CURRENTS

Issue Number 33 • December 2011

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To the left and page 27: *"The Seafarer"* by sculptor Julie Lluch, commissioned by Capt. Gregorio Oca, Head of the Associated Marine Officers and Seamen's Union of the Philippines (AMOSUP), is a life-size bronze statue located near the Manila Yacht Club. According to the Philippine Star's Mayenne Carmona, it is a tribute to the relentless, determined and undying spirit of Filipino seafarers.

MANAGEMENT CHANGES

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

NEW YORK

CHRIS HALL Vice President, Underwriting

LONDON

NIKI TIGA Claims Assistant

Cover Art:
The Saigon River continues to be a vibrant waterway for maritime trade since Vietnam joined the World Trade Organization in 2007.

CURRENTS is edited by:
Dr. William H. Moore
Denzil Stuart

Designed by:
Mirror NYC

Illustrated by:
Mr. John Steventon

THE AMERICAN CLUB 1917

INTRODUCTION

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

These introductory paragraphs in the last edition of *Currents* contained a discussion of the American Club's business strategy entitled *Partners in Progress*. The strategy's chief goals remain on course, despite the challenging global economic climate which continues to sap the confidence of the business community throughout the world.

Notwithstanding the lamentable political deadlock which persists both in Europe and in the United States at present, it is to be hoped that the commercial energy of the emerging markets will maintain its momentum over the months ahead as the European sovereign debt crisis moves toward a positive denouement, and growth in the US rises as the capital markets recover.

The American Club has weathered the recent difficulties in thoroughly respectable form. Tonnage continues to grow, influenced by a policy of careful risk selection, while premium and claims volumes remain steady. As to the latter metric, the recent figures continue to track the results of twelve months earlier, an encouraging trend given the exceptional nature of those 2010 results at that stage by comparison with previous years. While the year remains immature, there are grounds for cautious optimism that 2011 will be a relatively benign year for the Club's retained exposure, although much will depend on the outcomes attendant upon the winter season in the northern hemisphere.

As we move toward the 2012 renewal season, it is likely that the themes of twelve months earlier will largely reassert themselves. At the time of writing, your Board had yet to consider its policy in regard to premium and related requirements for the following year. Your Directors will of course be giving the subject their careful consideration in over the weeks ahead.

This edition of *Currents* contains a speech on the future of marine insurance which was made to the annual meeting of the Association of Average Adjusters of the United States in early October. While the contents of that address speak for themselves – and are intended to be more wide ranging as to the likely components of future success in the industry as a whole, rather than those limited simply to the P&I world – the American Club remains very conscious of the demands of the market as they are likely to emerge over the years ahead.

It is to this end that *Partners in Progress* was conceived with a view to confronting the imperatives of the future. The American Club has committed itself to meeting the winning criteria outlined in the speech contained in the pages which follow. Most of those criteria have, we like to think, largely been met, but we recognize also that more work is needed in regard to the few which remain. This is very much on your Managers' – and your Board's – continuing agenda!

Ultimately, the proof of the pudding is in the eating. And, from the American Club's point of view, this will be seen in maintaining an excellent reputation for effective, business-friendly service and a reliable level of rating and other economic certainty from year to year. As your Managers and your Board have made clear over an extended period, these remain the overwhelming priorities to which the affairs of the Club are committed.

There will be much to do at the working level as we proceed toward the 2012 renewal. We look forward, over the forthcoming period, to refreshing our relationships with existing Members of the Club, and to having the opportunity of welcoming more Members to our global family.

We will be reporting on the results of this exciting time of year – which represents such a fascinating conjunction of so many elements of Club activity – and, in the meantime, as a new year approaches, wish everyone the very best of the holiday season lying ahead!

HARNESSING THE WINDS OF CHANGE OR THE FUTURE OF MARINE INSURANCE AND HOW TO WIN IT

Joe Hughes recently concluded his period as Chairman of the Association of Average Adjusters of the United States at its annual meeting at the beginning of October. At that time, he gave an address in which he reflected on his 35 years' experience of the marine insurance world and looked to the future of the industry as the new century unfolds.

The following is an edited version of his remarks.

To speak of the winds of change is to employ a vivid metaphor describing the onset of a future very different from the past. The expression was first used by British Prime Minister Harold MacMillan in 1960 in an address to the South African Parliament. He used it to describe the growing demand for self-determination among Britain's colonies in Africa. The winds of change blew fast and furious during the remainder of that decade as the old regime was dismantled and former colonies in Africa and elsewhere were granted independence. Although they took longer to engender change in South Africa itself, the same winds proved inexorable in the end, even there.

The winds of change in the political world are readily discernible since they are the stuff of which current news and historical writing are made. The winds of change as they affect the world of commerce are perhaps less obvious, although looking back over only ten years, who would have predicted that a company making hand-held communication devices would have a valuation on the stock market which for a while recently exceeded that of the world's largest energy conglomerate? I refer, of course, to Apple and Exxon Mobil respectively. And given the news overnight about Steve Jobs, it is a rather melancholy observation to make this morning.

In our comparatively small and somewhat cloistered world of marine insurance, the winds of change have blown more gently, I think, but change there has undeniably been. The nature of that change, however, has in many respects been different from that which has occurred in other areas of commerce.

The reason why change has been slower in our industry than in others is because, collectively, we occupy as risk carriers and service providers alike, a traditional, "upstream" section of the great river of global business.

This is a reflection of the maritime industry which we serve. Although there have been far-reaching changes in the way in which maritime transport is conducted, the introduction of the shipping container and the growth of multi-modal transport being notable examples, such change has been largely incremental. The shipping industry has not undergone the paradigm shift which, say, the information technology and communication sectors have seen over the past 50 years.

Because of its primary, "upstream" role in world commerce, the shipping industry, and the commercial and legal architecture supporting it, are largely the same now as they were several generations ago. This is not, incidentally, to devalue the role of shipping. It is of course a role of fundamental importance to the global economy, the more so since international trade as a proportion of global GDP continues to grow and, indeed, has risen from about 23% to 30% of that GDP over the past decade.

Of course, the players in world shipping have changed as the balance of global trade has shifted over recent decades from West to East. But the shipowners of today do essentially the same things, and in essentially the same way, as their counterparts did in the past.

The same is true of the marine insurance industry, I suggest. The core elements of what we do as marine insurers and related service providers are essentially the same as they were in the middle of the last century. In many respects, we do what we do differently these days. This is certainly true in the context of how we are structured, how we implement our business processes internally, and how we deliver value to the markets we serve. Moreover, the climate within which we operate is very different now. Nevertheless, the product we provide is, at its core, much the same as it has been for many years.

Accordingly, as I come to identify the winds of change as they affect marine insurance, you will see that they mainly bear on the external factors which are changing the way we do things, rather than the essence of what we do itself. But, however they may be identified, they are no less important for our collective future, and harnessing them to better serve our markets – and in doing so winning that future – is of vital importance to all of us, and most particularly to the next generation of marine practitioners.

Let me seek to identify the winds of change blowing across our industry by reference to a series of propositions which, I believe, collectively describe the evolving environment in which we practice our trade. I will not dwell to any length on any of these propositions in particular, but the mosaic leading to the larger picture which they are intended to create will, I hope, be clear.

I should add that my remarks are directed primarily at the international markets, and the observations and conclusions I draw are aimed chiefly at those who conduct business in the global arena. They have great relevance, of course, to those who operate solely in a domestic context, but the kernel of my argument is informed by changing international, rather than purely local, business conditions.

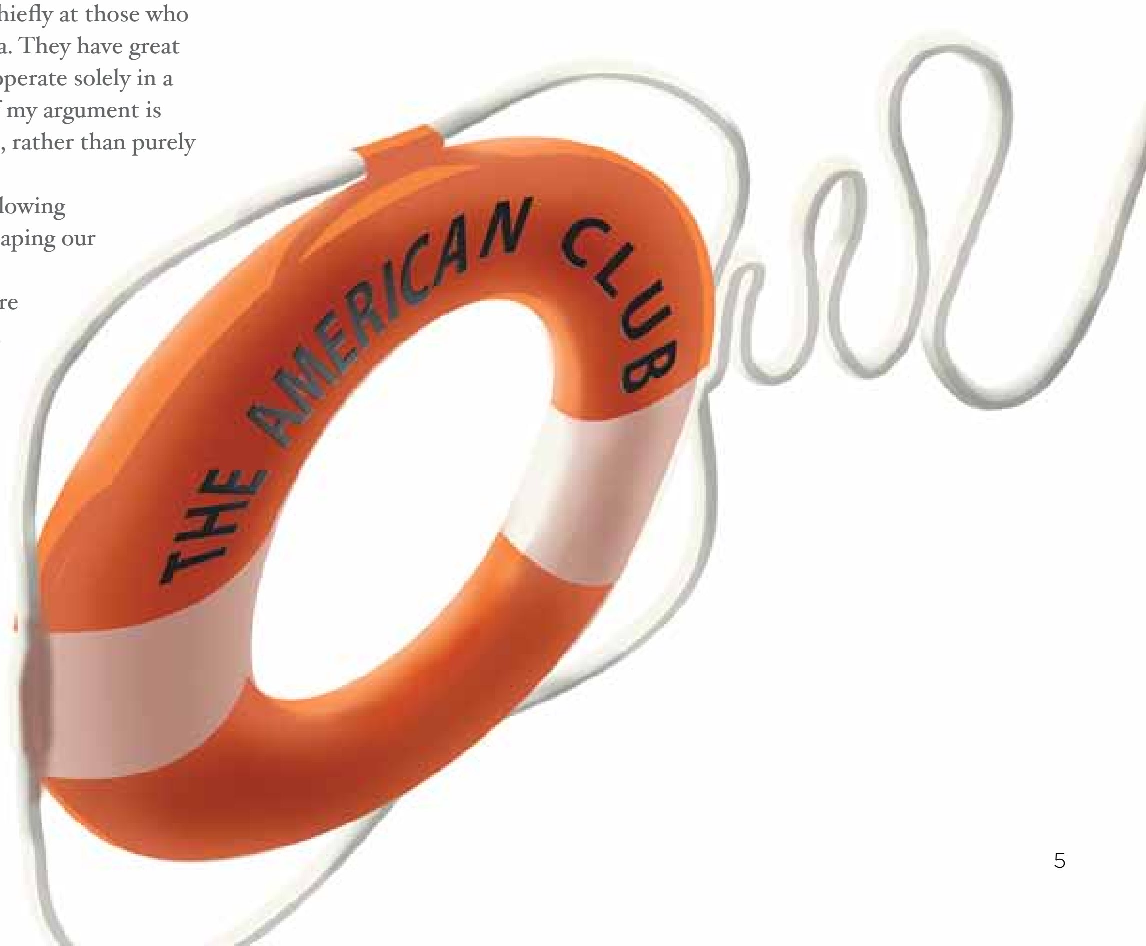
I suggest, therefore, that the following trends, or winds of change, are reshaping our business landscape.

First, we live in a relentlessly more interconnected and borderless world, culturally, socially, commercially, and especially in terms of the immediacy with which information can be accessed, transmitted and deployed. This is perhaps the most vibrant part of the larger phenomenon of modern "globalization". The ability to acquire, share, analyze and act upon information has never been greater, nor ever had greater implications for competitive advantage.

Second, the product quality and service expectations of clients, and other business counterparties, have never been more acute. In satisfying those expectations, the need to be innovative, to respond to the market's changing demands, to achieve a clear identity in product differentiation and above all to add value, and be seen to add value, has never been more compelling.

Third, the breadth and intrusiveness of regulation in the affairs of insurers has never been greater. Nor has the heavy hand of litigation hovered more balefully over our affairs than it does at present, and not just here in the United States. In parallel, the media interest in what we do has never been greater and the ability to deal with the news cycle, such as it is in our field, never more important.

Fourth, the increased outsourcing of financial judgments of insurers into the hands of third parties, and the implications of those judgments, have never been a more



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potent influence on market perceptions. Such judgments now go beyond matters of purely economic significance, such as levels of capital adequacy (on which I have some further comments later in the context of the trend toward multiline business models). The testing of insurer strength by reference to operational benchmarks such as enterprise risk management, and the quality of corporate governance, is a growing trend. It has also been embraced by regulators – Solvency II in Europe, and NAIC protocols on this side of the Atlantic, being cases in point. And this is to say nothing of the activity of non-statutory institutions such as, for example, the Lloyd's franchise board and its focus on the delivery of business plans.

Fifth, and as a direct consequence of the globalization I mentioned earlier, the need for dedicated regional service delivery by insurance suppliers – and, indeed all other stakeholders in the marine insurance business – has become increasingly important. For example, in responding to this trend over the last 13 years, the American Club has itself opened new regional service centers in, successively, London, Athens and Shanghai.

Sixth, a growing shift from monoline to multiline product supply has characterized the positioning of many marine insurers in recent years. This has been a trend visible among some of the P&I clubs, for example. Part of it has been driven by market consolidation, part of it by a desire to generate new sources of revenue and part at least in implicit recognition of the requirements of new regulatory regimes, notably Solvency II, where the presumed volatility of monoline business may, over time, impel demands for higher levels of capitalization, at least among non-mutual insurers.

Seventh, the application of modern technology to the marine insurance business model has developed exponentially in recent years and will continue to do so in the future. No serious player can allow itself to fall behind the curve in this respect. Such technology includes not only that related to the processing of information and the means of communicating it to the market, but also that related to the analysis and pricing of risk based on actuarial and other models.

Finally, the manner in which marine insurers conduct their affairs is driven these days by rising expectations of transparency and accountability. As the manager of an International Group shipowners' mutual, where members are insureds and insurers alike, and where there is a clear nexus between operational accountability and strategic oversight by virtue of the club's mode of governance, transparency for us is embedded in the mechanisms of day-to-day business. But those who invest in, and consume, marine insurance products will, increasingly, demand to know more about those who provide those products, and the manner in which those products are developed, financed, priced, implemented and overseen. And, as to oversight, they will expect that boards are well qualified, thoughtful, committed to the interests of shareholders, properly engaged and motivated, and appropriately representative of those whose interests they are mandated to serve.

I am sure that many other trends can be identified as agents of change in our industry. I believe that the foregoing are among the most significant. They will surely shape the landscape of our business over the years ahead.

At the same time, the recognition of, and response to, these trends must never be permitted to erode the enduring values which characterize our industry, based as they are on the great traditions which continue to run as a golden thread through the fabric of what we do. We welcome the future as we build on the past. We welcome change as a stimulus to improvement. This does not mean compromising our values as much as enhancing outcomes for our customers as we cleave to those values in the pursuit of evolving imperatives.

Having identified these winds of change, how do we harness them to best effect and win the future of marine insurance? The short answer would be: by responding to the changing environment in a focused and energetic way. This is entirely correct. But such a goal cannot be accomplished in a vacuum. The overarching culture of the commercial surroundings in which any business hopes to succeed needs to be appropriate to, and provide encouragement for, that success. This proposition is based on the "comparative advantage" theory of the early nineteenth century British political economist David Ricardo. The idea is as vitally important to the future of marine insurance as it is to any other sector of commercial enterprise.

A commercial culture which is conducive, in that overarching sense, to winning the future of marine insurance, comprises the following elements.

First and foremost, simple enthusiasm and vision: the ability of the participants in a business to see the landscape ahead, and their genuine desire to be part of it. This is predicated upon an insurance establishment interested in the marine specialty, appropriately capitalized and willing to deploy that capital in the pursuit of marine opportunities, with a prudent, but realistic, appetite for risk.

Second, a benign regulatory, legal and operational environment creating the minimum amount of friction in the development of opportunities, and a general ease of doing business in the marine insurance field.

Third, ample access to qualified people – the vitally important human capital on which all commerce relies – and the educational platform and vocational training which underpin the supply of those people. One of America's greatest advantages in the global market has been its ability to attract and nurture talent, and its exceptional capacity for innovation and renewal. We can, and should, promote these advantages in the world market for marine insurance.

Nor should we lose sight of the fact that expertise in our field represents a tradable export in the supply of which only a relatively small number of national economies compete, the US being one. Since this expertise creates a valuable export of services in support of the growth of US trade internationally, it must continue to be encouraged and promoted.

Finally, and as a related component of the first cultural positive I described, is a simple will to succeed and a dogged persistence in achieving that success. This connotes singularity of purpose coupled with a willingness to embrace change and assume risk when needed.

> **"The application of modern technology to the marine insurance business model has developed exponentially in recent years and will continue to do so in the future."**

I shall pause here and restate my main observations which lead to the conclusions in the final part of this address as to what key characteristics of success an ambitious marine insurer – and by extension any kind of marine insurance related entity – will be cultivating in order to win our industry's future.
To recapitulate, the winds of change which will shape that future are, I suggest, as follows:

- Globalization as a fundamental business driver.
- Rising customer expectations of product value and innovation of approach.
- More demanding regulatory and legal environments.
- Increased outsourcing of financial and qualitative analysis to third parties.
- Decentralization of service delivery.
- Increased product diversification.
- Growing exploitation of IT and related technologies.
- Rising demands for transparency and accountability in operations and governance.

