CURRENTS

Issue Number 36 - February 2016

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To the right:

"Memorial to the Wife of the Seafarer"

Dedicated to the contribution and fortitude of the "unsung heroine, the wife of the seafarer", this memorial was designed by the sculptor Kostas Ananidas. The sculpture resides along the shore of Galaxidi, a Greek harbour with a long maritime tradition and close to Delphi, which the ancient Greeks considered the centre of the world. Unveiled by the the IMO Secretary-General at the time, Efthimios Mitropoulos, the statue shows a woman and her two children bidding farewell to her husband as he sets out to sea.

Color Code

- General Claims & Industry Information
- FD&D Corner
- Loss Prevention
- Correspondents' Corner

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INTRODUCTION

by: Joseph E.M. Hughes
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As 2016 begins, it is a particular pleasure to welcome readers to this new and revised format of the American Club's newsletter, ***Currents***. For purposes of convenience, together with making the distribution of Club news more efficient, the new format will, we hope, be greeted with enthusiasm by Members, brokers and the Club's many other friends across the world.

For an International Group P&I club, a new year brings renewal both literally, as February 20 starts off a new policy year, and figuratively, in the sense of creating fresh opportunities and a rededication to Member service.

In the American Club's case, 2016 holds special promise. Despite the generally difficult business climate for shipowners – particularly within the dry bulk sector – developments over the past twelve months have provided a strong platform for the American Club to make yet further progress over the year ahead.

Looking back at 2015, claims exposures have been emerging favorably of late, both in terms of the Club's retained losses and those in respect of larger claims under the International Group's pooling arrangements. As to the 2015 policy year specifically, losses for the Club's own account were, as of the ten month stage of development, some 44% lower than they were at the same point for 2014. Similarly, pool claims are emerging at levels lower than earlier years, particularly by comparison with 2011 and 2012. However, since the 2015 policy year is at a very early stage of development, it would be imprudent to make any firm predictions as to its ultimate outturn, although early signs are encouraging.

On the investment front, by contrast, the climate has been much more turbulent, particularly in recent weeks as concerns about China, oil and other commodity prices, the US Federal Reserve's recent raising of interest rates, and worries about future corporate earnings, have roiled the stock markets. Nevertheless, the American Club achieved a positive investment result for calendar year 2015. Although it was hardly a stellar achievement, the Club's portfolio enjoyed a 28 basis point return for the twelve months – a creditable performance in the circumstances.

Strategically speaking, the high point of 2015 was the American Club's alliance with Hellenic Hull Mutual, an initiative which is intended to lead to the establishment of a new, fixed premium hull underwriter, American Hellenic Hull Insurance Co., Ltd., based in Cyprus. As a wholly-owned investment of the American Club, American Hellenic will be structured, and operated, in accordance with the new Solvency II regime in effect throughout the European Union.

Much progress has been made in recent weeks in regard to this important development which continues to gain wide support not only within Hellenic Hull's traditional constituency in the eastern Mediterranean but also among shipping and broking communities elsewhere in the world. It is expected that American Hellenic will be fully licensed and operational over the weeks ahead, and will continue to generate a significant global presence. Further news will be made available over the months to come.

As to Eagle Ocean Marine, another American Club initiative which responds to the increasingly diverse expectations of the marine insurance market across the world, progress continues to be made in enlarging the facility's footprint, particularly in Asia. Most encouragingly, Eagle Ocean Marine is maintaining a solid level of profitability and, by reason of this, continues to lend support to the American Club's robust financial position. This, expressed as a dollar value of free reserves per gross ton, remains comfortably within the highest quartile of the market at large, being currently in excess of $4.00 per GT on both statutory and GAAP accounting terms.

2015 was a good year for the American Club in many respects and, in addition to the favorable results bearing upon its core business, new initiatives, most particularly that involving American Hellenic, suggest exciting prospects for 2016. As always, your Managers remain committed to providing a level of Member service unsurpassed in the industry. The importance of such service has never been greater in times of change and uncertainty for both the global economy in general and the shipping community in particular. As part of this commitment, it is hoped that this new format for ***Currents*** will be appreciated by Members, and the Club's many other friends and counterparts within the maritime community.

FRANZA WASHED AWAY CRUISE LINE'S IMMUNITY FOR MEDICAL MALPRACTICE

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In November 2014, the Eleventh Circuit held in *Franza v. Royal Caribbean Cruises, Ltd* that a cruise line could be held liable for negligence of medical personnel working onboard a cruise vessel. The Eleventh Circuit refused to follow the longstanding Barbetta rule as applied in the Second, Fifth, and Ninth Circuits since 1989. The Barbetta rule had effectively carved out an exception under U.S. maritime law where ship owners would not be held liable under the doctrine of respondeat superior and vicarious negligence of a ship's medical personnel.

Bad facts often lead to creation of bad law, as was the case in *Franza*: Pasquale Vaglio passed away due to a severe head injury he sustained while traveling on a cruise ship. Vaglio fell and suffered the injury while attempting to board a trolley "at or near the dock" during the ship's port call in Bermuda. Vaglio was taken to the ship's infirmary where one of the onboard nurses examined him and determined that Vaglio might have suffered a concussion. Vaglio went back to his room but his condition worsened and he later returned to the infirmary. Four hours after his initial exam, the ship's onboard doctor examined Vaglio and ordered that Vaglio be transferred to King Edward Memorial Hospital in Bermuda. By the time Vaglio arrived at the hospital approximately six hours after his initial examination, his life was beyond saving.

Franza, Vaglio's daughter, brought suit in the United States District Court for the Southern District of Florida seeking to hold the cruise line vicariously liable for the purported negligent actions of the ship's onboard medical personnel under the theories of actual and apparent agency. The district court initially dismissed the actual agency claim as a matter of law by applying the *Barbetta* rule and dismissed the apparent agency claim as inadequately pleaded. On appeal, the Eleventh Circuit determined that a passenger may utilize principles of actual and apparent agency to implicate a cruise line for an injury received through the negligent medical care of a ship's onboard doctor or nurse. In its decision, the Eleventh Circuit acknowledged the *Barbetta* rule, but determined that the "existence of an agency relationship is a question of fact under the general maritime law" and should not be barred as a matter of law.

