned around the ship, tied to her stern.

Just prior to high water time, the tugs had started churning their engines at reduced power, ready to roar to full throttle as the tide peaked. Soon thereafter, the tugs were belching out black smoke, and their ropes were now taught. Yes, it was high water time, and tugs were pulling with all their might.

After more than half an hour had passed, with the tugs constantly pulling, I lifted my binoculars to see if the rocks in vicinity of the vessel's sight showed any evidence of vessel's movement. Not yet, unfortunately. The vessel hadn't moved from the position she had been over the last three weeks.

The tugs continued their relentless pull, changing directions hoping that may help dislodge the vessel from the rocks. It was now almost 1-1/2 hours past the high water time and soon the tide would be receding.

Just as a sense of gloom was setting in, there was sudden cheer among the onlookers as the vessel appeared to be yielding to tugs power and was suddenly yawing, finally giving way to the tugs might. And then... there it was! The cheers burst into hugs and roars of delight as the vessel finally broke free from the rocks, and she was pulled deep into ocean, three miles away from land. She was once again, like a fish let loose in a pond, with new lease of life.

The mission was a success, and after waving a kiss to the mighty vessel, soon the team returned to their bases including the writer's trip home to the American Club in New York!

The writer thanks owner's representatives on the scene, and those behind the scene, who assisted/worked day and night alongside rest of the team, towards a successful conclusion of the mission

INDIAN SEAFARERS AND DIABETES

By: Khalil Memon, M.D.
Clinics of Dr. Khalil Memon
Mumbai, INDIA

As attributed to the International Journal of Diabetes, India has become the "Diabetes Capital of the World" and it has gone beyond an epidemic and is now a clear pandemic. Naturally this kind of progression necessitates further analysis and attention by medical practitioners within the sub-continent. With this in mind, it is imperative for shipowners to consider this medical concern when employing Indian seafarers. Medical facilities that perform *pre-employment medical examinations* (PEMEs) should consider focusing on additional testing in order to properly identify diabetic seafarers and reduce the inherent liability that such a population carries out to sea.

WHAT IS DIABETES?

Diabetes Mellitus is a group of metabolic diseases wherein the patient has high blood sugar. There are three main types of Diabetes as follows:

- *Type I diabetes* is a failure of Langerhen's cells within the patient's pancreas to produce insulin which is a hormone central to regulating carbohydrate and fat metabolism in the body.
- *Type II diabetes* is a defective response by the body tissue to insulin (also known as insulin resistance) resulting in reduced insulin secretion.
- *Gestational diabetes* is a combination of inadequate "insulin secretion" as well as "responsiveness", occurring in between 2 to 5 per cent of all pregnancies.

Common symptoms of diabetes are frequent urination, increase in thirst or hunger, and unexplained weight loss.

DIAGNOSING DIABETES

Diabetes can be characterized by persistent high blood sugar and is diagnosed by means of following pathology investigations such as:

- fasting blood sugar test & fasting urine sugar test;
- post lunch blood sugar test and post lunch urine sugar test (two hours after a meal); and/or
- a HbA1c test that measures the amount of *glycosylated hemoglobin* in the blood (used to measure average glucose levels).

As Members are aware, the American Club has had a well established pre-employment medical examination (PEME) program since 2004. The standards of health of seafarers employed on our Members vessels are primary concerns to ensure safety, security and environmental protection. As in past issues of *CURRENTS,* we will continue to feature articles on relevant medical concerns from representatives from the American Club's approved PEME medical facilties.

INTERPRETING THE RESULTS BLOOD TESTS

The sugar levels in blood measured by routine investigations using fasting blood sugar and post lunch blood sugar give values that are specific to that period in time (i.e. that day only). HbA1c testing which uses a direct combination of glucose and adult hemoglobin allows us to ascertain the average (over 80 to 100 days) level of blood sugar in a particular patient.

Consequently, HbA1c testing is recommended for both: (a) establishing blood sugar levels in people who might be pre-diabetic and (b) monitoring in patients with elevated levels of blood sugar, termed diabetes mellitus. There is a significant proportion of the seafarer population who are unaware of their elevated HbA1c level before they have blood lab work.

IMPLICATIONS & RECOMMENDATIONS FOR PEME

As medical examiners we often encounter known diabetic candidates who deliberately take insulin injections prior to pre-employment medical examination, so that on the day of the medical examination, the fasting blood sugar/post lunch blood sugar test fails to record their diabetes (normal blood sugar levels).

Therefore it is recommended that seafarers undergo HbA1c testing (which measures their average blood sugar levels over the last 80-100 days). As mentioned above, this testing also helps to identify the condition for seafarers who are not aware of their potential diabetic state. It also has good therapeutic value to ensure a timely prognosis and a consulting physician can prescribe effective treatment or an anti-diabetic regime as appropriate.

CONTEMPORARY ORACLES OF PYTHIA: **SEAMEN'S CONTRACTS OF EMPLOYMENT**

By: Dionyssis Constantinidis, LLM
Partner
Kyriakides Georgopoulos & Daniolos Issaias (KGDI) Law Firm
Piraeus, GREECE

PROLOGUE

I'd like to begin by making two observations: First, that maritime lawyers are legal counselors specialized in maritime law who, under this capacity, cannot and should not captain a vessel. Second, that captains are persons with a certificate to command sea-going vessels and that, *prima facie,* their seaman's background or captain's license do not make them eligible to provide legal counseling on maritime legal issues.

These admissions may sound like clichés but, to the best of my experience, are not always certainties in our industry: No sane shipowner would consider hiring a maritime lawyer to command his vessels—not even a rowing dinghy under the present officer manning crisis! Nevertheless, there are very sane shipowners who use the services of captains to deal with serious legal issues that many lawyers find themselves having to unwind thereafter.

A very common aspect of this 'not-so-uncommon practice' is the use by shipowners of *contracts of employment* (CoE) and *manning agreements* (MAs) governing the crews' work on board without having consulted a qualified lawyer to guide them in ensuring the contracts and agreements do not unduly put them at risk.

THE PITFALLS OF DRAFTING EMPLOYMENT CONTRACTS

Many owners do not assign this *ipso facto* legal job to their lawyers but enter into contracts drafted by their crewing directors, superintendants, port captains (most of who are formerly or currently employed captains). Many CoEs are "ready-made" or of unidentified origin. Others are drafted by the manning agents themselves (based on MAs that are also drafted by them) and thereafter signed by the shipowner without any legal advice or further negotiation as to the clauses contained in the contract or agreement.

When a serious injury or illness occurs onboard, then reality strikes when one has to deal with million-dollar personal injury claims resulting from "monstrous" contracts which do not provide a safe legal platform to protect the shipowner.

Such CoEs that are drafted with the intention to protect owners' interests do in fact serve the opposite parties by not ensuring the necessary provisions are included to defend the owners and the P&I club's interests. The simple truth is that those drafting these CoEs and MAs are not jurists with a knowledge and understanding of the legal pitfalls that can befall shipowners.

As did Ulysses in the *Odyssey* confront many monsters, I feel that I have seen as many, if not more, CoEs and MAs "monsters"! I have come across CoEs and MAs containing no provisions whatsoever for applicable law and jurisdiction. I have seen CoEs for employment for open registry flagged vessels

(i.e. flags of convenience (FoCs)), containing a clause titled "jurisdiction clause" but in the place where one expects to find the selected country the line is blank. By then, that information cannot be suitably filled in. The result is that in the event of a writ of action, the court of litigation most probably will refer the case, instead of the desired FoC forum, to the national jurisdiction the owners supposedly wanted to avoid.

I have seen contracts without any clause whatsoever regarding compensation for injury or death and MAs clauses contradicting those of the CoE and vice versa. I have seen opposing provisions contained in the same document. I have seen other contracts that, supposedly, were made to protect the shipowners' interests, but eventually over-protecting the manning agents or the seamen's unions. CoE's for ships under FoC providing entitlements and remunerations higher than the national legislations.

In a recent personal injury case for seaman from a developing country employed on board a Greek-owned FoC flagged vessel, the Owners paid on the basis of the MA, sick pay calculated on the basis of the seaman's total wages for an undefined unlimited time. Whereby, under the Greek Collective Agreement, they would have to pay a maximum of just 4 months basic wages.

In another case the Owners had to pay, by virtue of the MA, severance compensation that was 3 to 4 times more than the amount stipulated under Greek law.

These documents are often drafted in hybrid or idiosyncratic English, thus further complicating matters. But this may not be, after all, such a nuisance, if you consider that the clauses of many CoEs and MAs bear a resemblance to the Oracles delivered by Pythia: the priestess at the Temple of Apollo at Delphi. Their contents may be interpreted in various alternative and conflicting ways. As a result, even in cases where the outcome seems obvious, the court of litigation may validly interpret these clauses in the most unpredictable or unfavorable manner for owners and the P&I clubs.

The legal uncertainties caused by badly drafted contracts may be extremely costly and dangerous because whenever a claim arises, one cannot be sure whether it is better to proceed to litigation or just settle the matter quickly in order to avoid the litigation costs and the stress of an unpredictable verdict.

Under these circumstances many CoEs and MAs do not serve their primary goals which are to protect shipowners and seafarers effectively under established laws.

