CURRENTS

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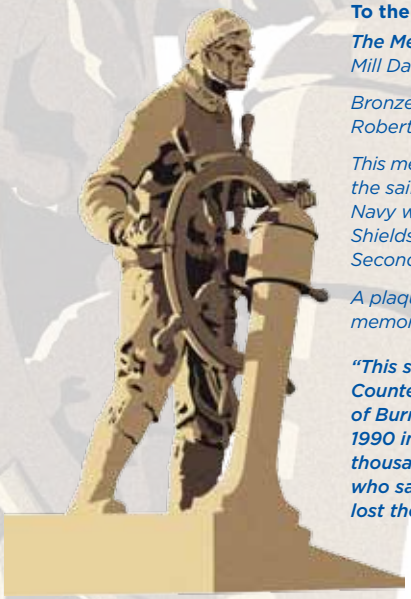

To the left and page 35:

The Merchant Navy Memorial, *Mill Dam, South Shields, UK*

Bronze sculpture by Robert Olley

This memorial commemorates the sailors of the Merchant Navy who sailed from South Shields and lost their lives in the Second World War.

A plaque on the memorial reads:

"This statue was unveiled by Countess Mountbatten of Burma on 19th September 1990 in memory of the thousands of merchant seamen who sailed from this port and lost their lives in WWII.

Unrecognized, you put us in your debt,
Unthanked, you enter or escaped the grave,
Whether your land remember or forget,
You saved the land, or died to try to save."

John Masefield, Poet Lauriet

MANAGEMENT CHANGES

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

NEW YORK

JOHN POULSON Vice President & Pricipal Surveyor

LONDON

SEBASTIAN TJORNELUND Marketing Assistant

PIRAEUS

DANAI MANTA Claims Executive

Cover Art:
A ship's officer and some of the crew enjoy the evening breeze during a moment of downtime.

CURRENTS is edited by:
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Mirror NYC

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Mr. John Steventon

INTRODUCTION

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

STAYING COMPETITIVE IN A COMPLEX WORLD

The older we get, the more we reminisce. This can be boring for young people who find themselves in earshot, particularly if they have no easy means of escape. It can be all the more irritating for the young when the past is portrayed as a golden age when doing business was an alloyed delight and, more generally, everything in the garden was lovely!

It never was, of course. But life was simpler. This is as true of the P&I world as it is of anything else viewed retrospectively through the spectacles of the present, particularly where those spectacles are worn by someone whose career started in those halcyon days of untrammeled simplicity.

There is a modern tendency to equate complexity with sophistication. However, only the most hard-bitten nostalgist would claim that today's P&I insurers are less well equipped to respond to the needs of their constituents than they were in the past. On the contrary, there has been unrelenting progress in the provision of P&I as an increasingly vital component in the commercial inventory required by shipowners to conduct their affairs in an ever more demanding business climate.

This is especially true of the American Club's experience. The steady product and service development in which the Club has been engaged over the past fifteen years has enabled it to occupy at present a thoroughly respectable place at the center of the P&I industry. Other clubs, and other stakeholders in the business, have also of course seen their capabilities and reach expand in recent years.

Where do the demands of progress lead in the future? The answer to that question must be informed by a recognition of what shape the emerging P&I landscape is likely to take. On any analysis, it will be challenging. Political and regulatory demands are increasing, the claims environment – relatively benign as to attritional exposure over the past few years – is likely to become less favorable over time, and the cover and service needs of shipowners will surely grow.

The current realities of the global economy, and the position of the shipping industry within it, are not encouraging. The overall climate remains difficult, characterized by very slow growth, and in some places recession, in the developed world and more subdued economic progress in the emerging economies.

Shipping itself suffers from an oversupply of tonnage, operating margins are at historically low levels, and pricing power in general is heavily compromised. It is to be hoped that global economic conditions improve over the years ahead, so as to create more uplifting prospects for shipping and, by extension, the clubs which serve it.

In this environment, the need for P&I underwriters to stay competitive is of critical importance. Competitiveness is a complex idea, where price and value are of course related, but by no means the same.

To stay competitive in a demanding commercial climate, a P&I underwriter will need to maintain strong core capabilities, nurture continuous improvement in cover and services, and innovate and differentiate in a focused manner specific to the market sectors in which that underwriter has chosen to be most active.

Member, client and all other stakeholder relationships must be collaborative and transparent, and linked to specific service outcomes rather than the mere provision of standardized responses to generic problems. Pricing should be realistic but sensible and, while recognizing the dynamics of the market, must always respect the collective interests of the mutuality, and of other stakeholders in the enterprise.

These are generalities, of course. The quotidian delivery of a competitive product requires the application of these principles to the immediate demands of everyday commerce. That is a challenge in itself! But whatever the circumstances of a particular transaction, the American Club remains committed to doing its best in every element of Member and client service. This has been a constant theme in its development over the years, and will remain so in the future.

In consequence, even if graybeards may complain about the complexity of the modern P&I landscape, Members, and the American Club's other friends and associates can be certain that, while nostalgia can be fun, the Club has the need to stay competitive firmly in its sights!

CLUB'S POSIDONIA 2012 RECEPTION FOCUSES ON CHARITY

The Club welcomed Members and friends alike to our Posidonia 2012 reception that was held at the Royal Olympic Roof Garden in Athens on Thursday, 31 May. This year's event in addition to thanking its Greek membership for their support, took on special importance as a result of austerity measures in Greece that have hit the average working family especially hard. These measures have led to a greater proportion of the population struggling to support themselves and provide even the most basic needs. A committee of the Club's Greek board of directors and representatives of the managers, Shipowners Claims Bureau Inc. led an effort to identify three quality charities to help the rising number of homeless, destitute people, people with special needs, as well as those in general need.

The Club's target donation was €60,000, to be split evenly among the three charities. However, in addition to this Club donation, a number of club directors as well as the managers pledged such significant amounts that more than doubled this figure.

These charitable donations are being distributed equally to: Krikos Zois, Argo and I Hara, the three charitable causes chosen by the Club's committee after careful investigation of various charities, all with special connections in some way to the shipping sector. Further donations were collected and combined with a "Matching Challenge Campaign" for guests from the Greek shipping, insurance and legal communities, assisting in the total amounts to date reaching close to €200,000.

HE Mr. Daniel Bennett Smith, US Ambassador to Greece.

Stuart Todd, Senior Vice President and Head of Underwriting & Marketing greeting guests.

Joe Hughes addresses guests at the reception with HE Mr. Daniel Bennett Smith, US Ambassador to Greece, to his right. Ambassador Smith also addressed the reception.

Arnold Witte, Chairman of the American Club's board, welcomes guests to the Club's Posidonia 2012 reception and fundraiser.

Panagiotis Stravelakis from Phoenix Shipholding Corporation (left), Club Director Markos Mariinakis (center), George Tsimis, Senior Vice President of Claims for the Shipowners Claims Bureau, Inc. (right) share a laugh.

Club Directors Chih-Chien Hsu (center) and Arnold Witte (right) chatting about the challenges to the industry.

THE DEEPWATER HORIZON SETS OPA-90 PRECEDENTS

By: Alfred J. Kuffler and John J. Levy
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Montgomery McCracken Walker & Rhoads LLP
New York and Philadelphia

The April 20, 2010 *Deepwater Horizon* disaster has produced important recent judicial decisions interpreting OPA-90 which will be of interest to owners, operators and charterers of vessels, including mobile offshore drilling units, lessees of oil exploration and production concessions in US waters, and their respective insurers. This article reviews those aspects of the decisions representing the first judicial pronouncements on the issues the litigation has raised and offers some comments on their significance. As the first decisions, these questions will likely have influence beyond that normally attributable to single trial court level determinations.
The following is an edited version of his remarks.

First, a very brief review of the OPA liability regime as it relates to the issues discussed below. The "Responsible Party" ("RP") from whose "vessel," "offshore facility," or "onshore facility" oil is discharged or for which there is a substantial threat of discharge, is liable for "removal costs" (clean-up) and "damages", including natural resource damages; the RP is also exposed to substantial penalties.

The RP's defenses are limited to establishing sole fault on the part of an act of god, and act of war, or a third party with whom the RP does not have a "contractual relationship." In most instances, the RP will find that the facts do not provide a defense. OPA does, however, preserve the RP's rights under general maritime law to seek indemnity or contribution from third parties whose activities may have caused the spill in whole or in part. For example, charterers who may have breached warranties fall into this category. In fact, with the *Deepwater Horizon*, BP availed itself of these rights by suing Transocean as the rig owner and operator, Halliburton, which was cementing the well, and Cameron, which built the blowout preventer which failed to contain the crude coming up the drillpipe from below the ocean floor.

Before discussing the decisions, it is worthwhile to identify the players and set out the relevant undisputed facts. BP and Anadarko were the co-owners of the Macondo Well, located on the seabed in the Gulf of Mexico. A blowout of the well occurred on April 20, resulting in explosions and a fire on the *Deepwater Horizon*, a mobile offshore drilling unit ("MODU"). It sank two days later, breaking the riser pipe that connected it to the Macondo Well. Oil flowed from the seabed through the blowout preventer ("BOP") and remaining section of riser pipe, and then into the Gulf. This release into the ocean water took place well below the water's surface.

The subsequent discharge of millions of gallons of oil into the Gulf resulted in multiple lawsuits being filed, which were consolidated. Transocean, the owner of the MODU, filed a shipowner's Limitation Action, 46 U.S.C. § 30501, et seq. In the Limitation Action, numerous claims were asserted, primarily for personal injury, wrongful death, economic loss, and property damage. In another case, the US government filed suit against BP, Anadarko and Transocean, claiming natural resource damages and civil penalties under the Clean Water Act. The United States also sought a declaratory judgment that all three of these defendants were "Responsible Parties" under OPA 90 and hence liable for removal costs and damages from the discharge of oil.

THE THREE DECISIONS ARE AS FOLLOWS:

The February 22, 2012 Decision[1]

In a February 22, 2012 decision, the first issue presented was under what circumstance the owner of a MODU can be held to be the "Responsible Party" under OPA 90.

As the lessees of the seabed below the *Deepwater Horizon*, BP and Anadarko did not generally dispute their liability for removal costs and damages under OPA 90 as the "Responsible Parties" for an "offshore facility." [33 U.S.C. § 2701(32)]. But the US government also sought to hold Transocean, the owner of the MODU, jointly and severally liable under OPA because the oil discharged from the BOP and the remaining riser section, which were deemed "appurtenances" of the *Deepwater Horizon*, a vessel. Under OPA 90, the owner of

a vessel that discharges oil into the sea can be deemed a Responsible Party when the oil flows from "appurtenances" to the ship.

The court held that the answer turned on how the MODU was being used at the time of the incident and whether the discharge occurs beneath the water's surface. The court's ruling lays down three, easy to follow rules.

1. If the MODU is being used as an offshore facility (is not being navigated) and the discharge occurs beneath the water's surface, the lessee/permittee alone will be the responsible party. The lessee's liability for removal costs is unlimited under OPA 90 and potentially limited to $75 million for other damages. [33 U.S.C. § 2704(a)(3)]
2. If the MODU is being used as an offshore facility and the discharge occurs on or above the water's surface, then the RP will be the owner/operator of the MODU up to the limits of liability for a tanker. Excess liability will be shouldered by the lessee.
3. If the MODU is not being used as an offshore facility — such as when it is moving from one location to another — the responsible party for the discharge will be the owner/operator of the MODU.

In the *Deepwater Horizon* case, the MODU was being used as an offshore facility when the discharge happened, and therefore BP and Anadarko as lessees of the area being drilled were held to be the "Responsible Parties" with respect to the subsurface discharge of oil, even though the discharge was from appurtenances to the vessel.

Because BP and Anadarko were both held to be responsible parties, the next issue the court reached was whether their liability under OPA was joint and several. The words "joint and several" do not appear in OPA. The statute does set the standard of liability with reference to the Clean Water Act, where liability is joint and several. But a recent Supreme Court case, *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 559 (2009), had held that the CWA's liability standard did not apply to the Comprehensive Environmental Response, Compensation and Liability Act, and this caused the DWH court to consider the issue because OPA's liability scheme follows that of CERCLA very closely.

The court concluded that OPA's legislative history made explicit Congress' intent to apply the CWA's standard of joint and several liability to OPA. BP and Anadarko were therefore held jointly and severally liable for removal costs and damages insofar as the United States and third parties are concerned. It remains to be seen how BP and Anadarko will treat this exposure as

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between themselves. Presumably, the losses will be allocated under the agreement governing the operations under the lease from the United States for the Macondo block.

This decision appears to be the first judicial pronouncement relating to the liabilities of a MODU depending on its function at the time of the spill, the liabilities of a lessee for subsurface releases, and confirmation that OPA imposes joint and several liability where there is more than one RP. This latter ruling may have broad application where one RP, as, for example, an independent tanker owner does not have the financial wherewithal to satisfy the liabilities it has incurred to third parties and should apply whether the Coast Guard has designated multiple RPs, or an RP attempts under OPA to have a third party whom it contends is solely at fault treated as an RP.

January 26, 2012 Decision[2]

The issue of significance to all those falling under the OPA liability scheme in this opinion concerns the enforceability of indemnification clauses in contracts that call for one party to indemnify the other without regard to fault, not only for removal costs and damages but also for both punitive damages and penalties arising from strict liability statutes like OPA and the CWA. Remember here the repeated press prognostications that the penalties could reach into the billions.