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In harnessing these, the successful marine insurance entity of the future will also be best served by an overarching business climate which exhibits the following elements:

- The vision of stakeholders with deployable capital and an appetite for writing marine risks.
- The friendliness of the regulatory, legal and operational environment.
- The availability of skilled and motivated people.
- The will to succeed, taking a long-term view of the business landscape.

Given the factors I have described, let me conclude by sketching the chief characteristics which the winning marine insurer of the future in my opinion is likely to possess. Several of these characteristics will apply, *mutatis mutandis*, to related service providers, since the underlying components of success will apply to all.

Such an entity will be found in a location where the business environment is marine insurance friendly – New York has traditionally been such an environment, while the Scandinavian nations, the United Kingdom and other European states belong to that category, as well as several in Asia and in emerging economies elsewhere, of course, where opportunities for marine insurers will surely continue to expand.

Wherever they happen to be located, the winners of the future will exhibit the following chief virtues:

- They will be well capitalized with access to levels of funding both necessary and sufficient to match present and future opportunities and the appetite for risk. There will be a powerful community of interest between all stakeholders.
- They will exhibit a degree of product diversification appropriate to their size and market positioning, and the skills at their disposal. A trend toward multiline insurance offerings will likely be evident.
- They will have a deep understanding of the markets they serve and the expectations of consumers within those markets. They will be innovative in product development, have a clear and differentiated identity, and will apply an exceptional focus on adding value to customer relationships.
- They will have a capacity for global outreach through regional service centers able to provide a strong local presence.
- They will employ highly skilled and motivated people, with the qualifications and experience able to supply outstanding levels of professional service within a strong, team-based working environment.
- They will foster cordial and cooperative relations with insurance regulators, financial analysts and all other agencies relevant to their operations wherever they are based, or wherever they might have a bearing on business. They will be environmentally conscious.
- They will have a clear and coherent business strategy recognizing the strengths, weaknesses, opportunities and threats inherent in their market positioning. This will be supported by a strong system of enterprise risk management and a robust architecture of governance.
- They will implement a business model benefiting from the widest range of statistical and market inputs, both internal and external, which enhances risk selection and loss control, yet is flexible enough to react intelligently to changing market conditions.
- They will execute their business model on a platform with first-division IT capabilities, and will possess an exceptional ability to connect with customers and to communicate knowledge with immediacy and relevance.
- They will, more generally, enjoy first-rate communication and public relations skills, capable of engaging with interlocutors from any sector of the shipping industry, governmental and trade organizations, the press and any other outside parties relevant to their business.

- They will, above all, conduct their affairs to the highest standards of integrity supported by a single-minded commitment to customer service and exceptional transparency and accountability in operations, and at the level of corporate governance.

What a paragon of virtue I have described! There are no doubt other elements of such virtue which can be identified, some of them subsets of the more general categories I have just mentioned. And, as I observed earlier, many of the above ideals are, mutatis mutandis, capable of application to other entities which occupy the marine insurance space, including brokers, lawyers and adjusting firms.

Now some of you may be wondering whether the American Club, and its sister businesses, as international insurers and service providers based here in New York, meet the winning criteria I have just outlined. Most of them, I believe, they do. There is more work needed in regard to a few, perhaps, but we know what is required, and are determined to get wherever we need to be!

Above all, I am certain that we are not alone here in New York in aspiring to win the future of marine insurance. This extraordinary, world-class city – a microcosm of the world itself, no less! – must surely, with its glittering maritime and commercial traditions, continue to assert itself at the forefront of marine insurance, and related professional practice, on the global stage. It is a stage we share with others – the representatives of some of whom we welcome here today as friends.

Many of those others may already be winners, or will be winners in the future, in markets only as yet developing. And let us not forget that, more than ever, we occupy an interdependent world. This is not a zero sum game, so let us hope we can all to some extent be winners over the years ahead. But let it also be understood that my own group, as well as the maritime community at large here in New York, has every intention of continuing to compete both now and in the future.

PEOPLE AND PLACES

JOE HUGHES INDUCTED INTO INTERNATIONAL MARITIME HALL OF FAME

Joe Hughes was inducted into the International Maritime Hall of Fame at a ceremony in New York which took place just prior to the last edition of *Currents* going into print.

Hughes joined fellow honorees Claudio Bozzo, President, Mediterranean Shipping Company, USA, Rick Gabrielson, Director, Target Corporation and Charles Moorman IV, President and CEO, Norfolk Southern Corporation.

Hughes (center) is pictured below with his fellow honorees, and Tim Ferrie, Chairman of the Maritime Association of the Port of New York and New Jersey.

Solid Bulk Cargo Liquefaction – where are we now?
A situation update from around the world.

By: Simon Burnay, Director-Marine Consultancy Services
Allan Ashby, Senior Marine Surveyor
Aime Harrison, Engineer/Scientist
Braemar Technical Services, Ltd.
London, UNITED KINGDOM

INTRODUCTION

The liquefaction of solid bulk cargo has become a global concern in shipping. As defined in the 2011 International Maritime Solid Bulk Cargoes (IMSBC) Code (Section 7), Group A cargoes "may liquefy if shipped at a moisture content in excess of their transportable moisture limit (TML)" which can result in cargo shift and a loss of stability. It is becoming common knowledge that liquefaction of some ore cargoes can be caused by the normal incidents of a sea voyage, but greater investigation is required into the sampling, testing and certification of all cargo types that may fall into Group A.

WHAT IS LIQUEFACTION?

Liquefaction is the phenomenon of a solid behaving as a liquid (ie, exhibiting the ability to flow) when the solid particles lose their internal shear strength due to an external applied force, for example the motion of the ship in the seaway and vibrations caused by waves and the running of the main engine or other onboard machinery. When these external forces are applied, the solid particles lose contact with each other due to the inherent water pressure increase.

The moisture content value that initiates this solid cargo "flow" behavior under the external forces is called the flow moisture point (FMP). Therefore, the FMP represents the point at which the pressure of the moisture content is greater than the internal shear strength that holds the solid particles together. The TML for solid bulk cargo determined by laboratory analysis is 90% of the FMP as the TML represents the upper bound moisture content for a cargo that is suitable for safe transport.

The moisture content of a solid bulk cargo is highly susceptible to exposure to weather and handling from mine to ship and the determination of FMP (critical for ensuring the safe transport of such materials) is highly dependent on laboratory test accuracy, sampling methods and, consequently, validity of the cargo declaration.

A SITUATION UPDATE FROM AROUND THE WORLD

An increased understanding of the problem, heightened safety concerns and the economic climate have created changes in the 'on the ground' situation in the various countries exporting iron ore. The following presents our experience of the current situation in each:

INDIA

The Indian Authorities published Merchant Shipping Notice No 9 on 27th August 2010 which became mandatory in India on 1st January 2011. This document reinforces implementation of the IMSBC Code and goes further than the Code in that it **directs** masters to verify the moisture content of iron ore fines if they are in any doubt about the accuracy of the declaration provided by shippers.

The Kolkata Port Trust, which handles the iron ore exports from Haldia, issued a circular on 19th August 2011 to exporters, surveyors and agents stating that iron ore fines stockpiles tendered for shipment from the port have to be jointly surveyed by a P&I or owner's surveyor, a shipper's surveyor, and a charterer's surveyor (if any). Subsequent joint analysis for TML has to be carried out "*as per the requirement of P&I or owner's surveyor*" and the subsequent report must state whether cargo is accepted or rejected for loading. On the face of it this may sound like progress is being made on safety but the circular makes no mention of the actual moisture content of the stockpile. It is the moisture content that is, in most cases, the cause of dispute between shippers and owners, and it is the moisture content that must be determined within seven days prior to loading (and again after periods of rain if less than seven days) in accordance with the IMSBC Code. This circular does little to protect the interests of owners, and masters must still exercise utmost caution when loading iron ore fines in India.

INDONESIA

Some shippers and port authorities are still preventing surveyors from attending at the stockpiles and on board vessels loading nickel ore. Local interests dictate that expatriate surveyors should not work in the port areas or on board vessels as, typically, their visa does not allow such activity and local surveyors must be used. The master must be confident in the surveyor, as it is important that they have the requisite experience (in particular, their knowledge of the IMSBC Code and the latest on test methods for FMP) and are not influenced by the local shippers. The problems of intimidation and aggression by some shippers still remains and the surveyor must be robust. A key issue is still access to good quality independent laboratories in the area, with Singapore or Hong Kong currently providing the nearest 'trusted' laboratories.

THE PHILIPPINES

The problem of some cargoes of nickel ore being exported with the moisture content above the TML continues. However, surveyors and other experts are reluctant to attend the shore loading facilities in the Philippines due to rebels attacking the offices and mines of the nickel ore exporters in the Surigao region. There have been casualties and the rebels have taken hostages and destroyed some mining equipment.

There have been no reports so far of ships' crews being threatened by the rebels but the situation remains tense. Owners intending to load nickel ore in the Philippines may consider taking on board a surveyor prior to arrival in the Philippines. The on-board surveyor can then assist and advise the master during loading but would be unable (and almost certainly unwilling) to leave the vessel to sample the shore facilities.

LIBERIA

A new iron ore fines export facility began production earlier this year in Port Buchanan and the first export vessel was loaded in May. During loading this cargo was found to have a moisture content above the TML. After a short investigation the cargo was offloaded and the vessel sailed without her cargo. We understand that there have been no further problems of this nature in Liberia, but are closely watching the situation in view of the continued expansion of commodities exports from West Africa.

Iron ore fines stockpile in India during monsoon season

Flow table test sample for FMP and TML analysis

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BRAZIL

Exports of large quantities of sinter feed from Brazilian ports are continuing, generally without liquefaction problems. However, there are concerns that the cargoes are being mis-declared by shippers as 'Group C' rather than a 'Group A'. Under the IMSBC Code, Group A cargoes are those which "…*may liquefy if shipped at a moisture content in excess of their* TML". Group C cargoes are those which "…are neither liable to liquefy nor to possess chemical hazards" and accordingly do not require the shipper to provide test results for Transportable Moisture Limit (TML), Flow Moisture Point (FMP) and moisture content of the cargoes. The master must be vigilant to the cargo declaration and, if in any doubt about the categorization of the cargo, should seek further advice.

LIQUEFACTION AND SHIP STABILITY

The problems that excessive free surface and cargo shifting create for ship stability are well known and taught extensively to all seafarers. The liquefaction of a solid bulk cargo can result in a sudden and catastrophic loss of stability as evidenced by the loss of three ships and 44 seafarers in late 2010. To help highlight the problem, Braemar has undertaken extensive studies into the effect of cargo liquefaction on ship stability and found that even small percentages of the cargo (of the order of 10%) undergoing liquefaction can be sufficient to cause a loss of metacentric height (GM, the measure of a ship's ability to right itself) and that the loss of stability can occur even with liquefaction in one or two holds.

This highlights the importance of ensuring that the cargo is safe to carry and in accordance with the IMSBC Code. It also highlights the importance of good seamanship and the ability to recall and implement the procedures for dealing with a list due to a shifted cargo or an angle of roll due to a loss of GM. Ballasting of topside tanks to try and correct a list has been seen in at least two incidents to have contributed to the loss of the vessels.

SUMMARY

The IMSBC Code is very clear that all fine-grained cargoes with inherent moisture content shall require flow testing to determine suitability for shipment (Appendix 3, Section 2.1). Controlling all aspects of cargo storage, sampling and testing prior to loading as well as clarifying the distinctions between Group A and Group C cargo classifications are critical to eradicating the carriage of cargoes with moisture contents above TML that can lead to the loss of the vessel. Certificates and declarations of the moisture content of a cargo must be verified by competent authorities to ensure that they are below the transportable moisture limit and thereby not likely to liquefy.

NOTE: *The contents of this article are not a substitute for the Code itself and if there is any doubt the Code should always be consulted.*

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the authors of this article.

Further evidence that SBC liquefaction is now very much on the watchlist of hull underwriters and P&I clubs came in September when the subject occupied most of the legal and liability workshop at the annual conference of the International Union of Marine Insurance in Paris.

BOBBY GUTHANS – AN APPRECIATION

A former director of the American Club, Robert ('Bobby') A. Guthans died in Mobile, in his native Alabama, in June this year at the age of 82. An elder statesman of the US maritime industry, he will be remembered with affection by all those whose path he crossed in the American Club, which he served with distinction as a director from 1997 until he retired from the board in 2008.

Bobby Guthans was president of Midstream Fuel Inc, Petroleum Energy Products Company and Tenn-Tom Towing Company until 1999. He served as chairman of The American Waterways Operators and of AWO's Southern Region, which was a post held in 1957 by his father, Harold Guthans, who invented the Guthans ratchet and went on to become president of Warrior & Gulf Navigation and Ohio Barge Line.

Bobby served in the Korean War as an officer in the US Army, and was on the board of many Mobile area corporate and community organizations.

Among the many honors he received during his long career were Propeller Club Maritime Person of the Year in 1990 and the National Rivers Hall of Fame Achievement Award in 1996, while in 1999 the US Coast Guard bestowed on him its second highest civilian award, the Meritorious Public Service Commendation.

On his retirement from business in 1999, the Hon. Sonny Callahan of Alabama, in the House of Representatives, described Bobby as "a respected leader in his field and an outstanding citizen in our community." He said that "as one of the founders of Midstream back in 1974, Bobby helped build a company that soon became recognized around the world as one of the innovative leaders in the maritime industry."

Bobby Guthans is survived by his wife, Barbara Ann, a son, a daughter and a sister.

SHIP RECYCLING IN THE INDIAN SUBCONTINENT AND BEYOND: PROGRESS IN LEAPS AND BOUNDS

By: Shashank Agrawal
Legal Advisor
Wirana Shipping Corporation
SINGAPORE

This article is the first in a two part series by Mr Shashank Agrawal of the Wirana Shipping Corporation. Wirana is the oldest cash buyer and was established in 1983. In 2009 and 2010, Wirana successfully negotiated over 320 vessels with LDT in excess of 3 million and DWT in excess of 12 million and has so far negotiated over 1,700 vessels and delivered a total DWT in excess of 48 million since 1983. They are the FIRST and ONLY cash buyer to feature in the Guinness Book of World Records for the two ULCCs purchased with a combined LDT of 148,691, a record which even today remains unmatched and unbroken.

Wirana has so far successfully negotiated over 300 tankers, 5 ULCCs, 28 VLCCs and in excess of 110 container vessels, with the list continuing to rise and grow every day. On a final note, Wirana will be the principal sponsor of a Ship Recycling Forum in Singapore, March 12/13, 2012, organized by TradeWinds.

The last three years have been extremely significant for the shipping industry as a whole, acting as a wake-up call to industry veterans.

The start of the market crash and collapse in 2008 with the slow but steady decrease since then has forced many industry players to re-think their strategy and positions across the globe and sectors. Throughout the world shipping companies have closed down or relocated to more friendly jurisdictions and pruned their top staff and management in order to conserve costs and running expenses. The "green dollars" industry slowly turned into the "red dollars" industry.

The current capesize tonnage on order for 2011 is approximately 103.2 million DWT and it is anticipated that in excess of 25 million DWT for scrapping would hit the beaches of India, Bangladesh and Pakistan this year. It has been an extremely challenging time for many, with the serious falls in freight rates and high bunker costs forcing scores of owners to cancel and terminate their charters early.

The veteran shipping banks do not want to finance shipping any further, thereby accelerating the rate of foreclosure leading to forced sale of vessels across High Courts in Singapore, India, Bangladesh and even China. To put numbers in perspective, capesize rates were USD30,587 / day last year and they have significantly fallen to USD8,296 / day this year. It was joked that charterers could charter hire a super yacht at the same price as a VLCC from South Africa to India, something which has sent alarm bells ringing across the shipping industry.

THE ROLE OF A CASH BUYER

Companies such as Wirana within the ship recycling industry are known as cash buyers since they purchase, from the owners, the vessel, basis 100% cash. In turn, the cash buyer would sell the vessel to a ship recycler in any one of the ship recycling countries. For vessels purchased basis "as is" the cash buyer takes over the vessel at the delivery port and then boards his own crew to sail the vessel. In the meantime, the vessel is re-flagged, given a brand new name and provided with a fresh insurance cover for the voyage to the recycling yards. Therefore Wirana is rightly referred to as an underwriter of recycling market risks. Due to fluctuations in steel prices in an extremely volatile market, the owners/sellers could stand to lose millions of dollars by the time the vessel arrives at delivery port. Irrespective of market conditions principals of Wirana have steadfastly stood by owners and sellers.