By declining to follow the *Barbetta* rule, the Eleventh Circuit outlined and rejected the three basic arguments in favor of the rule. First, the *Barbetta* rule relied on the foundation that no third party principal could be vicariously liable for the actions of a doctor because of the lack of control a principal retains in regard to the doctor-patient relationship. This argument failed, the court in *Franza* noted because today most doctors practice within the confines of agency relationships, principals are able to retain the requisite control over doctors and nurses through proper training, hiring, practicing guidelines, and disciplinary measures.

Second, the Eleventh Circuit commented that the *Barbetta* rule rests on the assumption that medical advice is outside the scope of a cruise line's expertise. Under basic agency principals, the scope of an employer's vicarious liability is not limited to negligence arising from its primary business, but is regularly found in regard to actions taken by agents working within the scope and authority of their employment. The Eleventh Circuit further stated that no principle from maritime tort law justifies treating shipowners so differently from ordinary employers.

Third, the *Franza* court stated that the *Barbetta* rule relied on the argument that a shipowner is never physically close enough to exercise "sufficiently immediate" control over the ship's medical personnel. The Eleventh Circuit rejected this argument as well, stating that while physical separation may affect liability in some cases, advances in modern technology enable effective communication between shore based principals and onboard medics.

For these reasons, the Eleventh Circuit determined that Franza "plausibly and adequately pled all three elements of apparent agency." The Court noted that the cruise ship operator represented to Vaglio, through its promotional materials, that the cruise medical personnel were authorized agents of Royal Caribbean and Vaglio relied on his belief that the ship's medical personnel were employed by the cruise ship operator line. Accordingly, the Court determined that Franza's pleading was sufficient to defeat the cruise ship operator's motion to dismiss and subsequently reversed the district court's dismissal.

This decision established a new standard for reviewing and assessing claims of medical negligence under U.S. maritime law. The *Franza* decision has carved out an exemption to the Barbetta rule and has chosen to follow the same agency principles that the Eleventh Circuit has followed in other types of maritime tort cases. Consequently, cruise lines will no longer be able to assert immunity from liability for such claims, and passengers will now be able to hold cruise lines vicariously liable for the actions of the ship's onboard medical personnel.

Although the Eleventh Circuit's *Franza* ruling does not specifically overrule the Fifth Circuit's *Barbetta* decision, the *Franza* decision has created a conflict among U.S. Circuits. The *Franza* decision may very well lead to the abandonment of the prior rule by the other circuits. Moreover, the Eleventh Circuit's location as home to the majority of North America's cruise ship operations will result in *Franza's* supplanting *Barbetta* as the new majority rule unless the Supreme Court rules otherwise.

NEGOTIATING PERFORMANCE WARRANTIES IN TIME CHARTERPARTIES

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Speed and consumption claims have formed a considerable part of the Club's FDD caseload in recent years. Although such cases are usually amicably resolved, in certain instances they are litigated, leading to London arbitration awards and occasionally Court judgments constituting the building blocks of legal precedent in underperformance disputes.

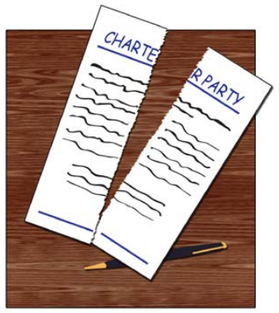
When considering the facts of such cases, one would be surprised with the number of instances that crucial elements of performance warranties are – usually inadvertently – missed. Indeed, points that may seem basic and self-evident may "slip through cracks" of the various exchanges in the heat of negotiating a fixture.

The following are some of the mishaps and contingencies most commonly encountered when drafting performance warranty clauses in the context of negotiating time charters, which are subject to English law, based on the Club's experience in dealing with speed and consumption disputes in conjunction with the evolving London arbitration trends and English case law:

1. In practice (despite the findings in *The Al Bida* [1987] 1 Lloyd's Rep 24), it is now fairly accepted that the insertion of "about" in the wording of performance warrantee clauses generally signifies a tolerance of 0.5 knots in terms of speed and 5% in terms of consumption. However, we have seen cases where during negotiations the omission of the word "about" went unnoticed by Owners, thus unknowingly warranting absolute figures. An argument that if the term is absent, it should nevertheless be implied would be rather weak and unconvincing from a legal construction point-of-view, since if the parties intended for warranted figures to be approximate then they would have inserted an express term to this effect.

2. Including the effect of currents in the performance warranty naturally creates more certainty and prevents disputes down the line as to whether currents are to be accounted for or not, when assessing speed and performance. This is usually done by adding "no adverse currents" in the wording. As far favorable currents are concerned, in practice no express wording is virtually ever added as to their effect. One could argue that rules of construction dictate that unless the intention to account for favorable currents in the performance assessment is express in the warranty wording, such currents should work in the ship's advantage, although recently reported arbitration awards indicate that London Tribunals may not be happy with this result and may lean towards allowing both favorable and negative currents, if possible.

3. Caution must be exercised in providing details and information when answering the Charterers' questionnaire, always bearing in mind that it forms part of the charter agreement. Such details should ideally be given without guarantee ("WOG") or at least "for information only", whilst they should be cross-referred to the charterparty text, so as to avoid any conflicting terms therein. An illustration of this can found in *The Pearl*



C [2012] 2 Lloyd's Rep 533 whereby the Owner had warranted the vessel's MCR (Maximum Continuous Rating) and NCR (Normal Continuous Rating) (values that invariably do not form part of a vessel's sea trial data), and was found in breach of the NYPE's clause 8 duty of utmost dispatch, whilst the off-hire clause was triggered due to default of the Master as a result of slow-steaming. Obviously, including BIMCO's standard form slow-steaming clause in the time charter would regulate slow-steaming, and thus would be well-advised.