THE MLC 2006 PROSPECT

Yet there is some hope within sight with the future entry into force of the Maritime Labour Convention (MLC), 2006. The MLC 2006, which was adopted by the International Labour Organization (ILO), establishes international requirements for comprehensive rights and eprotections for all seafarers including minimum terms to be applied to seamen's CoEs.

A significant part of the MLC 2006 is devoted to compliance and enforcement including inspections of conditions on all ships as well flag State certification and port State inspection of labor conditions. The MLC 2006 could come into force as early as 2012, whereby the maritime community will be obliged to use better and more definitive wordings in their Contracts of Employment relatively soon.

CONCLUSIONS

Until the MLC 2006 comes into force, some simple advice for shipowners:

(a) *do not enter into "ready-made" CoEs and MAs.* This may be the starting point of a costly legal odyssey that could be avoided.

(b) trust your lawyers to draft or supervise these tricky legal documents from the beginning to suit your needs and minimize your perils. *Please do not call your lawyers to decipher the CoEs and the MAs after a claim.*

By: Commodore David Squire
General Secretary
Marine Accident Investigators' International Forum
London, UNITED KINGDOM

Human element related accidents

WHAT IS THE MARINE ACCIDENT INVESTIGATORS' INTERNATIONAL FORUM (MAIIF)?

The MAIIF is an international non-profit organisation dedicated to the advancement of maritime safety and to the prevention of marine pollution through the exchange of ideas, experiences and information acquired in marine accident investigation. Its purpose is to promote and improve marine accident investigation, and to foster international cooperation and communication between marine accident investigators.

MAIIF members are guided by the principles of IMO Resolution MSC.255(84): *The Code of the international standards and recommended practices for a safety investigation into a marine casualty or marine incident – The Casualty Investigation Code,* which sets out a common approach for states to adopt in the conduct of marine safety investigations into marine casualties and marine incidents. Importantly, it mandates that marine safety investigations do not seek to apportion blame or determine liability; and that marine safety investigations should be separate from, and independent of, any other form of investigation.

When seeking the root cause of any incident, it is invariably the human input to the design, manufacture or operation of a system that has been a contributory factor. The accident reports produced by MAIIF members indicate that the causes of maritime accidents can be linked to a number of contributory factors, such as:

- poor ship or system design;
- equipment failure through poor maintenance;
- fatigue;
- complacency;
- ineffective communication;
- lack of attention to rules, regulations and procedures;
- inadequate training in the operation of equipments; and
- unawareness of the vulnerabilities of electronic systems.

HUMAN ELEMENT RELATED ACCIDENTS: SOME RECENT EXAMPLES

A few examples of accidents that have been investigated in recent years will give a feel for some of these contributory factors and will highlight certain human element issues arising from them:

THE HUMAN SYSTEM INTERFACE FAILURE

Firstly, a collision between a relatively new container vessel and a linkspan has highlighted the need for increased training in the operation, maintenance and fault finding of technically complex, and multi-discipline systems.

An engine failure had occurred as the ship approached the pilot boarding ground some four hours prior to the incident. Although the engineers managed

“The grounding of a container vessel on the Varne Bank in the English Channel revealed a number of inadequacies in voyage management system skills and errors of judgement resulting from a disregard for conventional navigation.”

to re-start the engine, they misdiagnosed the cause of this failure and inadvertently disabled an integral part of the control system. The ship was entering the swinging ground, prior to berthing, when her main engine failed again. The engine was unable to be started astern to reduce the vessel’s headway, resulting in her making heavy contact with the linkspan.

Although the engineers on board were experienced and held appropriate Standards of Training Certification and Watchkeeping (STCW) Convention certificates, they were unable to correctly diagnose the reason for the engine faults. They did not have a sufficiently good knowledge of the main engine control system or specific system engineering training to successfully diagnose faults. None of the ship’s technical staff had received any formal training in the operation, testing, maintenance or fault finding of the complex engine control system.

The report observes that the generic training undertaken by marine engineers during courses leading to professional qualifications, may be insufficient on its own to equip engineers to operate, maintain and successfully diagnose and repair faults on fully integrated, complex engine systems. It also raises questions about the proliferation and identification of alarms; the need for joint simulator training for pilots and tug masters, and for tug masters to make ship visits in company with pilots; and the difficulties of effectively testing the main propulsion systems of large, powerful vessels when

continued from page 21

alongside, prior to departure, due to the potential for mooring rope failure.

ENCLOSED SPACE ACCIDENTS

This next report on three enclosed space fatalities aboard a North Sea Emergency Response Rescue Vessel highlights a number of safety concerns relating to enclosed/confined space entry.

Two seamen had gone forward to secure a rattling anchor chain in the chain locker. One of them entered the locker and collapsed; the second entered in an attempt to help his companion and also collapsed. During the consequent rescue efforts, the first rescuer found he was unable to enter the chain locker wearing a breathing apparatus, so donned an Emergency Escape Breathing Device (EEBD). At some point the hood of the EEBD was removed, or became dislodged, and he too collapsed. All three seamen died as a result of an oxygen deficient atmosphere within the chain locker.

The vessel's crew failed to recognise that the chain locker was a potentially dangerous enclosed/confined space. Permit to Work measures were not considered before the space was entered, and training in the use of EEBDs had not been sufficient to ensure that the limitations of the equipment were recognised in an emergency. Company policy on entry into enclosed spaces was not clear. The gas monitoring equipment was unsuitable for ensuring safe entry into enclosed spaces, and the audit regime employed by the ship's managers failed to detect deficiencies in training, equipment and safety culture on board.

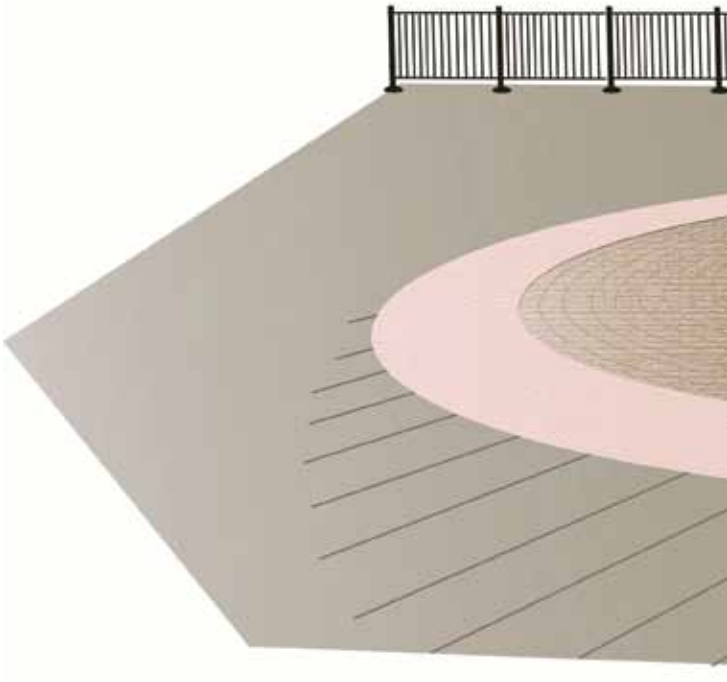
In short, the lookout had reported the light from the Varne lightship and an object crossing into the fairway from the port side. The Officer On Watch (OOW) planned a starboard evasion manoeuvre, which took the ship between the east and west cardinal buoys marking the Varne Bank – which he interpreted as moving fishing vessels. While approaching the bank, 15 to 20 different acoustic signals were heard, which the OOW interpreted as a problem with the engine system. It went unnoticed for some time that the ship was aground.

Ultimately the ship ran aground as a result of inadequate voyage management system skills on the part of the OOW, and resultant incorrect settings, particularly in relation to depth contours, chart alarms and the depth alarm settings; and, errors of judgement in disregarding conventional navigation. The report assumes that during his bridge watch, the OOW navigated solely "according to the computer".

SLIPS, TRIPS AND FALLS

And finally, the fatality to a seaman aboard a 16-years old geared cellular container ship whilst trying to stow the cargo crane hook in its cradle, reveals a significant contributing safety factor in that the design of the cradle for the cargo crane hook did not allow for unassisted stowage of the hook when the ship had a stern trim in excess of 2.1 meters.

The cradle could not be seen from the crane driver's cabin when containers were stowed two or more high on the hatch cover. Hence, it became usual for a crew member (the "dogman") to give directions to the crane driver, via a hand-held radio, to lower the hook until it was stowed.



The stern trim was 2.5 meters, such that the hook did not align with its cradle. The rating had climbed about 4.1 meters up the emergency ladder on the crane pedestal in an attempt to manually guide the hook into position. It is likely that while trying to position the hook, he fell, landing on the platform below. He was not wearing a safety harness, as was required for carrying out tasks at that height, on a ladder that was not fitted with safety devices to reduce the risk of a fall.

The job safety analysis for crane operations, and subsequent reviews of it, did not identify the potential hazards associated with stowing the hook; no issue regarding hook stowage problems at stern trims in excess of 2.1 meters had been raised at health, safety and security environment (HSSE) meetings, nor had anything been entered in the job hazard opportunity log.

No working aloft permit had been issued for climbing the emergency ladder when stowing the hook on that day; and, no permit had ever been issued for this task. The crew had routinely deviated from the working aloft procedure when it was necessary to manually assist with the stowing of the cargo crane hook.