Upon delivery of the vessel in the Indian subcontinent, Wirana accepts Letter of Credit (LC) as the mode of payment from the end ship recyclers, something which the original owners maybe unwilling to accept or perhaps may have little experience in negotiating; therefore, owners prefer to work with cash buyers and it is estimated that at least 98% of vessels for recycling are sold via cash buyers. At all times the owners remain completely secure as their final payment from Wirana for the vessel is NOT contingent upon receiving funds from the end ship recyclers, which clearly demonstrates that Wirana act as the cushion between the owners and the end buyers of the vessel.

We therefore provide an important economic and distribution function to the owners as they now deal with one single entity which in turn deals with 300 ship recyclers between India, Pakistan, China (north and south), Turkey and Bangladesh.

Wirana has the in-house resources to continuously monitor the markets thereby placing it in a unique position to accurately and firmly guide owners. This knowledge is country specific and involves the spread across the five major ship recycling markets. Wirana remains fully abreast about of government regulations and is constantly being updated, thereby leading to an increase and maximization of the asset value for the owners.

THE INTERVENTION OF THE JURDICIARY:

INDIA

Both India and Bangladesh have seen their fair share of litigations involving the ship recycling markets. In India, the arrival of the *BLUE LADY (ex-NORWAY)* caused a huge uproar due to the alleged onboard quantities of asbestos and other hazardous materials. The matter was dragged right up to the Supreme Court of India which is the apex court body deciding on major issues. The Supreme Court handled the matter for months and then laid down extremely stringent rules and regulations for governance of the ship recycling industry.

The rules and regulations came to be followed by all sectors and industries involved with ship recycling. Some of the salient features of the Supreme Court order were:

1. Submission of the Ship Recycling Plan (SRP).
2. Details of the vessel, including best possible quantities of onboard wastes.
3. Ship recycling schedules with sequences of work.
4. Operational work procedures.
5. Availability of work handling equipment and PPEs
6. Plan for removing of oil and cleaning of tanks.
7. Hazardous wastes handling and disposal plans.
8. Gas Free for Hot Works certificate issued by the competent authority.
9. Identification and marking of all no breathing spaces.
10. Identification and marking of all places likely to contain hazardous wastes.
11. Confirmation that ballast water has been exchanged on the high sea.
12. Dismantling stage.
13. Waste water downstream stage.

BANGLADESH

The Bangladesh ship recycling industry was hit by the landmark environmental litigation initiated by the Bangladesh Environmental Law Association *(BELA)*

continued from page 15

which sought inter alia directions from the Supreme Court of Bangladesh on the safe and environmentally sound recycling of vessels arriving for recycling at Chittagong.

Sensing an immediate concern to set the house in order, the Supreme Court of Bangladesh banned the working of the recycling industry for 10 months in 2011 and directed the Shipping Ministry and Ministry of Environment to frame "Ship Recycling Guidelines" within six months. Relentless efforts by BELA saw the industry running in all four directions to comply with the Order of the Apex Court which mirrored the Order passed by the Indian Supreme Court. For the very first time, vessels arriving in Bangladesh were required to be gas free for hot works (Naked Flame Rules) as well as opposed to the plain gas free for man entry requirements which are far less stringent and less onerous.

Ship recycling is an important social economic activity which provides direct and indirect employment for over 500,000 people. Looking at the growing economic burden and perhaps the lack of contribution due to closure of millions of dollars in terms of direct and indirect taxes, the Supreme Court allowed the temporary reopening of the industry in May 2011 for a period of three months, further extendable upon the terms and conditions determined by the Court. As we write the Order remained in force until 12 October 2011 and will be suitably reviewed by the courts in order for any future extensions to be granted. Until this time the Ministry of Environment has to present the framed guidelines for the approval stamp of the courts. Once the guidelines have been framed it is hoped that the Industry would rise from the ashes like the Phoenix.

PAKISTAN

Unfortunately, Pakistan has consistently lagged behind the global race on upgrading themselves to the next tier. The yards there continue to be rudimentary in nature, relying heavily upon human workforce and labor, with little care for industrial rights and consequent violations. The inherent lack to upgrade perhaps stems from the fewer number of vessels arriving each year for recycling, which is directly proportionate to the price being paid by shiprecyclers. In fact, vessels from the Pakistan National Shipping Corporation (PNSC) have routinely been sold outside of Pakistan and have come down to India and Bangladesh. This speaks for itself.

RECYCLING CAPACITIES

INDIA

In India the ship recycling activities are principally carried out at Alang which is situated on the west coast of India in the state of Gujarat. At present, Alang has approximately 175 active and fully licensed and functional yards which are leased by the Government of Gujarat for a period of 10 years to ship recyclers, with the leases being renewed upon their expiry appropriately. To complement the yards at Alang we have some recycling yards at Jamnagar, a few nautical miles away from Alang but again in the same state of Gujarat. The unique strength of Alang is that they rely upon the beaching tides which vary month to month in order to derive the maximum advantage of the force of the water to push the vessel onto the beach. Of course, some vessels that are dead and under tow or those of extremely low LDT do not require meeting the beaching tide schedules and can beach at any time during the month. Both Alang and Jamnagar are under the aegis of the Gujarat Maritime Board (GMB) which operates under the directions of the Government of Gujarat.

More than 7,000 vessels have been scrapped at Alang since 1983, generating steel output in excess of 80 million tons. In an average, year Alang recycles about 600 vessels with an annual sales turnover of about of about USD 1.4 billion.

To complement the two destinations, a few vessels are also beached at Mumbai at the Darukhana which falls under jurisdiction of the Mumbai Port Trust (MBPT) which functions under the Government of Maharashtra. However, this port has size restrictions and not all vessels can be recycled here. For example, vessels in excess of 170 meters in length will have to go to Alang or Jamnagar as they will not be allowed at Mumbai.

BANGLADESH

In Bangladesh there are approximately 55 ship recycling yards which are fully functional and meeting the recycling needs of the nation. This industry now comes under the Ministry of Industries as opposed to the Ministry of Shipping and any ship coming inwards for recycling is required to obtain a *"No Objection Certificate"* in order for the Letter of Credit to be opened from the ship recycler's bank. Unless this is provided, the bank will not start the various procedures required for the release of the LC, which may then considerably delay the beaching process of the vessel. In Bangladesh, as well, vessels are beached according to respective beaching tides and vessels need to strictly meet these tides in order to prevent considerable waiting at anchorage, some times up to 14 days, until the next tide.

PAKISTAN

In Pakistan there are approximately 25 ship recycling yards on the coast of Gadani in Baluchistan which are under the Ministry of Revenue but outside the territorial jurisdiction of Karachi. The inwards formalities are little and vessels are beached without any hassles considering that no tides are required to be met. Therefore, any owner looking for quick beaching and swift money in the pocket may perhaps find his solace and answers in Pakistan as opposed to India and Bangladesh.

ISO CERTIFICATIONS

INDIA

In India there approximately exist more than 20 licensing bodies and the industry is extremely and heavily regulated. With the stepping in of the Supreme Court the industry realized the urgent need to upgrade to the ISO Club. So in this very tough and competitive environment the ship recyclers spent their own funds and invested manpower to meet the stringent standards of ISO without any financial or other support from any third party. Currently, at least 100 yards are certified with ISO 14001/9001 and OHSAS 18001 and at least 50 yards have ISO 30000. This is remarkable as since 2007 the industry has pushed all buttons to gear itself to the constantly changing challenges in this labor and economic intensive industry.

BANGLADESH

Of the 55 yards at least 25 have ISO 14001/9001 and OHSAS 18001, including ISO 30000, which is remarkable considering the levels of Bangladesh some years ago. We applaud the initiatives taken by the ship recycling community to raise the bar and improve the health and standard of living of their workers and their surrounding environment. This indeed shows that even in non- subsidized economies and coming from those industries that receive little or no support from the government, a small group of recyclers are making all efforts to make that "*big change*" that will benefit future generations of the ship recycling industry and those directly and indirectly connected with it.

PAKISTAN

Unfortunately for Pakistan, it has lagged behind even in this race and of the 25 ship recycling yards none of them is even basic ISO-certified. The lack of interest, as explained earlier, stems from a variety of reasons, including the smaller offering of vessels and the potential terrorism-ridden economy dealing with a highly unstable government and regime. For Pakistan the adoption to ISO standards seems difficult in the foreseeable future. Until adopted and strictly enforced the industry will continue to work using old practices and methods.

INVASION TO PROPERTY AND ACTIONS TO MITIGATE DAMAGES SATISFY THE PHYSICAL DAMAGE REQUIREMENT OF THE ECONOMIC LOSS RULE

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It is well settled under general maritime law that there can be no recovery for economic loss absent a showing of physical damages to property. This rule is known as the economic loss rule and was established by the U.S. Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927). Numerous decisions arising out of the U.S. Fifth Circuit Court of Appeals, as well as other federal appellate circuits, have issues in line with the Robins Dry Dock case, including *Louisiana ex. rel. Guste v. M/V TESTBANK,* 752 F. 2d 1019 (5th Cir. 1985)(en banc), *cert. denied*, 477 U.S. 903 (1986). The Fifth Circuit recently issued an opinion that focuses on the means by which a plaintiff can satisfy the physical damage requirements set out in the economic loss rule.
The Fifth Circuit overturned the U.S. District Court for the Western District of Louisiana's decision to dismiss a plaintiff's demand for economic losses arising from a maritime tort for failure to satisfy the physical damage requirement of the economic loss rule. The bright line rule under general maritime law is that there can be no recovery for economic loss without physical damage to or an invasion of a proprietary interest. *Robbins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927); *Louisiana ex. rel. Guste v. M/V TESTBANK*, 752 F. 2d 1019 (5th Cir. 1985) (en banc), *cert. denied*, 477 U.S. 903 (1986). In *Catalyst Old River Hydroelectric Limited Partnership v. Ingram Barge Co.*, 639 F.3d 207 (5th Cir. 2011), the Fifth Circuit clarified the issue of whether a physical invasion of a proprietary interest and preparations to mitigate further damages are sufficient to satisfy the physical damage requirement under the economic loss rule.

COLLISION ON THE MISSISSIPPI WAS THE TRIGGER

In December 2007, two tug and barge units collided on the Mississippi River in Concordia Parish, Louisiana. As a result of the collision, several barges broke free and drifted downriver. One of the barges drifted into the intake channel of a hydroelectric station owned and operated by Catalyst Old River Hydroelectric Limited Partnership ("CAT"). CAT owned the station and surrounding property necessary for its operation. There is an intake channel and a small island located in the mouth of the intake channel where the channel meets the Mississippi River. Both the channel and island were functioning elements of the hydroelectric facility and acted as a pipe to direct water into the station's eight turbines to produce electricity.

The barge grounded on the east bank of the intake channel and lodged against the station and abutment. As a result of the barge being stuck in the channel, CAT had to reduce the flow of water into the turbines, which decreased the electricity output. This action was necessary both to prevent the barge from sinking and allowing access to other equipment to remove the barge. After CAT reduced the flow of water and shut down six of its turbines, a barge crane entered the intake channel and freed it from the bank. There was no actual physical damage to the facility and normal operations resumed after the barge had been freed from the bank.

CAT filed a lawsuit in Louisiana state court against the barge companies involved in the collision ("barge defendants") seeking damages for the value of the electrical power that it was unable to generate due to the barge intrusion. The case was removed by the barge defendants to federal district court, where a motion for summary judgment was subsequently filed seeking dismissal of all economic loss claims on the grounds that CAT sustained no physical damage and, therefore, could not recover such damages under the economic loss rule. CAT urged the district court to consider that, as a conduit for directing the flow of water into its turbines, the intake canal was damaged by the barge in that, while the barge was there, the canal could not perform its function. *Catalyst Old River Hydroelectric Limited Partnership v. Archer-Daniels-Midland Company, et al*, 2010 AMC 1601 (W.D. La. 2010).

ECONOMIC LOSS RULE

On appeal, the Fifth Circuit noted that the purpose of the economic loss rule is to limit the consequences of negligence and exclude indirect economic repercussions, which can be widespread and open-ended. *TESTBANK*, 752 F.2d at 1022. The Fifth Circuit also explained that in the *TESTBANK* decision, *physical harm to or invasion of a proprietary interest* is generally an appropriate condition for recovery of negligently caused economic loss. *Id* (emphasis added).

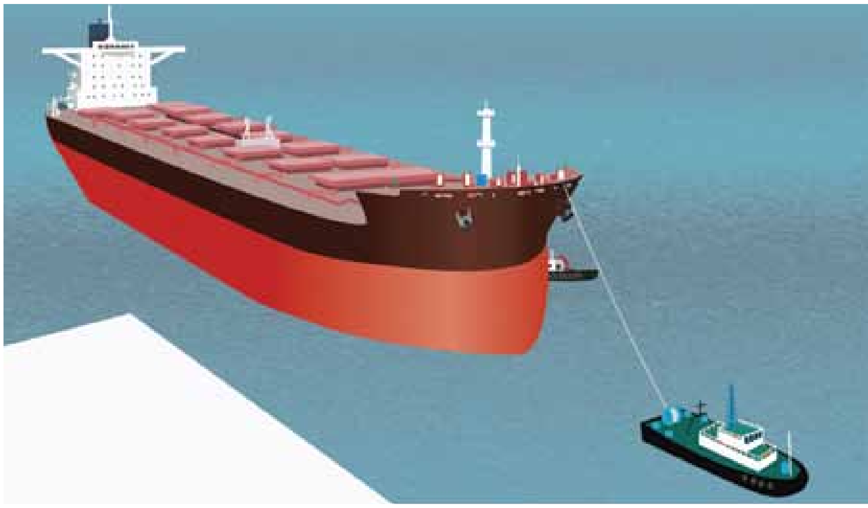
The barge defendants argued that CAT suffered no physical harm in that neither the channel, nor any of the facilities, was damaged by the barge. However, the court sided with CAT in holding that the mere presence of the barge in the intake channel, which was a functioning component of the hydroelectric facility and owned by CAT, interfered with the unobstructed continuous flow of water in the channel and, impairing the ability of the facility to operate as designed. The Fifth Circuit held that the intrusion was sufficient to qualify as damage to CAT's proprietary interest, and thus satisfied the requirements of the economic loss rule.

Not only did the Fifth Circuit hold that the intrusion of the barge in the channel interfered with the flow of water and electrical generation, it also held that the physical recovery effort to secure and remove the barge from the intake channel also required a reduction of water flow that decreased operation of the turbines. Acts taken in mitigation to prevent permanent physical damage can also serve to satisfy the physical damage requirement rule under TESTBANK. *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198 (5th Cir. 1995). Here, CAT shut in and reduced the production of power of its hydroelectric facility to allow removal of the barge and prevent further permanent damage to its facility. Without these acts, CAT would have run the risk of incurring physical damage to its hydroelectric station and, therefore, triggered the right to recover economic losses.

INTRUSION OF A PROPRIETARY INTEREST

The Fifth Circuit ultimately concluded that the presence of the barge in the intake channel caused physical damage to the hydroelectric facility by obstructing the supply of water, which was critical to station operations. The barge's interference with the flow of water was considered an invasion to CAT's proprietary interest. The Appellate Court also held that actions taken by CAT to shut in and reduce power production at its facility to prevent further damage satisfied the *TESTBANK* rule requirement.

Based on this reasoning, the Fifth Circuit reversed the district court's granting of summary judgment and remanded the case back to district court for further proceedings. In *Catalyst*, the Fifth Circuit illustrated that a party may claim economic losses without demonstrating actual physical damage to property. A plaintiff may recover economic losses upon a showing of an invasion, intrusion or interference of a proprietary interest, in addition to obvious physical damage to the property. The physical damage requirement can also be met if the plaintiff has undertaken physical acts to mitigate the damages that would have resulted from the intrusion or invasion. Therefore, an analysis of whether a party may be entitled to economic losses should not stop at the question of whether the party sustained actual physical damages. Rather, there should also be an analysis of whether there has been an intrusion of a proprietary interest.



PILOT'S MISTAKE: WHO BEARS THE BURDEN OF LIABILITY?

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Pilotage is one of the oldest and most important professions in maritime safety and protection of the maritime environment. The economic and environmental risk from today's large cargo ships makes the role of the pilot essential, given the responsibility to ensure the vessel is safely navigated through the various passageways to avoid damage to the ship, its crew, or the marine environment.

Most coastal states have areas nominated as compulsory pilotage districts, where ships are not allowed to enter unless navigated by a pilot licensed in such country. However, irrespective of whether pilotage is compulsory or voluntary, the pilot's authority does not usually supersede that of the master, who remains in overall control of the vessel. The only major jurisdiction where the pilot remains responsible for command of the vessel is the Panama Canal, and the Panama Canal Authorities will compensate if the casualty is proven to be the fault of the pilot.

Undoubtedly, there are various Pilotage Acts in various maritime countries, nevertheless most follow a common principle; a shipowner, whose vessel is receiving pilotage services, is vicariously liable to third parties for any loss or damage resulting from the negligence of the pilot. Whilst the role of a pilot varies greatly around the globe, this article will only address pilotage and the authoritative relationship between a pilot and the shipowner under UK pilotage laws.