4. Turning to another BIMCO clause, which may affect the vessel's subsequent performance, when the standard 15-day period of inactivity in tropical waters set out in the default BIMCO Hull Fouling Clause is increased, this must be done with caution and proper planning, since there is a risk that Charterers will be virtually discharged from their hull-cleaning duty, unless the vessel remains at each port for the minimum prescribed number of days.

5. Conclusive evidence clauses in favor of weather routing companies' reports are found in some charterparties, obviously prejudicing Owners' ability to rebut their findings by relying on their ship's deck and engine logs as evidence when assessing her performance. If the element of conclusiveness is removed from the clause, then Owners are entitled to rely on the ship's logs to evidence the prevailing weather conditions and her performance, unless they are discredited due to insufficient, inaccurate, exaggerated or even incomprehensible record-keeping by the vessel's officers, in which case a weather routing company's report will prevail.

6. Finally, in charterparties where a number of different clauses refer to the vessel's description and performance or refer to past fixtures, it must be ensured that they are not conflicting/contradicting, since the interaction between such clauses when applying rules of legal construction may lead to unwanted results. *The Gaz Energy* [2011] EWHC 3108 Comm, is a typical example of such mishap, where her Owner inadvertently provided an all-weather, instead of a good weather warranty.

What becomes evident from most of the foregoing examples is that rules of construction (often reiterated in judgments, as in *The Gaz Energy*) which require a fair degree of legal understanding often come into play in order for a Tribunal or Court to decide what the "true" meaning of a clause is.

In order to conclude, it goes without saying that the more detailed a warranty clause is, the less room for ambiguity and implied terms and, consequently, the less room for disputes it leaves. For example, a performance warranty providing for good weather conditions of winds not exceeding Beaufort force 4, with DSS3, without adverse current and without adverse swell and - to take it a step further - providing for even-keel condition and sea water temperatures max 28 degrees Celsius would be considered ideally comprehensive. However, in chartering reality conciseness must be combined with brevity, otherwise it will attract undue attention and scrutiny. In this respect, there is always a fine balance to be struck, so as not to prejudice the ship's marketability, especially in the context of the current freight market.

INSURANCE ACT 2015
OVERVIEW OF THE CHANGES INTRODUCED

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On July 2014, the new Insurance Act was introduced to the UK Parliament and will be the default regime for commercial insurance contracts across all aspects of insurance, including marine. The Marine Insurance Act 1906 (MIA) was considered to be out of date, thus not reflecting the realities of today's commercial environment.

The Act reforms the operation of warranties in insurance contracts, the duty of utmost good faith, the duties regarding disclosure and representations and clarifies the remedies available to insurers for fraudulent claims. The Insurance Act 2015 received Royal Assent on 12 February 2015 and will come into force in August 2016. As the new Act comes into force, it is important to evaluate what the significant changes are.

Insurance contracts are governed by the doctrine of utmost good faith both at common law and by reason of **Section 17** of the MIA 1906. Both parties who are involved in the insurance contract have the obligation to disclose any information that might affect the pre-contractual negotiations between the assured and the insurer, while it lasts for the duration of the policy. So, if the utmost good faith is not observed by either party, then the contract might be avoided ab initio. Avoidance entails that the insurer is retroactively freed of any liability under the contract; the policy could be considered void and the premium would be returned.

The remedy of avoidance seemed as an unfair burden on the assured.

With the introduction of the new Act, the remedy for a breach of the doctrine of good faith is no longer that the contract is void.

The assured is now under a duty:

- to make a clear and accessible disclosure of every material circumstance, which the assured knows or ought to know,
- to disclose sufficient information to put a prudent insurer on notice that it needs to make further enquiries and
- to ensure that any representations as to a matter of fact are substantially correct.

Under **Section 18** of the MIA 1906, a commercial policyholder is required to disclose to the insurer every material circumstance that he knows or ought to know in his ordinary course of business before entering the contract. If a circumstance is not mentioned, the insurer may avoid the contract and refuse all claims.

With the introduction of the new legislation, the onus to disclose every material circumstance still remains on the insured or alternatively is required to give the insurer "sufficient information to put a prudent insurer on notice that it needs to make further enquiries" to reveal such material circumstances.

The 2015 Act also reforms **Section 19** of the MIA 1906, which relates to the brokers' disclosure obligations. It is repealed that the broker is under the obligation to disclose information obtained as agent for the assured, but it clarifies that knowledge about a material circumstance will extent only to those individuals who participate on behalf of the insurer in the decision whether to take the risk and on what terms.

In other words, the new legislation requires both the assured and their brokers to disclose sufficient information to put a prudent insurer on notice that he needs to make further inquiries about the risk. By this way, the insurer plays a more active role in the pre-contractual negotiations. However, the brokers are not under duty to disclose confidential information received through other clients. Thus, the pre-contractual duty of disclosure and non-misrepresentation remains.

Section 20 of the MIA 1906 allows an insurer in the event of material non-disclosure or misrepresentation by the assured to avoid the policy from its inception. The 2015 Act seeks to correct the imbalance between insurers and commercial policyholders in cases of material non-disclosure of misrepresentation by introducing the concept of "proportionate remedies".

This concept of proportionate remedies into consumer insurance contracts was already introduced by the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). An honest breach of the disclosure duty would entitle the insurer to be put in the position they would have been in if the error had not been made; in this case the insurer would be entitled to a proportionate remedy.

For example, if the insurer would have entered into a contract, but would have charged a higher premium, the insurer has to demonstrate that a higher policy premium would have been charged if that fact had been disclosed before inception and thus may reduce proportionately the amount to be paid on a claim. However, a dishonest breach of the disclosure duty though, would entitle the insurer to refuse all claims and retain the premium.

The 2015 Act also attempts to reform the operation of warranties included in the insurance contracts. When a warranty is incorporated into the policy of insurance, the assured undertakes that some particular thing shall or shall not be done or that some condition shall be fulfilled or whereby he affirms or negatives the existence of a particular state of facts. The unique characteristic of a warranty is that the insurer only accepts the risk provided that the warranty is fulfilled while materiality and causation are irrelevant.