SUMMARY

In conclusion, it is worth repeating that marine safety investigations do not seek to apportion blame or determine liability. Instead a marine safety investigation is one which is conducted with the objective of preventing marine casualties and marine incidents in the future. In other words, through these reports, all those who are involved in the design, operation and support of ships and their systems should learn from the mistakes of others. However, it would seem that not all of the industry is heeding the lessons from these investigations...

U.S. COAST GUARD MARPOL INVESTIGATIONS: A MARITIME LAWYER'S PERSPECTIVE

By: Michael G. Chalos
Chalos, O'Connor & Duffy, LLP
Port Washington, New York

Violations of the MARPOL 73/78 Convention continue to be a significant and very costly problem for shipowners in the United States. We cannot overemphasize the need to ensure compliance. We strongly encourage all Members to register for the *Clean Seas: Complying with MARPOL 73/78* e-learning tool available to all Members that can assist in ensuring seafarers are well trained in the MARPOL 73/78 Convention requirements. In addition, we strongly encourage all Members to follow the guidance contained in Circular 01/06, of February 9, 2006 *International Convention on the Prevention of Pollution from Ships (MARPOL) 73/78: Oily Water Separators.* This circular outlines proactive steps Members should consider for preventing and protecting themselves against such incidents.

Since the late 1990s, the United States government has become very aggressive in prosecuting vessel owners and operators for violations of the *International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978* ("MARPOL") and U.S. environmental laws. The Department of Justice has convicted many well known shipping companies and cruise lines for violating MARPOL. Multi-million dollar fines are not unusual, with some vessel owners and/or operators facing criminal fines in excess of $10 million, and, in one case $37 million.

This article discusses the legal framework for MARPOL investigations and prosecutions, as well as provide insight to the investigative process utilized by the Coast Guard and the Department of Justice in such matters.

THE LEGAL LANDSCAPE

MARPOL is an international marine environmental convention whose purpose is to set forth rules and regulations for the reduction and/or elimination of oil pollution, engine exhaust pollution, and ocean dumping from vessels.[1] The *Act to Prevent Pollution Ships* ("APPS") is the U.S. enactment of MARPOL.[2] Relying on the APPS and up to fifteen (15) other federal statutes, from the Clean Water Act[3] to Sarbanes Oxley[4], the Coast Guard and Department of Justice investigates and, when appropriate, prosecutes vessel crewmembers, as well as vessel owners and operators, for violations of MARPOL.

The Coast Guard and Department of Justice have jurisdiction to prosecute the alleged crimes involving a U.S.-flagged vessels anywhere in the world.[5] For foreign-flagged vessels, however, criminal jurisdiction only extends to crimes committed within twelve (12) miles of the United States territorial waters. The U.S. cannot prosecute foreign-flagged vessels for improperly discharging bilge waste outside of U.S. territorial waters.[6]

However, if any such illegal discharge is not recorded in the vessel's Oil Record Book (ORB), and the ORB is presented to the Coast Guard during a port State control inspection, the Department of Justice can,

and will, prosecute vessel crewmembers, as well as owners and operators, for failing to properly maintain an ORB under the APPS.[7]

The Department of Justice may also bring charges for making a false statement under the False Statement Act[8] for the same presentment of a false ORB, as well as obstruction of an administrative proceeding (i.e., a port State control inspection)[9] and, if there is an attempt cover-up alleged illegal activity, obstruction of justice[10], witness tampering[11], conspiracy[12], and/or destruction of records under Sarbanes Oxley.[13] Each of these charges is a felony, subjecting corporate defendants to up to $500,000 per offense and individual defendants to potential prison terms and fines of up to $250,000 per offense.[14]

Any ship's officer or crewmember convicted of APPS-related charges face potential terms of incarceration, bans from entering U.S. waters and future immigration issues and fines. The vessel's owner and operator can also be held vicariously liable for the criminal acts of the vessel's crewmembers. To be held vicariously liable for the criminal acts of its crewmembers the crewmembers' criminal acts must be shown to have been committed: (1) within the scope of their employment; and, (2) were intended, at least in part, to benefit the owner and/or operator. The fact that a crewmember may be acting against the established procedures or the specific instructions of the owner or operator will not preclude the owner and operator from being held vicariously liable for the criminal acts of that crewmember.[15]

VESSEL INSPECTIONS—WHAT DOES THE COAST GUARD LOOK FOR?

Coast Guard personnel regularly board foreign-flagged vessels in United States waters to conduct *port State control* ("PSC") inspections, as well as U.S.-flagged vessels, worldwide. During these inspections, the Coast Guard, as part of their duties, will conduct a review of the vessel's records and pollution control equipment to determine MARPOL/APPS compliance. In this regard, the Coast Guard will usually look for certain "red flags" in the engine room and elsewhere.

The presence of a flexible by-pass hose near the oily water separator ("OWS"), or anywhere in the engine room if the hose contains oil, will almost always trigger an expanded MARPOL examination of the ship.[16] The same goes for signs of recent use – or fresh paint – on the flanges, piping, valves, and nuts and bolts around the OWS. Oil on valve stems on the discharge side of the OWS, or inside the piping between the OWS and the overboard discharge valve, can suggest to Coast Guard inspectors that an illegal bypass of the OWS may have occurred.

During such inspections, the Coast Guard will request the vessel's crewmembers to test the OWS and the oil content meter ("OCM") to ensure that pollution control equipment is working properly and that the OWS is discharging no effluent containing more than 15 parts per million ("ppm") of oil, as required by MARPOL. If the OWS malfunctions during the PSC Inspection, this will be considered a red flag.

The Coast Guard will also review the vessel's ORB, as well as the International Oil Pollution Prevention Certificate ("IOPP") to compare the rated pumping capacity of the OWS to the entries made in the ORB. Any entry that purports to show the OWS was

continued from page 25

discharging bilge water in excess of its IOPP rated capacity is a red flag that will likely result in an expanded MARPOL examination of the vessel.

The Coast Guard will also inspect and test the vessel's incinerator to determine if it is capable of burning waste oil. In this regard, the Coast Guard applies a 1% "rule of thumb" calculation, which assumes that a vessel underway should generate waste oil in amounts of approximately 1% of the bunkers consumed during a voyage. The Coast Guard will expect to see entries in the ORB for the disposal of the expected generated waste oil either by pumping the waste oil to a shore facilities or properly burning it using the vessel's incinerator.

The Coast Guard will review "sludge" receipts to ensure entries in the ORB for the disposal of waste oil to barges and shore facilities are supported by corresponding receipts. The Coast Guard will also review the vessel's IOPP certificate to determine the rated burning capacity of the incinerator and then review incinerator entries to verify that no ORB entries exceed the rated capacity of the equipment.[17] The failure to maintain "sludge" receipts, and making incinerator entries beyond the rated capacity of the incinerator, are also red flags.

It is also now common for the Coast Guard to request the vessel's engineers demonstrate that the vessel has adequate spare filters, gaskets, and other essential parts to maintain an OWS and incinerator in regular use. A lack of, or excessively dated, spare parts raises another red flag.

If the Coast Guard finds red flags, they will initiate an expanded MARPOL examination.[18] Similarly, if the Coast Guard receives a tip from a whistleblower (i.e., former or current crewmember)[19] that the vessel has improperly discharged bilge waste, it will conduct an expanded MARPOL examination. In such circumstances, the Coast Guard will also likely issue a Captain of the Port Order to detain the vessel within the port.[20]

An expanded MARPOL examination entails interviews of officers and crew[21], removal of piping and component parts of the OWS, OCM and/or incinerator, removal of the vessel's overboard discharge valve and related piping, and seizure of the ORB, engine logs, deck logs, other essential documentation of the vessel, and vessel computers. The Coast Guard has also become quite sophisticated and technologically advanced in their investigations by also seizing and analyzing electronic records from the vessel such as equipment memory cards and records of alarms.

SECURITY AGREEMENTS

Once the Coast Guard asserts there is "reasonable cause to believe" APPS has been violated, it will request Customs and Border Protection revoke the vessel's Customs clearance to depart the port.[22] Thereafter, the Coast Guard will demand the vessel's Owner and Operator enter into a Security Agreement.[23]

The usual Security Agreement proposal utilized by the Coast Guard these days requires the owner and operator to post a Surety Bond in a substantial amount as security against any civil and/or criminal fines that may be imposed, and to ensure there are sufficient funds to cover the owner's and operator's obligations under the Security Agreement to maintain and house the detained crewmembers during the course of the investigation.

In this regard, a substantial number of the vessel's crewmembers (often including the Master and the entire engine room department) will be detained in the United States for a potentially **indefinite** amount of time. As part of the usual Security Agreement demands, the owner and operator are required to pay the detained crewmembers' "total" wages (including guaranteed overtime), lodging, per diems (often in excess of US$50 per day), health care, and transportation costs. As the crewmembers are often detained for periods exceeding six (6) months, the owner and operator will incur substantial expenses to fulfill the terms of the Security Agreement.

In addition to maintaining the detained crewmembers in the U.S., the usual Security Agreement demands also require the owner and operator to facilitate the service of Grand Jury and trial subpoenas, produce a Custodian of Records to testify before the Grand Jury or at trial, and to stipulate to the authenticity of all documents and things seized from the vessel during the course of the Coast Guard's investigation.

These requirements, as well as the significant financial obligations the owner and operator must undertake to ensure the detained crewmembers are maintained in the U.S. are well beyond the scope the provisions of APPS, which merely permits the Coast Guard to demand the posting of a bond or other surety in order to obtain Customs Clearance for the vessel.[24] These obligations impose a substantial economic penalty on the owner and operator based solely on an allegation of misconduct, prior to a U.S. District Court establishing a violation of MARPOL, APPS or any other U.S. law has been violated.