The UK pilotage regime is spelled out in the Merchant Shipping Act 1995 and the Pilotage Act 1987. Prior to the Pilotage Acts, the shipowner and master had the defense of compulsory pilotage at their disposal, but this advantage to the shipowner has been dismissed by the Pilotage Act 1913 s.15 – s.35 of the 1983 consolidated Act – which made a compulsory pilot the shipowner's servant for all purposes connected with navigation. The Act specifically states that "the owner of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory".

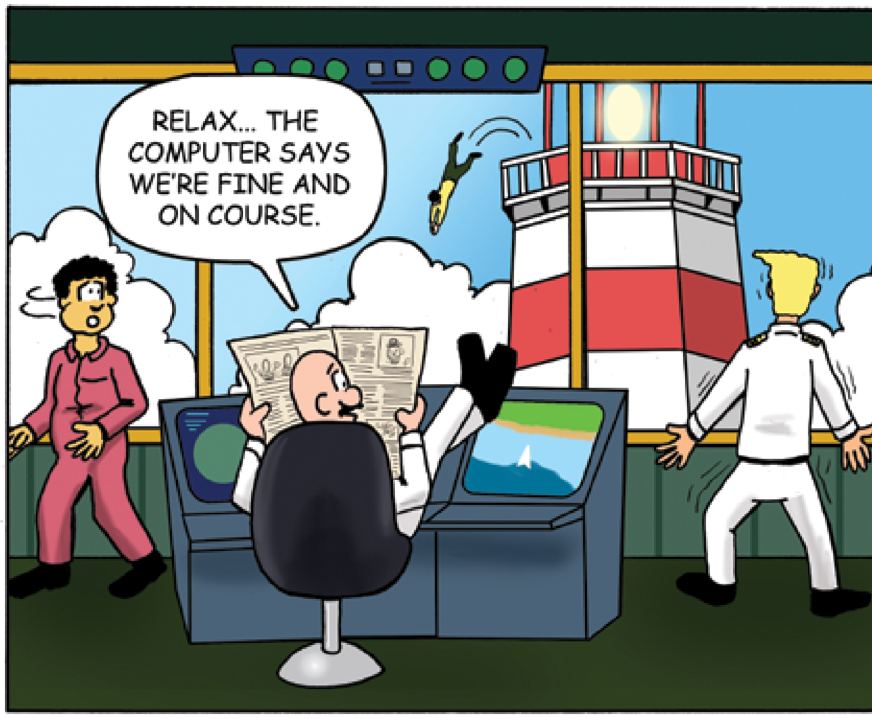
QUESTIONABLE LAWS

What is more, courts have neither made a distinction between piloting offered by a self-employed pilot and a pilot employed by a competent authority. The case of *Esso Bernicia* is persuasive in supporting the opinion that pilots are considered as independent professionals and that the employers of qualified licensed pilots are not as a general rule responsible to the owner of the ship. There seems to be no doubt either that an engagement of a pilot by a shipowner still remains as an employment for services independent of whether the pilot is self-employed or not, in which case the court would probably follow the precedent of regarding the relationship between a shipowner and pilot as one of the exceptions to the general rule - that principles are not vicariously liable for the actions of independent contractors.

These laws are very questionable in today's environment where pilotage is now organized under a limited company owned by the state monopolizing in piloting. Now that many UK pilots under the Pilotage Act have elected to be employed by their respective harbor authorities rather than remain self-employed, it is questionable whether a shipowner should remain responsible for the negligence of a pilot, particularly in the case of compulsory pilotage. The only certainty is that there is no binding authority that precludes from finding both the general and the temporary employer liable in the appropriate circumstances. In any case, a pilot's liability is not absolutely excluded in the Pilotage Act 1987.

Overall, the 1987 Pilotage Act has not changed the previous law in the 1913 and 1983 Pilotage Acts. This was admitted in the *Cavendish* where it was held that the effect of section 2 of the 1987 Act was not to impose duties on competent authorities to pilot ships, but to require them to supply properly authorised pilots for ships. In the circumstances, owners argued that the authorities were vicariously liable for the negligence of the pilot, being liable in contract to supply pilotage services, subject to a statutory or common law implied term, that they would be performed with reasonable skill and care. However, as far as breach of contract was concerned, the court ordered that the arrangement was no more than to discharge a shipowner's statutory obligation by taking a compulsory pilot and paying for his services as provided for in the Pilotage Act.

The 1987 Act has only partly challenged the imperviousness of the pilot in holding the pilotage company liable to compensate for damage caused during pilotage when the damage was caused intentionally, or through



gross negligence, or with knowledge that damage was likely to arise. Pursuant to this new provision, the maximum liability shall not exceed £100,000 per occurrence. However, the limitation contravenes normal tort rules, according to which liability for damage caused intentionally or through gross negligence can never be limited. Apart from this, the new liability rules have little practical impact as the liability for damage caused intentionally or through gross negligence will seldom materialize, given in fact that the onus is on the claimant to provide evidence of collusion of willful misconduct.

However, when pollution is involved, there is no need for the owner to illustrate willful or reckless misconduct or indifference on the part of the pilot in order to displace the immunity provided within the Act. In the *Sea Empress*, the port authority - by virtue of its wholly-owned subsidiary responsible for employing pilots - was sentenced to pay a fine of £4 million for the pilot's fault that caused the ship to ground and caused pollution. The court ordered that s 85(1) of the Water Resources Act 1991 creates an offence of strict liability to which the port authority had no defense. What is more, the port authority could not invoke s22 of the 1987 Act, as the £100,000 limitation of liability is not applicable to criminal charges.

IS THERE A NEED FOR CHANGE?

Pilots and their associations have tended over the years not to carry E&O insurance. Yet it is the P&I clubs who are ultimately exposed to the risk of the legal costs and expenses that arise whenever a master or deck officer is in the dock under a criminal condemnation. Their position is even more worrying in light of the recent trend of criminalization of pilots. The criminal prosecutors of the pilot onboard the *Cosco Busan* in San Francisco, and of the pilots on board the vessels *Yang Hai* and *Neftegaz-67* in Hong Kong, could possibly set a precedent that will encourage other maritime jurisdictions to criminalize the pilot.

Worries have been growing for some time in the International Group of P&I Clubs, so the group started a database in 2003 recording all "pilot error" related claims over US$ 100,000. It has been observed that the average number of pilot incidents incurring claims over $100,000 is 52 per policy year - in other words one substantial claim reported per week somewhere in the world. Of some 260 claims studied by the group, groundings were the most expensive — four times as costly compared to pollution claims. The reason why pollution claims come more cheaply could probably be attributed to the coercive contribution of the port authorities under water resources or similar environmental acts, which, as discussed above, do not recognize any immunity offered to the pilots and their general employers.

Behind the decision of whether the insurance risk should be passed on to the shipowners or through the pilot's employer side, rests the decision of whether the ship or the pilotage company should be liable for the consequences of an accident resulting from the pilot's fault. Such decision is consistent with the rationale behind the vicarious liability rule which is to roll over the liability to the party with the deepest pockets. Certainly, the wealth of a defendant or the fact that he has access to resources via insurance has had an unconscious influence on the development of legal principles.

In conclusion, it is imperative to widen the circle of responsibility after a casualty during pilotage. By all accounts the states must, by legislation, require that as a condition to the pilot's immunity under the Act, the harbor should provide a financially secure source of recovery for those harmed by the services of the ports. Only adequately insured ports should be able to offer the Act's immunities to their pilots, which at the same time would also enhance the safety of the ports, as insurers would press for higher standards of "duty of care" including chart, pilotage, lighthouse, marking authorities and all aspects of the services provided by coastal administrations.

RECENT 11TH CIRCUIT OPINIONS MAY ALTER THE MANNER IN WHICH FOREIGN SEAMEN CLAIMS ARE HANDLED IN THE UNITED STATES

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Recent decisions from 11th Circuit Court of Appeals may significantly alter the manner in which claims by foreign seamen in the U.S. are handled when the employment contract contains an arbitration provision which is enforceable pursuant to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention").

In *Lindo v. NCL (Bahamas) Ltd. d/b/a NCL*, --- F. 3d ---, 2011 WL 3795234 (11th Cir. 2011), the Eleventh Circuit, on August 29, 2011, affirmed an Order of the U.S. District Court for the Southern District of Florida requiring the seaman to arbitrate his Jones Act claim in Nicaragua (Lindo's country of citizenship) under Bahamian law (the law of the vessel's flag state). In a lengthy 2 to 1 decision, the majority court cited to various decisions of the US Supreme Court and the Eleventh Circuit in support of their holding requiring arbitration in a foreign forum under a foreign law.

In this case, the seaman filed suit in state court against its employer/vessel owner asserting causes of action for Jones Act negligence; failure to provide entire maintenance and cure; failure to treat; unseaworthiness; and disability benefits under the employment contract. The vessel owner removed the case to the US District Court for the Southern District of Florida and sought to enforce the arbitration provision in the employment contract pursuant to the Convention.

The seaman then filed an amended complaint asserting a single count for Jones Act negligence and opposed the motion to compel arbitration. The seaman relied on *Thomas v. Carnival Corp.*, 576 F. 3d 1113 (11th Cir. 2009) to argue that the arbitration provision was void as against public policy because the choice of forum clause and the choice of law clause operated in tandem as a prospective waiver of his United States statutory rights. The District Court rejected *Thomas* and enforced the arbitration provision and the choice of law clause which required the application of Bahamian law. Thereafter, Lindo appealed to the Eleventh Circuit.

ANALYSIS OF AVAILABLE DEFENSES

In enforcing the arbitration provision contained in the seaman's employment contract, the Eleventh Circuit followed its decision in *Bautista v. Star Cruises, Norwegian Cruise Line, Ltd.*, 396 F. 3d 1289 (11th Cir. 2005). The Eleventh Circuit in Lindo held that the *Bautista* court "followed the clear weight of the Supreme Court's and [Eleventh] Circuit's precedent." The *Lindo* court cited A vast amount of Supreme Court precedent, holding that under the Convention "there is a strong presumption in favor of freely-negotiated contractual choice-of-law and forum-selection provisions, and this presumption applies with special force in the field of international commerce." The Eleventh Circuit further held that U.S. statutory claims are arbitrable absent a clear contrary intent expressed by Congress.

The *Lindo* opinion included a detailed analysis of the defenses available under the Convention and explained that those available depend on the stage of enforcement. The court expressly held that defenses available at the time of enforcement of an arbitration *clause* were different than those available at the time in which the parties seek to enforce the arbitration *award*.

Specifically, Article II of the Convention provided the defenses available at the arbitration clause enforcement stage. See 9 U.S.C § 206. Under Article II, a seaman may avoid arbitration if the clause being enforced is null and void or the clause is incapable of being performed. Moreover, the null and void defense is limited to the standard breach of contract defenses such as fraud, mistake, duress, and waiver which can be applied neutrally on an international scale.

Conversely, Article V of the Convention provides seven (7) defenses available at the arbitration award enforcement stage allowing a court the right to reject the enforcement of an arbitration award. See 9 U.S.C. § 207. The Article V defenses include the "public policy" defense which allows the court the right to refuse to enforce an award if the enforcement would be contrary to the public policy of the country in which enforcement is sought.

ARBITRATION ENFORCEMENT STAGE

The *Lindo* court rejected the seaman's reliance on *Thomas* as premature and explained that the seaman's argument that arbitration provision was void as against public policy and operated as a prospective waiver of the seaman's right to pursue statutory remedies came from dictum in a footnote in *Mitsubishi Motors Corp. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). Interestingly, the *Thomas* court overlooked the court's statement contained in that same footnote indicating that they were not concerned with the public policy defense at the arbitration clause enforcement stage as this defense only applies at the time of enforcement of the arbitration award.

The *Lindo* majority held that *Thomas* created a new public policy defense under Article II of the Convention at the arbitration enforcement stage in violation of *Bautista* and the Eleventh Circuit's prior panel precedent rule. Specifically, the *Thomas* court disregarded clear precedent from the Supreme Court, holding that the "prospective waiver" question only applies at the time of enforcement of the arbitration award. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540–41, (1995). The *Lindo* majority criticized *Thomas'* creation of a new defense and admonished that the court should not speculate about the outcome of the arbitration at the arbitration clause enforcement stage.

The *Lindo* court also relied on prior precedent from the Eleventh Circuit in holding that choice of law clauses will not be invalidated simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States. Rather, choice of law clauses are only unenforceable when the remedies available in the chosen forum are so inadequate that enforcement would be fundamentally unfair.

This decision was followed by three decisions in which the Eleventh Circuit also enforced the contractual provisions calling for arbitration in a foreign jurisdiction applying foreign law.

JONES ACT

In *Henriquez v. NCL (Bahamas) Ltd.*, 2011 WL 3890357 (11th Cir. 2011), the Eleventh Circuit followed *Lindo* in affirming an order of the lower court requiring arbitration of the seaman's Jones Act and maintenance and cure claims in Nicaragua under Bahamian law. The Eleventh Circuit held that the seaman could not avail himself of the public policy defense at the arbitration enforcement stage. The court further held that even though the maintenance and cure claims arise from the employment relationship rather than the employment contract, the maintenance and cure claim was arbitrable pursuant to *Bautista*.

Similarly, in *Doe v. Princess Cruise Lines, Ltd.*, 2011 WL 4425288 (11th Cir. 2011) the court compelled the parties to arbitrate the statutory and general maritime claims and held, in part, "to the extent *Thomas* allowed the plaintiff seaman to prevail on a new public policy defense under Article II, *Thomas* violates *Bautista v. Star Cruises*, 396 F. 3d 1289 (11th Cir. 2005) and our prior panel precedent rule."

The Eleventh Circuit once again reinforced its decision in *Bautista* recently in *Maxwell v. NCL (Bahamas), Ltd.*, Case No.11-12257 (11th Cir. Oct. 18, 2011). The *Maxwell* court held that under *Bautista* the only defenses available at the arbitration enforcement stage are fraud, mistake and waiver because these defenses could be applied neutrally internationally. Further, the court held that the public policy defense created in *Thomas* violated the prior panel precedent rule as stated in *Lindo*.

The Eleventh Circuit's recent decisions in *Lindo, Henriquez, Doe* and *Maxwell* appear to indicate that the Eleventh Circuit has departed from the public policy defense created in *Thomas* and chosen to reinforce its holding in *Bautista* and other precedent from the Supreme Court in enforcing arbitration under the Convention.

The significance of these decisions is that shipowners may now arbitrate claims of foreign seamen in foreign countries under foreign law and minimize their exposure to U.S. courts and juries.

LESSONS ON EFFECTIVE BILLS OF LADING

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A simple cargo case: rust damage to steel pipes occurring during transit from Dalian, China, to Houston, Texas. Similar facts have presented themselves in the international shipping industry on countless occasions. What is instructive about this case, *QT Trading, L.P. v. M/V SAGA MORU, et. al.*[i], a case of first impression in the U. S. Court of Appeals for the Fifth Circuit, is that very simple errors in the execution of the bills of lading by the shipper can completely preclude recovery for damage to the cargo from the vessel owner.

THE FACTS

In March 2008, QT Trading, LP ("QT") purchased over 800 bundles of steel pipe from a Chinese company. To transport the pipe from Dalian to Houston, the seller contracted with Daewoo Logistics Corp. ("Daewoo") for the ocean transport of the pipe. Daewoo then chartered the vessel M/V SAGA MARU from Saga Forest Carriers International AS ("Saga"). The two-year timecharter party agreement ("Charter Party") provided that:

> The Charterers are to load, stow, trim, secure and discharge the cargo at their expense under the supervision of the Captain, who if requested to do so by Charterers, is to sign Bills of Lading for cargo as presented, in conformity with Mate's and Tally Clerk's receipts.

More importantly, the charterparty also stated that Daewoo, as charterer, or it agents were:

> ...authorized to sign on Master's and/or on Owners' behalf Bills of Lading as presented in accordance with the Mate's or Talley Clerk's receipts without prejudice to Owners' rights under this Charter Party, but Charterer's [were] to accept all consequences that might result from Charterers and/or their agents signing Bills of Lading not adhering to the remarks in Mate's or Talley Clerk's receipts.

To further refine the relationship between the parties, the master of the SAGU MARU authorized Daewoo's agent to "sign on [his] behalf all bills of lading covering the present shipment...according with Mate's Receipt and the P&I remarks." The following day, the master again authorized Daewoo to sign bills of lading on his behalf, with the condition that Daewoo ensure "that the original Bills of Lading are issued in strict conformity with the Mate's Receipts, i.e. all remarks of quantity and condition which are contained in the Mate's Receipts must be entered on the Bills of Lading prior to signing."