The drilling contract between BP and Transocean allocated to BP the risk of pollution originating beneath the water's surface, and to Transocean, the operator of the MODU, the risk of pollution originating on the water's surface. Thus, BP agreed to indemnify Transocean for the risk of subsurface oil pollution, "without regard for whether the pollution ... is caused in whole or in part by the negligence of Transocean ... and without regard to the cause or causes thereof ... the unseaworthiness of any vessel ... breach of contract, strict liability, ... gross negligence."

Transocean's limitation action opened the floodgates to hundreds of claims filed against it. Transocean then impleaded BP (under Fed. R. Civ. P. 14(c)[3]), thus tendering

"The drilling contract between BP and Transocean allocated to BP the risk of pollution originating beneath the water's surface, and to Transocean, the operator of the MODU, the risk of pollution originating on the water's surface."

BP to the claimants and demanding judgment in the claimants' favor. Meanwhile, in the United States's case, the government asserted claims against BP and Transocean for OPA 90 strict liability for removal costs and damages, and for penalties under the Clean Water Act, 33 U.S.C. §1321(b)(7). In both cases, BP and Transocean cross-claimed against each other seeking contribution and indemnity based upon the language in the drilling contract. Against this background, the court was asked to decide whether BP was required to indemnify Transocean for gross negligence, strict liability and statutory fines and penalties. The court answered "yes" to strict liability under OPA and to gross negligence, but "no" to reckless or intentional conduct," punitive damages, and fines and penalties.

The court reasoned that the contract was a fair allocation of risk and liability between sophisticated parties, and nothing in OPA prohibited a party from indemnifying another for gross negligence. However, the court also reasoned that BP was not required to indemnify Transocean for reckless or intentional conduct and that the enforcement of the indemnification

agreement on that basis would be void under public policy grounds. The court also rejected Transocean's effort to foist punitive damages and CWA penalties on BP, noting that such penalties were designed to punish and deter future pollution, and therefore could not be passed along under a contract for someone else to pay. To permit such a transfer of risk was seen to circumvent the "punish and deter" features of these liabilities.

August 26, 2011 Decision[4]

There are many complicated issues discussed in this opinion: Whether a MODU is a vessel for purposes of applying federal admiralty jurisdiction (it is) and whether OPA displaces general maritime law claims for punitive damages (it does not). But there is a simple issue that is worth noting.[5]

Before a claimant either brings a lawsuit against the Responsible Party in court, or submits a claim to the NPFC, he must first present the claim to the Responsible Party and either have the claim denied or the RP must take no action for 90 days. The court found that thousands of claimants had not taken this action before filing suit against BP, notwithstanding that OPA clearly required that claimants must first "present" their OPA claim to the Responsible Party before filing suit or submitting the claim to the Fund. While this requirement appears to be jurisdictional - meaning that failure to follow the required procedure should lead to dismissal of the claim - the court ruled that in the face of the thousands of pending claims, it would not undertake an examination of each claim and allowed the claims to proceed. This action, while taken in the interest of judicial economy, may well have provided BP with grounds for a successful appeal. However, with the voluntary settlement fund BP had established which now has been taken over by the court pursuant to a settlement between BP and thousands of claimants, the issue is probably moot.

But the lesson remains: RPs should follow this presentment requirement to the letter, as should claimants.

These opinions are thoughtful and well reasoned. Whether one agrees with the results or not, these three decisions are likely to exert considerable influence in the future if they stand. Given the amounts at stake, appeals must be anticipated, but piece by piece BP is settling with the major players and it may be that, as time passes, settlements will make appeals unnecessary and some or all of these trial court decisions may survive unchallenged in the *Deepwater Horizon* litigation. But for the timebeing they represent the only judicial pronouncements on the issues covered and must be taken into account in any analysis of oil pollution liabilities.

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1 *In re Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, --- F.Supp.2d ----, 2012 WL 569388, E.D.La., February 22, 2012 (NO. MDL 2179, 10-4536).

2 *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on April 20, 2010*, --- F.Supp.2d ----, 2012 WL 246455, E.D.La., January 26, 2012 (NO. MDL 2179, 10-2771, 10-4536).

3 Rule 14(c): Admiralty or Maritime Claim (1) Scope of Impleader.

4 *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on April 20, 2010*, 808 F.Supp.2d 943, 2011 A.M.C. 2220, E.D.La., August 26, 2011 (NO. MDL 2179).

5 It should be noted that in an earlier decision the Deepwater Horizon court decided that OPA does not preclude the general maritime rule allowing punitive damages in the appropriate case. This decision is at odds with the First Circuit's decision in. *South Port Marine, LLC v. Gulf Oil Limited Partners*, 234 F. 3d 58 (1st Cir. 2000), holding that OPA as a comprehensive environmental liability scheme does not include punitive damages as a remedy available to those injured in a pollution incident. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) confirmed that admiralty courts could award punitive damages in the pollution context, but those claims arose prior to OPA's enactment. Thus, we think the availability of punitive damages under OPA-90 remains an open question.

THE SALVAGE OF ULTRA-LARGE VESSELS

By: Geoffrey Holland
Staff Surveyor
Braemar Technical Services Inc
(incorporating The Salvage Association)
Montreal, CANADA

The largest container vessels at sea today are almost 400m long and 56m wide. The height from the summer waterline to the top of the upper tier of containers can be about 36m. They can carry 14,770 teus (20ft standard containers), including approximately 7,700 carried on deck. Laid end to end, the containers would form a line 92km long.

In 2014, even larger vessels are expected to come into service, designed to carry approximately 18,000 teus.

Passenger ships also continue to increase in size. The largest passenger ship afloat today is 360m long, has an extreme breadth of 60.5m and sits approximately 62m above the water when floating at its summer draft. The ship can carry around 8,600 passengers and crew, accommodated over 16 decks.

Quite clearly, if a vessel of the sizes outlined above were to run into grave difficulties, any salvor would be presented with major technical and logistical challenges.

SOURCING OF SUITABLE EQUIPMENT

The scale of the salvage operation would likely necessitate the mobilization of specialized, very high capacity equipment such as crane barges/ships, barges, pumps etc. to the casualty site. Floating cranes, whether on ships or barges, with sufficient reach, and sufficient safe working load at maximum reach, needed to discharge containers from the deck of a listing, fully-laden, ultra-large containership are few and far between, owing to their limited application, building, maintenance and operational costs.

Although salvors will make use of what is immediately available on board the stricken vessel, useful resources are likely to be restricted, as most of the ultra-large vessels are gearless, and unable to contribute to lightering operations.

CASUALTY LOCATION

The likelihood of successfully sourcing the specialist equipment likely to be required is greatly improved if a casualty happens to occur close to a major maritime or offshore energy hub. However, if a casualty occurs in a more remote location, the chance of successfully locating the equipment required locally diminishes. This impacts not only on overall costs, but also on the salvor's ability to intervene rapidly in order to stabilize the situation.

LOGISTICS

Timely intervention is crucial. Challenges are likely to be encountered in both sourcing the equipment required, and getting it where it's needed quickly. The nearest suitable crane could be weeks away from the casualty site, which could delay the earnest start of the salvage operation.

The time required to make the casualty as environmentally safe as possible is expected to be much longer on an ultra-large vessel. For example, the ultra-large container vessels carry over 17,000 cubic meters of fuel and lubes, most of which may need to be removed.

While the clock is ticking, not only are costs increasing, but also the vessel is being exposed to the risks inherent in the environment. Wind and waves can rapidly turn a salvage operation into a wreck removal operation.

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.

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SCALE

All casualties requiring the assistance of salvors are difficult, and each one presents its own unique set of circumstances. Salvage of an ultra-large vessel compounds those challenges, because of the sheer scale involved. The equipment needs to be higher capacity, naval architects are likely to be challenged with limited options for ballasting, maintaining or recovering stability and ensuring structural integrity, plus the shoreside support needs to be more expansive .... where do you put 92km of containers or 8,600 evacuees? The challenges involved have been very dramatically demonstrated by the Rena boxship casualty in New Zealand; a significantly smaller vessel that has presented numerous problems to the salvors.

THE MEDIA

The media today has spread far beyond TV cameras and reporters' microphones. Nearly every cell phone can record video and have the recording up on YouTube, Facebook or Twitter in seconds.

This can lead to events being misinterpreted or misrepresented, and in turn lead to a spiral of misinformed commentary that can undermine the best efforts of the salvors. One only needs to look at the scale of the misinformed comment and speculation surrounding the Costa Concordia to understand this.

Most salvage companies are very aware of this, and it is not uncommon to see a "Media Management Officer" accompanying the salvage team.

The salvage master, already in a highly stressful situation, is under even more pressure to be seen to be "doing the right thing". With every move scrutinised, and subject to ever increasing regulation, the freedom to move in and "get the job done" is greatly reduced. Not only does he need to be technically highly competent, be able to motivate and lead a team in circumstances that are usually extremely dangerous, and think "out of the box" to come up with unique solutions to unique challenges, he also needs to be a diplomat, a spokesperson and able to convince government authorities that his salvage plan is the right way forward.

THE ROLE OF THE SURVEYOR

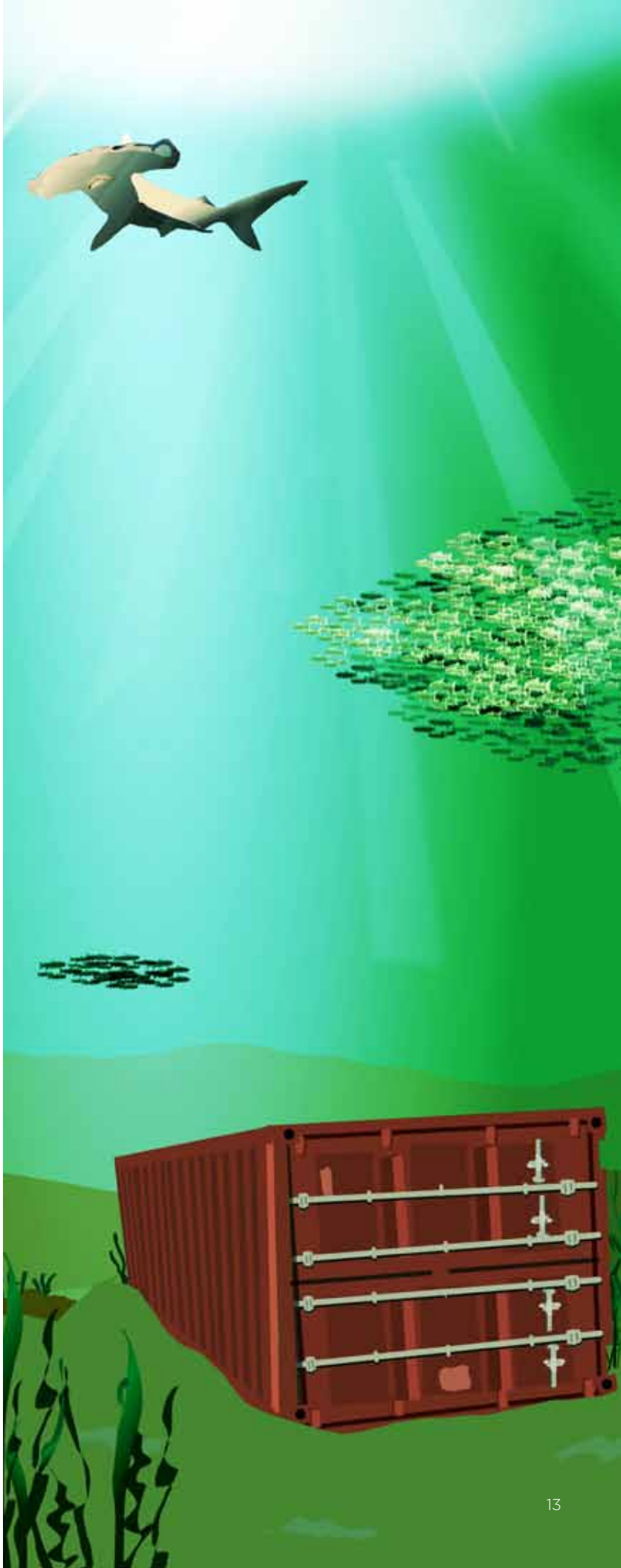
The surveyor, whether appointed by H&M, P&I or other interests, has a crucial role to play. Whilst he is there to attend to the interests of his principals, those interests are generally common to all parties involved, and they are to resolve the situation as efficiently, safely and cost effectively as possible. He will contribute whatever he can to the team effort, whether it's useful local knowledge, technical and practical experience gained through previous experience, or simply knowing when to stay in the background.

He will be there to assist the salvage master in his decisions, or to discuss any planned actions that might require clarification at a later date and to monitor the balance of salvor's best endeavors against escalating costs. When the dust has finally settled, all parties can be assured that the actions and decisions taken were considered, at the time, to be the most prudent given the circumstances; or that in the event that they were questioned, they were questioned in good time. The decisions taken during salvage of an ultra-large vessel are likely to have very significant cost implications, and need to be thoroughly examined.

CONCLUSION

In a "bad case scenario", we could one day be facing the grounding of an ultra-large vessel in an environmentally sensitive, remote, exposed location. The challenges facing the marine community will be massive, but not insurmountable. Our marine industry has been built on challenges, and with enough foresight and planning, a casualty of this nature need not become a disaster.

NOTE: *The author has recently been appointed to the panel of Special Casualty Representatives (SCRs).*



By: James Brewer *

SERVICING AMERICAN CLUB MEMBERS IN ASIA AND THE PACIFIC RIM

Shanghai office's fifth anniversary

It might not have been obvious at the time, but a one-page notice to American Club members almost five years ago turned out to herald one of the most significant developments in the club's history – in all 90 years of it, at that stage.