DEPARTMENT OF JUSTICE INVESTIGATIONS AND PROSECUTIONS

Once the Coast Guard makes a determination that there is "reasonable cause to believe" a vessel has violated MARPOL or APPS, the matter will be referred to the Department of Justice for criminal prosecution. While a comprehensive discussion of Department of Justice investigations and prosecutions is beyond the scope of this article, we provide a brief summary of the process below.

After a Coast Guard referral for prosecution is received by the Department of Justice, and the detained crewmembers are housed ashore, a Grand Jury will be convened to investigate the allegations of criminal conduct. The Grand Jury will hear witness testimony, will issue subpoenas to the owner and operator to obtain vessel documents and documents that are maintained in the offices of the owner and operator, and will ultimately vote on whether an Indictment will be issued. If the Grand Jury finds there is "reasonable cause" to believe U.S. laws have been violated, an Indictment will be issued and the defendants (i.e., individual vessel officers, as well as the owner and operator of the vessel) will be arraigned in a U.S. District Court.[25]

Once an Indictment is issued, the officer, owner and operator are faced with the choice of defending themselves at trial or negotiating a settlement with the Department of Justice.[26] Either of these options will cause the owner and operator to incur substantial costs,

> **Once the Coast Guard asserts there is "reasonable cause to believe" APPS has been violated, it will request Customs and Border Protection revoke the vessel's Customs clearance to depart the port."**

continued from page 27

including the cost of abiding by the terms of the Security Agreement and paying to maintain crewmembers in the United States while the criminal prosecution is pending.

LESSONS LEARNED

A critical precaution to avoid Coast Guard investigations and possible prosecutions for violations of US environmental regulations is to ensure all corporate and vessel procedures and policies track the requirements of applicable U.S. and international marine environmental laws and regulations. Vessel owners and operators should ensure that all crewmembers and shoreside personnel receive proper training on the company's safety management system policies and manuals in compliance with the International Safety Management (ISM) Code, with special emphasis on pollution control, compliance and prevention procedures.

If the port State control inspection appears to be more than routine, the vessel's Master must **immediately** notify the manager, port agent, and/or the P&I club's local correspondent. Once an investigation commences, the crewmembers must not, under any circumstances, remove or destroy any documents, piping, flanges or other potential evidence, and the owner and operator must not give any advice or orders that could be interpreted by the Coast Guard or Department of Justice as an obstruction of justice or interference with an agency proceeding.

Perhaps most importantly, in the event the owner or operator becomes aware of a potential MARPOL violation before the authorities discover it, they should immediately consult with knowledgeable counsel on the subject of self-reporting the violations to the proper authorities.[27] When available, self-reporting can drastically mitigate the ensuing fines, criminal liability and the onerous terms of posting security to avoid detention of the vessel.

CONCLUSION

There is no indication that MARPOL and APPS related investigations by the Coast Guard have waned. On the contrary, investigations and prosecutions are on the rise. Furthermore, the costs that are incurred by owners and operators to merely obtain the release of a vessel detained for an alleged MARPOL or APPS violation have grown exponentially, as the Coast Guard continues to demand Security Agreements that contain onerous and costly provisions that far exceed the type of security that can be demanded pursuant to 33 U.S.C. § 1908(e).

Under these circumstances, owner and operators must carefully implement and monitor procedures, practices, policies and training to ensure all bilge waste and sludge is handled in accordance with the requirements of MARPOL and APPS, and must take a proactive role in ensuring vessels and crewmembers abide by all U.S. and international maritime environmental laws and regulations.

[1] *International Convention for the Prevention of Pollution from Ships* (MARPOL 1973/1978), Nov. 2, 1973, 1983 U.N.T.S. 184, as amended by Protocol of 1978, February 17, 1978, 1983 U.N.T.S. 62, enacted in the United States by The Act to Prevent Pollution from Ships of 1980 (the "APPS"), Pub. L. No. 96-478, codified at 33 U.S.C. §1901 *et seq.*

[2] 33 U.S.C. §§ 1901 et seq.

[3] 33 U.S.C. § 1319; 33 U.S.C. § 1321.

[4] 18 U.S.C. § 1512(c); 18 U.S.C. § 1519.

[5] 18 U.S.C. § 7(1); 18 U.S.C. § 9; 14 U.S.C. § 89(a) and 33 U.S.C. § 1907(e). Pursuant to 14 U.S.C. § 89(a), "the Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."

[6] 33 U.S.C. § 1906(b); 33 C.F.R. § 151.15.

[7] 33 U.S.C. § 1901, *et seq.,* specifically, 33 USC §1908(a); see also 33 C.F.R. § 151.25(a).

[8] 18 U.S.C. § 1001.

[9] 18 U.S.C. § 1505.

[10] 18 U.S.C. § 1519.

[11] 18 U.S.C. § 1512(c).

[12] 18 U.S.C. § 371.

[13] 18 U.S.C. § 1519.

[14] Pursuant to the APPS, specifically 33 U.S.C. § 1908(d), the vessel itself is liable *in rem* for any civil or criminal fines imposed against the vessel's owner or operator.

[15] *United States v. Twentieth Century Fox Film Corp.,* 882 F.2d 656, 660 (2d Cir. 1989).

[16] The term "Expanded MARPOL Examination" and process involved will be explained in more detail below.

[17] Other ORB red flags include: failure to record internal transfers of bilge waste and waste oil; transfer quantities of bilge waste or waste oil in excess of the capacity of a holding tank; repeated identical entries in the vessel's ORB; and, entries in the ORB that do not match sounding records maintained by the vessel.

[18] If the Coast Guard determines there are clear grounds to believe the vessel, its equipment or its crew does not correspond substantially with the requirements of MARPOL or that the Master or crewmembers are not familiar with essential shipboard procedures relating to the safety of the vessel or the prevention of pollution, an expanded MARPOL examination will be performed. See Coast Guard G-PCV Policy Letter 06-01, dated January 20, 2006, at paragraph c; see also 33 C.F.R. § 151.23.

[19] Tips from whistleblowers are extremely common in Coast Guard MARPOL investigations and are the basis for the vast majority of the Coast Guard investigation and Department of Justice MARPOL/APPS prosecutions. APPS provides that these whistleblowers can receive up to fifty (50%) percent of any fine that is imposed against an individual or corporate defendant. *See* 33 U.S.C. § 1908(a). The Department of Justice regularly posts on its websites and through other newspaper and magazine publications the fact that individual whistleblowers have been rewarded hundreds of thousands of dollars for information leading to an APPS conviction.

[20] 33 C.F.R. § 151.23(b).

[21] Any crewmember who is questioned by the Coast Guard, regardless of citizenship and nationality, has a Fifth Amendment right to remain silent and to refuse to answer questions posed by the Coast Guard if anything such crewmember might say will have the tendency to incriminate him or her as well as a right to consult with counsel before speaking with the authorities. Non-English speaking crewmembers have a right to the services of a competent interpreter to translate any questions posed by the Coast Guard. If the crewmember does speak with the Coast Guard, he must be absolutely truthful, as any materially false answers or statements could result in additional charges for making false statements to a government agent, or even a charge that the crewmember obstructed justice.

[22] 46 U.S.C. § 60105 (a) & (b).

[23] 33 U.S.C. § 1908(e)("If any ship subject to the MARPOL Protocol, Annex IV to the Antarctic Protocol, or this Act, its owner, operator, or person in charge is liable for a fine or civil penalty under this section, or if reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or civil penalty under this section, the Secretary of the Treasury, upon the request of the Secretary, shall refuse or revoke the clearance required by [46 U.S.C. § 60105]. Clearance may be granted upon the filing of a bond or other surety satisfactory to the Secretary.").

[24] There have been several actions filed in U.S. District Courts which have challenged the Coast Guard's authority to demand, pursuant to 33 U.S.C. § 1908(e), that an owner and operator execute an onerous Security Agreement to obtain Customs clearance for a detained vessel. These actions have not been adjudicated on the merits by the courts as the Coast Guard has repeatedly asserted that U.S. District Courts do not have jurisdiction to hear such actions under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq*.

Specifically, the Coast Guard has argued that until an administrative appeal of the Coast Guard Sector's security demand is fully exhausted (i.e., prosecuting the appeal through the District Commander, Area Commander, and ultimately to the Commandant of the Coast Guard), the Coast Guard has not taken "final agency action", and therefore the Administrative Procedures Act precludes the filing of any action in a U.S. District Court to challenge the Coast Guard's interpretation and application of 33 U.S.C. § 1908(e).

This creates a procedural roadblock as it takes several months to exhaust the administrative appeals process, and while this process is ongoing the vessel remains detained in the U.S. However, as the Coast Guard, emboldened by the procedural roadblock it has created, continues to demand ever more egregious conditions in Security Agreements, the challenges of the Coast Guard's interpretation and application of 33 U.S.C. § 1908(e) will continue and ultimately an action will be heard by a U.S. District Court. When the court considers the plain language of the statute and the legislative history of APPS, it is this writer's opinion that the court will conclude the power to withhold customs clearance is limited solely to ensuring that a bond is posted to pay any fine or civil penalty that might be imposed. See House Report No. 96 1224, *reprinted in 1980* U.S.C.C.A.N. 4849, 4864 (stating that the purpose of posting security is, "***to ensure payment of any fine or civil penalties that might be incurred upon completion of criminal proceedings or civil penalty actions***,") (emphasis added).