Prior to loading the pipes, the SAGA MARU's P&I club commissioned an independent cargo survey and a "Preshipment Cargo Condition Report" was issued to the ship's master noting damage to a number of the pipe bundles. Thereafter, Daewoo's agent issued mate's receipts incorporating the survey by describing the goods as "clean on board as per P&I surveyor report."

Bills of Lading for the cargo were signed by Daewoo's agent describing the goods as "clean on board," with no mention of the mate's receipts and no mention of the P&I survey. In addition, the Bills of Lading were signed simply "As Agents For The Carrier Daewoo Logistics Corp."

Upon arrival in Houston, the cargo was found damaged with surface rust on some bundles and other damage due to "rough, careless, and/or improper handling" and "faulty stowage." On March 10, 2009, QT filed suit in the Southern District of Texas in *rem* against the SAGA MARU and *in personam* against Daewoo and Saga alleging a claim under the Carriage of Goods by Sea Act ("COGSA").[ii] Daewoo declared bankruptcy and never made an appearance in the lawsuit; the District Court dismissed QT's claims against it without prejudice. Ruling on Saga's Motion for Summary Judgment, the District Court dismissed QT's claims, and QT filed an appeal with the Fifth Circuit.

"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."

THE FIFTH CIRCUIT'S ANALYSIS

When QT discovered its damaged cargo, it looked to Daewoo as the shipper, and Saga as the vessel owner, to recover for its loss. Because Daewoo promptly filed bankruptcy, QT's sole potential remedy was a claim against Saga under COGSA.

COGSA is the US statute governing the rights and responsibilities between shippers of cargo and vessel owners for shipments to and from the United States. A cargo owner may only recover under COGSA from the "carrier" of goods. A "carrier" is defined as "the owner or the charterer who enters into a contract of carriage with a shipper," and a "contract of carriage" is only those contracts "covered by a bill of lading or any similar document of title."[iii] In order to bind the vessel owner and confer COGSA carrier status, a charterer must have authority to sign bills of lading "for the Master," and the master must have authority to sign bills of lading for the vessel owner.

The contractual relationship between the parties to this shipment was properly constructed for Saga to be a COGSA carrier. In fact, the charterparty and the instructions from the master to Daewoo provided a road map for Daewoo as to how to bind Saga to the contract of carriage. The vessel was time-chartered to Daewoo and the charterparty gave Daewoo authority to transport cargo and sign bills of lading on behalf of the master and/or the owner of the vessel, thereby binding Saga as a "carrier" under COGSA. The charterparty further required Daewoo, when signing bills of lading on behalf of the master or vessel owner, to sign them according to the mate's receipts, failing which, Daewoo would assume all the associated risk. In addition, the master gave Daewoo's agent specific authority to sign bills of lading on his behalf and on behalf of Saga, but again required that it sign those bills of lading according to the mate's receipts and the "P&I remarks."

Daewoo's agent failed to follow the roadmap provided by the charterparty and the master in two very important ways.

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First, Daewoo failed to abide by the language of the charterparty and the instructions of the master requiring the Bills of Lading to be signed by Daewoo as agents by the authority and on behalf of the master. Daewoo merely signed the Bills of Lading "as Agent for the Carrier Daewoo Logistics Corp." Consequently, Saga as vessel owner was not a party to the Bills of Lading. A vessel owner cannot be held personally liable as a COGSA carrier where a bill of lading names only the charterer as carrier and is not a document signed "for the Master."[iv]

Second, Saga cannot be held liable as a COGSA carrier because Daewoo exceeded its authority to sign bills of lading by failing to sign them in conformity with the mate's receipts and/or the P&I survey. Both the charterparty and the instructions from the master included this specific requirement. Moreover, the charterparty explicitly noted Daewoo would "accept all consequences that might result from Charterers and/or their agents signing Bills of Lading not adhering to the remarks in Mate's or Talley Clerk's receipts." Daewoo merely signed the Bills of Lading noting the cargo to be "clean on board," with no mention of the mate's receipts, which referenced the P&I survey, which noted pre-shipment damage to portions of the cargo. When the shipper exceeds its authority by signing bills of lading that do not comply with the master's instructions, the owner cannot be held liable as a COGSA carrier.[v]

LESSONS FOR CHARTERERS AND OWNERS

On its face, this was a very simple cargo damage case, but within the court's ruling were some very important lessons for international shippers.

In an instruction to vessel charterers, the Fifth Circuit highlighted the principles that charterers must at all times understand the extent of their authority to issue bills of lading, and must exercise prudent document control to ensure bills of lading are properly executed. Bills of lading must be signed "for the Master," and must incorporate the mate's receipts to bind vessel owners to the contract of carriage.

For vessel owners, the court's decision was an affirmation that limitations placed on a shipper's/charterer's authority to bind a vessel owner to the contract of carriage are appropriate and enforceable. The owner will only become a party to the contract of carriage if bills of lading are signed "for the Master." And the owner can limit its liability for pre-shipment cargo shortage or damage by requiring the incorporation of mate's receipts and/or pre-load surveys in the bills of lading.

Beyond the legal rulings made by the Fifth Circuit in QT Trading, shippers, charterers and vessel owners worldwide must bear in mind that whenever an inaccurate bill of lading is issued, there are consequences for doing so. A bill of lading which incorrectly represents the condition or quantity of cargo can preclude rights of recovery which would otherwise have been available to that party; it can constitute a charterparty breach and expose a charterer to liability; and it can prejudice one's P&I cover. Accordingly, in the world of international shipping, accurately signed bills of lading remain paramount.

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i QT Trading, L.P. v. M/V SAGA MAR, et. al., 641 F.3d 105 (2011).

ii QT also filed suit against the true vessel owner, Attic Forest AS, who chartered the vessel to Saga, and the vessel operator, Patt Mansfield & Co. Ltd. The court found no privity of contract between QT and these two parties and they were dismissed.

iii 46 U.S.C. §1301.

iv Man Ferrostaal, Inc. v. M/V AKILI, 763 F. Supp. 2d 599, (S.D.N.Y Jan. 24, 2011).

v Cargill Ferrous Int'l v. M/V SUKARAWAN NAREE, No. 96-CV-1705, 1997 WL 537992, at *4 (E.D. La. Aug. 26, 1997); Tuscaloosa Steel Corp. v. M/V NAIMO, No. 90-CV-2194, 1992 WL 477117, at *3 (S.D.N.Y. Sept. 14, 1992).

SETTLING INTER-CLUB AGREEMENT CLAIMS

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The following sentences give P&I claims executives terrible headaches:

> "*...the ship and shore tallies do not agree...*"
>
> "*...the stevedores are heavy-handed and light-fingered, we have damage to the cargo and pilferage....*"
>
> "*...we can't get proper surveys carried out at the receivers' warehouses...*"
>
> "*...we will not have a fair trial in the local court against the cargo receivers...*"

Fortunately, "*rough and ready*"[1] relief is at hand thanks to the Inter-Club Agreement (ICA). So, assuming you have an authorized contract of carriage incorporating the Hague Rules with no material amendments to cargo responsibility, what do you need to recover an indemnity for a settlement?

The first point is, of course, that there has to be a settlement. This can be seen from the *Lazos*[2]. In this case the New York Court released an owner's Rule B attachment securing an ICA indemnity because the owner had not settled the claim. There was no cause of action on the back of which security could be obtained.

The next question is: was the claim "*properly settled or compromised and paid*"?[3]

Guidance on this point can be obtained from an English decision which, while not an ICA case, concerned an indemnity for settlement of a cargo claim. The case is *General Feeds Inc. Panama v. Slobodna Plovidba Yugoslavia*[4] in which Tony Swinnerton of this firm acted for the owners.

CONDITION OF THE CARGO

In *General Feeds* a cargo of Peruvian fishmeal shipped to China was damaged by fire, heat and smoke. The owners settled at 25% of the amount claimed, arguing that the cargo had not been properly treated with anti-oxidants. They then sought to recover the payment from the charterers. The charterers' response was that owners were not liable because the damage was caused by the condition of the cargo. The charterers said that they were not obliged to pay anything in settlement even though, if they were correct, they had shipped dangerous cargo.

The arbitrators awarded the owners two-thirds of the settlement. They considered that the owners had failed to take proper steps to minimise the cargo damage which had increased the claim. Therefore, they reduced the indemnity by one-third. The award was appealed to the High Court. A number of features of the judgment are of general interest.

The Judge followed *Biggin & Co. Ltd. v. Permanite Ltd.*,[5] where the Court of Appeal considered that there were two questions which had to be answered:

(a) were the plaintiffs acting reasonably in reaching a compromise; and

(b) was the amount of the compromise reasonable?

This shows that the law encourages reasonable settlements (as does the ICA).

The point is particularly important where proving liability for the cargo claim would be expensive. The fact that a settlement was made under legal advice is a relevant factor when assessing "reasonableness", although the legal advisers who had given that advice would not usually give evidence. The fact that advice was given is relevant rather than proving that the advice was correct. However, reliance on obviously incorrect advice may not be "reasonable".

"REASONABLE" SETTLEMENT IS A PLUS

It also seems that the court will be relatively sympathetic to a person arguing that a settlement was reasonable. Applying *Biggin in General Feeds* the Judge said that the claim would have to be so weak that no reasonable owner or club would take it as sufficiently serious to negotiate any settlement involving payment to prevent a reasonable settlement being recovered. This suggests a relatively light burden.

The Judge also held, following the *Sargasso*,[6] that the facts known to the party at the time he settled and not facts which later come to his attention are relevant. There is no room for hindsight on this analysis. It also shows that where there is an indemnity claim evidence of the facts at the time the settlement is negotiated must be preserved.

Concerns about the local courts were also considered in *General Feeds*. The owners argued that they had to settle because they feared bias in the Hong Kong court which had jurisdiction. The arbitrators were dismissive of this allegation, particularly as the local P&I representatives had recommended the matter be taken to the Hong Kong court and this advice was ignored.

Of course, courts in different jurisdictions may have an appearance of unfairness but it will always be difficult to persuade arbitrators to make a finding of bias. It may also be difficult to prove bias if local practitioners feel uncomfortable giving evidence that their system is unfair.

The outcome of the *General Feeds* case was that the arbitrators' award was upheld.

There are a couple of further points which are worth mentioning on the topic of settlement. The first relates to how far owners should go when investigating claims. LMAA Arbitration 29/04 concerned a shipment to the Yemen. There was a claim for US$18,554.01 for shortage and security was refused. The owners had a choice – pay up or stay. The owners, quite sensibly, took the first option and settled the claim. They then sought an indemnity from their charterers.

The charterers said:

- the owners had not obtained any claims documentation;
- the voyage was on "free out" terms so owners should not be responsible for a shortage;
- the receivers' stevedores were responsible in any event;
- the owners had not checked title to sue;
- the owners had not obtained legal advice.

The charterers said, therefore, that it was a commercial settlement and not recoverable. The owners relied on advice from the club correspondent who had confirmed that if they went to court they would lose.

RECOVERY UNDER THE ICA

The award suggests there is no requirement to investigate a claim before settling and, in some circumstances, it may be desirable not to. Where there is a small claim - and substantial expenses will be incurred if the claim is not settled quickly - there is a lot of sense in this; but it would be unwise to assume that investigation is unnecessary in all cases. That may not always be "reasonable".

The arbitrators also said that recovery under the ICA would be permitted if the owners could later show that they would be held liable for a greater amount than the settlement. So, in this case, hindsight was relevant. Owners obtained a 50% indemnity. They could not do better because there was no irrefutable evidence of the responsibility of the stevedores.

The second case, coincidentally, also concerns the Yemen. This is LMAA Award 3/07. There was a claim for shortage (which was charterers' responsibility under the charterparty) and cargo damage as a result of unseaworthiness. The owners entered into a lump sum settlement. It could be said that they could not prove how much of the settlement related to shortage. The arbitrators took the pragmatic course of giving owners a *pro rata* indemnity out of the settlement.

This goes to show that on a "knock for knock"7 basis the party seeking an indemnity tends to have a good chance of making an ICA recovery. The prospects can be improved if the evidence relating to the claim is preserved and local advice has been obtained as to what will happen if the claim is not settled. Legal advice given on settlement is also relevant. Provided settlement is approached with care, the appropriate ICA indemnity should be achieved.

1 *Strathnewton* [1983] 1 Lloyd's Rep 219

2 [2007] 722 LMLN

3 ICA (4)(c)

4 [1999] 1 Lloyd's Rep 688 (not a shipping case)

5 [1951] 2 KB 314

6 [1994] 1 Lloyd's Rep 412

7 *ELPA* [2001] 2 Lloyd's Rep 596

FUNCTIONAL CAPACITY EVALUATION AND FITNESS TESTING

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Functional Capacity Evaluation or FCE is defined as a "systematic method of measuring an individual's ability to perform meaningful tasks on a safe and dependable basis." FCE includes all impairments, not just those that result in physical functional limitations. In general, the purpose of FCE is to collect information about the functional limitations of a person with medical impairment.

In 2005, Physicians' Diagnostic Services Center (PDSC) pioneered in the Philippines what could be the first systematic medical method in determining an overseas Filipino employee's working capacity and health condition. After successfully developing the FCE program and procedures through extensive studies in the United Kingdom, the Rehabilitation Medicine/ Functional Capacity Evaluation Department of PDSC was launched in August 2005, in response to the advice of the clinic's European clients to come up with a testing tool to evaluate the physical capabilities of its seafarers.

FCE conducts more than the physical examination and medical laboratory evaluation to find out if seafarers being deployed on board are indeed healthy and fit. FCE evaluates the strength and fitness of seafarers, and the question that the evaluation basically tries to answer is: are they (seafarers) physically capable and fit in doing the type of work that they are supposed to be doing?

The evaluation has three specific purposes. First, it improves the likelihood that the patient will be safe in subsequent job task performance. It also assists the patient to improve role performance through identification of functional decrements so that they may be resolved or worked around. And FCE determines the presence (and, if present, the degree) of disability so that a bureaucratic or juridical entity can assign, apportion, or deny financial and medical disability benefits.

FCE may be used to determine the individual's ability to safely return to work full time or on modified duty. It can also determine if work restrictions, job modifications, or reasonable accommodations are necessary to prevent further injury. Likewise, the extent to which impairments exist, or the degree of physical disability for compensation purposes, can be determined through this evaluation. Further, it can predict the potential ability to perform work following acute rehabilitation or a work-hardening/ work- conditioning program.

The employers normally set the job description for the seafarers to meet. This becomes a mandatory requirement to get the job. We have to remember that seafarers work between 8 to 12 hours a day and we have to find out within at least an hour whether or not they could cope up with the physical rigors or demands of their job. Hence, we should be very strict with selecting our staff. They should have a good balance between academic intelligence and pragmatic thinking, and they should be able to evaluate and educate the patients effectively.

FCE may be able to assess for the presence and severity of the impairments or other problems. It can determine if employees with stable impairments can perform their job duties safely. For an individual with previous back injury, FCE determines if he can perform frequent repetitive bending and heavy lifting. It can also determine progressive conditions that would ultimately require job reassignment to a more sedentary occupation. Moreover, FCE can also identify intermittent problems that would impair safety of performance. For example, if an individual has a history of seizure disorder, and seizure control is less than complete, then placement considerations should be taken to ensure safety of the employees and co-workers. A patient may exhibit signs and symptoms of intolerance to the activity being done. Examples of these would be pallor, chest pain or dyspnea.

What we use as tools to find out whether seafarers are coping with the activity or not is their blood pressure and heart rate. If these become abnormally high during the activities, we allow them to rest for brief periods. If they remain abnormally high for a certain period of time, we stop the activity and refer them to our physicians. Both their blood pressure and heart rate are recorded at certain intervals during the entire procedure. Although an abnormal rise in either the heart rate or blood pressure is not immediately an indication of disease, it may serve as a warning to the examiners to further evaluate the patient. Examiners should also not discount the fact that the patient may just be anxious about the activity or that he has a sedentary lifestyle to begin with.

FCE is something that workers have to prepare for, not just for a week but rather, starting today, especially if they are not living a healthy lifestyle. If you have an unhealthy lifestyle, such as being a smoker, or overweight and you don't exercise and you don't eat right, you can't just stop that for a week and expect that a lot of great changes would just happen. But it is a start. If you start practicing a healthier lifestyle, you'll expect that your body will co-operate. You'll have more energy to do the things you want to do and you'll live longer and enjoy the fruits of your labor.

The Rehabilitation Medicine/Functional Capacity Evaluation Department of PDSC allows the patient's wife or other family members to witness the FCE activity of the seafarer. This is to educate them along with their husbands during the lifestyle counseling. FCE does not just evaluate the patient's capabilities, the evaluation also educates them through lifestyle counseling. Most often than not, the wife is the one who prepares the meals for the entire family, so with her being educated to proper diet, she can lead the family into having a healthier lifestyle. Add to that the fact that wives know if their husbands have other bad habits that they can tell you, which the husbands prefer not to.