From an insurer's point of view, a warranty is typically a promise by the policyholder to do something to mitigate the risk, for example to maintain a fire alarm. If the assured fails to comply with a warranty, then subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

The new legislation introduces the temporary effect of a breach of warranty and changes the treatment with regard to the remedy in the event of a breach. This actually means that under the new regime insurers are no longer immediately discharged from further liability once a warranty has been breached; a breach will suspend rather than discharge an insurer's liability for a claim. Therefore, the insurer will have no liability for losses, which arise whilst an owner is in breach of warranty, but will be liable for losses, which occur after the breach is remedied, provided that the risk originally contemplated remains the same.

A new statutory provision is also introduced that clarifies the remedies available to insurers where the assured has made a fraudulent claim. When the assured submits a fraudulent claim, under **Section 12** of the new Act, the insurer will be in a position to reject the whole claim to which the fraud relates and will be liable to recover any interim payments previously made in relation to that claim.

On discovery of a fraud, the insurer must communicate the findings to the assured and will be able to choose to treat the contract as terminated with effect from the fraudulent act without the obligation to return any premiums paid under the contract. Otherwise, it may be taken to have waived its defense to a subsequent claim. However, a fraudulent claim does not render illegitimate any previous valid claims, where the loss arose before the fraud.

As with any new legislation, the 2015 Insurance Act is expected to bring some kind of initial uncertainty over the interpretation of the new concepts and the changes introduced. However, the Law Commission recognized the need for certainty and flexibility, especially in sophisticated and high risk markets such as marine insurance. Since it is appreciated that there is considerable legal certainty that is based on the present law, the parties have the right to opt out of the new legislation if they wish to. Despite any imperfections, the MIA 1906 will remain a valuable platform for marine insurance going forward as it was for more than 100 years now.

MULTI-JURISDICTIONAL LEGAL UPDATES ON PROCEEDINGS FOLLOWING OW BUNKER'S BANKRUPTCY

FD&D CORNER

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It has been over a year since OW Bunker A/S's ("OW") insolvency in November 2014, and disputes, vessel arrests and legal proceedings concerning bunker stems and supplies involving OW show no signs of fading. Vessel owners, operators and charterers continue to face competing demands from physical suppliers, from OW itself, and from OW's assignee, ING Bank NV ("ING"). The numerous issues and dilemmas facing the Association's Membership prompted the Managers to prepare general guidance entitled *"The Collapse of OW Bunker and The International Tail of Maritime Litigation Regarding the Supply of Bunkers"* which can be accessed at: http://www.american-club.com/page/OW_bankruptcy. This resource provides information and guidance regarding bunker supply transactions and complications subsequent to OW's fallout, maritime lien issues, legal developments, as well as loss prevention advice and recommended actions upon receipt of claims by unpaid bunker suppliers.

As courts worldwide continue to debate competing claims in the case of OW, we provide herein below a series of summaries and updates on the status of the pending legal battles and decisions from various jurisdictions.

USA: INTERPLEADER RELIEF IS ENJOYED BY VESSEL OWNERS, BUT INTENSELY CHALLENGED BY PHYSICAL SUPPLIERS

There are now approximately 34 actions pending in New York Federal Court which have been commenced as interpleader cases by vessel owners and/or time charterers. In addition, there are other cases pending in New York and other districts (primarily in Texas), in which interpleader was raised in response to vessel arrest actions commenced by US-based physical suppliers. All told, there are approximately 50 cases pending in the US involving OW bunker transactions.

To date, there has not been a substantive ruling in any of the interpleader cases, and it is unknown precisely what substantive relief will ultimately be granted. That being said, discovery in the majority of the interpleader cases is either complete or nearly complete, and it is anticipated that the courts will soon be in a position to issue rulings concerning the respective rights of the parties. Additionally, there have also been a number of procedural developments due to the persistent efforts of physical suppliers to have the interpleader cases dismissed, or to have their rights determined without discovery being conducted. Thus far, these efforts have not been successful. Recent rulings regarding these issues include the following:

• In New York, one of the physical suppliers appealed the District Court's approval of the use of the interpleader mechanism. Briefing is complete and oral argument was held in November 2015 before the U.S. Circuit Court of Appeals for the Second Circuit ("Second Circuit"). It is expected that the Second Circuit will issue its decision in approximately 6 to 12 months. The outcome of the appeal may be significant to all OW related interpleader actions because the appeal concerns the fundamental issue of whether the District Court appropriately exercised interpleader jurisdiction.

• In July 2015, the New York Federal District Court issued an opinion and ruled that interpleader relief is appropriate under the circumstances. In doing so, the court rejected challenges by two physical suppliers and held that jurisdiction exists over the physical suppliers' maritime lien claims. No appeal has been lodged yet from this ruling, however it is significant to note that the issues addressed in this ruling are similar to the ones that were argued in November 2015 before the Second Circuit in the appeal described above.

• In November 2015 and January 2016, two Federal Court District Judges in Texas rejected near identical challenges by the same physical supplier to have the interpleader aspects dismissed, finding that the existence of multiple lien claims was sufficient to sustain the interpleader. These rulings were consistent with those of the District Court Judge in New York discussed above.

• Several physical suppliers in pending actions in New York, Texas, Louisiana and Alabama have moved for summary judgment, arguing that there are no factual issues to be tried and that they are entitled to a judgment as a matter of law declaring that they have a lien against the vessels under the U.S. Lien Act. Thus far, these courts have been unanimous in declaring that a summary determination is inappropriate at this time and that discovery must be allowed to proceed before a determination can be made regarding the lien issue.

In sum, there have been no substantive determinations in the pending US interpleader proceedings regarding the question of which claimant, if any, has a lien, and if so, the impact of such a finding on the contractual claims. The US interpleader cases continue to progress through the usual stages of discovery and, ultimately, for the trial of all relevant issues surrounding these bunker supply situations involving OW, ING, physical bunker suppliers, vessel owners and/or charterers' respective rights.