[25] If an individual officer, owner or operator negotiates a plea agreement with the Department of Justice prior to the issuance of an Indictment by the Grand Jury, the charges are brought by an Information, which serves as the formal charging document in lieu of an Indictment.

[26] While several owners, operators, and individual officers have successfully defended themselves at trial, the vast majority of APPS related prosecutions have been resolved through plea agreements.

[27] U.S. Coast Guard Maritime Law Environment Manual (MLEM), Appendix V – Environmental Crimes: Voluntary Disclosure Policy (commonly known as "Appendix V").

RECENT INITIATIVES AT THE IMO

By: William Moore, Dr. Eng.
Senior Vice President
Shipowners Claims Bureau, Inc.
New York, NY

STATES INVITED TO GIVE EFFECT TO FAIR TREATMENT OF SEAFARERS

A draft assembly resolution aimed at promoting compliance with the 2006 IMO/ILO *Guidelines on Fair Treatment of Seafarers* in the event of a maritime accident was agreed by the Legal Committee when it met for its 98th session in April. Member states are to be asked to consider amending their national legislation to give full and complete effect to the *Guidelines on Fair Treatment of Seafarers* and invites governments to respect the principles in the Guidelines when considering fair treatment of seafarers in other circumstances where seafarers are detained.

Since the adoption of the Guidelines in 2006, a number of incidents have taken place in which seafarers on ships that have been involved in maritime accidents have been detained for prolonged periods. This treatment raises questions about whether they have been treated fairly in full accordance with the principles set out in the Guidelines.

The draft resolution also recognizes that the Guidelines should be implemented alongside the mandatory IMO *Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Accident.*

The draft resolution will be submitted to the next meeting for approval of the IMO Assembly in November 2011 and also to the International Labour Organization (ILO) Governing Body in June 2011.

FOLLOW-UP TO OIL-WELL INCIDENTS PROGRESSED

The Legal Committee discussed liability and compensation issues connected with trans-boundary pollution damage from offshore oil exploration and exploitation activities. This came following a preliminary debate at its last session in the wake of the much publicized DEEPWATER HORIZON incident and following the well blow out incident leading to pollution from on the MONTARA

offshore oil platform located in the Australian Exclusive Economic Zone.

The Committee discussed the report of an informal intersessional consultative group on consultations concerning liability and compensation for oil pollution damage resulting from offshore oil exploration/exploitation. It was noted that no dedicated internationally binding instruments for compensating victims of trans-boundary oil pollution damage existed and, accordingly, there was a need to develop effective measures for mitigating and responding to the impact on the environment caused by incidents of pollution, including liability and compensation issues connected with trans-boundary oil pollution damage.

There are two existing international and regional instruments. First, there are the provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) which *inter alia* require States to control pollution of the marine environment from seabed activities and to provide recourse for compensation for damage caused by such pollution. Second, there a 1977 Convention on Civil Liability for Oil Pollution Damage from Offshore Activities, which contains the text for such a regime, but has not entered into force; and a 1974 regional Convention between Denmark, Finland, Norway and Sweden on protection of the environment, which provided for compensation for oil spills from offshore platforms and which could serve as a precedent for regional action.

The Committee recommended that, pending approval by the IMO Council and Assembly of the proposed amendment to the relevant strategic direction in the Organization's High-Level Action Plan, the informal consultative group of interested states and organizations should continue to work together intersessionally, co-ordinated by Indonesia, to analyze the issue further, taking into account the discussions during the session.

NEED TO REVIEW LIABILITY LIMITS UNDER CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS

There was wide agreement in the Legal Committee on the need to review the limits of liability under the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1996).

It was agreed to make no decisions regarding the amount of any possible increase in limits of liability at this session, since the formal proposal for an amendment under article 8 would only be considered at the Committee's next session in April 2012.

There was a wide exchange of views relating to the possible extent of the increase in limits and also the potential impact on other treaties on liability and compensation. The Committee recognized that it was important to have a broad consensus at its ninety-ninth session, in order to adopt an amendment to the limits of liability under the LLMC 96.

STATES URGED TO RATIFY MARITIME LABOUR CONVENTION, 2006

The Committee received an update on the status of the Maritime Labour Convention, 2006 (MLC 2006) and urged states to ratify the treaty at the earliest opportunity, if they had not already done so.

As of the date of publication of this issue of *CURRENTS,* the MLC 2006 had been ratified by 12 states representing approximately 48 per cent of the world fleet based on gross tonnage. Eighteen more ratifications were needed to achieve the required number for entry into force. Several states had indicated that they were working to ratify the Convention before the end of 2011, to enable it to enter into force in 2012.

If this deadline is met it will keep pace with the adoption of the 2010 Manila amendments to the International Convention on the Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW) and the 1995 STCW Code, both of which are also due to enter into force in 2012.

CORRESPONDENT PROFILE

A VIEW FROM ROMANIA:

THE DEVELOPMENT OF INTERSERVICES SA

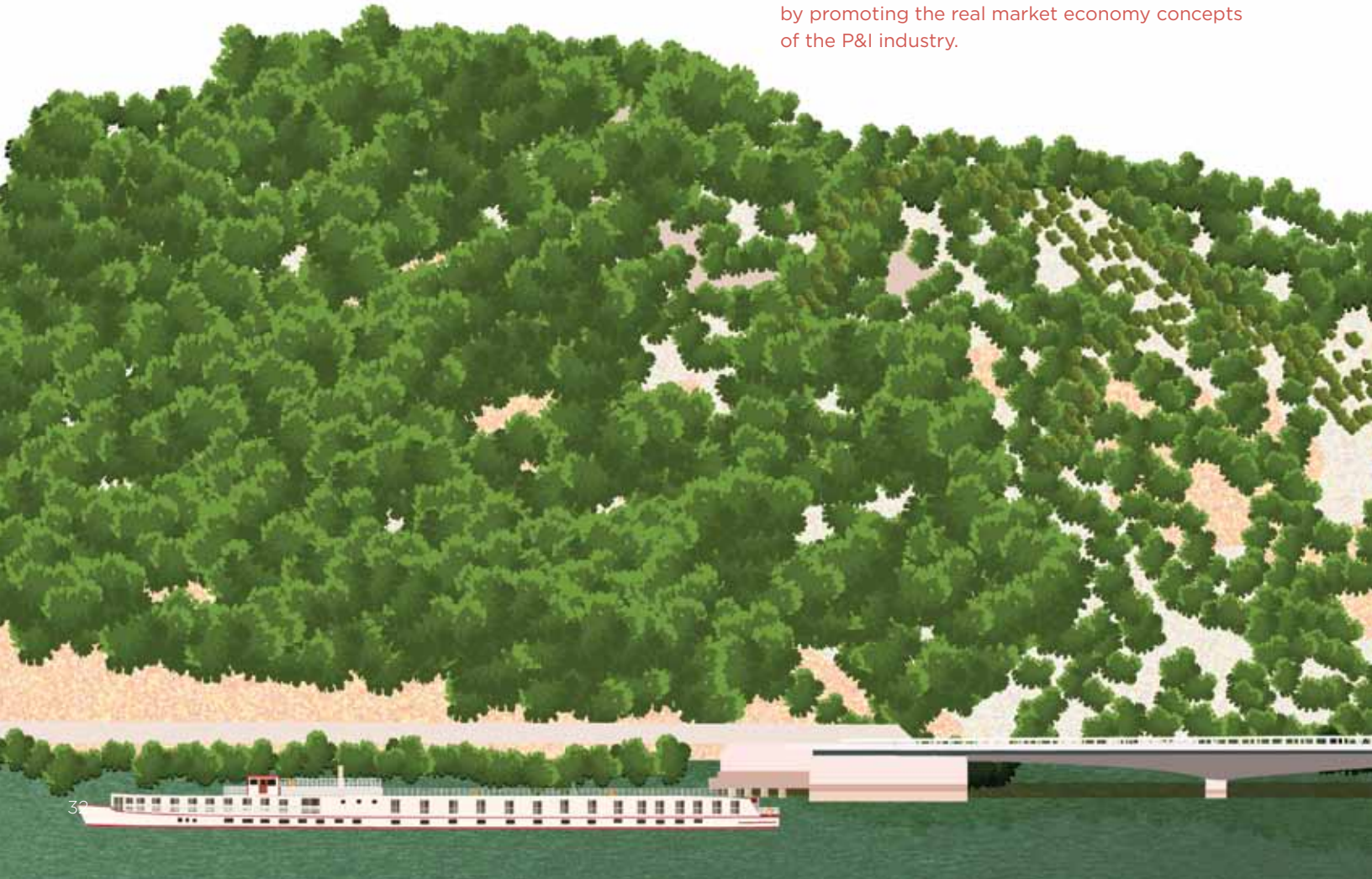
By: Luciana Mancas
Interservices SA
Bucharest, ROMANIA

We have always viewed the P&I business as 'a ship' with the shipowners and P&I clubs as the masters in command, and the P&I correspondents as the skillful and loyal crew members. Without someone in command the ship, it cannot sail. However, the master cannot sail a ship alone and thus requires a skillful crew to ensure the vessel sails safely, efficiently and profitably between destinations.