Aside from FCE and fitness testing, the department also offers lifestyle counseling, exercise prescription/modification and physical therapy services. While FCE might be relatively new in the Philippines, its objective is to provide measurement of a patient's/client's safe functional abilities compared with the physical demands of work. This detailed examination and evaluation reports on the level of function primarily within the context of the demands on competitive employment. To date, the department has already evaluated about 3,000 patients.

The practice is continuing to evolve, with many employers wanting healthy and fit employees to work for them, without the worry that their employees will not be able to carry out their contracts because of illness acquired from an unhealthy lifestyle.

DEEPLY DIVIDED US SUPREME COURT AFFIRMS "SLEIGHT" STANDARD OF CAUSATION IN JONES ACT PERSONAL INJURY CASES ... BUT POWERFUL DISSENT DENIES THE STANDARD WAS EVER REDUCED AND SOWS SEEDS OF DOUBT

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Seamens' personal injury lawsuits in US courts have long been a source of concern for shipowners who trade to the United States and their underwriters. Standards of liability are liberal and pro-plaintiff jury verdicts are often so high as to be stunning.

Two recent US cases were the subject of much interest in shipping circles as they seemed to offer hope of a restoration of some degree of procedural fairness between shipowners and injury claimants in terms of the seaman's burden of proving causation of injury. Although the US Supreme Court ultimately allowed the pro-seaman liability standard to stand, it did so in such a manner as to raise some doubt whether the final word has really been said.

INTRODUCTION

It is an article of faith among the US maritime plaintiff's personal injury bar that the standard of causation in a Jones Act[1] personal injury suit is something less than in a common law personal injury suit. Indeed, the seaman's overall burden of proof has often times been said to be "featherweight," and the standard applied to causation is "sleight".

At its most extreme, the "featherweight" rule could be formulated as follows: a seaman need only offer the slightest evidence of the slightest negligence by the shipowner, which contributed in the slightest way to the seaman's injury, in order for the seaman to prevail or at least "get to the jury". In contrast, on the issue of causation, in a common law personal injury suit a plaintiff must prove that a defendant's negligence was the "proximate cause" of the injury, a more demanding showing, although the precise elements of "proximate cause" have been the subject of debate over the years. Given the legendary generosity of US juries in certain jurisdictions, the risks the relaxed standard of causation poses for a shipowner are readily apparent and substantial.

Two recent decisions by the United States Supreme Court have addressed the issue, the most recent of which, *CSX Transportation, Inc. v. McBride*[2] ("McBride"), purports to "reaffirm" the reduced standard of causation. That decision, however, is saddled with a powerful dissent grounded in an earlier decision, *Norfolk Southern Railway Co. v. Sorrell*[3], which presented a well researched and tightly reasoned rebuttal of the notion that the standard of causation had ever been reduced to begin with.

Taken together, these two decisions by the United States Supreme Court reveal that at the very highest level of the US judicial system there is substantial disagreement as to just what the applicable standard of causation in a Jones Act case actually is or should be.

BACKGROUND

Under the Federal Employer's Liability Act (the "FELA") and the Jones Act, employers are liable for injuries "resulting in whole or in part" from the employer's negligent conduct. Specifically, the first section of FELA provides:

> Every common carrier by railroad... shall be liable in damages to any person suffering injury while he is employed by such carrier... for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents or employers of such carrier...

45 U.S.C. § 51

While the FELA deals with railroad employee personal injury claims, the Jones Act, which deals with seamens' personal injury claims, incorporates the FELA, and all case law applicable to the FELA is deemed to apply with equal force to the Jones Act.

As drafted, the FELA expressly struck down several common law defenses which had traditionally made it difficult for employees to successfully sue their employers, the most important among these being the traditional rule that if the employee was himself partly to blame for his injury (called "contributory fault"), recovery was barred.

What the FELA did not expressly strike down, or so it appeared, was the common law rule on causation, which was and is that the defendant's negligence must have been "the sole, efficient, producing cause of the injury," which is called "proximate cause."

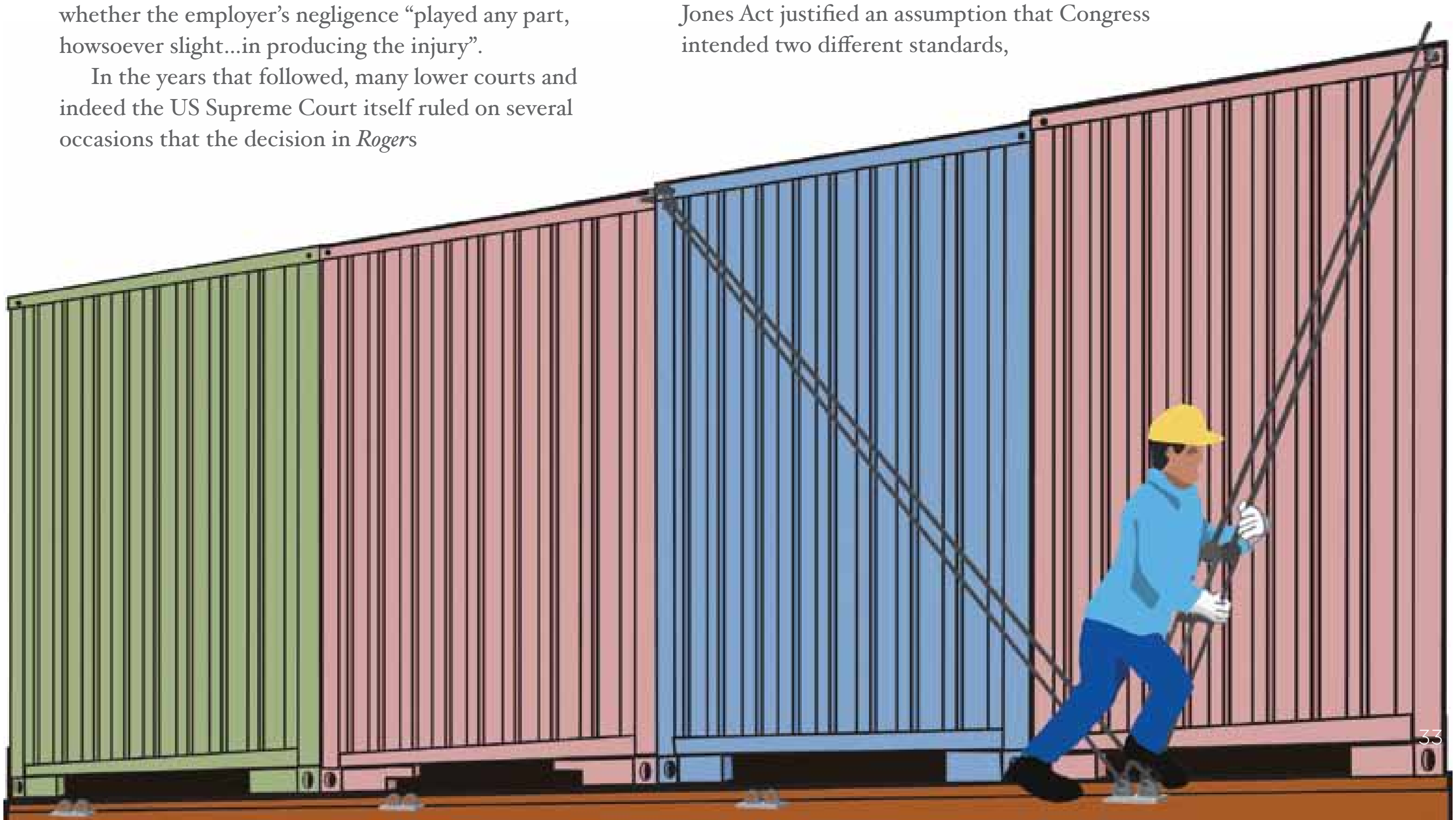
Over the years, and in particular between passage of the FELA in 1908 and 1957, a number of decisions dealing with the FELA incorporated common law "proximate cause" analysis in applying the statute, while others did not, choosing instead to rely on the statutory "in whole or in part" causation language. Whether that implied a lesser standard of causation, as opposed to an acceptance of multiple causes of injury, was unclear.

In 1957 the US Supreme Court decided the case of *Rogers v. Missouri Pacific R. Co.*, another railroad worker personal injury case under the FELA, which appeared to present the question whether the FELA allowed recovery where there are two producing causes of the injury, the railroad's negligence and the worker's concurrent negligence. The court ruled that it did, stating that the FELA allowed recovery if the defendant's negligence "played any part, however small, in the injury or death which is the subject of the suit" and in other words whether the employer's negligence "played any part, howsoever slight…in producing the injury".

In the years that followed, many lower courts and indeed the US Supreme Court itself ruled on several occasions that the decision in *Roger*s recognized a "relaxed" standard of causation in FELA cases, as opposed to the "proximate cause" rule familiar to common law tort litigation. Other decisions, including other Supreme Court decisions, asserted that traditional "proximate causation" was still an essential element of the claim.

So stood the law until 2007, when the Supreme Court was presented with the case of *Norfolk Southern Railway Co. v. Sorrell* which required the court to decide what standards of causation should be applied in evaluating the relative responsibility of the parties where both the worker and the railroad were potentially negligent.

The Chief Justice of the US Supreme Court (Justice Roberts) held that at the time the FELA was enacted, the prevailing common law rule was that the same rules applied to employer and employee negligence (whatever that standard might be) and there was no indication that Congress intended to change that rule by passing the FELA. Justice Roberts and the majority rejected any notion that the "remedial" purpose of the FELA and the Jones Act justified an assumption that Congress intended two different standards,



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a lighter burden for the seaman and a heavier burden for the shipowner.

While Justice Roberts did not take the opportunity to address what the proper formulation of the causation standard might be, several other Justices did, with each writing a concurring opinion.

Expanding upon Justice Roberts' reasoning in the majority opinion, the conservative group of justices argued that the so-called "slightest negligence" standard applied by some courts (including, at times, the Supreme Court) to the employer was based on a misreading of *Rogers* over the years. They pointed out that standard proximate cause requirements ("negligence directly caused the injury") were the rule when the FELA was passed, and there was nothing in the FELA which explicitly abrogated that rule. Given that Congress had explicitly changed the common law rules in other respects, particularly in respect of contributory fault as a bar to recovery, there was no reason to believe Congress intended to implicitly change the causation rule.

Furthermore, the conservative group pointed out, *Rogers* should not be read as having changed the common law causation rule as the only issue actually before the Court in *Rogers* was whether FELA (and the Jones Act) recognized the possibility of more than one proximate cause (ie concurrent causes), which, they pointed out, was exactly what Congress had explicitly allowed when it enacted FELA and abolished the contributory fault bar to recovery. Again, at that time, under the common law, contributory fault by the plaintiff was a bar to recovery. In contrast, under FELA and the Jones Act, if the employer's negligence contributed "in the slightest" to the injury, the case had to go the jury on the issue of comparative fault. Thus, the conservatives concluded, all that *Rogers* meant to do was recognize that FELA allowed concurrent fault. It follows that the FELA and Jones Act require common law proximate causation, and there is no reason to read *Rogers* as having introduced a lesser or "slighter" burden on the issue of causation.

In the concurrence of the progressive group of the court, Justice Ginsburg, perhaps inclined to leave the issue for decision in a case which directly presented the question, was content to agree that the same standard should apply to employer and employee negligence – though she believed that the standard should be the "caused...even in the slightest" standard she stated was recognized by *Rogers*.

The progressive and conservative sides of the Supreme Court having reserved their positions on the causation issue, the question awaited direct treatment in another case. That case was *McBride*.

MCBRIDE

In *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (U.S. 2011), a deeply divided Supreme Court grappled with the seeming inconsistency and ambiguity of its own decisions over the years on the standard of causation applicable in FELA (and hence Jones Act) cases, and in a very close, 5 to 4 decision (a majority by one Justice), the court, with Justice Ginsburg writing for the majority, held that the common law rule of proximate cause does not apply to cases brought under the FELA and Jones Act. At the end of the day, the majority appears to fall back on the justification that the "relaxed" standard of causation formula adopted by many district and appellate courts since has been the rule for so long that it is best to "leave things alone."

The majority's decision, however, is countered by a very strong and well-reasoned dissent by Chief Justice Roberts, in which he argues that there was never any intent by Congress to remove the traditional element of proximate cause from FELA (and Jones Act) cases, and that, by reading it out, the court's majority has opted for rule of causation so open ended as to be no rule at all, and goes on to suggest that the decision essentially invites further litigation on the causation issue. In so arguing, Justice Roberts drew heavily on the reasoning of Justice Souter in *Norfolk Southern Railway Co v. Sorrell*, 349 US 158 (2007), discussed above.

MCBRIDE FACTS

Robert McBride was employed by CSX Transportation, Inc. as a locomotive engineer. He was assigned to a train which had multiple locomotives, which he argued was an unusual arrangement which required him to employ a hand-operated independent brake multiple times when "switching" (starting and stopping to remove and add cars). McBride allegedly voiced an objection to the arrangement but was told to take the train as it was.

About 10 hours into the run, McBride's hand became fatigued from continuous braking, and because his hand was fatigued it banged into the brake. Despite two surgeries and therapy, he never regained the full use of his hand. McBride sued CSX in the Federal District Court in Illinois, charging the railroad with negligence under the FELA. Plaintiff's theory of liability was that the allegedly unusual arrangement of the locomotives resulted in his hand becoming fatigued, which led to the injury. The District Court instructed the jury that a verdict for McBride would be in order if the jury found CSX "was negligent" and that the "negligence caused or contributed to the injury". In expounding on the latter instruction, the district court said: "Defendant 'caused or contributed to' plaintiff's injury if [its] negligence played a part – no matter how small – in bringing about the injury."

CSX requested an instruction that its negligence must have been "a proximate cause" of the injury, and another that "proximate cause" meant "any cause which, in natural or probable sequence, produced the injury complained of". The court rejected CSX's request in favor of the familiar "no matter how small" formulation.

The jury returned a verdict for McBride. The railroad appealed to the Seventh Circuit, which affirmed, on the ground that the Supreme Court's decision in *Rogers* had relaxed the standard of causation in FELA cases and the District Court's instruction complied with that relaxed standard.

The Supreme Court took the case on appeal.

THE MAJORITY DECISION

Justice Ginsburg, who had carefully reserved her position on the causation issue in *Sorrell*, wrote the opinion for the majority. Justice Ginsburg declined to read *Rogers* as having been limited to issues of concurrent causation concerned only with the issue of liability in cases involving multiple causes of injury. *Rogers*, she wrote, recognized that FELA had not incorporated common law proximate cause principles, but had, instead prescribed a new causation test specific to FELA cases, ie "whether employer negligence played any part, even in the slightest, in producing the injury." 352 US at 506.

The court took note of the fact that the concept of "proximate cause" has confounded scholars, courts and jurors alike for years, and argued that Congress intended to clarify the meaning of "proximate cause" in FELA cases.

Justice Ginsburg went on to buttress this analysis by essentially emphasizing the remedial purpose of the FELA, an approach the court had previously rejected in *Sorrell*.

Turning to a pragmatic approach, Justice Ginsburg noted that in the years after *Rogers*, many juries had applied the *Rogers* standard without problem, many appellate courts had approved jury instructions based on the "reduced" standard of causation, and many Supreme Court decisions had approvingly discussed the *Rogers* "reduced" standard, even in cases where multiple causation was not an issue. Indeed, she noted, in the 50 years since *Rogers* was decided. Congress had not acted to overrule the decision. At the end of the day, Justice Ginsburg concluded, it would be best to leave matters undisturbed.

THE DISSENT

The sharp dissent written by Chief Justice Roberts, in which two other Justices joined, is little short of withering in its rejection of the majority view. The dissent concedes that arriving at a precise formulation of the concept of proximate cause has always posed a conundrum, but notes that other legal concepts have endured despite their imprecision, specifically referencing the oft-criticized standard of "proof beyond a reasonable doubt."

The dissent notes that at the time FELA was enacted "proximate cause" was a common law rule of longstanding duration and there was nothing in the language of the FELA to suggest that Congress intended to abrogate it. Congress explicitly abrogated the common law in

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important ways when it enacted FELA, ie, it abolished the common law contributory negligence rule, which barred recovery for those whose negligence contributed to their injuries, abandoned the fellow-servant rule, prohibited assumption of risk as a defense, and barred employees from contractually releasing their employers from liability. Understandably, the dissent states that had Congress intended to do away with the requirement of proximate cause in FELA, it would have done so explicitly. It did not.

Finding no support in the language of FELA for the majority's decision to do away with the doctrine of proximate cause, Justice Roberts next analyzed the court's 1957 decision in *Rogers* to determine whether that decision signaled a sea change in the court's jurisprudence with respect to the standard of causation in FELA/Jones Act cases. He concluded it did not, noting that in *Rogers*, the court "clarified" under FELA, where employer and employee negligence could both be considered as having caused the injury, the employer's negligence need not be the most direct cause to be considered a proximate cause. As Justice Roberts observed, *Rogers* was "an application of proximate cause, not a repudiation of it."