Circular no. 20/07 was headed Service Provision in the People's Republic of China and Elsewhere in Asia, and the managers went on to announce that they had appointed an exclusive correspondent in China, through the establishment by SCB Management Consulting Services Ltd of a representative office in Shanghai.

It meant that the club, the only mutual protection and indemnity association domiciled in the Americas, had become the only member of the International Group of P&I Clubs offering service directly from the bustling Chinese metropolis that is Shanghai, and which now ranks as one of the world's leading ports and container hubs.

More than that, the development opened the way for a substantial increase in the Asian element in the composition of club membership. Naturally, most P&I clubs take a great interest in China, but the American Club's firm connection with a country base has enabled it to add an all-important personal touch.

The representative office, in a central and readily accessible area of Shanghai, has been so successful in its goal of enhancing claims and other services to American Club members trading to and from China and a wide region beyond, that many new members have been attracted to enrol their tonnage.

If anyone had doubted the club's determination to move decisively from a membership once dominated by US-based interests to a community of shipowners and charterers from all continents, they needed simply to peruse the statistics. Even the strong European emphasis which was a feature of a first stage in the strategy has been balanced by a swing to the Asian market.

As recently as 2009, club membership included a 63% European contingent and 18% Asian contribution. The very latest figures put Europe at 46% and Asia at 40%, and of the Asian tonnage, around 70% is Chinese. The US, Latin America and the Middle East continue to provide the remainder of the entries.

Raymond Sun, the club's exclusive correspondent in Shanghai, says that the wise decision of Joe Hughes and his colleagues at Shipowners Claims Bureau to recommend a presence on the ground in China has paid off. "Before that, the American Club was relatively unknown in China and Asia," says Mr Sun.

The timing of the debut of the Shanghai office was handy, for it caught the pre-2008 shipping boom when companies were investing and building, and when trading companies were moving into ship ownership. Even though shipping trade has cooled, there remain opportunities for the club to enlist newcomers, and for

> Raymond Sun, the club's exclusive correspondent in Shanghai, says that the wise decision of Joe Hughes and his colleagues at Shipowners Claims Bureau to recommend a presence on the ground in China has paid off.

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expansion by means of secondhand tonnage acquired by established Chinese companies.

Mr Sun and his colleagues advise any club member who encounters problems in an extensive area that embraces China, Hong Kong, Taiwan, Singapore, Indonesia, Malaysia, Philippines, South Korea, Japan, Australia, India, Pakistan and Bangladesh. The American Club's guarantee is being acceptable to more and more parties in China. In one recent case, the chief representative assisted an owner, whose ship was arrested in China, by providing a club guarantee, thus releasing the vessel after only one day as opposed to the more common period of several days.

The most frequent cases as in other club areas relate to cargo claims (both loss of or damage to cargo), personal injury, collisions and occasional pollution incidents. Personal injury cases are becoming more difficult to deal with nowadays, due to the emotions of the crew or persons involved.

Authorities as well as insurers are concerned at the growing number of collisions in Chinese waters, often between merchant ships and fishing vessels. Most casualties involving fishing vessels are near Ningbo/Zhoushan, and Weihai/Yantai. In the past two years, there were three cases where the fishing boats were sunk together with the tragic loss of the crew.

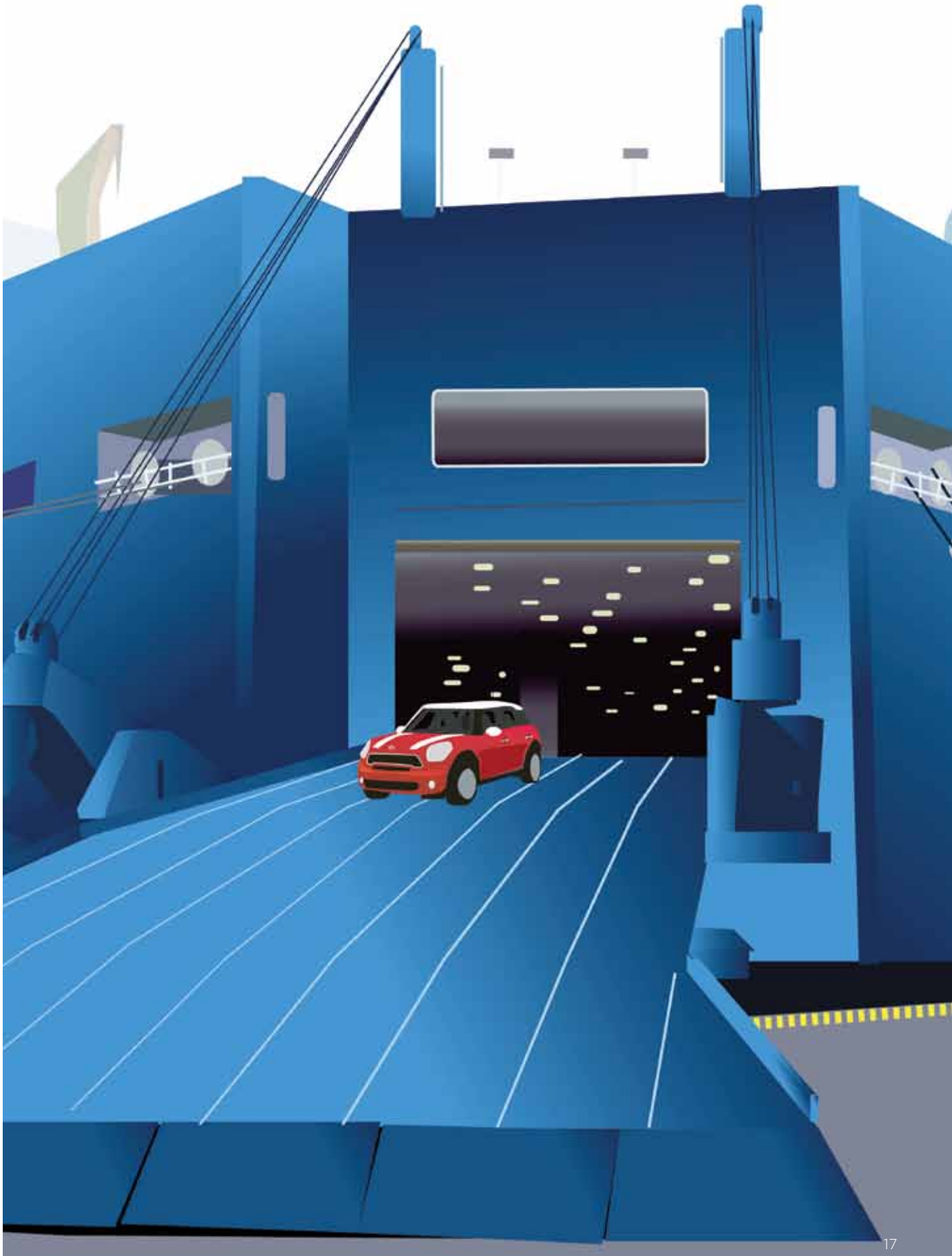
Mr Sun – supported in the office by claims executives Jeff Liu and Yelin Tang, and office manager Annie Chan – has an impressive background in maritime law, diplomacy and studies. He speaks Putonghua, English, Cantonese and Swedish, reflecting his varied career path. Born in Hebei province, he gained his BSc degree in 1983, and although having studied navigation ("I was supposed to be a master mariner") he joined the Ministry of Communications in Beijing. This led to his first overseas experience, with the Chinese embassy in London, including attendance at deliberations of the International Maritime Organization, especially meetings of its key maritime safety committee.

He went on to study at the IMO-supported World Maritime University in Sweden. The next step was taking up an appointment as claims manager for a P&I club in Hong Kong, followed by legal practice with international firms in the Special Administrative Region. After 13 years in Hong Kong he returned to the People's Republic, to work for the first time in Shanghai, for the American Club.

Having qualified in law in England and Wales and in Hong Kong, Mr Sun is well placed to advise not just on P&I matters, but on freight, demurrage and defense cases. His colleagues' knowledge of Chinese law adds to the quality of Shipowners Claims Bureau FD&D assistance in disputes involving shipbuilding and buying, selling, owning and operating ships.

The club management's confidence back in 2007 that Mr Sun and his staff would be there "over the months and years to come" to devote themselves to service to members has proven amply justified.

** James Brewer is a freelance writer and commentator on international maritime and marine insurance/P&I matters. He was recently in Shanghai.*



SHIP RECYCLING IN THE INDIAN SUBCONTINENT AND BEYOND: PART 2

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This article is the second part of the article by Mr Shashank Agrawal of the Wirana Shipping Corporation – the first part was published in the last issue of *CURRENTS* (No. 33).

This final instalment discusses the benefits of ship recycling by beaching methods, deals with the legal, financial and regulatory aspects of the industry, comments on future prospects, and provides a fascinating insight into the end use of the stripped vessel, listing how 17 basic items and commodities are sold or passed on. As the author says, the recyclers have developed a re-use market for every nut, bolt and the proverbial kitchen sink found on board.

Wirana is the oldest cash buyer and was established in 1983.

PROCESS OF BEACHING IN THE CLEAN AND GREEN WAY

The beaching method for ship recycling has been successfully practiced for several years along the 10 km long beach at Alang which has a very high tidal gradient, leaving vessels out of the water during low tide. In order to pronounce a particular method of ship recycling as environmentally friendly, an exhaustive study of beaching or drydocking should be carried out, and only then can one conclude accurately about any particular method.

A comparative life cycle assessment has been initiated of beachings compared with drydocking in India, and involves estimating the environmental footprint of each for both facilities construction and subsequent operation. In the preliminary analysis it could be clearly seen that the capability of the beaching method practiced at Alang to recycle is far superior than the drydock method followed elsewhere.

At Alang the following agencies of the Government of Gujarat are involved upon the arrival of the vessel for inward clearances:

1. Gujarat Maritime Board
2. Gujarat Pollution Control Board
3. Explosives Department
4. Customs
5. Atomic Energy and Research Board (AERB)

The wastes that fall in the inter-tidal zone and on the dry portion of the ship recycling yard during the dismantling of vessels remains the same in quality and quantity irrespective of the dismantling method. Those criticizing beaching methods have little or no experience of recycling a large number of different types of vessels.

They have, at best, broken a few small vessels and committed them to landfill sites. The International Maritime Organization's International Convention for the Safe and Environmentally Sound Recycling of Vessels (now the HK Convention of 2009) is indeed a most welcome step since it has provided, for the first time, an international convention that addresses and hopefully systematizes all the operations, so that the health and safety of workers and prevention of pollution of the environment, both at sea and ashore, can be ensured and verified. In the unlikely event that the beaching method of ship recycling is banned, far greater socio-economic harm will be caused to more than 500,000 workers who are employed in the recycling yards on the Indian sub-continent than any adverse effect on the environment. In addition, this will have disastrous consequences on the indirect industries that are fully dependent on this recycling industry for their daily needs.

The benefits of ship recycling by beaching methods as carried out in the Indian sub-continent is environmentally and economically a sound practice and safe for workers. The industry is labor and capital intensive, economically viable for all stakeholders and a highly sustainable activity, considering the socio-economic situation in the region.

LEGAL ISSUES AND ARREST OF VESSELS IN THE INDIAN SUBCONTINENT

Vessels arriving for recycling bring their old love affairs with them. By trading for approximately 25 or more years, owners tend to accumulate legal issues and perhaps

outstanding disputed claims for varying periods in length. Unfortunately, the outer anchorage at the delivery port turns into the battleground for many owners and their creditors, each pulling swords. The recent recession has seen a quicker battle for cash, with many creditors now refusing to allow the credit period to be extended and/or transferred to another trading vessel of the owner. Previously, such flexibility was seen and often agreed mutually between owners and their creditors.

Unfortunately, the innocent cash buyer started getting involved in these battles through no fault of theirs. Upon delivery and payment by the cash buyer to the owner, the vessels would start getting arrested sometimes just short of beaching and sometimes even on the beach. Upon invocation of the indemnities provided for under the governing Memorandum of Agreement (MOA), the sellers most often would refuse or ignore the calls for such indemnification, thereby forcing the cash buyers to underwrite the claims of the original owners/sellers. This causes serious hardships and consequences for the cash buyers who are in any event paying top dollar for each and every vessel, working on extremely low and limited margins, and now being forced to even underwrite such claims to which they had little or no connection.

In courts the ONLY form of acceptable security would be a bank guarantee from a local nationalized bank, which means that the bank should be fully owned and controlled by the Government of India and/or by depositing the claim amount in cash in court. By adopting either of these two methods, the vessel would be allowed to beach or, if already beached, cutting permission would be given. Unfortunately, courts in the Indian subcontinent do not accept P&I club letters for release of the vessel, and these events lead to considerable delays before the courts.

Courts such as the Bombay High Court, the Kolkata High Court and the Chennai High Courts are examples of courts that have Ordinary Original Civil Jurisdiction (OOCJ), which means that they have the Admiralty Jurisdiction to arrest vessels and pass arrest orders irrespective of the location of the vessel as long as it is within the territorial waters of India. The other courts such as Gujarat High Court also pass arrest orders but they do not have the Ordinary Original Civil Jurisdiction. At the time of arrest, counter securities are not required to be put up and usually arrest is granted subject to merits of the case, which is then required to be served upon the master and other local statutory authorities within whose jurisdiction the vessel lies.