As human beings, we also have a sense of the importance of property. With this in mind, as a P&I correspondent, we try to sit in the shoes of the shipowner by considering the ship as our own property. This is the basic business philosophy upon which Interservices SA performs and acts in the service of shipowners: "to care as if the ship is your own". To Interservices SA, this is not just a simple metaphor.

The company was set up in early 1990 on the dawn of transition from the country's former communist system to a democratic society. It began from the initiative of two local people with the immense and invaluable support of many P&I clubs.

Consequently, Interservices SA has had a substantial role in bringing back to life the valuable assets in the Romanian maritime business culture. This culture had been buried by 50 years of communism and then had to challenge the past by promoting the real market economy concepts of the P&I industry.



HISTORY BUILT ON CHANGE

In 2011, Interservices SA celebrates 21 years of interactive team work. We are comprised of lawyers, master mariners, naval architects and marine engineers. Our staff is devoted to finding the best possible and cost effective solutions to respond to the needs and serve the shipowners and their P&I associations. We are proudly representing the American Club as well as all other P&I clubs of the International Group.

Interservices SA has become a brand name in the region through the professionalism of its employees integrated into a system capable of individual and collective motivation. The company has three main offices. The first office is located in Bucharest and handles core business functions and retains a legal staff. The second office is in Constanza, the largest and busiest of Black Sea ports. We maintain a third office in Galatz which is a port hub on the Danube River.

The Bucharest office handles matters on the upstream ports along the Danube River which is the waterway linking the Baltic Sea to the Black Sea. Upon occasions, we also handle cases in various jurisdictions such as Moldavia, Serbia, Slovenia, Hungary, Ukraine and Bulgaria, and remoter locations such as Azerbaijan.

We handle a wide scope of matters such as wreck removals, dock damages, cargo claims, personal injury, death claims, providing services to the cruise line industry, surveying, consultancy and legal assistance. All of these services are handled and managed professionally by Interservices SA's own staff employees.

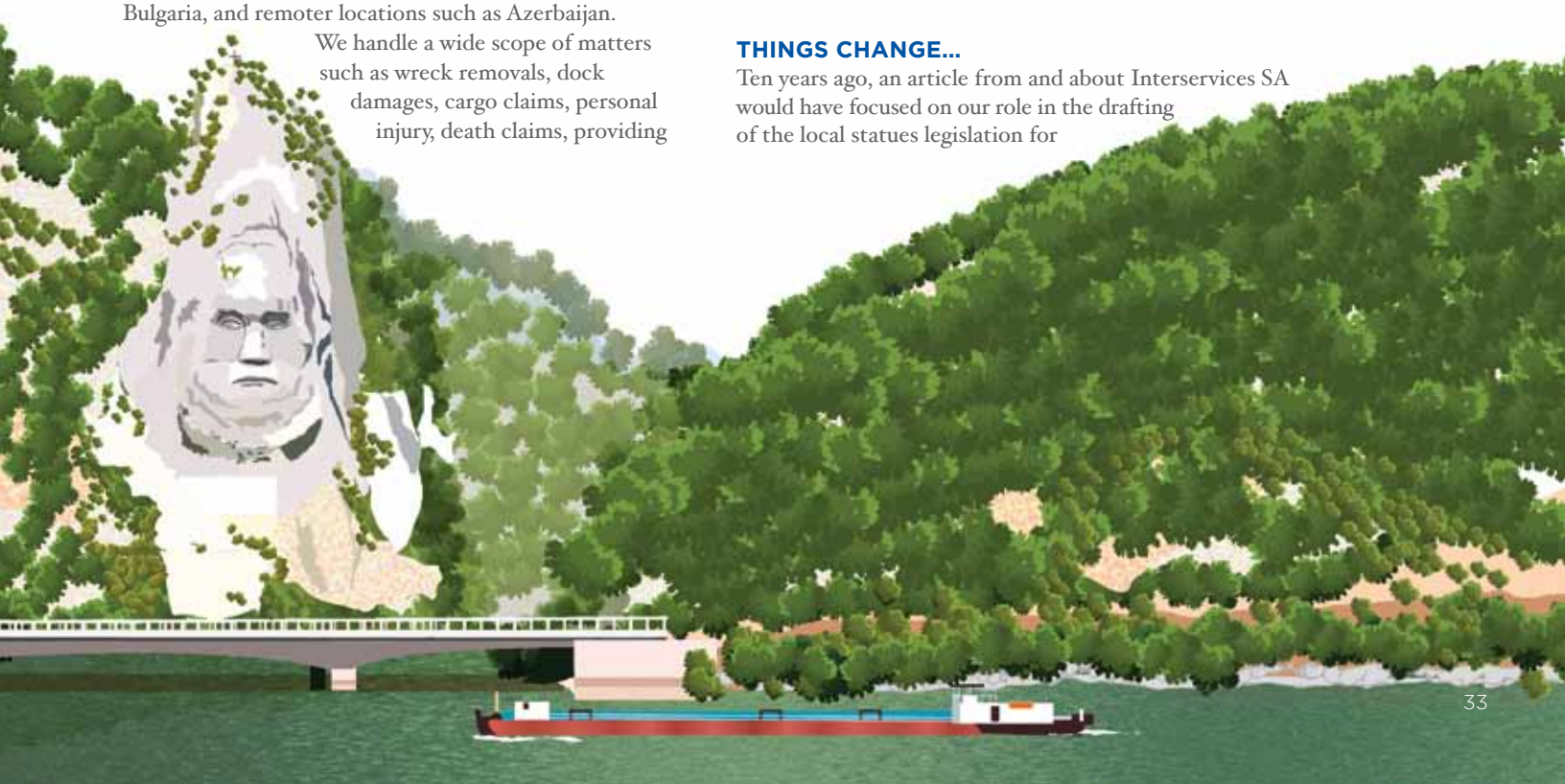
Each and every case, major or small, is important and needs to be responded timely and adequately. This is a golden rule of our day to day business. We are here to help.

Through the 21 years of history of the company, Interservices SA has succeeded to manage cases commissioned to it by shipowners and P&I clubs through staff member awareness, a deep knowledge and understanding of the local cultures, laws and environment, part and parcel of the trading assets of Interservices SA's culture.

Fifteen years ago an article from Interservices SA would have focused on its educational role with regard to the P&I clubs and endeavors done for the acceptance of the clubs' letters of undertaking given the inconsistencies with Romania's commercial legislation recognizing such letters. Over the years and through our diligent efforts, Interservices SA succeeded to put up acceptable club letters of undertaking in each and every case whether outside or inside the courts.

THINGS CHANGE...

Ten years ago, an article from and about Interservices SA would have focused on our role in the drafting of the local statues legislation for



continued from page 33

the Romanian government to comply with the *1992 International Convention on Civil Liability for Oil Pollution Damage* (CLC 92). This effort led to clubs' letters of undertaking being expressly considered and accepted as sufficient security instead of shipowners and clubs having to cash secure that immobilize significant funds. Incorporating explicitly the clubs' letters of undertaking into a government statute ruling on the mechanisms for the application of CLC 92 is possibly a unique case in the world.

Another focus at that time would have been on the problems for shipowner carriers loading steel or about problems of loading grains at Romanian ports. Another concern at that time was the international traders' coalition in pushing shipowners to hire services of the surveyors loyal to their assignments and turning a blind eye on cargo deficiencies.

Thanks to clubs' continuous support of our firm stand, which clearly voiced the shipowners and their concern and recommendations through various circular letters, we have resisted all adversities to date.

Five years ago we particularly focused on Romanian seafarers on board cruise lines and we succeeded to prevent many fraudulent claims, and most importantly their recurrence.

Two years ago, the article would have spoken about the necessity of reviewing the Romanian ships' classification society rules and risks posed to shipowners by outdated rules and the operational criteria tugs involved in assisting large containers carriers and whether they meet proper safety criteria.

HANDLING TOUGH CASES

Interservices SA successfully handles claims: both big and small. Such cases including a wreck removal following sinking of a vessel loaded with steel across Sulina channel. We have handled dock damage cases over 120 meters (400 feet) wide to the northern breakwater of Constanza, unfortunately resulting in loss of life of crew members of two large bulk carriers. We manage cases of vessels sinking as well as fire and explosion cases.

We have successfully defended direct action cases against clubs in the Romanian courts resulting in the savings of several million U.S. dollars. Furthermore, we have defended the carriers' rights in clausing of a grain bill of lading, which cases lasted in the Romanian courts for nearly 10 years. Fortunately, the carriers' case was successful whereby their award was inclusive their large counter claims associated with the vessel's loss of use and all associated costs.

One of the most dramatic cases we have been involved in included a container carrier which was not permitted to enter in the port of destination and/or in any other port in the Black Sea due to a high chemical hazard casualty occurred while she was at sea. Through the efforts of Interservices SA, permission was finally granted for the vessel to enter Constanza for decontamination. The hazards were removed and the vessel was quickly returned to service.

INTERSERVICES SA TODAY

Did we achieve what we have planned on setting up the company 21 years ago? Are we prepared for the future in a regulatory and market climate which changes pace at a faster rate every day? Are we prepared to face the ups and downs of the global economic downturn?

We believe the answer to these three questions is a definitive YES. To be a good P&I correspondent, the service needs constant attention and should be effective, reliable and durable. Furthermore, we believe in achievement, awareness and preparedness by our staff is imperative to success. To do that our professional and qualified staff members must work within a flexible system capable of personal and collective motivation.