In the meanwhile, in December 2015, one US court (in a case initiated as a vessel arrest action and not involving an interpleader) determined that the physical supplier did not have a lien under the US Lien Act simply because it supplied bunkers on the order of an OW entity which could eventually be traced to the vessel's owner or charterer. *See Valero Markeing. & Supply Co. v. M/V Almi Sun*, 14-cv-2712 (E.D. La. Dec. 28, 2015). This decision was issued in a summary judgment context and it is not clear whether its reasoning will be accepted as persuasive by the other courts in the US addressing OW lien issue.

CANADA: INTERPLEADER RELIEF GRANTED FOR CHARTERER THEREBY AVOIDING PROSPECT OF ITS PAYING TWICE FOR THE SAME BUNKERS

By way of background, in 2009, s.139 of Canada's Marine Liability Act was enacted which granted a maritime lien against a foreign vessel to service and supply providers who carry on business in Canada. It is still unclear as to whether this new law creates an independent maritime lien, or whether the lien only attaches provided that there was a contractual relationship between the owner of the vessel and the supplier. Furthermore, Canadian courts recognize foreign maritime liens and will enforce the foreign maritime lien even in cases where Canadian law does not grant a maritime lien in similar circumstances. Canadian courts do enforce "foreign maritime lien" clauses provided that the connecting factors test is met.

In September 2015, in *Canpotex Shipping Services Limited v. Marine Petrobulk Ltd. (2015 FC 1108)*, the OW debacle surfaced in Canadian litigation where a charterer successfully defended its vessel owner (under the charter party) and itself from having to pay twice for the same bunkers. The Canadian Federal Court found that in its contract with OW, the charterer had a clause where the trader had agreed that its contract was modified, save for price and credit term, by the incorporation of the terms and conditions of the actual supplier. One such typical term is the definition of "customer" which includes the vessel, its owner, the charterer and the trader. The Canadian Federal Court ordered the charterer to pay into court the total sum claimed by ING, but prohibited ING from receiving anything unless and until it had irrevocably directed payment to the actual supplier, thus discharging the "in rem" debt.

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The *Canpotex* decision is a victory, at least for the time being, for the charterer and the vessel owner / operator insofar as it did not produce a result where payment had to be made twice for the same bunkers. Under this decision, ING was only entitled to seek the amount equivalent to OW's mark-up on the physical supply of bunkers for the transaction in question. As will be seen below, this result is a stark contrast from the decision recently issued by the English Courts.

ENGLAND: VESSEL OWNERS AND OPERATORS FACE THE RISK OF DOUBLE PAYMENT UNDER SINGLE BUNKER SUPPLY TRANSACTION

On October 22, 2015, the English Court of Appeal handed down its Judgment in *The Res Cogitans*, [2015] EWCA Civ. 2015, which was an appeal from the decision of the High Court of Justice in London, which, in turn, had involved an appeal of an arbitration award. The Court of Appeal did not address the wider issues which this case presented in terms of the competing claims of OW, ING and the unpaid physical suppliers. Rather, the Court of Appeal deliberately chose to restrict its review to the question of whether, in order to enforce payment, OW had to transfer title.

The Court of Appeal held that the contract was one under which the bunkers were delivered to the shipowners and bailees with license for them to use the bunkers and an agreement pending payment to sell any quantity remaining at the date of payment. The court further noted that, while this scenario and fact pattern did not satisfy the strict requirements of the Sale of Goods Act of 1979, a claim for the price could be maintained.

The Judgment notes two further points as follows:

1. Owners did not advance an alternative argument that they were not liable to pay OW because the physical suppliers had not authorized the consumption of the bunkers. The Court felt this issue should be left to the arbitrators.

2. The physical suppliers appeared as an interested party to argue that the license to consume the bunkers pending payment did not bind them. The Court said that this point may have to be considered on another occasion.

Accordingly, as a matter of English law, OW and ING do still have a right to claim payment for the bunkers. The vessel owner has lodged an application for permission to appeal this decision to the Supreme Court, the outcome of which is expected in early 2016.

While the *Res Cogitans* decision is specific to the facts and contractual terms in that case, this decision nevertheless places vessel owners and operators at risk of claims from the physical suppliers even if ING has been paid in full. Such a result would appear to confound fairness by allowing two parties to be paid for the same supply of bunkers. It is hoped that this decision will either be reviewed further or otherwise challenged in other OW related proceedings and that principles of equity will prevail to prevent the unjust enrichment of a party that has itself failed to honor its own payment obligations.

SINGAPORE: NO LIEN RIGHT FOR THE SUPPLIER; NO INTERPLEADER RELIEF FOR THE PURCHASER

In *Precious Shipping and others v OW Bunker and others [2015] SGHC 187*, the bunker purchasers (owners and charterers) were facing claims from both ING and the physical suppliers. They therefore applied for interpleader relief to the Singapore High Court.

Under Singapore law, for interpleader relief to be granted to the bunker purchasers, the following 3 conditions had to be satisfied:

1. The bunker purchasers are under a liability for any debt, money, goods or chattels;

2. There must be an expectation that the bunker purchasers would be sued by (at least) 2 parties; both of whom must disclose a prima facie case; and

3. There must be adverse or competing claims for the debt, money, goods or chattels from ING and/or the physical suppliers whom the bunker purchaser expects will bring suit.

The burden of proving that the 3 conditions have been met in full falls on the applicant, here the bunker purchasers, but, as it was in their interest that the monies not be paid to ING, the physical suppliers largely supported the application.

While numerous arguments were advanced by the bunker purchasers and physical suppliers, the Singapore High Court held that the second condition was not satisfied as there was no prima facie case disclosed on any of the arguments. The Court also determined that the physical suppliers' claims were different in nature to that of ING and so the third condition was not met either. The application was therefore dismissed. However, the Court also ruled that it did not have the power in the circumstances to summarily determine the merits, if any, of ING's competing claims or grant it judgment against the bunker purchasers.