CASH BUYERS' POSITION STATEMENT TO IMO

As cash buyers a position statement was sent to the IMO and we reproduce some of the essential and vital points below:

1) MARITIME LIENS

Current Situation: Shipowners may not disclose the existing maritime liens or maritime claims on the vessel to the cash buyer. Once the lien-holder or claimant finds out that the vessel has been delivered for recycling, the creditor is able to arrest the vessel, even after the vessel has been delivered and beached at the recycling yards. The situation is so severe that arrests have been known to be passed on vessels even when the cutting process has started and maybe even half the vessel has been scrapped. Despite ship recyclers providing photographic evidence of the cutting, courts are reluctant to vacate their arrest orders. The original registered owner always closes the one-ship company after delivery.

As a result, both the cash buyer and the recycling yard are left to defend a claim that does not belong to them and puts them under an unacceptable legal obligation. Often cash buyers are also faced with a situation where the original registered owner is in clear connivance with the creditor to defraud the cash buyer and the ship recycler, and is simply supporting the creditor in generating fraudulent and backdated documents to support the claim before the court. This is by far the single biggest financial risk that the cash buyers and ship recyclers face under current conditions.

How do some owners get away with this? In our experience, by either of two ways: (a) by providing fraudulent documents (free of encumbrance certificate from the vessel's flag registry); or (b) registering the vessel under a flag of convenience just prior to delivery of the vessel to the cash buyer.

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Recommendation: The convention must declare that once the vessel has been sold to the cash buyer for recycling, the ship is no longer a ship, and therefore no longer accountable or subject to maritime/admiralty laws or interim orders from arbitration tribunals. Therefore, a claimant or a lien-holder can no longer enforce a maritime claim or lien on the vessel once the ship has been delivered to the cash buyer. At the time of dealing with "delivered vessels", all maritime liens or claims should cease at the time once the vessel arrives at the outer port anchorage. This should be addressed in the convention in order to prevent chaos at the time of delivery of vessel, often a period, when demands are raised by unknown third parties.

Once the IMO recognizes the above, vendors, lenders and other institutions will exercise greater diligence when extending credit facilities to old vessels or to owners without proper financial securities. We believe that, at this time, this process is very lax since creditors are secure in the fact that they are able to arrest the vessel at any time without repercussions.

2) GREEN RESPONSIBILITY

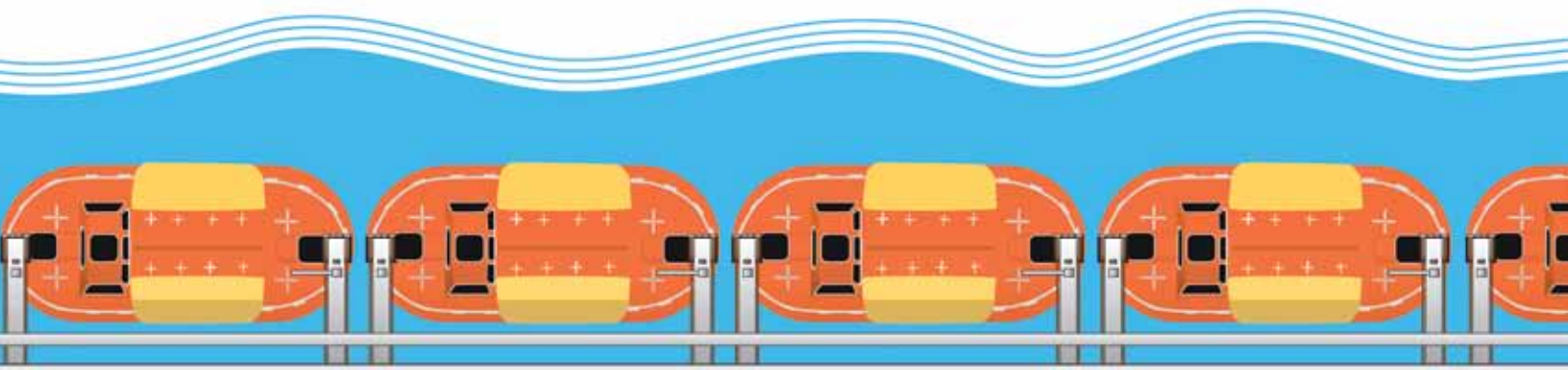
Current situation: At this time, very few (estimated to be less than 5%) of shipowners provide an inventory of hazardous materials onboard the vessel to the ship recycler. With the new Supreme Court ruling in India, this will change. However, in most cases, instead of preparing the vessel for environmentally sound recycling, due to profit incentives the owners tend to simply shift the delivery port of the vessel from India to, say, Bangladesh.

Recommendation: In order to plug this loophole the IMO must mandate that every ship destined for recycling must be prepared by the owner for safe and environmentally sound recycling. Responsibilities for preparing the vessel for recycling (eg, inventory of hazardous wastes and materials) should remain with the original shipowner. The cash buyer should ensure that the owner understands the requirements for recycling, and that the owner prepares the vessel and completes the necessary documentation of compliance.

In the event the owners do not meet the required ship recycling criteria, the cash buyer should have the legal right to reject delivery of the vessel for ship recycling until the mandatory guidelines have been complied with. Once the vessel is delivered to the cash buyer, the documentation prepared by the shipowner should be passed onwards to the recycling yard for further compliance and action. In the event of any misrepresentation in the inventory of wastes, the original registered shipowner should be made liable to compensate the affected parties.

3) LEGAL OWNERSHIP

Current Situation: Vessels are sold for recycling by owners on either basis: (a) as is, where is, foreign port; or (b) delivered Alang anchorage. Under (a), the cash buyer becomes the legal owner of the vessel during the voyage to the recycling yard. In (b), the vessel is delivered to cash



buyers and then within hours, days or weeks redelivered to the ship recyclers. During this period the vessel is not reflagged to the cash buyer. Therefore, the vessel's beaching could be under an expired flag.

Recommendation: The convention must mandate that even though the vessel is delivered to the cash buyer at outer anchorage, the owners' responsibility should not end until the vessel is beached at the recycling yard. Meanwhile, the convention must encourage registration authorities to develop interim registration documents for cash buyers, where the ship can be flagged for a period of 1-30 days. This provision will eliminate the 'black hole' under which several transactions fall at this time.

4) COUNTER SECURITIES

Problem: In all jurisdictions in the Indian subcontinent, a vessel can be arrested at the recycling yard by a petitioner (who has claims against the previous owner or the vessel), WITHOUT lodging any counter-securities. Once the vessel is arrested, the judicial system in the Indian subcontinent can take years to produce a judgment. As a result, even if the cash buyer and/or ship recycler wins the lawsuit, the plaintiff will simply disappear and the defendant is left with years of losses. In many cases, this can easily bankrupt the ship recycler or cause a huge dent in the financials of the cash buyer.

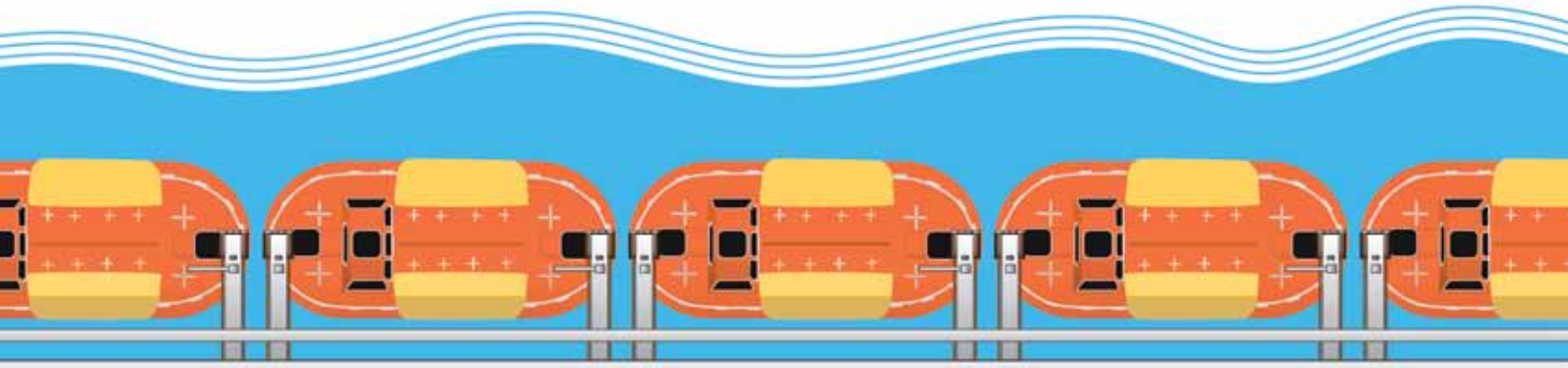
Recommendation: The convention must mandate that in order to arrest a vessel that has already been delivered to the ship recyclers or to a cash buyer, the plaintiff must lodge a cash security in the amount of the value of the vessel using the MOA as a basis for the valuation of the ship along with compound interest (London Bank Rate) for a minimum period of one year. The above should eliminate frivolous applicants who simply intend to extort money from innocent cash buyers and ship recyclers.

5) BEACHING METHOD OF SHIP RECYCLING

Current Situation: The beaching method for recycling vessels has long been a subject for discussion. Non-governmental organizations (NGOs) and organizations with their own agendas have often criticized the beaching method. Often, these reports are without merit and proper analysis of the facts.

India practices the beaching method of ship recycling. Gujarat Pollution Control Board **(GPCB)** has determined that vessels can be recycled safely and in an environmentally sound manner at Alang. Therefore, the convention needs to address the fact that beaching of a vessel is safe and does not damage the environment, contrary to existing media reports. Further, Turkish yards are known to beach vessels as well. Therefore if beaching is considered safe in Turkey as an OECD country, we trust the same parameters would be made applicable to the recycling yards at Alang.

Position Statement: IMO must take a position, which confirms that the beaching is an acceptable method of ship recycling.



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6) DECONTAMINATION

The Convention is a bit unclear on the requirement of "pre contamination". It is our opinion that the responsibility for the decontamination of the vessel should lie at the appropriate recycling yards, since they have the necessary infrastructure in place to deal with the procedure of de-contamination.

7) MEDIA BASHING

Current Situation: The media often publishes inaccurate reports on the working conditions at Alang, creating misperceptions about it. Subsequently, these erroneous perceptions are often perceived as reality.

Position Statement: Since the IMO has spent several years studying the situation and done its own fact-finding, it should create a public relations committee (with a budget) that is responsible for proactively disseminating accurate information on the ship recycling industry in India. When an incorrect report is published on the industry, the IMO must respond immediately with a rebuttal. For a long time now, this industry has been the "whipping boy" of shipping. Most of the attacks on the ship recycling industry in India go unchallenged. This has created a very negative image of the industry. Consequently, the IMO's assistance is urgently required to dispel myths with facts.

In addition to the above, the convention must address the following:

- Recognize the role of the cash buyer in the sale of a vessel for recycling
- Recognize legal ownership of the cash buyer
- IMO must create an Appeals Review Board (ARB). Any owner that violates the fundamental requirements for ship recycling could be referred to the ARB for further action. The IMO must maintain a list of violators.
- All cash buyers must register with the respective governments, shipping and ports authority and the IMO. Only ISO-certified cash buyers must be approved and recognized by the IMO and local governments.
- IMO must maintain a database of registered cash buyers. Any change in the constitution of the cash buyer should be reported to the IMO promptly.

OTHER POINTS

1. The correct data of Alang recycling yards is not being used during the convention which leads to certain members of the delegation still using statistics and figures from the year 2000 - statistics which are over 11 years old, and members should use the most current figures available. The nodal government agency at Gujarat, the GMB, has agreed to post on their official website the latest data for each year. We hope the convention members will update their records.

2. The convention does not address the development of recycling facilities in developing countries. Today, these are struggling within their own resources and without any government grants or aids or subsidies. In the circumstances, the convention should provide for government assistance or aids or subsidies to Indian recycling yards that are self motivated to be brought up to International standards. One of the fear factors looming today is that if the Indian yards update themselves after spending millions of dollars, they do not want to see the vessels going to other countries that may have chosen not to become parties to the convention.

The convention should allow and make provision for the movement of foreign government-owned vessels to Indian recycling yards. While we appreciate that war vessels are not an IMO issue, encouragement from the IMO would go a long way towards finding solutions for governments and recycling yards. If the IMO convention leads to more government vessels coming to Alang, this will present a huge financial incentive for this industry to ratify the convention.

SHIP RECYCLING VERSUS SHIPBREAKING

Often we see leading "shipping" publications switch between the terms "ship recycling" and "shipbreaking". Perhaps the confusion stems from the "lack of knowledge" in the eventual end use of the vessel by the recycling yards. During the process of ship recycling the following items are recovered for re-use and re-circulation in the markets:

1. *Ship steel* - this is the primary material from the ship and is used by the steel re-rolling mills to convert into rods and bars, which are used in infrastructure projects and in the ever growing construction and other allied industries in the Indian subcontinent.
2. *Ropes and chains* - these are generally re-exported for re-use in the maritime industry or re-used by the ship recyclers themselves at their yards.
3. *Generators* - these are used in most major industrial concerns such as garment manufacturing and washing units or in the agricultural sectors where there is a shortage of regular power supply or generation. Often, major owners seek these for their sister vessels trading in other jurisdictions, so this may form an important item of export.
4. *Boilers* - these are used in rice and jute mills across the country. Again, these sometimes form the bulk of the export orders due to their high re-use value.
5. *Furniture, beds, cots, bunks, cabin materials* - these are either purchased by mid-tier households and / or by public hospitals, emergency camps, hotels, motels, hostels, Red Cross and YMCA etc.
6. *Utensils, crockeries* - these are purchased by households, emergency camps, hospitals and hotels.
7. *Electrical items, electronic appliances, irons, heaters, insulators* - these are re-used by Industrial concerns and agricultural houses.
8. *Sanitary wares, bathroom mirrors* - mid-tier households and hotels are the biggest purchasers.