Without the clubs' investment and commitment to us, Interservices SA would never have existed. We are grateful to the American Club for their continuous support in that we view the future with great optimism and reliance on the strength of the cooperative efforts of the American Club, its owner Members and Interservices SA.

This article has been prepared on behalf of Gabriel Mancas, Capt. Spiridon Timofte, Mrs. Manuela Dumitru, Mr. Gabriel Ciutu, Mr. Gabriel Tudorache, Mr. Laurentiu Badila, Mr. Virgil Naghirneac, Mr. Iliuta Mocanu, Mr. Vlad Mancas, Mr. Ilie Ungur, Mrs. Adriana Malinescu, and all the others who have not been named but whose role is essential in the running of our company.

FD&D CORNER

By: Parker Harrison, Esq.
Vice President and FD&D Manager
Shipowners Claims Bureau, Inc.
New York, NY

POST-JUDGMENT *KOEHLER* ACTION UPHELD

In the November 2009 issue of *CURRENTS,* the Managers reported on the demise of Rule B attachments of EFTs, or electronic funds transfers, in the hands of intermediary banks in New York. As the membership is aware, pre-litigation Rule B attachments of EFTs had become an incredibly powerful tool for securing claims often subject to UK arbitration and for bringing a recalcitrant party to the negotiating table. Since the U.S. Second Circuit's landmark decision in *Shipping Corporation of India v. Jaldhi,* the options for obtaining pre-judgment security have been more limited. However, as we reported in that same issue of *CURRENTS,* **post**-judgment enforcement of even foreign judgments has been made possible in New York under the *Koehler v. The Bank of Bermuda* case from the New York Court of Appeals, 12 N.Y.3d 533 (N.Y. June 4, 2009).

In the *Koehler* case, the Court ruled that 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. When the decision was first issued, commentators expressed some doubt about whether the courts in New York, both federal and state, would be willing to implement the decision, given the significant constitutional implications. But in January 2011, the United States District Court for the Southern District of New York did just that in *JW Oilfield Equipment, LLC v. Commerzbank AG,* 2011 U.S. Dist. LEXIS 19094, 78 Fed.R.Serv.3d (Callaghan) 699 (S.D.N.Y. Jan. 14, 2011).

In this case, JW Oilfield obtained a judgment against JJS Oilfield Supply, GmbH ("JJS"), from a federal court in Oklahoma. JW Oilfield registered the Oklahoma judgment in the Southern District of New York and then sought to enforce it through an application for a *Koehler* turnover order requiring Commerzbank AG, which had a branch in New York City, to remit JJS's funds held in a checking account in the bank's parent in Germany. Commerzbank resisted the application based on a variety of arguments, including some of the constitutional concerns raised by the dissent in *Koehler.*

A brief background to JW Oilfield's *Koehler* application is necessary to fully understand the case and the Southern District's decision. In 2009, JJS filed suit against JW Oilfield in Oklahoma. After a two-day jury trial, the judge entered judgment as a matter of law for JW Oilfield and later awarded JW Oilfield its attorney's fees in the amount of over US$166,000. After JJS failed to pay the fees awarded, the Court ordered a judgment debtor examination to identify JJS's corporate assets. The Court also forbade JJS from transferring or otherwise disposing of any money or property until further order of the Court. Neither JJS nor its corporate representative appeared for the examination, and the Court thereafter found the representative to be in civil contempt.

Meanwhile, perhaps anticipating JJS's failure to appear, JW Oilfield filed an application against Commerzbank in the Southern District of New York seeking a turnover order under F.R.C.P. Rule 69(a) and NY CPLR § 5225(b), based on information that JJS held an account at Commerzbank. By this application, JW Oilfield sought to enforce the Oklahoma judgment, which had already been registered in the Southern District. The Court granted the application and ordered Commerzbank to freeze any accounts held by or for the benefit of JJS, including any such accounts in Germany. Commerzbank complied with that order and froze JJS's assets, up to the amount of the judgment, held in Germany. In response, JJS filed an injunction proceeding against the bank in Frankfurt, seeking an order requiring Commerzbank to pay out the frozen funds.Commerzbank opposed the injunction and the German court denied JJS's petition for a temporary injunction.

In the New York case, Commerzbank challenged JW Oilfield's turnover action on several grounds, including the questionable extraterritorial reach of the requested order. The Court noted that the issue of NY CPLR § 5225(b)'s extraterritorial application was already decided in the *Koehler* case. In *Koehler,* the New York Court of Appeals – the highest state court in New York and therefore the final authority on questions of New York law – distinguished between prejudgment attachment, which requires the court's jurisdiction over the property being attached, and post-judgment enforcement, which requires only jurisdiction over the person.

The Court of Appeals reasoned that when a judgment debtor is subject to personal jurisdiction in a New York

continued from page 35

court, "that court has jurisdiction to order the judgment debtor to bring property into the state, because the court's authority is based on its personal jurisdiction over the judgment debtor." *Koehler* at 540. The Southern District of New York reasoned that, by extension, a court's authority to order a garnishee to bring property into the state is similarly based on personal jurisdiction over that garnishee. Finding that it had general personal jurisdiction over Commerzbank (which the bank did not dispute), the court concluded that it was empowered under *Koehler* to issue a turnover order requiring the bank to surrender money up to the amount of the judgment, even if the money was held in an account in Germany.

Seizing upon the some of the concerns expressed by the dissent in *Koehler,* Commerzbank next challenged the proposed turnover order on the basis of various constitutional arguments. First, the bank claimed that it had standing as a third party to resist the application based on JJS's due process rights. The court rejected that argument, finding that the interests of JJS and Commerzbank were not truly aligned, and that there was no hindrance to JJS's ability to protect its own interests.

The bank next argued that comity required the court to reject JW Oilfield's application, given the potential that a turnover order would conflict with Germany's own banking laws. Applying the Second Circuit's five-factor test on the issue of comity, the court concluded that none of the various considerations outweighed the United States' strong interest in enforcing its own judgments, particularly where JJS could plausibly be considered to have deliberately courted legal impediments by failing to comply with the Oklahoma court's judgment debtor examination order.

Commerzbank also argued that *forum non conveniens* required that the court dismiss JW Oilfield's case. Noting that dismissal might be appropriate if Germany provided an adequate alternative forum, the court concluded that the balance of public and private interests favored the New York court's exercise of jurisdiction. The court appears to have been significantly influenced by the fact that JW Oilfield had not initiated the underlying dispute. Instead, JJS had chosen to sue in a U.S. court and then, when the result was unfavorable, it sought to avoid the consequences by failing to satisfy the award of attorney's fees and then failing to appear for the court-ordered judgment debtor examination. Under the circumstances, the court refused to require JW Oilfield to file suit in Germany to enforce the judgment.

Finally, Commerzbank argued that New York's "separate entity rule," which requires each branch of a bank to be treated as a separate entity for attachment purposes, mandated that the turnover application be rejected. The court summarily disposed of this argument, noting that under *Koehler,* the separate entity rule is inapplicable in postjudgment execution proceedings.

Having disposed of all of Commerzbank's objections, the court granted JW Oilfield's petition for a writ of execution and turnover order. This decision confirms the use of *Koehler* as a powerful tool for post-judgment enforcement, and is the first decision by the Southern District of New York – the same jurisdiction that grappled with Rule B EFT issues – in which *Koehler*'s principles have been applied. Judgment creditors in future maritime disputes should bear this decision in mind when considering their options for enforcement.

NICE DREAMS: COMMERCIAL COURT DEFINES "TIME CHARTER TRIP"

As the Members know, the standard charter party types are demise or bareboat charters, time charters, and voyage charters, each of which impose certain standard obligations on the parties. In recent years, however, a number of hybrid forms of charter have cropped up that blur the traditional boundaries between these otherwise distinct charter party arrangements. One such hybrid is the "time charter trip", which combines elements of time and voyage charters. In the recent case of *Ispat Industries Ltd v Western Bulk Pte. Ltd (Sabrina 1)* [2010] EWHC 93 (Comm), the arbitral tribunal and thereafter the Commercial Court were asked to categorize this strange new form, since its proper classification as either a time or voyage charter significantly affected the parties' rights.

In that case, owners chartered the SABRINA 1 to charterers on a standard NYPE form containing the usual Clause 16 exceptions with respect to acts of enemies. The charter called for the vessel to "be

employed for one time charter trip from Vizag to Mumbai lawfully trading between safe port(s), safe berth(s) and safe anchorage(s)." In accordance with the charter party, charterers sent voyage instructions to the Master on December 24, 2007, confirming that the vessel was to load at Vizag.

Two days later, after subjects were lifted but before the laycan, charterers notified owners that they would have to cancel the fixture due to civil unrest and insurgency preventing the cargo from arriving at the load port. Owners accepted the repudiatory breach and began looking for alternative employment for the vessel, which was not refixed until January 15, 2008. Owners then commenced London arbitration seeking damages in the form of the hire that would have been earned over twelve days, the minimum expected duration of the time charter trip.

The arbitral tribunal held in owners' favor, finding that although the cargo could not reach the load port due to "enemy activity" within the meaning of Clause 16 of the charter party, the charterers were nonetheless required to find alternative lawful cargo. They had made no attempt to do so, however. The tribunal also found that owners had not failed to mitigate their damages. More significantly, the tribunal determined that the fixture was a time charter in spite of the use of various terms more common in voyage charters.