One interesting point decided by the Court was that there was no property retained by the physical suppliers even with "retention of title" clauses in the contracts. The Court held that when the physical suppliers delivered the bunkers to the vessels, they must have intended (or at least must be taken to have intended) for the bunkers to be consumed. Accordingly, by the date of payment sometime later, no property could have existed. The Court added that even if the physical suppliers had managed to retain title to the bunkers, "they would not, without more, be entitled to the proceeds of the sale of the bunkers" as there was no "proceeds of sale" as such.

Based on the thorough examination and dismissals of the various possible claims put forward by the physical suppliers, it is therefore expected that physical suppliers facing a similar fact pattern would be reluctant to file suits in Singapore. That is because to the extent the matter is fully tried in Singapore, the bunker purchasers would likely and eventually only pay once and quite probably not to the physical suppliers. That said, if the owners trade their vessels in jurisdictions where monies owed under a bunker supply contract are recognised as a maritime lien, such vessels remain exposed to arrests by physical suppliers.

CONCLUSION

As reflected by the various decisions reviewed above, the landscape regarding OW bunker litigations is both diverse and complex. Members are encouraged to contact the Managers and consult legal counsel when facing potential exposures stemming from the long tail of the OW insolvency. We will do our part to continue monitoring further developments in OW proceedings worldwide and provide further reviews in future editions of FD&D Corner.

Acknowledgements:

We would like to thank Stephenson Harwood (Singapore), Brisset Bishop (Montreal), Swinnerton Moore LLP (London) and Freehill, Hogan & Mahar LLP (New York) for their kind assistance and input regarding this article.

POLLUTION PERMIT VIOLATIONS: THE NEXT FRONTIER IN ENVIRONMENTAL LITIGATION AGAINST VESSEL OWNERS?

by:
Daniel A. Tadros, Partner
Alan R. Davis, Partner
Chaffe McCall LL.P.
New Orleans, LA, USA

Two lawsuits recently filed in Louisiana's Civil District Court for the Parish of Orleans may portend what could become a source of potentially costly litigation for vessel owners and operators.

During the month of December, 2014, a zealous environmentalist hid in the bushes at various points along the banks of the Mississippi River near New Orleans filming as one vessel after another loaded cargo and sailed out of port. In the case of at least one unlucky vessel the environmentalist observed and recorded on video what he perceived to be the illegal discharge of a pollutant into the river during the crew's post-loading deck wash down with the vessel's fire hose. He then launched an investigation into the vessel's operator and identified what he perceived to be photographic evidence of a second discharge under nearly identical circumstances occurring in February, 2009, from a vessel under common management. Armed with his video and photographic evidence, the environmentalist commenced litigation and sought the arrest of both vessels upon their subsequent calls in New Orleans.

In *LeMaire v. Sacramento Navigation Ltd.* and *LeMaire v. New Sydney Shipping Ltd.*, the environmentalist filed "Citizen Suits" against the current owners and operators of the two vessels claiming that the Cypriot-flagged vessels had committed illegal discharges in violation of the Louisiana Environmental Quality Act (LEQA). In such Citizen Suits, the LEQA authorizes the assessment of a "civil penalty" of up to $10,000 for each violation of the statute, and provides that each day on which a discharge occurs constitutes a separate violation. However, read broadly, the LEQA arguably also provides that the failure to report a discharge is also a statutory violation, and that each day of the failure to report a discharge may be treated as a separate violation. Relying on these provisions, the Plaintiff claimed that for the 2014 incident alone the civil penalty that could be assessed was up to **$1.7 Million** – $10,000 for the single discharge event itself, plus $10,000 per day for each day since the alleged incident on which the vessel's operators had failed to report the discharge to the Louisiana Department of Environmental Quality. Relying on this interpretation, the Plaintiff obtained a writ of attachment against the first vessel upon its arrival in New Orleans, agreeing to refrain from seizing it only in exchange for $2.5 Million in security.

Notably, under the same interpretation of the statute, the allowable civil penalty for the alleged 2009 incident exceeded **$23 Million** – again, a single "discharge" violation plus six years' worth of "non-reporting" penalties.