9. *Food items, bottled water, packed non-perishable food stocks, biscuits, tinned food* - households and small hotels are potential buyers.
10. *Glassware* - industries and showroom owners are the biggest buyers.
11. *Fridges* - these are purchased by households, small hotels, Industrial houses, mid-tier purchasers and factories.
12. *Pipes and fittings, wires, coils, rubber* - agricultural and domestic use for most pipes and fittings and other items.
13. *Paintings, sofas, desks, chairs* - households, hotels and factories are the biggest buyers.

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14. *Oil and other products removed* - depending on quality they are resold to licensed factories.
15. *Sludges, paints, etc.* – are disposed under the guidelines framed by the Gujarat Maritime Board into specific incinerators.
16. *Asbestos and hazardous materials* – are sent to the pre-determined and government-approved landfill sites after being appropriately bagged, itemized and sealed.
17. *Rubber and other materials recovered* – these are sent to the various recycling units for their secondary market use and are often utilized by the car and transport industry due to their durability and thickness.

In short, the recycling markets have developed a 're-use' market for every nut, bolt and the kitchen sink found on board the vessel. This industry is entirely 'self dependent and reliant' and in fact it supplies all the essential items to the world at large and is the backbone for many indirect industries in the Indian subcontinent.

You will be surprised but Alang in an average year recycles about 600 vessels with an annual sales turnover of about USD 1.3 billion. Certainly, 'breaking' would not generate this revenue income!

The International Convention on the Environmentally Safe and Sound Recycling of Vessels is a major supporting example of a term being universally adopted and used internationally by all stakeholders, which clearly reflects changing trends.

The IMO Convention is indeed a most welcome step since it has provided, for the first time, an international instrument that addresses and hopefully systematizes all the operations, so that health and safety of workers and prevention of pollution of the environment, both at sea and ashore, can be ensured and verified. In the unlikely event that the beaching method of ship- recycling is banned, far greater socio-economic harm will be caused to more than 500,000 workers who are employed in the recycling yards on the Indian subcontinent than any adverse effect on environment. The benefits of ship recycling by beaching methods as carried out in the Indian subcontinent is environmentally and economically a sound practice and safe for workers; the industry is labor and capital intensive, economically viable for all stakeholders and a highly sustainable activity considering the socio-economic situation in the region.

Strange as it may sound, unlike any other industry in the western world, the ship recycling industry does not have an international trade association to represent its interests.

In light of the above, are there no media savvy individuals who can get the message of the industry across to policy-makers, bureaucrats, the media and the public at large? The gap between perception and reality is perhaps widest in the ship recycling industry than any other in the modern world. If the shipping fraternity does not take the initiative to work together and find practical solutions, then the day will arrive soon when a ship for scrap is indeed a liability and not an asset.

CAN RECYCLING HELP THE CURRENT SHIPPING IMBALANCE?

In our opinion, the recycling of double-hull tankers could begin shortly and it would not be surprising that owners and their lenders soon start making their own internal evaluations on when to offer the vessels for recycling. As anticipated by us, tankers in the age group of 15/16 years are today valued at recycling rates as most owners do not wish to send their vessels for expensive second surveys. As matters stand, even if 25 million DWT was taken out due to recycling, freight rates will remain miserable and possibly even lower than 2011 levels.

Looking ahead and perhaps into 2013, we feel that the fleet growth rate will be under 3%. Unless the overcapacity is fully absorbed, VLCC rates will never be closer to USD26,000 per day for a very long time. This is a wake-up call to the industry and a call that should force market players to re-think their strategies and game plan for a very dark future in this industry. Unless executable and achievable plans are made now, most companies, even possibly bluechip ones, could face closures and Chapter 11 filings.

CLOSING THOUGHTS

Vessels that are sold for recycling today are often at the same purchase price at which owners purchased them years ago. The average price of a Suezmax tanker today in the Indian subcontinent could be in the region of USD 12 million. Ship recycling is effective in India due to its high demand for ship steel which is much cheaper and durable than steel generated from the usual iron ore process. Similarly in Bangladesh, due to the high growth rate of the construction business, the demand for ship steel has been the highest and most unprecedented seen to date.

A healthy, vibrant and growing recycling industry is good for the environment as it helps to prevent possible accidents to old vessels at sea and prevents possible abandonment by the owners of their aging fleet.

Likewise for the shipping industry, recycling is the safest and most secure method in providing a green outlet for the safe and sound disposal of old, unsafe and environmentally unfriendly vessels. Consequently, it improves the residual values of the assets for their owners and lenders.

Ship recycling is therefore necessary and essential for the growth of local economies; this industry supports and provides the robust backbone for many industries indirectly and directly connected with it.

IS A CHARTERER'S INTEREST IN THE USE OF A VESSEL ATTACHABLE PROPERTY UNDER RULE B?

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In our past experience representing American Club Members in charter party disputes or seeking security for their maritime claims, the ability under Rule B to attach a time-charterer's bunkers or other property aboard a vessel to secure a claim against the time-charterer is well known. Are there circumstances, however, where a charterer's actual interest in the use of a vessel is attachable as security under Rule B? Somewhat surprisingly, there are no court decisions that directly answer that question. One older court decision has addressed this issue in dicta, and a few decisions have discussed related issues, but none has addressed this issue head on.

The start point of any analysis is the language of Rule B, which provides only that a defendant's *"tangible or intangible personal property"* in the hands of a garnishee may be subject to attachment. Rule B(1)(a). It does not define these terms and their interpretation is left for the courts to resolve on a case by case basis.

Historically, courts have typically given the terms *"tangible or intangible personal property"* under Rule B and its predecessor wording an expansive interpretation. For example, attachable property has included (a) real property, (b) goods, chattels, credits and effects, (c) unmatured or partially matured debts, including a charterer's obligation to pay charter hire, (d) bank accounts, and (e) as well as a variety of other contingent interests, such as a defendant's interest in an arbitration award.

In *Winter Storm Shipping, Ltd. v. TPI*, when considering the scope of Rule B's grasp in the context of electronic funds' transfers, Judge Haight mused that:

> *It is difficult to imagine words more broadly inclusive than "tangible or intangible." What manner of thing can be neither tangible nor intangible and yet still be "property?" The phrase is the secular equivalent of the creed's reference to the maker "of all there is, seen and unseen."*

This expansive view of the terms "tangible or intangible property" has been confirmed by recent court decisions. See, e.g., *World Fuel Services, Inc. v. SE Shipping Lines Pte., Ltd. ("Rule B does not identify the specific legal interest in the property that defendant must have before it is subject to seizure. In its prior ruling, the Court concluded that defendant had at least a right of possession, a legal interest, in the bunkers."); Aifos Trade SA v. Midgulf International Ltd. ("However, the evidence provided to the Court shows that at the time of the attachment, Midgulf retained at least some legal interest in the attached funds, and that is all that is required of Rule B..."); HBC Hamburg Bulk Carriers GMBH & Co. KG v. Proteinas y Oleicos S.A. de C.V.* (finding in context of competing interests in EFTs that ... *"Rule B is intended to impact any property in which the defendant has a legal interest. Nothing in the language of Rule B requires that the property attached be the exclusive property of the defendant.")*

Turning to the specific issue of whether a charterer's interest in the use of a vessel is attachable under Rule B, the journey begins with Judge Learned Hand's 1929 decision in *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, where he upheld an attachment of vessels based on a conditional buyer's possession of the vessels and "equitable" interest in them despite the fact that title to the vessels remained technically with the conditional seller until such time as the vessels had been paid for in full. He observed that *"[i]t would be curious if possession, coupled with a conditional right to title, should now be thought insufficient to support a seizure."* Thus, the conditional buyer who had possession, but not title to the vessels, had an attachable interest in the vessels.

A decade later in *McGahern v. Koppers Coal Co.*, the Third Circuit was faced with the attachment of a vessel for the debts of its bareboat charterer. While it essentially agreed with Judge Hand's reasoning in the *Kingston Dry Dock* case, the Third Circuit found the existence of a mere bareboat charter did not permit attachment of the vessel itself.

Although a bareboat charterer is *"for many purposes treated as owner pro hac vice,"* it merely confers a right to possession of the vessel and *"is not the equivalent of title and does not subject the vessel to the general debts of the charterer."* The Third Circuit distinguished, however, between an attachment of the vessel itself, which it declined to

permit based on a debt of the bareboat charterer, and an attachment of the bareboat charterer's interest in the vessel, which it did not decide since the issue before it was limited to an attempted attachment of the vessel.

The *McGahern* decision was followed some years later in *Applewhaite v. S.S. Sunprincess*, where the court vacated an attachment of a vessel based on the *McGahern* decision. In dicta, the district court answered the question left open by the Third Circuit. It said that a time-charterer's interest in a vessel would not be attachable, reasoning that a charterer's interest is not subject to attachment because *"[t]he only asset available for judicial sale ... would be the contract rights arising out of the charter"* and *"[t]he very nature of a charter agreement is a manifestation of the intent of the parties that it shall not be assignable."* (The court's finding of the non-assignability of a charterer's interest in a vessel is of dubious validity in today's world given the presence of sub-let clauses in many form charterparties.)

Another instructive case is *Interpool Limited v. Char Yigh Marine (Panama) S.A.*, in which the Ninth Circuit held that a vessel could be validly attached to secure a claim against a time- charterer, where the charter in question was not a true lease with a reversionary ownership interest, but was in fact a disguised security interest in connection with the purchase of the vessel. Applying commercial law under the UCC relating to leases of equipment and machinery, the *Interpool* court explained that "*if a document purporting to be a lease is in fact part of a security arrangement, the 'lessor' does not have a reversionary ownership interest in the subject of the 'lease' [and] [t]he 'lessee' rather than the 'lessor' is viewed as the owner."*

What may be gleaned from these cases is that where a charterer has a right to purchase the vessel at the end of the charter period, this may be sufficient to establish an attachable interest in the vessel under the reasoning of the *Kingston Dry Dock* and *Interpool* decisions.

It remains to be seen, however, whether and to what extent under the current expansive interpretations of Rule B a charterer's actual interest in the use of a vessel would be considered attachable *"tangible or intangible property."* Certainly one could argue that dicta from one district court decision issued over 50 years ago (based on a dubious finding of non-assignability of that interest) should not be sufficient to provide a controlling answer to the issue left open by the Third Circuit in *McGahern, i.e.,* whether a charterer's interest in the use of a vessel is attachable under Rule B.

That does not, however, necessarily end the analysis. In circumstances where federal maritime law does not provide clear precedent on an issue, federal courts are permitted (and in fact quite often do) adopt state law precedent to answer the question. The adoption of New York state law was at the heart of the 2009 *Jaldhi* decision by the Second Circuit in which an electronic funds transfer passing through an intermediary (correspondent) bank was found not to be attachable property under Rule B. The *Interpool* decision discussed above also involved the adoption of state law in order to reach a decision on whether the vessel was subject to attachment under Rule B.

Although one would not expect the issue of whether a charterer's interest in the use of a vessel to have been directly addressed by a New York state court, New York state law does provide guidance in respect of analogous issues. For example, a lessee's interest in an automobile has been found to be seizable under New York state law. *Gleich v. Rose, ("Inasmuch as the interest of an automobile lessee, ..., is present and possessory, it is a tangible interest in personal property 'capable of delivery by taking the property into custody' and this is subject to levy by, and only by, seizure...")*. A leading expert on New York state law has also commented: *"... a present right of possession may be levied on even if a right of repossession or outright title lies elsewhere, as long as the right, however limited, has anything of economic value that might entice a buyer."* Siegel, NEW YORK PRACTICE. While not binding on a federal court, New York state law could offer persuasive authority in support of a Rule B attachment of a charterer's interest in the use of a vessel.

Going forward, we would not be surprised to find that American Club Members seeking to secure their claims in this volatile chartering market may well seek attachments under Rule B based on a charterer's interest in the use of a vessel.

US ENVIRONMENTAL PROTECTION AGENCY REQUIREMENTS UNDER VESSEL GENERAL PERMITS (VGP)

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INTRODUCTION

For over 30 years, vessels were excluded from United States Environmental Protection Agency (EPA) permit regulations that required permits for any "discharge of a pollutant" from a point source (a vessel is considered a point source). Lawsuits by environmental groups challenged this exclusion and since February 2009 the exemption was eliminated for most seagoing vessels operating in the United States territorial sea. These vessels are now subject to the Vessel General Permit (VGP), which is part of the National Pollution Discharge Elimination System (NPDES). The NPDES requires vessel owners and operators to meet certain effluent discharge limits and conduct various activities in connection with the effluent discharges, including inspections, monitoring, record-keeping, reporting, and taking corrective actions for remedying permit violations.

The VGP is required for all vessels operating in US waters with the exception of recreational vessels. Fishing vessels and commercial vessels less than 79 feet in length were not subject to the original requirements but will have to comply with the new VGP requirements to take effect in 2013.

The VGP applies to almost all discharges incidental to the normal operation of a vessel, including deck washdown and run-off, bilge water, antifouling hull coating leachate, aqueous film-forming foam, boiler blowdown, cathodic protection, chain locker effluent, fire main systems, and various other gray-water and effluent discharges. In total, 26 types of effluent are regulated.