The charterers appealed to the Commercial Court on various grounds, including serious irregularity and questions of law under sections 68 and 69 of the Arbitration Act 1996. Specifically, charterers argued that the fixture was in fact a voyage charter, or at the least a charter limited to only a specific trip. Mr. Justice Teare rejected this argument, holding that although the fixture note indeed referred to the "intended voyage" and the "cargo intention" of iron ore, those references were to the voyage and cargo intended *by the charterers*. Those references simply indentified the charterers' intention at the date of the recap, but did not define the time charter trip as being only a voyage from Vizag to Mumbai carrying a cargo of iron ore.

This decision confirms that while a "time charter trip" might in some respects appear to be a hybrid, it is essentially a time charter on a time charter form.

BIMCO PUBLISHES RADIOACTIVITY RISK CLAUSE FOR TIME CHARTER PARTIES

The March 11, 2011 earthquake on Japan's northeast coast caused massive losses to property within hundreds of miles of the epicenter and was the fourth-largest earthquake recorded since 1900. The ensuing tsunami caused even greater damage to both life and property. Those effects continue as Japanese authorities struggle to contain radiation leaking from the Fukushima nuclear plant. Although the advisories issued by the relevant nuclear authorities indicate that the level of radioactivity in the region surrounding the plant is low and unlikely to increase to levels dangerous to humans, the situation nonetheless remains very serious.

In response to the nuclear disaster, owners and charterers alike have begun to reexamine their respective rights and obligations under the charter party when the vessel is directed to a Japanese port. Concerns about the safety of the crew, the cargo, and the vessel itself have prompted parties, particularly owners, to ask whether and to what extent owners may reject otherwise legitimate voyage orders for the vessel to call at Japanese ports or simply transit through or near Japanese territorial waters. The Club Managers have fielded quite a few such

continued from page 37

inquiries in recent months but, because traditional charter party clauses may not adequately address this situation, the parties' options may not be very good. Also, a number of homespun "radiation clauses" have begun circulating in the market. As a general rule, these clauses tend to favor the drafter and often give one party broad rights to refuse to call at Japanese ports, often without any valid justification. Depending on the circumstances, the other party may have little meaningful opportunity to reject these onerous terms.

To address this perceived inequity and provide a more balanced solution, BIMCO recently issued a standard *Radiation Risk Clause for Time Charter Parties.* In broad terms, the clause gives owners the right to refuse to call at any port, or transit any waters, that may expose the vessel, her crew, or cargo to dangerous levels of radiation as determined by a competent authority.

If the owners decline to send the vessel to such areas, the charterers are obligated to issue alternative orders and must indemnify owners against claims by holders of the bills of lading for any associated delays caused by waiting for the alternative orders and/or for performance of the alternative voyage. And, as with the BIMCO Piracy Clause for Time charters, the vessel is to remain on-hire during any time lost waiting for or as a result of such orders. Radioactive surveys performed at owners' request are to be at charterers' time and expense, and again the vessel remains on-hire during any screening of the vessel for radiation by port authorities.

The background and full text of the Radioactivity Clause, as well as some answers to frequently asked questions, can be found at *www.bimco.org*.

WATCH WHAT YOU SAY! THE "INTERPRETATION EXCEPTION" TO THE "WITHOUT PREJUDICE" RULE.

Parties seeking to resolve disputes through negotiation typically stress that their communications, whether written or verbal, are "without prejudice," meaning that the communications cannot be referred to in subsequent court or arbitration proceedings. The rule is designed to encourage open and forthright settlement negotiations. Over the years, the English courts have recognized various exceptions to this rule, including where a settlement agreement may be set aside on grounds of misrepresentation, fraud, or undue influence, or in circumstances giving rise to an estoppel argument. In the recent case of *Oceanbulk Shipping & Trading SA v TMT Asia Limited and others* [2010] UKSC 44, however, the Supreme Court recognized a new "interpretation exception" that similarly permits representations made during without – prejudice ("WP") discussions to be used in court.

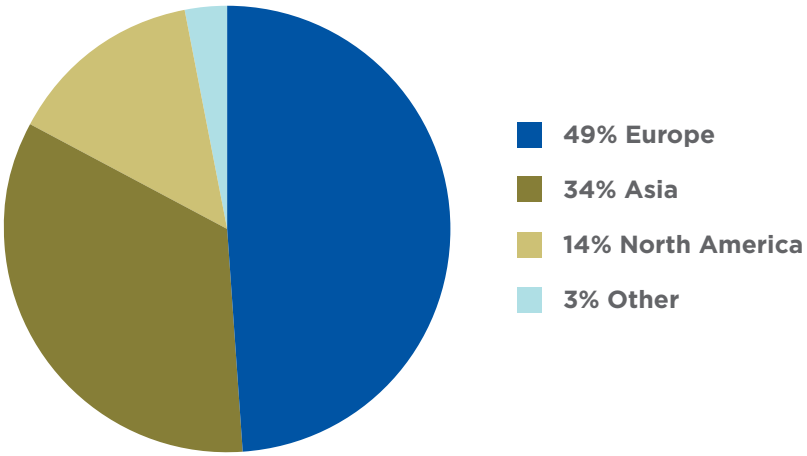
TMT had become liable to pay a substantial amount to Oceanbulk under a series of freight forwarding agreements ("FFAs"); the parties entered into without-prejudice negotiations that culminated in a settlement of the dispute. Unfortunately, although there was no dispute about the existence of the settlement agreement or the completeness and accuracy of its terms as agreed, the parties had conflicting opinions about the meaning of one of those terms. Based on that disagreement, Oceanbulk brought a claim for damages against TMT for breach of a particular clause in the settlement agreement. In its defense, TMT sought to adduce evidence of certain of Oceanbulk's representations made in the course of the parties' WP settlement discussions. The court was thus required to decide whether TMT was entitled to rely on Oceanbulk's alleged representations in support of TMT's interpretation of the agreement.

At first instance, the London High Court held the evidence to be admissible, but the Court of Appeal reversed. The Supreme Court reversed again, ruling that the interpretation exception should be recognized. Specifically, the Supreme Court held that evidence of facts contained within without-prejudice communications may be admissible when a court is asked to construe the true meaning of a settlement agreement.

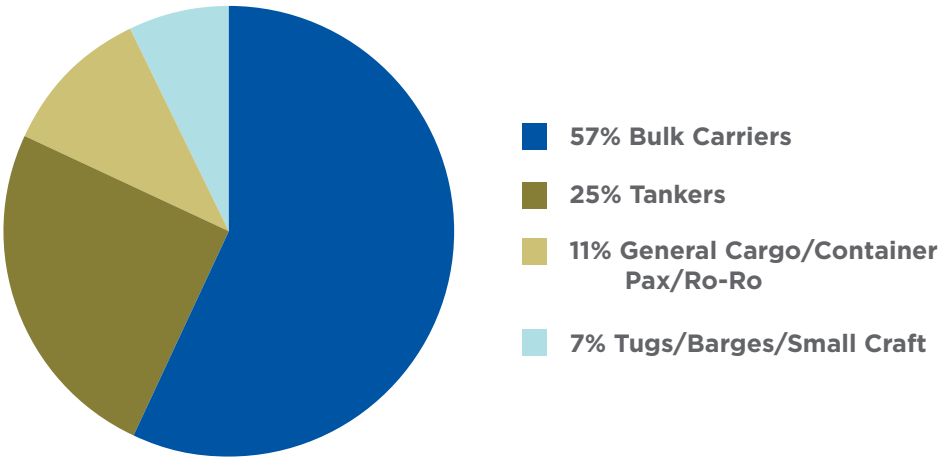
Although disputes over the meaning of settlement agreements are relatively rare, parties engaged in WP negotiations should bear this decision in mind and be prepared for the potential disclosure of confidential information should such a dispute arise after a settlement has been reached.

MEMBERSHIP PROFILE, MAY 2011

P&I TONNAGE BREAKDOWN BY REGION



P&I TONNAGE BREAKDOWN BY VESSEL TYPE



AMERICAN STEAMSHIP OWNERS MUTUAL
PROTECTION & INDEMNITY ASSOCIATION, INC.

SHIPOWNERS CLAIMS BUREAU, INC., MANAGER

SHIPOWNERS CLAIMS BUREAU, INC.
One Battery Park Plaza, 31st Floor
New York, New York 10004 U.S.A
TEL +1.212.847.4500
FAX +1.212.847.4599
WEB www.american-club.com

SHIPOWNERS CLAIMS BUREAU (UK), LTD.
London Liaison Office
New London House – 1st Floor
6 London Street
London EC3R 7LP U.K.
TEL +44.20.7709.1390
FAX +44.20.7709.1399

SHIPOWNERS CLAIMS BUREAU (HELLAS), INC.
51 Akti Miaouli – 4th Floor
Piraeus 185 36 Greece
TEL +30.210.429.4990.1.2.3
FAX +30.210.429.4187.88

SCB MANAGEMENT CONSULTING SERVICES, LIMITED
Room 1803 – Hongyi Plaza
288 Jiujiang Road
Shanghai 200001 China
TEL +86.21.3366.5000
FAX +86.21.3366.6100
EMAIL claims@scbmcs.com

THE AMERICAN CLUB