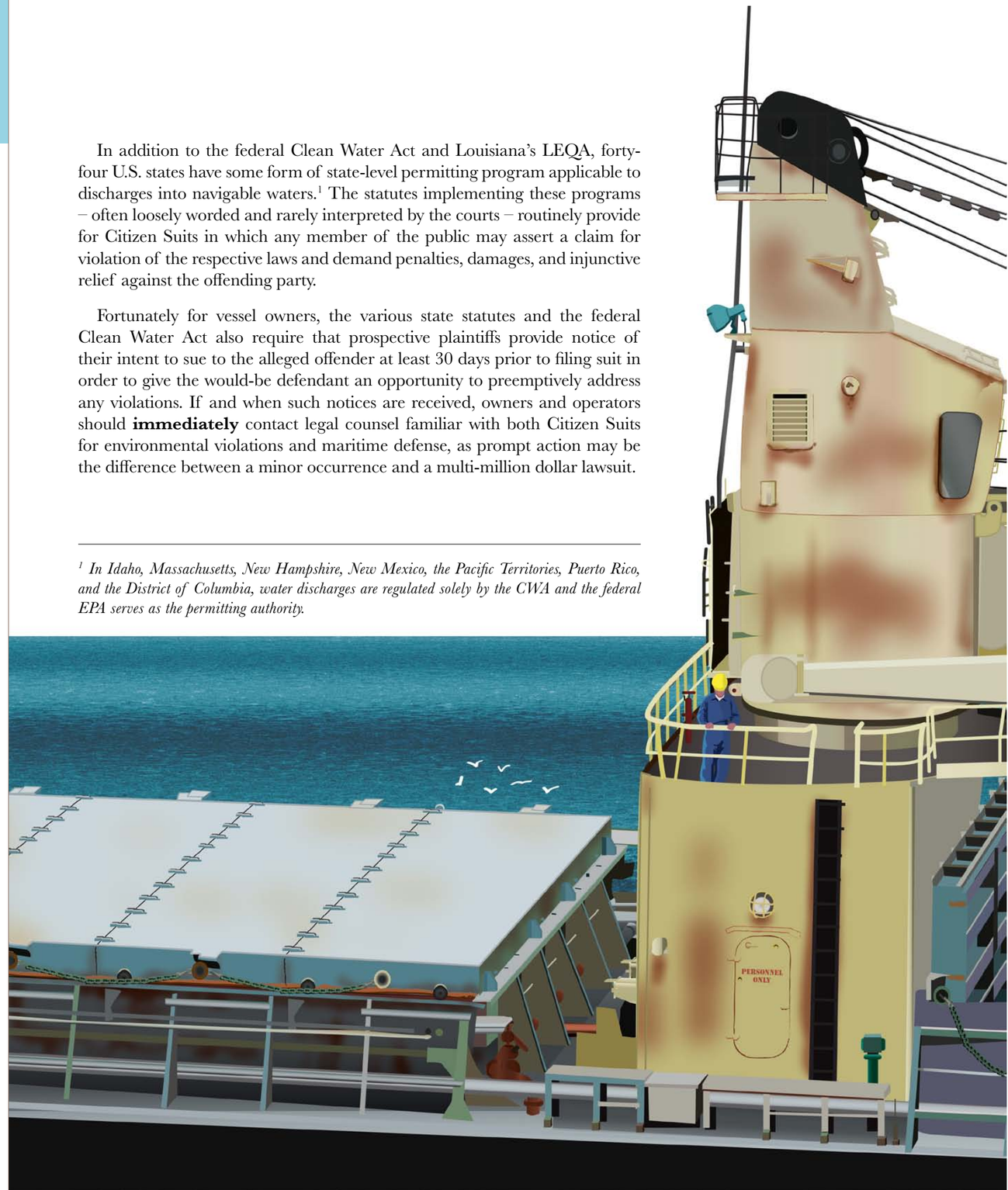
Expedited discovery ordered in the first filed suit revealed that the cargo in question was agricultural in nature (corn and soybean meal), and that the vessel's crew would testify to having swept and collected the cargo remnants before washing cargo dust off into the river. While acknowledging that the cargo was non-toxic, the Plaintiff persisted in his suit relying on the broad definition of "pollutant" under the LEQA and the fact that the vessel's Operator could not produce a state permit authorizing the discharge of even non-hazardous substances.

After avoiding the seizure of both involved vessels by providing substitute security for Plaintiff's claims, Chaffe McCall, as counsel for the Operator, successfully defended both suits by aggressively challenging the Plaintiff's sources of evidence and asserting its right to recover the fees and costs associated with its defense in the event the Plaintiff's claims ultimately failed.

In addition to the federal Clean Water Act and Louisiana's LEQA, forty-four U.S. states have some form of state-level permitting program applicable to discharges into navigable waters.[1] The statutes implementing these programs – often loosely worded and rarely interpreted by the courts – routinely provide for Citizen Suits in which any member of the public may assert a claim for violation of the respective laws and demand penalties, damages, and injunctive relief against the offending party.

Fortunately for vessel owners, the various state statutes and the federal Clean Water Act also require that prospective plaintiffs provide notice of their intent to sue to the alleged offender at least 30 days prior to filing suit in order to give the would-be defendant an opportunity to preemptively address any violations. If and when such notices are received, owners and operators should **immediately** contact legal counsel familiar with both Citizen Suits for environmental violations and maritime defense, as prompt action may be the difference between a minor occurrence and a multi-million dollar lawsuit.

[1] In Idaho, Massachusetts, New Hampshire, New Mexico, the Pacific Territories, Puerto Rico, and the District of Columbia, water discharges are regulated solely by the CWA and the federal EPA serves as the permitting authority.



E-MISSION CONTROL
WE HAVE A PROBLEM!

The first of a two-part series on emerging environmentally driven fuel issues

by: John Poulson
CEng, Principal Surveyor
AMA Inc.
New York, NY, USA

ECA's and continuing downward pressure on emissions from ships is environmentally desirable but it is creating some major headaches for Owners and their crews today. How did we get here and what does the future hold for marine fuels?

Historical Background

Early ships and boats were propelled by various configurations of oars manipulated by men. It can therefore perhaps be stated, not unreasonably, that the first fuel to propel ships was actually food; the food consumed by sailors to provide the energy needed for them to power the oars needed to row a ship. Speed and distance was undoubtedly proportional to the amount and quality of food consumed. It can be said then that since the earliest days of waterborne transportation to the present, the fuel required to get from A to B has changed from carbohydrate to hydrocarbon!

The natural power of the wind was harnessed by sail, initially for local trade then bigger ships with bigger sails to travel to all corners of the world. Wooden sailing ships grew in size eventually becoming iron-clad and then iron hulled when the steam engine was fitted to sailing ships then replaced the sails completely as power increased, as did the size of empires and trading areas and the need for speed. This all then needed a vital resource - fuel.

Nowadays, ninety per cent of cargo worldwide is transported by sea. The vast majority of the 60,000 or so vessels moving that cargo at any one time are powered by residual fuel oils i.e. hydrocarbons. As its name suggests, residual fuel oil, also generically referred to as heavy fuel oil (HFO) or intermediate fuel oil (IFO) depending upon specified delivery viscosity, is mainly constituted from the residue remaining from the refining of crude oil. It is basically a fuel made from what's left of crude oil once the desired constituents such as gasoline, kerosene, gas oil etc., have been removed.

Its use as a marine fuel initially in boilers, stemmed from the opportunity arising from the sheer volume of residue produced by the refining process and the opportunity to profit from its use. In the 1950's development of the marine diesel engine and importantly its lubricating oil to allow operation on HFO, together with its better efficiency finally made it economically superior to steam plant which was gradually superseded throughout the world's fleets.