Complicating matters, the NPDES allows individual states and Native American Tribes to establish additional water quality standards that are included in the VGP. These standards, which vary from state to state and are often more stringent, create additional headaches for vessel operators. For instance, several states include various ballast water treatment standards and requirements, but some of these have been deemed unachievable and have been successfully challenged in court.

OBTAINING THE VGP

To be covered under the VGP, vessel owners must file a Notice of Intent (NOI) with the EPA for each vessel that will be operating in US territorial waters. The NOI, which is essentially the application for cover under the VGP, is required for vessels greater than 300 gross tons or having a ballast water capacity of at least 8 cubic meters (2113 gallons). The NOI must include vessel owner and operator information, general voyage information, and discharge information. The NOI form can be found at the Environmental Protection Agency website (http://cfpub.epa.gov/npdes/vessels/enoi.cfm). The completed NOI needs to be filed (electronically or otherwise) with the EPA. An additional wrinkle: If your vessel is less than 300 gt and has the capacity to carry less than 8 cubic meters of ballast water, but is larger than 79 feet, you need not submit an NOI application, but your vessel must still comply with all applicable provisions of the VGP regulations.

The VGP itself is a general permit issued under the NPDES program. Vessels do not receive an individualized copy of the permit and it is not mandatory to keep a copy on board. However, the EPA recommends that a copy of the VGP is kept on board for reference and to ensure that all requirements are being met.

The EPA needs at least 30 days to process an NOI for coverage under the VGP for vessels which have not previously been scheduled. This requires some advance planning by vessel owners and operators.

REGULATED DISCHARGE STREAMS

The VGP covers the full array of potential discharge streams that can occur on a daily basis from a vessel. A good rule of thumb if you can't remember what's

covered: if it can somehow get into the water from somewhere on the vessel, it is covered.

Each of the 26 specific discharge streams covered under the VGP is addressed in detail in the VGP. What were formerly standard operating procedures subject to minimal regulation and commonsense are now regulated down to small details with accompanying record- keeping requirements. Here are some examples:

DECK WASHDOWN AND RUNOFF

For deck washdown, vessels must use cleaners and detergents that are phosphate free and non-toxic, it is also recommended they are biodegradable and minimally caustic. Vessels must also maintain tidy decks and minimize garbage and other debris from entering the water. Also, vessel owners must minimize deck washdowns while in port.

AMERICAN CLUB VGP COMPLIANCE TRAINING

The 2008 Vessel General Permit (VGP) regulates discharges incidental to the normal operation of vessels operating in a capacity as a means of transportation. The VGP includes general effluent limits applicable to all discharges; general effluent limits applicable to 26 specific discharge streams; narrative water-quality based effluent limits; inspection, monitoring, recordkeeping, and reporting requirements; and additional requirements applicable to certain vessel types. In conjunction with the U.S. Environmental Protection Agency (EPA) Vessel General Permit (VGP) regulations, the American Club has released the latest e-Learning training module available to all Club Members entitled "Vessel General Permit". We encourage all Members with vessels trading to the United States and required to comply with the VGP to familiarize themselves with the requirements. All Members with owned entries in the American Club have access to all of the Club's e-learning training programs including the VGP module via the website https://secure.idessonline.com/americanclub/facility, free of charge.

Dr. William Moore, Senior Vice President of Loss Prevention & Risk Control, presenting the Club's VGP e-Learning tool module to Club Members.

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BILGE WATER

Unless it's not technologically feasible or is required for safety or stability, vessels greater than 400 gt that regularly sail outside the territorial seas (at least once a month) are not permitted to discharge bilge water into waters within 1 nautical mile of shore, between 1 and 3 nautical miles unless sailing at least 6 knots or faster, or into other regulated waters. These discharges must not cause a visible sheen or otherwise be a harmful quantity. Vessel operators must also not use dispersants, detergents, emulsifiers, chemicals or other substances to remove the appearance of a visible sheen in their bilge water discharges.

BALLAST WATER

The VGP incorporates other Coast Guard regulations for mandatory ballast water management and exchange standards. The VGP also does not allow discharge of sediment from ballast water tanks into US waters, requires saltwater flushing for all vessels with residual ballast water and sediment coming from outside the US Exclusive Economic Zone waters, and also has additional requirements for vessels on US Pacific Coast voyages.

If a vessel is capable, it must use shore-based treatment if available and economically practical and achievable. All of the requirements are subject to a safety exemption and also do not mandate diversion of a vessel.

ANTI-FOULANT HULL COATINGS

Coatings cannot contain any material banned for use in the US. In choosing a coating, consideration must be given to the biocide with the lowest release rate. If a vessel spends more than 30 days in copper impaired water, owners and operators must consider a non-copper based alternative. Organotin coatings cannot be used and if they are already applied must be removed or overcoated.

GRAYWATER

For graywater discharges, specific treatment requirements are needed for cruiseships; the vessel must eliminate the discharge of kitchen oils and phosphate-free soaps must be used.

OTHER VGP REQUIREMENTS

Complying with the VGP includes additional record-keeping, reporting, training, corrective actions, and inspections.

RECORD-KEEPING AND REPORTING

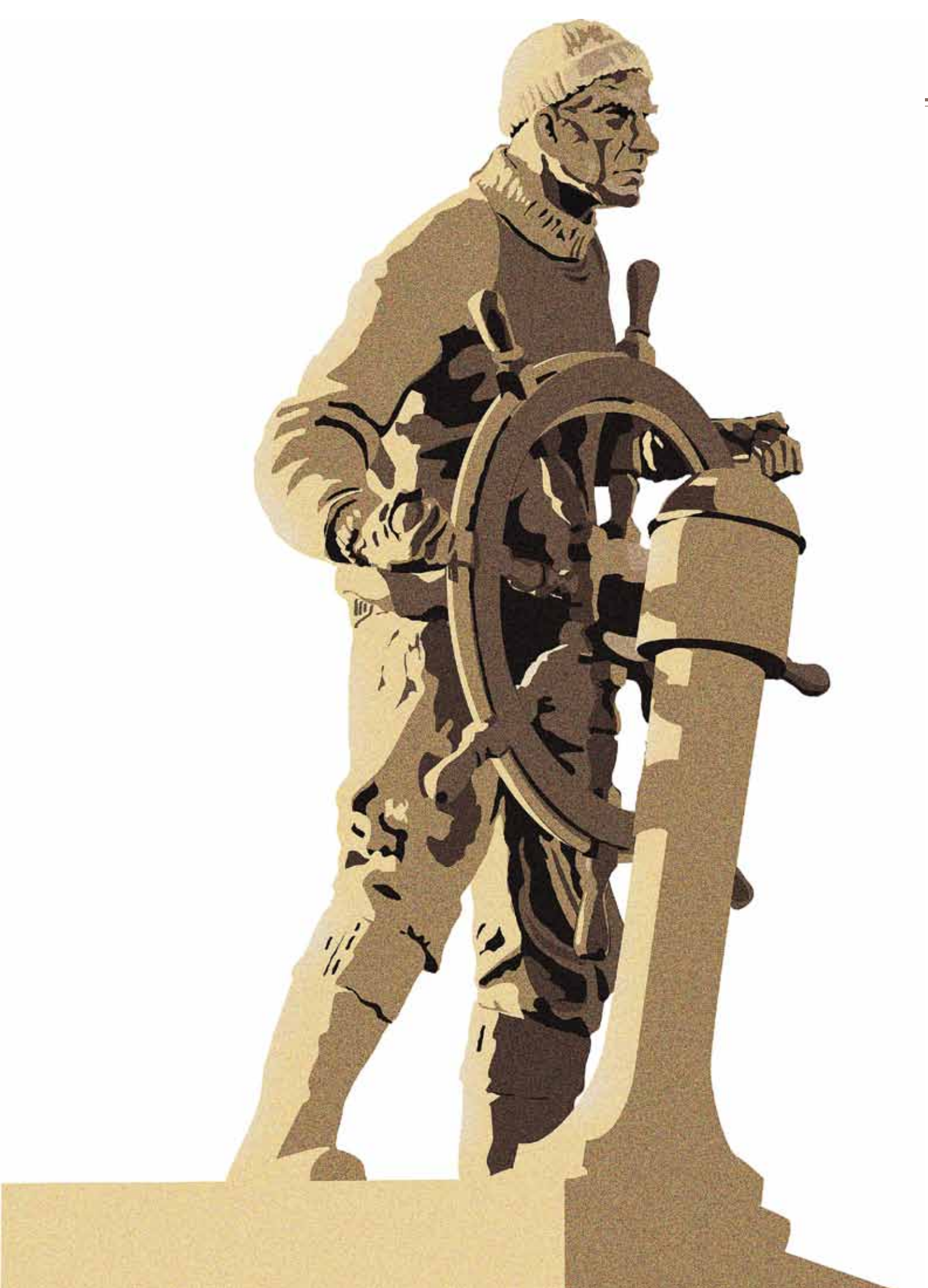
Numerous records must be kept to comply with the VGP. These include owner and voyage information, a voyage log, records of any violation of any effluent limit and corrective action taken, a record of routine inspections and any deficiencies or problems found, analytical monitoring results, a log of findings from annual inspections, a record of any specific requirements given to the vessel by the EPA or state agencies, and additional maintenance, certification and safety exemption claims.

Certain discharges must always be reported, including ballast water release, spills that endanger health or welfare, spills of oily materials, and a report of annual non-compliance. A "one time" report is also required for all vessels approximately three years after obtaining VGP coverage.

While the amount of record-keeping is potentially onerous, the EPA does state that it does not intend to require separate records from that which is already required by the Coast Guard. Rather, vessels can harmonize their record-keeping practices, where appropriate, so that records are not unnecessarily duplicative. For example, information can be logged with maintenance records, the ship's log, in existing ISM/SMS plans or other additional record-keeping documentation already maintained by the vessel.

CORRECTIVE ACTIONS

If you violate any of the effluent discharge limits in the VGP, you must take corrective action. This includes an assessment investigating the nature, cause, and potential options for eliminating the problems. Depending upon the extent of the problem, the VGP provides deadlines for resolving the issues and failure to take corrective action within the specified time period is another permit violation. The VGP contains a full description of the



> For over 30 years, vessels were excluded from United States Environmental Protection Agency (EPA) permit regulations that required permits for any "discharge of a pollutant" from a point source (a vessel is considered a point source).

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corrective action process. The allowed time for minor changes is two weeks, for major changes requiring new parts three months, and for major renovations before relaunching from the next drydocking. A record must be kept of all corrective actions.

INSPECTIONS

Various types of inspections are required under the VGP, including routine visual inspections of all accessible areas of the vessel in order to verify that effluent limits are being met. A more comprehensive annual inspection must be conducted once every 12 months that must focus on areas likely to generate harmful pollution or violate effluent limits. Drydock inspections are also required. Special monitoring is also required for select cruiseships and vessels with experimental ballast water treatment systems. The findings of each routine visual inspection and annual inspection must be documented in the official ship logbook or as a component of other record-keeping documentation.

ENFORCEMENT OF THE VGP

Under a Memorandum of Understanding between the USCG and the EPA, the Coast Guard is responsible for enforcing the VGP as part of its normal Port State Control inspections. It remains uncertain as to when the Coast Guard will incorporate VGP verification into its inspections, but vessel owners and operators must now be prepared for such inspections.

Failure to comply with VGP requirements can result in civil and criminal penalties.

SUMMARY OF THE PROPOSED 2013 DRAFT VGP

The current version of the VGP expires in December 2013. The EPA is currently considering comments on two proposed VGPs. The draft VGP and draft Small Vessel General Permit (sVGP) were proposed in November 2011 and comments were due by February 21, 2012. EPA intends to finalize the draft VGPs by November 30, 2012, more than a year in advance of the effective date of December 19, 2013 (when the current VGP expires) to allow time for an orderly phase-in of the new requirements.

The draft VGP would continue to regulate 26 specific discharge categories that were contained in the current VGP, and would also regulate the discharge of fish hold effluent (which was previously exempt). Some other potential changes include the application of the International Maritime Organization (IMO) ballast water standards that contain numeric ballast water discharge limits for most vessels. Ballast water standards could be met by treating the ballast water with an approved treatment device, utilizing onshore ballast water treatment, utilizing potable water from the US or Canada as ballast water, or no discharge of ballast water at all. The draft VGP also contains more stringent effluent limits for oil to sea interfaces and exhaust gas scrubber washwater.

The EPA is also suggesting improvements to several of the VGP's administrative requirements, including allowing electronic record-keeping, requiring an annual report in lieu of the one-time report, and only one annual non-compliance report. Under certain circumstances, multiple unmanned, unpowered barges could be included in one annual report.

For small vessels, the draft sVGP would regulate discharges incidental to the normal operation of certain vessels less than 79 feet in length if the current Congressional moratorium for these vessels is not extended beyond December 18, 2013. This moratorium exempts all incidental discharges, with the exception of ballast water, from commercial fishing vessels and non-recreational, non-military vessels less than 79 feet in length from having to obtain a Clean Water Act permit. Unless the moratorium is extended the sVGP would provide permit coverage for these entities after that date.

Similar to the VGP, the sVGP is organized by discharge management categories. All covered discharges are located in these categories. The discharge management categories in the draft sVGP include fuel management, engine and oil control, solid and liquid maintenance, graywater management, fish hold effluent management, and ballast water management. As a requirement of this permit, vessel owner/operators must complete the sVGP Permit Authorization and Record of Inspection (PARI) form. Additionally, the permittee must conduct an annual self-inspection and certify that he or she has done so by signing the form each year.

POSSIBLE CHANGES TO THE VGP REQUIREMENTS

While it is likely that the VGP will continue to be required, there are Congressional efforts to reform the regulation of vessel discharges, which could reign in the individual state requirements to ensure that states or Indian Tribes do not add contradictory or unachievable conditions to the VGP and sVGP.