Since *Rogers* was a case involving multiple causes, use of the phrase "any part, even in the slightest" made sense because the Court in deciding *Rogers* was not concerned with how direct any one cause must be. As Justice Souter had noted in *Sorrell*, "'even in the slightest' concerned multiplicity of causations, not the directness of causation." In sum, the *McBride* majority took "even in the slightest" out of the context in which *Rogers* intended and used it to conjure up a "novel" standard of causation.

Justice Roberts cautions that the standard of causation adopted by the majority imposes no limits at all on the conduct which could be considered as having caused an injury under FELA and the Jones Act. Under the court's standard, the dissent warns, "*caelum terminus est* – the sky's the limit." Whether this issue is now for Congress or the court to decide remains to be seen. In classic terms, "for want of nail," the blacksmith is now liable for "the loss of the kingdom."

CONCLUSION

The progressive wing of the Supreme Court carried the day by a single justice majority in *McBride* but the stinging dissent by Chief Justice Roberts suggests that the issue of the applicable standard of causation in FELA and Jones Act cases may well be revisited in the future.

Shipowners faced with seamens' Jones Act cases in the US should consult closely with their managers and counsel as to how best to deal with the "novel" standard of causation now promulgated by a slight majority of the Supreme Court.

** The author gratefully acknowledges the assistance of Noreen Aralde, Esq., of the firm Kenny & Zonghetti, in the preparation of this article.*

[1] The Jones Act is the US statute which created the seaman's cause of action against his employer for negligently caused injury.

[2] *McBride*, U.S. LEXIS 4795 (June 23, 2011), The Club had filed a related case with similar issues, entitled *Brown v. Reinauer Transportation Co.*, Case No. 05-1712 (Supreme Court State of New York, Ulster County)

[3] *Northern Suffolk R. Co. v. Sorrell*, 549 U.S. 158.

RECENT INITIATIVES AT THE IMO

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ENVIRONMENTAL MATTERS

Amendments to IMO's MARPOL Convention for the prevention of pollution from ships, which come into force on August 1, 2011, relate to banning heavy fuel oil from the Antarctic and creating a new North American Emission Control Area (ECA).

USE OR CARRIAGE OF OIL IN ANTARCTIC AREA

A new MARPOL regulation to protect the Antarctic from pollution by heavy-grade oils is added to MARPOL Annex I (regulations for the prevention of pollution by oil), with a new chapter 9 on *Special requirements for the use or carriage of oils in the Antarctic area*.

The new Regulation 43 prohibits both the carriage in bulk as cargo and the carriage and use as fuel, of: crude oils having a density, at 15°C, higher than 900 kg/m3; oils, other than crude oils, having a density, at 15°C, higher than 900 kg/m^3 or a kinematic viscosity, at 50°C, higher than 180 mm^2/s; or bitumen, tar and their emulsions.

In effect, passenger or cargo ships will need to switch to a different fuel type when transiting the Antarctic area, defined as "the sea area south of latitude 60°S". One particular exception is for vessels engaged in securing the safety of ships or in a search-and-rescue operation.

NORTH AMERICAN EMISSION CONTROL AREA (ECA)

Amendments to MARPOL Annex VI (prevention of air pollution from ships) will formally establish a North American ECA whereby emissions of sulfur oxides (SO_x), nitrogen oxides (NO_x) and particulate matter from ships will be subject to more stringent controls than the limits that apply globally. The ECA will take effect on August 1, 2012.

The entry into force will mean there are currently three designated ECAs, the other two being sulfur oxide ECAs: the Baltic Sea area and the North Sea area.

In July 2011, IMO adopted MARPOL amendments to designate certain waters adjacent to the coasts of Puerto Rico (United States) and the Virgin Islands (United States) as another ECA (United States Caribbean Sea ECA). The MARPOL amendments adopted in July 2011 are expected to enter into force on January 1, 2013, with the new ECA taking on 1 January 2014.

OTHER ANNEX VI ISSUES

The MEPC adopted guidelines for reception facilities under MARPOL Annex VI and guidelines addressing additional aspects to the NO_x Technical Code 2008 with regard to particular requirements related to marine diesel engines fitted with selective catalytic reduction (SCR) systems.

The committee approved, for future adoption, draft amendments to the NO_x Technical Code 2008, relating to engines not pre-certified on a test bed and to NO_x-reducing devices. It also agreed terms of reference for the review of the status of technological developments to implement the Tier III NO_x emission standard.

BLACK CARBON MEASURES TO BE FURTHER CONSIDERED

Black carbon is a strongly light-absorbing carbonaceous aerosol produced by incomplete combustion of fuel oil and is considered a constituent of primary particulate matter, as distinguished from secondary particulate matter pollutants formed in the atmosphere from sulfur dioxide emissions. In addition to harmful human health effects associated with exposure to particulate matter, black carbon has effects on climate change. When deposited on snow and ice in the Arctic and lower latitudes, it darkens light surfaces and absorbs energy, causing snow and ice to melt.

The committee will look to developing and agreeing to a definition for black carbon emissions from international shipping; consider measurement methods for black carbon and identify the most appropriate method for measuring black carbon emissions from international shipping; investigate appropriate control measures to reduce the impacts of black carbon emissions from international shipping in the Arctic.

ANNEX IV (SEWAGE) BALTIC SPECIAL AREA ADOPTED

The MEPC adopted amendments to MARPOL Annex IV Prevention of pollution by sewage from ships to include the possibility of establishing "Special Areas" for the prevention of such pollution from passenger ships and to designate the Baltic Sea as a Special Area under this Annex. The amendments are expected to enter into force on January 1, 2013.

REVISED ANNEX V (GARBAGE) ADOPTED

The Committee also adopted the revised MARPOL Annex V Regulations for the prevention of pollution by garbage from ships, which has been developed following a comprehensive review to bring the annex up to date. The amendments are expected to enter into force on January 1, 2013.

The main changes include the updating of definitions; the inclusion of a new requirement specifying that discharge of all garbage into the sea is prohibited, except as expressly provided otherwise (the discharges permitted in certain circumstances include food wastes, cargo residues and water used for washing deck and external surfaces containing cleaning agents or additives which are not harmful to the marine environment); expansion of the requirements for placards and garbage management plans to fixed and floating platforms engaged in exploration and exploitation of the sea-bed; and the addition of discharge requirements covering animal carcasses.

BIO-FOULING GUIDELINES ADOPTED

The MEPC adopted the first set of international recommendations to address bio-fouling of ships, to minimize the transfer of aquatic species. The guidelines for the control and management of ships' bio-fouling to minimize the transfer of invasive aquatic species will address the risks of introduction of invasive aquatic species through the adherence of sea life, such as algae and mollusks, to ships' hulls.

Research indicates that bio-fouling is a significant mechanism for species transfer by vessels. A single fertile fouling organism has the potential to release many thousands of eggs, spores or larvae into the water with the capacity to found new populations of invasive species such as crabs, fish, sea stars, mollusks and plankton. Minimizing bio-fouling will significantly reduce the risk of transfer.

GUIDELINES ON RECYCLING OF SHIPS ADOPTED

The MEPC adopted the 2011 guidelines for the development of the Ship Recycling Plan as well as updated guidelines for the development of the Inventory of Hazardous Materials, which are intended to assist in the implementation of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, adopted in May 2009. The committee encouraged governments to ratify the Convention, which has been signed, subject to ratification, by five countries, and to review the program of technical assistance aimed at supporting its early implementation.

BALLAST WATER MANAGEMENT SYSTEMS APPROVED

The committee granted final approval to two and basic approval to seven ballast water management systems that make use of active substances, following the recommendations of the Joint Group of Experts on the Scientific Aspects of Marine Environment Protection (GESAMP) Ballast Water Working Group.

The MEPC also adopted the procedure for approving other methods of ballast water management in accordance with regulation B-3.7 of the Ballast Water Management Convention as well as approved guidance on scaling of ballast water management systems.

The MEPC reiterated the need for countries to ratify the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, to achieve its entry into force at the earliest opportunity. To date, 28 states, with an aggregate merchant shipping tonnage of 26.37 per cent of the world total, have ratified the Convention. It will enter into force 12 months after the date on which not fewer than 30 states, the combined merchant fleets of which constitute not less than 35 percent of the gross tonnage of the world's merchant shipping, have become parties to it.

GUIDELINES FOR THE CARRIAGE OF BLENDS OF PETROLEUM OIL AND BIO-FUELS APPROVED

The MEPC approved guidelines for the carriage of blends of petroleum oil and bio-fuels, which set out carriage and discharge requirements for bio-fuel blends containing 75% or more of petroleum oil (they are subject to Annex I of MARPOL); bio-fuel blends containing more than 1% but less than 75% of petroleum oil (subject to Annex II of MARPOL); and bio-fuel blends containing 1% or less petroleum oil (also subject to Annex II of MARPOL).

A VIEW FROM THE PHILIPPINES

LEADING THE WAY FOR MARITIME LAW IN THE PHILIPPINES

By: Ruben del Rosario
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Manila, THE PHILIPPINES

The Philippines is the leading source of seafarers in the world, supplying over 20% of the total workforce in the international trading fleets. The manning and shipping sector in the Philippines is a dynamic and ever-growing industry. It is also a vital component in achieving socio-economic progress as Filipino seafarers contribute significantly to the Philippine economy and are considered as the new Filipino heroes.

To serve the ever-growing requirements of the international maritime industry, the highly regarded grandfather of maritime law in the Philippines, Arturo M. Del Rosario, Sr., formed Del Rosario & Del Rosario Law Office in May 1977. Since its inception, the firm has earned the reputation of being the leading maritime firm in the Philippines, providing high-quality, prompt and efficient legal service to its clientele. Although, the firm's founding partner has since passed away, he has passed on his more than four decades of experience and his legacy of excellence to his two sons, Ruben and Arturo Jr., who are now the co-managing partners.

From humble beginnings of less than a handful of lawyers, the firm has now grown to a highly respected general practice firm of five partners, 20 lawyers and more than 35 personnel. Its commercial correspondent affiliate, Del Rosario Pandiphil Inc., has a complement of 20 claims handlers. The firm acts for international shipowners and their P&I clubs on a multitude of controversies extending from labor, collisions, oil pollution/spills, charterparty/bill of lading disputes, ship sale and purchase, ship finance, ship mortgage and ship registrations to corporate matters and general recovery work, including ship arrest. The firm is usually involved in the major maritime incidents in the Philippines, including the Guimaras Oil spill, the Philippines' worst oil spill. Its opinion is repeatedly sought in the formulation of the Philippines' major maritime policies.

STANDARD EMPLOYMENT CONTRACT

The firm has also taken the lead in promoting maritime arbitration, especially voluntary arbitration for Filipino crew claims. Its efforts have been officially recognized by the Philippine Dispute Resolution Centre, Inc. Charter president of the Philippine Maritime Voluntary Arbitrators Association (PMVAA), Ruben T. Del Rosario, is regularly invited to sit in the tripartite body that formulates the POEA standard employment contract which contains the minimum employment terms of all Filipino seafarers serving onboard overseas vessels. The latest tripartite discussion between the Philippine government, the seafarers' unions and the employers/agent concluded last year has resulted to the approval of the 2010 POEA standard employment contract for all Filipino seafarers. Ruben was also involved in discussions leading to the enactment and implementation of the Amended Migrant Workers Act (Republic Act 10022), more commonly known as AMWA, which created a stir last year due to the compulsory insurance benefits for Filipino seafarers.

Ruben is a graduate of the renowned Ateneo Law School and University of Michigan. His daughter, Veronica, and son, Jay Arthur, are senior handlers in Del Rosario Pandiphil. Veronica has completed her law studies and will be taking the Philippine bar examination soon. Ruben's youngest, Ruben Jose, has just started to follow in his father's footsteps in Ateneo Law School where he is presently a freshman.

Arturo T. Del Rosario Jr. (or Johnny to his friends and colleagues) is a trustee and a recent past president of the oldest and one of the most respected voluntary organizations of lawyers in the Philippines, the Philippine Bar Association (PBA). He is also a trustee of the Intellectual Property Association of the Philippines (IPAP) and is an accredited mediator of the Court of Appeals' Philippine Mediation Center. Johnny spearheads the firm's litigation, labour & employment and intellectual property practice. He is also considered an expert in dry and wet work. He graduated from the prestigious University of the Philippines College of Law. His son, Aldrich, is already an

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associate in the firm and has just completed his Master of Laws in Maritime Law in Tulane University.

The firm is associated with the Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), Asian Patent Attorneys Association (APPA), Association Internationale pour la Protection de la Propriete Industrielle (AIPPI), International Trademark Association (INTA), Counsel- Alliance (CA), Asociacion Europea De Abogados (AEA); and European, American and Australia-New Zealand Chambers of Commerce in the Philippines.

The firm has consistently been considered as the Philippines' top shipping firm by Asia Legal 500, Asia Law Profiles and Chambers.

AREAS OF PRACTICE

The firm's list of P&I and H&M and specialist clubs cover the major continents.

Through the years, the clientele have grown significantly with the inclusion of major cruise lines such as Royal Caribbean, Carnival, Princess, Holland America, and international general insurers and reinsurers with whom the firm advises on various aspects of Philippine law. The firm likewise closely collaborates with various firms in the United States, the United Kingdom, Hong Kong, China, Singapore, Norway, Greece, Germany, Netherlands, Japan and Korea in various fields of law, including labor & employment, foreign direct investment, corporate / M&A, insurance, general recovery and of course maritime law.

The firm's labor & employment department acts on a full range of labor matters involving Filipino seafarers and industrial relations. Aside from closely advising foreign clients on their human resource related issues in their Philippine operations, the firm effectively handles a wide array of employer-employee related cases in the National Labor Relation Commission (NLRC), the Philippine labor court.

The corporate and immigration department client base, on the other hand, has expanded from shipping clients to international companies engaged in manufacturing, holding property leasing, recruitment, training, financing, advertising, cruiseship catering, hotel management, retail, marketing, and religious activities. It advises the Royal Embassy of Norway and the Panamanian Consulate in Manila.

The intellectual property department continues to advise Sony, Facebook, and major pharmaceutical companies such as Zuellig. The arbitration and litigation practice cuts across different clientele in a myriad of disputes/controversies involving various fields of law.

Del Rosario & Del Rosario has depth and experience in the transport industry, being at the forefront of transportation law. The reputation the firm earned in defending the interests of international shipowners and their P&I clubs has created a strong impression in the industry.

THE PEOPLE BEHIND THE FIRM

Aside from the co-managing partners, Ruben and Johnny, the associate partners are similarly well experienced in their respective fields. They bring their ideas and knowledge to make the firm outstanding among other maritime law firms in the Philippines. They are regularly invited to speak in various forums, both local and international, concerning shipping developments in the Philippines.

Partner Charles Jay D. Dela Cruz is a trustee of the Law Foundation of Makati City and the Norwegian Maritime Foundation of the Philippines. He is regularly invited to speak at various intentional forums, the latest of which is the "Personal Injury Claims of Filipino Seafarers and their International Perspective" at the 2011 Seafarers Conference held on 27-29 June 2011 in Singapore. He is a past president of the Maritime Law Association of the Philippines (MARLAW) and a graduate of the well-respected San Beda College of Law.

Partner Joseph Manolo R. Rebano, present trustee and a recent past president of MARLAW and a vice chairman of the Maritime Law Committee of the IPBA, has been invited as a resource person to the technical working group discussion of the Committee of Transportation of the Philippine Congress on the proposed Maritime Code of the Philippines. He is well regarded on his wet shipping prowess. He is a graduate of the University of the Philippines College of Law.

Partner Herbert A. Tria is a vice president of MARLAW and closely assisted in the Philippine Joint


Joseph Rebano, Arturo Del Rosario, Ruben Del Rosario, Charles de la Cruz and Herbert Tria.

Manning Group (JMG) in the deliberations on AMWA and its implementation of rules. He also actively participated in the tripartite discussions leading to the approval of the 2010 POEA standard employment contract. Presently, he is involved in discussions on a potential POEA standard employment contract for cruiseship personnel and on the draft Magna Carta for Seafarers presently pending in the Philippine Congress. He graduated at the San Beda College of Law where he also completed his Master of Laws.

COST-EFFECTIVE STRATEGIES

The success of Del Rosario & Del Rosario lies not only with the expertise and persistence of its partners but also with the wealth of talent and dedication of its associate lawyers and staff. Partners and their associates work closely together to build cost-effective strategies in handling cases.

The firm conducts regular training and seminars not only for its lawyers and staff but also for the maritime industry in general. It is the only Philippine firm that sends participants to the University of Southampton, Institute of Maritime Law Singapore Short Course. The firm also has regular exchange programs with some of its foreign clientele.