ADDITIONAL INFORMATION

Further information regarding the VGP is available on EPA's webpage at:
http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm#2008.

Any additional questions can be submitted to *Commercialvesselpermit@epa.gov*.

The Water Quality Insurance Syndicate (WQIS) is the largest underwriter of pollution liability insurance for marine vessels in the United States. Founded in 1971, WQIS has over 40 years' experience as an absolute specialist in the industry, focusing on the issues of marine pollution insurance.

WQIS provides water pollution liability insurance for over 40,000 vessels operating in US waters or traveling in international waters between US ports. WQIS also provides COFR guarantees for over 2,500 vessels to the US Coast Guard. And vessels everywhere have been issued a WQIS Bunker Convention blue card.

The author of this article, Andrew Garger, joined WQIS in June 1997 as Vice President of Legal. His duties include supervising outside counsel in litigation matters, assisting WQIS management in various corporate and personnel matters, and overseeing WQIS's legislative efforts. He is a former chairman of the International Union of Marine Insurance's legal & liability committee, and has also clerked for a federal court of appeals judge and practiced admiralty law in Seattle, Washington and New York City.

Mr Garger would also like to thank Mr Andrew Hoffman, WQIS paralegal, for his assistance in preparing this article.

FACES OF SHIPOWNERS CLAIMS BUREAU, INC.

Joe Hughes discussing the challenges ahead in the European and Asian markets with Dorothea Ioannou and Raymond Sun.

Vince Solarino and Ed Horbacz, Assistant VP of Billing & Statistical Analysis.

Cheryl Ramdial, Arpad Kadi and Cecelia Casado-Davies discussing the Club's accounts payable.

Mary Evans, Accounts Receivable Assistant.

AMERICAN CLUB WELCOMES NEWLY APPROVED PEME CLINIC IN JAKARTA

Dr William Moore welcomes representatives from the *Rumah Sakit Port Medical Center* in Jakarta as a newly approved medical facility to its Pre-Employment Medical Examination (PEME) program. The American Club's PEME program has been in effect since 2004 and its successes are due to the dedicated medical staffs of all Club approved clinics around the globe.

CORRESPONDENT PROFILE

THE VIEW FROM SOUTH AFRICA

By: Michael Heads
Director, Legal, Claims & Operations
P&I Associates (Pty) Ltd.
Durban, SOUTH AFRICA

On April 27 this year, South Africa celebrated 18 years of democracy. The images of South Africans standing in long snaking queues voting for the first time and the subsequent election of Nelson Mandela to be our first president were beamed to all four corners of the globe at the time.

During those early years, South Africans basked in a sea of optimism which has, sadly, receded like an outgoing tide and been replaced by growing criticism of a country facing difficult challenges in the years ahead. One of the loudest criticisms has been the lack of service delivery and the enhancement to the simplest needs of most South Africans - a home and running water.

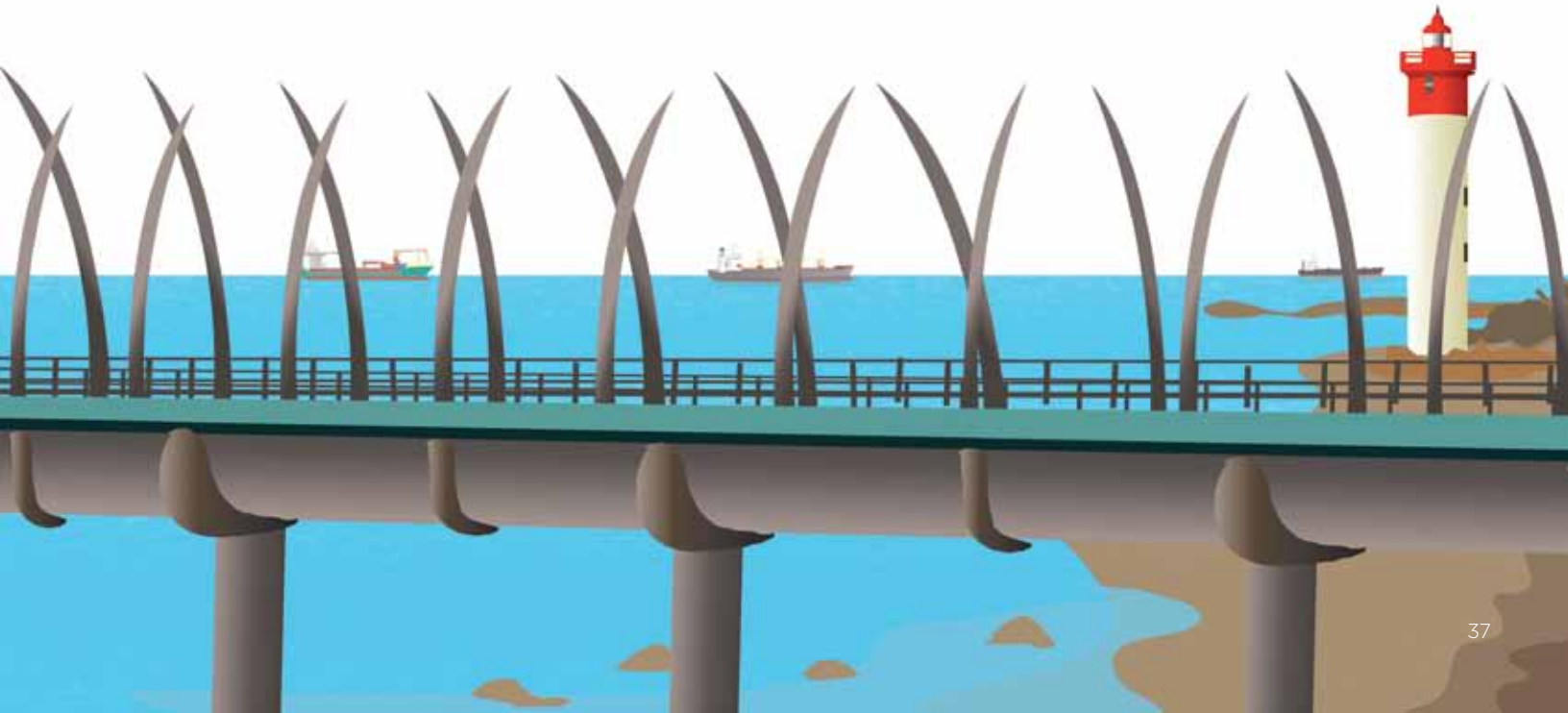
At the same time, our marine industry has undergone enormous change but this has often been slow or divisive as the government introduces new policies and laws without proper discussion with stakeholders.

It is against this background that P&I Associates has found itself writing to government to question the lack of legislation to adopt various IMO protocols, like the Fund Convention for oil pollution, as well as the lack of support concerning armed merchant vessels calling at South African ports. We continue tirelessly to petition government ministers to consult with us and local stakeholders on the issue of piracy, stowaways, pollution and ports.

The ports in South Africa are owned by the state but operated by the Transnet National Ports Authority (TNPA) on a commercial basis, often placing profits before commercial acumen and safety. It has been common knowledge that although South Africa offers safe places for vessels to anchor in time of an emergency or at a time of refuge, subject to certain restrictions, the TNPA has adopted a much harder line. It will often demand that letters of guarantee are provided and that an indemnity is signed before a vessel is allowed to enter into one of our eight ports.

We keep a very open dialogue with the various harbour masters and we nurture the trust that has been developed over the last 30 years of P&I Associates' existence. These relationships, like other professional relationships, are forged over time so that when an emergency arises we are able to call on many resources for the benefit of shipowners and P&I clubs. We adopt the same open dialogue with the South African Maritime Safety Authority (SAMSA - Port State) and, as a result, we are often able to achieve a pleasing result for a shipowner and club.

P&I Associates is headed up by Capt. Alan Reid who is well known in the P&I world. He is often contacted by clubs seeking advice on various aspects of P&I insurance since his knowledge and expertise is widely acknowledged, especially in the field of maritime casualties. He has addressed the P&I correspondents' conference on two occasions and his paper on the role of a P&I correspondent is often used as a guideline by other correspondents. Alan is based in our head office in Durban where he is ably assisted by Michael Heads. Michael is a qualified English and South African lawyer. His father was a naval architect, so a career in shipping was hereditary. He studied in South Africa and London, and on his return to South Africa, was employed by a Durban maritime law firm before joining P&I Associates 15 years ago.



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During this time, Alan and Michael have handled maritime casualties stretching around the whole of Southern Africa and the Indian Ocean islands to Tristan Da Cunha in the South Atlantic.

Regarding stowaways, P&I Associates have also been at the forefront of that aspect of the industry for many years. The stowaway department is headed by Ron Evans who is assisted in Cape Town by Neil Chetty and Garth Hansen, and in Durban by David Macdonald. Ron Evans enlightened the delegates at the last P&I conference in Amsterdam with his knowledge and wisdom regarding the movements of stowaways and the problems they cause for shipowners.

The issue of stowaways is always difficult since not only are they an irritation but now an unnecessary expense. The age of the professional stowaways is now fully entrenched as these individuals cast their nets across the world looking to exploit shipowners and operators alike.

We have always been able to land undocumented African stowaways along the South African coast. However, in 2011 the Department of Home Affairs issued a ruling that no stowaways could be landed in South Africa unless they were in possession of a valid travel document. P&I Associates immediately petitioned the South African government and submitted a detailed report on the issue of stowaways. One of the major points that we raised was South Africa's strategic position on the world's ocean trading routes, and that all the African countries have embassies in South Africa so we can easily arrange travel documents quite quickly. We have requested that P&I Associates is granted a licence to operate in this field with regular reports to government on the number of stowaways landed and subsequently repatriated. Our report is currently before the Minister and her advisors and we are expecting their response soon.

We have also raised the issue of piracy with government and the need to amend local law with regard to the issuing of permits to merchant vessels calling at South African ports with armed guards on board. Again, because of South African's strategic position, there is a growing need for armed security guards to be able to disembark vessels following passage through the high-risk piracy area. At present there is a conflict of laws. Under the South African Firearms Control Act, a person applies for a firearm licence and the particular firearm is licensed to the individual. Ships on the other hand are carrying weapons which can be used by various individuals so the law with regard to shipping needs to be amended. At the moment, South Africa is allowing vessels to apply for a permit to have weapons on board but such permits can only be made 21 days prior to the vessel's arrival at a South African port.

We believe that this p eriod is too long and should be shortened to 96 hours, the same time period for ships applying for ISPS clearance.

It is very difficult at present to land weapons in South Africa and transfer them to another vessel, and again this issue has been raised with government so that, hopefully, vessels that berth in South Africa with weapons on board can have those weapons removed and taken out of the country or transferred to another vessel. Again, we are awaiting government's response to our report on this issue.

The survey department in Durban is headed up by Jason Hossack who is ably assisted by Byron Elkington. Jason and Byron both began their surveying careers in the tanker market but have expanded their surveying experience and are now regularly requested to travel into Africa to carry out surveys at other ports, especially in Mozambique whose economy continues to grow rapidly.

With the development of the coal terminal in Beira, we are expecting increased traffic at that port so our surveyors may find themselves travelling to Beira more often.

Although Cape Town is a very popular tourist destination with a bustling port, Durban is still South Africa's busiest port and the gateway into Africa. Our Cape Town office is managed by Garth Hansen and he is assisted by Neil Chetty. They also look after our Saldana Bay office and Namibia. We are expecting an increase in the volume of steel to be exported from Saldana Bay

over the next few years as the new steel mill comes on line. Saldana Bay is being marketed as a new economic zone; if it follows in the footsteps of Richards Bay, then it will be a very busy port too. Richards Bay continues to lead the way in the exportation of coal and other mineral sands. The Richards Bay office is headed up by Capt. Derek Wood.

In 2010, P&I Associates began an ambitious training programme. To meet our future staffing requirements we realized that we needed to begin training from within rather than filling positions when they became available. With a strong training policy, we believed that if we recruited the right candidates, we could train them in all aspects of P&I insurance. Thami Mhlongo was our first trainee. He first worked with Michael Heads in our Durban office where he was introduced to claims handling. After a year, he moved onto the survey department where he learnt all about the various different surveys which we undertake.

Nkululeko Mngadi and Tebogo Molefe have now also joined the team. Both young men, like Thami, studied at a local maritime school where they were given an excellent grounding in transportation, including courses on marine law and marine insurance. All the young men excelled in their studies, and Thami has now commenced a course with the Institute of Chartered Shipbrokers.

South Africa is a leading African nation, and visitors always depart with stories of how much they enjoyed their stay and that they will be coming back sooner rather than later. It is the personal touch which makes experiences more rewarding, which is the same philosophy that we, as a company, apply to our work.

FD&D CORNER

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

VESSEL OWNER'S RIGHT TO REFUSE EARLY REDELIVERY – THE CHARTER PARTY IS STAYIN' ALIVE!

Since the beginning of the current economic downturn in 2008, owners whose vessels have been fixed on long-term charter parties at relatively high rates have frequently faced attempts by charterers to redeliver the ship early. In such situations, where the market rate has plummeted to a point where a charterer cannot profitably trade the vessel, the charterer would often prefer to redeliver the ship early and face potential damages than to continue to trade at a significant loss. And where the charterer has no readily identifiable assets, owners are often left holding the proverbial bag with no option but to try and mitigate the loss by trading the ship on the spot market at substantially reduced rates.