In June this year it hosted a crew claims seminar in Singapore for P&I clubs and shipmanagers. Earlier this year, it conducted a series of seminars for the various Philippine manning agents to educate them on the AMWA and the 2010 POEA standard employment contract.

The firm continues to circulate the *Philippine Shipping Update* which tracks important domestic maritime developments. It also continually updates its very popular “Primer on the POEA Standard Employment Contract”, an indispensable guide to the handling of Filipino crew claims.

DEL ROSARIO PANDIPHIL INC

Together with the Del Rosario & Del Rosario law offices, Del Rosario Pandiphil, formerly known as the Pandiphil Claims Department, was also founded by Arturo M. Del Rosario Sr. in May 1977, to handle seafarers’ claims. Over the years, it has grown to become a full service commercial correspondent providing outstanding service to its clients.

FD&D CORNER

By: Parker Harrison, Esq.
Vice President and FD&D Manager
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IS IT YOUR FAULT, OR IS IT **ALL** YOUR FAULT?

Delays in getting a vessel onto berth often have multiple causes, some of which may rightly be laid at an owner's feet and others which may not. For instance, when a vessel arrives at the load port but the holds are rejected until several days later, by which time the berth is unavailable for several more days, is the vessel off-hire for the entire period from the first rejection until the vessel finally berths? Or is the vessel off-hire for only a portion of that time?

A London arbitration panel was recently asked to consider just such a scenario. In London Arbitration 5/11, owners fixed their vessel to charterers on the NYPE form, clause 37 of which required the vessel's holds to be "thoroughly cleaned and dried before delivery." Charterers ordered the ship to load a cargo of corn, and the ship was delivered into their service at 2300 hrs on October 20th. At 1715 hrs the following day, the vessel failed a hold inspection at the load port. Cleaning operations were carried out and the vessel thereafter passed a subsequent hold inspection at 1830 hrs on October 26th. By that time, however, the berth was occupied so the vessel did not berth and commence loading until 2005 hrs on October 30th.

Charterers purported to place the vessel off-hire, or alternatively claimed damages, for the entire period from 1715 hrs on October 21st until 2005 hrs on October 30th – that is, from the time that the vessel failed hold inspections until it was finally on the berth and loading had begun. In opposition, owners pointed to the fact that the grain elevator was occupied until 2200 hrs on October 26th – an hour-and-a-half after the vessel passed inspections – so there was no loss of time for that period. And as to the subsequent period, owners noted that instead of the berth immediately being allocated to their vessel at 2200 on October 26th, it was allocated to another vessel that had only arrived late on October 25th. Consequently, any loss of time during that period was not due to any fault or breach on owners' part. So although owners conceded that they were technically in breach of clause 37, charterers had suffered no loss of time as a result.

The Tribunal held that the fundamental question to be answered was whether the charterers had suffered the alleged loss of time as a result of the holds' condition on delivery or instead as a result of something else. If the fact that the holds were not clean as required on delivery was in fact the cause of a loss of time, then charterers were entitled to either put the ship off-hire or to recover damages.

The evidence showed that on October 17th, while the ship was discharging at another port and prior to delivery into charterers' service, the load port agents advised that the elevator was being "somewhat vague about prospects." At the time, there was one other ship ("A") waiting in the anchorage that was to load soybeans and another due on October 20 to load soybeans, but neither cargo was ready and there was a chance that the owners' vessel would berth ahead of both.

On the afternoon of October 20th, although the berthing line-up was still not fixed, vessel A was in the berth loading. The next day, charterers' representatives sent charterers an email advising that the shippers of the intended cargo "may" be able to halt A's loading and move owners' vessel onto the berth instead, provided that the vessel passed inspection and was ready to load on arrival.

On October 23rd, the intended cargo was apparently not ready and that after the holds were passed the ship would shift to the anchorage to wait. The next day, the agents advised that another ship ("B") was loading soybeans and that yet another ship ("C") was due to arrive late on October 25th, also to load soybeans. By October 25th, the agents advised that they anticipated the elevator berthing owners' vessel as soon as she passed inspections, even if vessel C passed first. But by the time that the subject vessel passed inspections on the evening of October 26th, vessel B was almost finished loading and vessel C had been ordered onto the berth next.

On November 1st, when owners' vessel was already on the berth and loading was underway, it came to light that the intended cargo of corn had at some point been shifted to another storage bin while vessels A, B, and C were loading and that the process of moving the corn back to the loading area was taking longer than expected.

Considering all this evidence, the Tribunal concluded that even if owners' vessel had passed her inspections on October 21st, the elevator would likely have continued to load vessel A and would not have interrupted A's loading to accommodate owners' vessel. So the charterers' representatives' message of October 21st merely gave notice of a possibility rather than a true option. As a result, charterers had suffered no loss of time before the owners' vessel would have berthed had she been taken in immediately after vessel A completed loading. Adopting as appropriate charterers' argument that the subject vessel would have berthed by 1200 hrs on October 24th, the Tribunal determined that charterers were in fact losing time after that point that had to be compensated either by placing the vessel off-hire or by damages for breach of clause 37.

It did not necessarily follow, however, that *all* of the time lost from 1200 hrs on October 24th until 2005 hrs on October 30th was for owners' account. In fact, once the vessel was clean and ready on October 26th, there was no obvious reason why she could not have gone onto the berth. The Tribunal noted that shortly after the vessel passed inspections on October 26th, the berth was in fact vacated when vessel A completed and vessel C did not come onto the berth for several hours. It was apparent that by the time the subject vessel passed inspections on October 26th, the elevator had already decided to give vessel C priority. That decision, in the Tribunal's view, broke the chain of causation between the vessel's lack of cleanliness and resulting failed inspections and the loss of time after the vessel was in fact ready.

Since owners were entitled to hire until the time at which the vessel would have berthed had she been clean when first presented – that is, at 1200 hrs on October 24th – hire was owed from the time that she would have berthed if the terminal had taken her instead of vessel C, which was at 0600 on October 27th (the time when vessel C in fact berthed). In other words, no hire was owed during the period from 1200 hrs on October until 0600 hrs on October 27th.

WHAT EVER HAPPENED TO THE ACHILLEAS?

In prior issues of *CURRENTS*, the managers reported on the House of Lords' decision in *Transfield Shipping Inc. v. Mercator Shipping Inc.* [2008] UKHL 48 (*The ACHILLEAS*), in which the court confirmed that a charterer's liability for late redelivery is based on the parties' intentions at the time of contracting. The decision inspired quite a bit of controversy when it was issued in 2008, the main issue for debate being whether or not the case established a new test of remoteness for damages in breach of contract.

The facts of *The ACHILLEAS* case are well-known but in brief, as the charter party approached its end, it became clear to owners that charterers would be redelivering the vessel late. The owners had by that time already arranged a lucrative follow-on fixture that was in jeopardy of being lost and owners were consequently forced to agree to a reduction in hire. Owners thereafter sought to recover the lost hire from charterers, and the critical issue was how to properly calculate owners' losses: owners contended that they should recover the difference in hire for the entire term of the follow-on fixture, whereas charterers maintained that the loss was limited to the difference between the contract rate and the market rate for the few days of overrun.

The owners were successful in arbitration and indeed all the way up to the Court of Appeal until charterers prevailed in the House of Lords. In the end, the owners' recovery was limited to the difference between the contract and market rates for the period of overrun. Since the case was decided, much of the debate has focused on the rationale underlying the decision. Some commentators point to the speech of one Judge who seems to have focused on whether, at the time of fixing, the charterers had assumed the responsibility for the owners' loss that would result from charterers' breach. So the question remains: did *The ACHILLEAS* establish a new test of remoteness or not?

To the surprise of many, the case has not been considered in as many reported decisions as had been anticipated. Shortly after *The ACHILLEAS* was handed down, the High Court's decision in *The AMER ENERGY* [2009] 1 Lloyd's Rep 293 cast doubt on whether *The ACHILLEAS* had not created a new test for remoteness, indicating that the House of Lords' decision would have limited impact.

Since then, although the case has been considered relatively widely, it has not been referred to in as many reported decisions as had been anticipated. Two recent decisions suggest, however, that *The ACHILLEAS* has indeed left its mark.

Supershield Ltd v. Siemens Building Technology FE Ltd [2010] EWCA 7, a non-maritime case, involved damage caused by a flood at the claimant's new office building. The flood was caused by the faulty installation of a valve, which caused a sprinkler tank to fill perpetually. The overflow drains were blocked and the resulting flood caused significant damage to the building and its contents.

The court rejected the defendant's argument that the loss was too remote, noting that the traditional test of remoteness in *Hadley v. Baxendale* remained the standard rule. However, that rule has been rationalized on the basis that it reflects the imputed intention of the parties in the ordinary case; but in accordance with *The ACHILLEAS*, where the circumstances require it, a party may not be liable for a loss even though that loss was a "not unlikely" consequence of the breach. *Supershield* therefore suggests that *The ACHILLEAS* recognized a new aspect of the remoteness test that is available in certain circumstances.

Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd [2010] EWHC 542 involved a claim by the charterers that they had lost a subcharter as a result of the owners' negligent maintenance of the vessel's holds. Charterers sought to recover from owners their losses on the subcharter – losses that were clearly foreseeable in the traditional sense. Owners, relying on *The ACHILLEAS*, argued that they had not assumed responsibility for these losses and were therefore not liable for them.

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Charterers prevailed. Hamblen J distinguished *The ACHILLEAS*, noting in particular that it was an unusual case, that there was no finding in the present case of a particular market understanding, and that the subcharter was for a finite and predictable period. These observations would tend to suggest a desire to limit *The ACHILLEAS's* impact.

However, Hamblen J confirmed the understanding of *The ACHILLEAS* that the *Supershield* court explained. There now appear to be two approaches to remoteness: the first is the time-honored "orthodox approach" dating back to *Hadley v Baxendale*, which is the general test to be applied in most cases. The second, described as the "broader approach," is to be applied in "unusual" cases in which "context, surrounding circumstances or general understanding in the relevant market" require it. In such circumstances, it would be appropriate for a court to consider whether a party had assumed responsibility for the particular loss.

AN ITCHY TRIGGER FINGER AND EARLY REDELIVERY

In the May 2010 issue of *CURRENTS*, the managers reported on a decision of the Commercial Court regarding an owner's obligation, when a charterer redelivers the ship early in breach of the charterparty, to be able to quantify and document its losses. Unfortunately, the problem of early redelivery is a recurrent one in the present economic climate. In addition to the question of how to measure damages, these disputes also present other, more fundamental issues, such as whether the charterer has in fact redelivered the ship early and, if so, whether owners have accepted the redelivery.

In a recent London arbitration, the tribunal was asked to consider just these kinds of issues, among others. In that case, the owners had fixed the vessel to charterers on April 12, 2005, for a period of 24 months, +/- 30 days in charterers' option. The daily hire rate was US$12,750, less address commission and brokerage. Redelivery was to be "DLOSP one good safe port" in a range that included "Far East / South East Asia."

In accordance with the charterparty terms, owners delivered the vessel into charterers' service at 0001 hrs on July 26, 2005, so the earliest possible redelivery date was June 26, 2007. But on September 4, 2005, charterers sent a message to owners complaining that the hire rate was too high for a vessel of this size in the current market and asking owners to agree to a reduced daily rate of US$7,000. The owners declined and, on September 6th, the charterers sent a further message advising that, "due to insurmountable losses incurred on all ships under its charters *(sic)* since the spring of 2005," charterers gave seven days' notice of redelivery upon DLOSP Shanghai on September 12th. Charterers left the door open for owners to reconsider the proposed reduction in hire, failing which the message was to be treated as definite notice of redelivery.

In response, owners advised that they were looking into substitute employment for the vessel to minimize losses, but that they considered charterers to be in breach of the charter party on the basis of the premature redelivery. Owners reserved their rights to claim unpaid hire, in addition to all other losses and expenses incurred as a result of charterers' breach.

In the event, the vessel was in fact redelivered on September 11, 2005, at Shanghai.

The owners contended that, by giving notice of redelivery before the minimum charterparty term had expired, charterers were in anticipatory repudiatory breach and that, by their own reply, owners had accepted that. Owners claimed damages of US$1,795,750 (for the repudiatory breach) and US$15,078.24 (for the balance of hire), for a total of US$1,810.828.24, plus interest and costs.

Charterers denied that they were in breach. They claimed that their September 6, 2005 message was merely an indication that they *might* redeliver early – in other words, it was just a negotiating tactic used in an effort to persuade owners to agree to a reduction in the daily hire rate. But even if their message did amount to an anticipatory repudiatory breach, charterers alleged that owners' response did not accept charterers' message as a wrongful repudiation. As a result, charterers' position was that the owners were not entitled to treat the charterers' conduct as repudiatory; in fact, by taking the vessel back on September 11th, it was the owners who had wrongfully terminated the fixture.

The Tribunal rejected charterers' arguments. They held that charterers' September 6th message was, in fact, an unequivocal notice of their intention to redeliver early, which amounted to an anticipatory repudiatory breach. Likewise, owners' response was a clear acceptance of that breach, so owners' claims succeeded and charterers' counterclaims were rejected. The owners were entitled to damages for the period from the date of redelivery (September 11th) until the earliest contractual redelivery date (June 26, 2007), or 653 days, based on the difference between the charterparty rate and the market rate for a charterparty on approximately the same terms for the period of shortfall. After accounting for commissions, owners were awarded the sum of US$1,728,409.38 for lost earnings, as well as US$15,078.24 for the balance of hire owed.

NEW NYPE INTER-CLUB AGREEMENT COMES INTO FORCE ON SEPTEMBER 1, 2011

In its Circular No. 23/11 dated August 3, 2011, the club alerted its membership to the fact that the 1996 NYPE Inter-Club Agreement ("ICA") has been amended. This new variant of the ICA became effective as of September 1, 2011, and will be known as "Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011)" (the "2011 ICA").

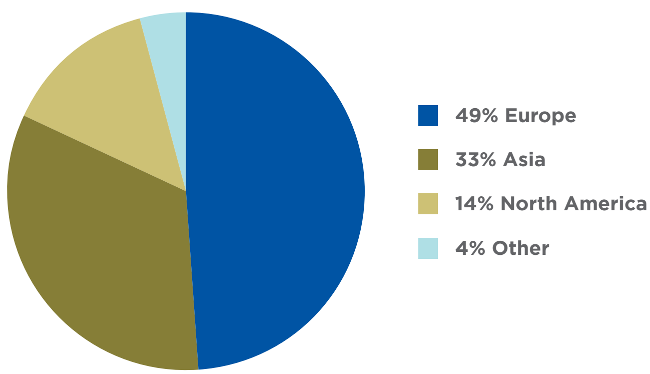
This new clause is significant because it establishes a contractual right to security for the vessel owner or disponent owner, provided that reciprocal security is given to the other party. Previously, under the 1970 and 1996 versions of the ICA, it had been decided by certain courts that the right to such security under the ICA could only be requested after the underlying cargo claim had been settled. This consequence often left the vessel owner/disponent owner unsecured and without recourse for any indemnity rights following the settlement of cargo claims.

The 2011 ICA remedies this inequity and allows for security to be demanded even if a right of apportionment has not arisen. As long as the claim constitutes a cargo claim as defined by the ICA, and as long as the notice period in Clause 6 is satisfied, the security demand must be honored.

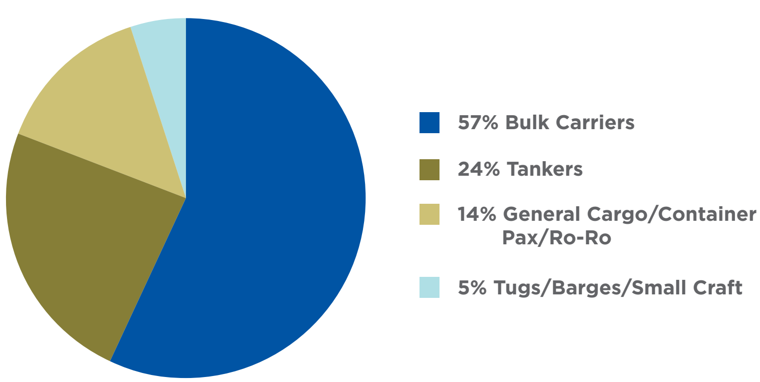
Our Association and the International Group have recommended that its members specifically incorporate the 2011 Agreement into all future charterparties on NYPE and Asbatime forms. Based on previous experience of attempting to obtain security for cargo claims, the ICA 2011 is welcome as it will significantly reduce the time and costs involved in dealing with security issues. Members are strongly encouraged to incorporate this provision to ensure that all rights of recovery under the ICA can be preserved to ensure the enforceability of any cargo indemnity claims against their charterparty contract.

MEMBERSHIP PROFILE, NOVEMBER 2011

P&I TONNAGE BREAKDOWN BY REGION



P&I TONNAGE BREAKDOWN BY VESSEL TYPE



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