The Commercial Court recently issued a decision in *Isabella Shipowner SA v Shagang Shipping Co Ltd* [2012] EWHC 1077 that may, in appropriate circumstances, offer an owner another option in the context of a purported early redelivery. In that case, the owners had fixed their vessel on an amended NYPE form for a term of 59 to 61 months; the charter party included an express warranty that the vessel would not be redelivered before the minimum 59-month term had expired. In the event, charterers redelivered the ship 94 days early.

The owners refused to accept the early redelivery and asked the Tribunal to issue a partial final award declaring that they were entitled to affirm the charterparty and hold the charterers liable for hire for the 94-day shortfall. The arbitrator refused, finding that owners were obligated to accept the early redelivery, trade the vessel on the spot market to mitigate the loss, and then claim damages from charterers. As the innocent party, owners could not perform the remainder of the charter party without some action or acceptance by the charterers, so the principle in *White & Carter (Councils) Ltd v McGregor* [1962 A.C. 413] was inapplicable. The arbitrator found further that the owners had no legitimate interest in affirming the contract and keeping the charter alive.

The owners appealed. On April 26, 2012, Cooke J handed down the decision affirming the basic principle of *White & Carter* that the innocent party generally has the choice of either accepting the repudiatory breach and suing for damages, or refusing the repudiation, affirming the contract, and suing for the agreed price. But the latter option is only available where the innocent party is able to complete the contract without the need for any action by the party attempting to repudiate.

Cooke J explained that the authorities reveal an exception to the *White & Carter* principle where the decision to affirm the contract is either wholly unreasonable or "perverse", and where damages would be an adequate remedy. In those instances, the innocent party would have no legitimate interest in maintaining the contract and so would not have the option to reject the purported repudiation.

Based on this reading of the authorities, Cooke J held that the arbitrator had erred in law in holding the *White & Carter* rule inapplicable in this case. The charterers did not need to do anything under the charter because the vessel would simply remain idle awaiting instructions, but hire would continue to accrue. Although charterers were required to provide and pay for bunkers, owners could arrange for bunkers themselves and add the charges to charterers' account.

Cooke J also held that the arbitrator had erred in law in finding that the exception to the *White & Carter* principle applied in this case.

This judg ment stresses that only in "extreme cases" will a shipowner's conduct be so egregious as to deprive it of the option of keeping the contract alive. Following this decision, a charterer who redelivers early will face a very high burden of showing that the owner had no legitimate interest in maintaining the contract and was therefore not permitted to refuse the repudiation. Cooke J appears to have been significantly influenced by the fact that this was a time charter in which the charterers were specifically authorized to sublet the vessel, and therefore charterers and owners had an equal opportunity to trade the ship. Under those circumstances, it was unfair for the charterers to shift to owners the burden of trading the vessel in a difficult spot market.

BIMCO ISSUES NEW GUARDCON CONTRACT

Pirate operations continue in the Gulf of Aden and beyond and have grown more sophisticated. Absent a comprehensive solution from governments or any international organizations thus far, owners of merchant ships have increasingly turned to private maritime security companies ("PMSCs") to provide a deterrent to piracy for vessels needing to transit these troubled waters. But the rapid increase in the number of PMSCs in the market has produced a bewildering variety of

contracts with no uniform terms and conditions. As a result, shipowners and their P&I Clubs have had to spend considerable time and effort analyzing each unique contract to ensure that it provides adequate protections for the vessel, her crew, and her owners on the one hand, and that it does not prejudice the vessel owner's P&I cover on the other. And as is so frequently true when there are so many variations, uncertainty is always a concern.

On March 28, 2012, BIMCO published GUARDCON, a standard contract for the employment of security guards on vessels. While BIMCO does not necessarily endorse the use of armed guards on ships, it nonetheless "recognizes that while the industry awaits a more permanent long term solution, armed guards currently provide an effective deterrent to piracy attacks." The new contract is therefore intended to provide shipowners and PMSCs with a clearly worded and comprehensive standard contract to govern the employment and use of security guards, whether armed or not, on board merchant ships. It also attempts to simplify the processes of vetting and approving contracts by shipowners and their P&I Clubs. The contract specifically addresses several key issues, including standards to which the contractor (PMSC) must conform in terms of providing insurance sufficient to cover the PMSC's liabilities and contractual indemnities and having all requisite permits and licenses to allow the PMSC to lawfully carry weapons. GUARDCON also addresses liability and indemnity provisions based on knock-for-knock principles and the Master's responsibility for the safe navigation and overall command of the vessel.

The Managers would encourage Members to refer to Club Circular No. 10/12 dated March 28, 2012, for further considerations relevant to the decision to employ armed guards aboard ships.

For more information, including the GUARDCON text, Explanatory Notes, and accompanying Guidance on the Rules for the Use of Force (RUF), please visit www.bimco.org.

THE "CAPTAIN STEFANOS" – A CASE OF BAD COMMA?

In *Osmium Shipping Corporation v Cargill International SA (The "Captain Stefanos")*, QBD (Com Ct) (Cooke J), the English High Court determined that the hijacking of a vessel by pirates constituted an off-hire event in accordance with a rider clause that provided for the vessel to be off-hire for "capture/seizure," in spite of the incorporation of the CONWARTIME 2004 clause. The case turned largely on the significance of a single comma appearing in an additional clause of the charter party dealing with off-hire.

Owners in this matter had fixed their vessel to Cargill on an amended NYPE (1946) form for one trip time charter. Pirates hijacked the vessel on September 21st and did not release it until early December after Owners paid a substantial ransom.

Cargill claimed that the vessel was off-hire during the period of detention by the pirates, relying on additional Clause 56 of the charter party:

> *Should the vessel put back whilst on voyage by reason of any...capture/seizure, or detention or threatened detention by any authority including arrest, the hire shall be suspended from the time of the inefficiency until the vessel is again efficient.*

Owners argued that, considering the context of the clause and the charter party as a whole, the words "*capture/seizure*" were qualified by the subsequent words "*by any authority*" – since pirates did not constitute such an authority, the clause did not render the vessel off-hire as a result of the hijacking. The arbitral Tribunal rejected this argument and instead accepted Cargill's contention that the words "*capture/seizure*" applied to a hijacking by Somali pirates.

Owners were given leave to appeal to the High Court, where they argued that the vessel should not be considered off-hire under Clause 56 for several reasons. First, they argued that the clause was ambiguous insofar as it was unclear whether the words "*by any authority*" applied to the words "*capture/seizure*" as well as to the word "detention." So Owners submitted that the correct construction of the clause depended on the significance attached by the reasonable reader to the comma following "*capture/seizure*." Owners further argued that, other than in relation to capture, seizure, and detention, the clause referred exclusively to off-hire events associated with deficiencies of the vessel or crew, so the words "*capture/seizure*" should be confined to capture or seizure resulting from the characteristics of the vessel or crew, and not resulting from hijacking.

Owners further argued that, in accordance with prior precedent requiring ambiguities to be construed against the party seeking to rely on the particular clause, Charterers were obligated to bring themselves clearly within a defined off-hire event.

Owners' final argument was based on the CONWARTIME clause that allocates to Charterers any expenses arising from Owners' compliance with Charterers' orders to trade the vessel through an area exposed to war risks (including piracy). Owners contended that the incorporation of this clause evinced the parties' clear intention that charterers – Cargill – should bear the risk of piracy, and that it would be inconsistent with that intent to construe Clause 56 in a manner that treated hijacking by Somali pirates as an off-hire event.

The Court, Cooke J, dismissed the appeal and upheld the Tribunal's decision. The Court found that the wording of Clause 56, its punctuation, and its grammar all "clearly"

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supported Cargill's argument that the vessel was off-hire during the period of detention by pirates. Cooke J said that:

> *the clause to my mind clearly sets out that it is only 'detention or threatened detention' which is qualified by the expression 'by any authority'. The words 'capture/seizure' are free standing and constitute a separate head of off-hire....*

The Court went on to note that where there are one or more clauses that deal with off-hire events, they must be looked at together and harmonized to the extent possible. But where the charter provides for off-hire in some provisions and charter party obligations and remedies for breach in others, the focus must be on the off-hire clauses alone when determining whether an off-hire event has occurred. Because the CONWARTIME clause only addresses the parties' respective rights and obligations in circumstances where the vessel might be exposed to war risks, including piracy, the clause relates to performance of the charter and to breach, but not to off-hire, and therefore it cannot affect the construction of the off-hire provision in Clause 56.

This case provides helpful guidance on the scope and application of the CONWARTIME clause, particularly the ruling that this clause does not affect off-hire clauses. Perhaps more importantly, the case also highlights the importance of syntax, grammar, and especially punctuation in the construction of charter party interpretation.

THE ROWAN – GUARANTEEING OIL MAJOR APPROVALS AND WHAT HAPPENS WHEN THAT APPROVAL IS WITHDRAWN

The ROWAN, [2011] EWHC 3374 (Comm), concerned the scope of a warranty in a voyage charter that the vessel would be approved for the carriage of fuel and/or vacuum gas oil by certain specified oil majors. The fixture recap provided, "TBOOK WOG VSL IS APPROVED BY: BP/LITASCO/STATOIL – EXXON VIA SIRE." ("TBOOK" stands for "to the best of owners' knowledge," and "WOG" means "without guarantee.") The charter-party itself incorporated Vitol's standard voyage chartering terms, clause 18 of which included slightly different terms:

> *Owner warrants that the vessel is approved by the following companies and will remain so throughout the duration of this Charterparty* – TBOOK VSL APPROVED BY: BP/EXXON/LUKOIL/STATOIL/MOH.

Shell, which was not one of the majors identified in either the recap or clause 18, had agreed with charterers to purchase the cargo on board, subject to vetting.

Meanwhile, during the voyage, the vessel underwent an annual survey inspection and SIRE inspections by both Shell and Conoco at Antwerp. Class issued an interim certificate requiring that the low suction sea-chest valve be repaired at the next port and imposed a condition of class. Shell subsequently rejected the vessel as a result of the SIRE report.

Owners instituted proceedings and claimed demurrage from charterers. Charterers counterclaimed for the difference in price of the cargo (which they had had to sell as a distressed cargo following Shell's rejection), on the basis that the vessel had never had – or alternatively that it had lost – oil major approval, such that owners were in breach of the charter party.

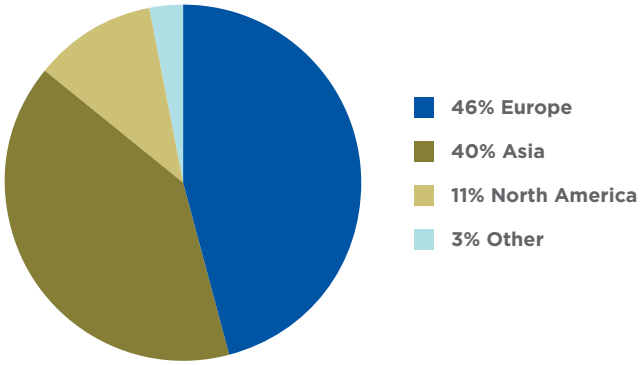
In defense of charterers' counterclaim, owners relied on letters provided at the inception of the charter party by the majors identified in the recap. Those letters stated that the vessel had been inspected and no further information was required, but cautioned that this did not constitute a blanket approval and that the vessel would be screened by the particular major each time it was offered for business.

At first instance, HHJ Mackie accepted that these letters were at the time regarded as "approvals" for the purpose of Vitol clause 18, and that Owners therefore had the necessary approvals in place at the inception of the charter party. However, he further found that owners had warranted that, to the best of their knowledge, the vessel would remain approved by the specified majors for the duration of the fixture. He also accepted charterers' expert evidence that oil major approval was not only lost when a major rejected a vessel, but could be lost automatically if the vessel fell into a condition that would cause a new vetting to fail. As a result, the vessel lost its oil major approval at Antwerp, even though Shell was not one of the majors identified in the charter party, owners were in breach of the warranty, and charterers were entitled to damages.

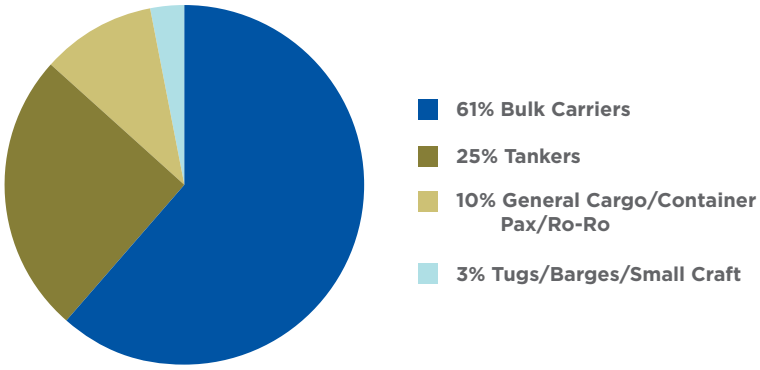
The Court of Appeal reversed, holding that the wording the in recap was not to be read together with, but was in substitution for, the boilerplate language of Vitol clause 18. The Court further held that while the Vitol clause was a continuing warranty of major approval for the duration of the charter, the qualified clause 18 was limited to a promise at the time when it was made. So whether owners were in breach depended on whether the vessel was approved by the named oil companies at the date of the charter, and whether owners knew anything at that time that would cause the oil companies to withdraw that approval. Because owners had obtained approvals from the named majors at the date of the charter, owners were not in breach.

MEMBERSHIP PROFILE, JUNE 2012

P&I TONNAGE BREAKDOWN BY REGION



P&I TONNAGE BREAKDOWN BY VESSEL TYPE



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