Unfortunately the increased efficiency of refineries leaves HFO with few desirable qualities including in some cases the ability to combust! Advanced refining processes also leaves residual fuel with raised sulphur content. Evolving environmental pressures now mean that sulphur limits are under constant downward revision and ultimately this particular issue is largely dictating the future of marine fuels.

Background to Environmental Regulations, Marpol Annex VI; Prevention of Air Pollution from Ships

The seventeenth session of the IMO Assembly, in November 1991, recognizing the urgent necessity of establishing an international policy on prevention of air pollution from ships, considered and decided, by way of resolution A.719 (17), to develop a new annex to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL Convention).

Following development of the regulatory text by IMO's Marine Environment Protection Committee (MEPC), an International Conference of Parties to the MARPOL Convention was held in London from 15 to 26 September 1997. The Conference adopted the Protocol of 1997 to the MARPOL Convention, which added a new Annex VI, Regulations for the Prevention of Air Pollution from Ships, to the MARPOL Convention (MARPOL Annex VI). The Conference also adopted, by Conference resolution 2, the Technical Code on Control of Emission of Nitrogen Oxides from Marine Diesel Engines (NOx Technical Code), which is mandatory under MARPOL Annex VI.

Following the entry into force of MARPOL Annex VI on 19 May 2005, MEPC 53 (July 2005) agreed to the revision of MARPOL Annex VI and the NOx Technical Code with the aim of significantly strengthening the emission limits in light of technological improvements and implementation experience, and then instructed the IMO Sub-Committee on Bulk Liquids and Gases to prepare the draft amendments to MARPOL Annex VI and NOx Technical Code. As a result, MEPC 58 (October 2008) considered and adopted the revised MARPOL Annex VI and the NOx Technical Code 2008, which entered into force on 1 July 2010.

In 2006, both Annex VI and the European Union (EU) directive 2005/33/EC restricted the SOx emissions of ships sailing in the Baltic Sea "SECA" (Sulphur [oxide] Emission Control Area) to 6 g/kWh which corresponds to fuel oil sulphur content of a maximum 1.5%. In addition, the EU directive extended the 1.5% Sulphur limit to ferries operating to and from any EU port.

In 2007, the North Sea and English Channel also became a SECA area where the 1.5% sulphur limit applied. In 2010 this cap was reduced to 1.0% and further reduced to 0.1% in 2015.

In August 2012 the USA and Canada enforced the North American Emission Control Area (ECA) which required vessels operating within 200 nautical miles of the coast to use less than 1.0% sulphur as required in the Baltic & North Sea ECA, with the corresponding cap then lowered to 0.1% in 2015.

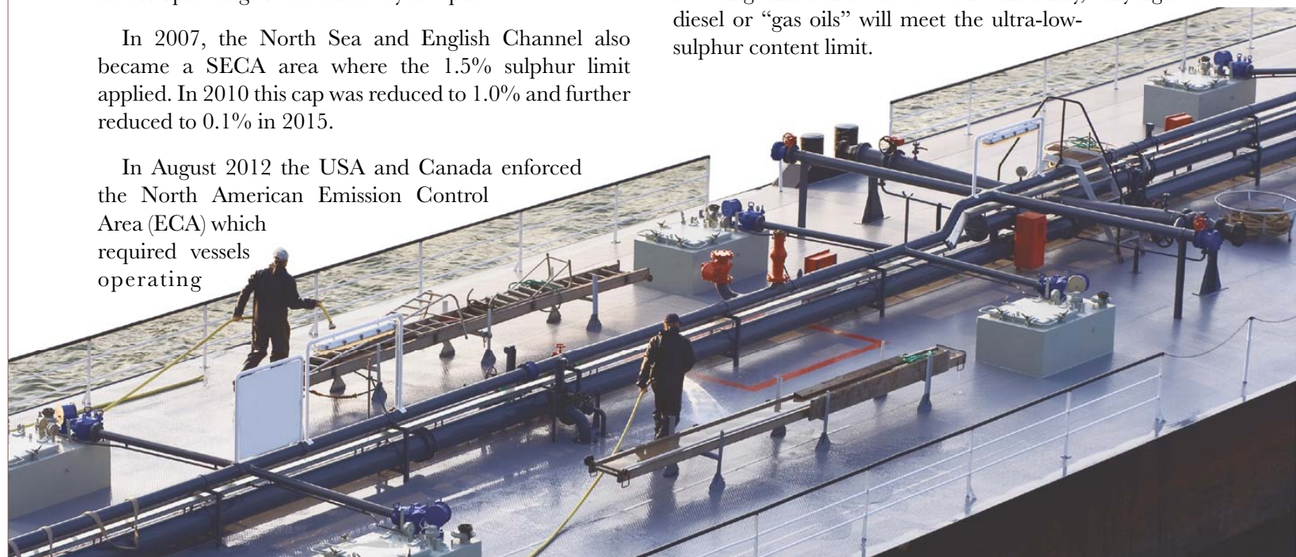
In 2020 the plan is to introduce a global cap of 0.5%. This aim is to be reviewed in 2018 with a possible stay until 2025 but clearly Sulphur is well and truly in the cross-hairs!

Current and Future Global and ECA Limits

Fuel Sulphur Standard (Maximum Percentage by Weight)			
Global Sulphur Cap		**ECA Sulphur Cap**	
On and after Jan. 1, 2012	3.50%	On and after Aug 1, 2012	1.00%
On and after Jan. 1, 2020	0.50%	On and after Jan. 1, 2015	0.10%

What does this all mean for Ship Owners?

The bottom line is that ships can no longer use normal residual fuel oil (with a maximum allowable sulphur content of 4.5%) in these areas. Unless the vessel is equipped with an exhaust gas scrubber capable of reducing emission levels of SOx sufficiently, only light diesel or "gas oils" will meet the ultra-low-sulphur content limit.



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Ship Owners have generally had three options to comply with emission regulations:

1. Install new machinery (or convert existing machinery where possible) designed to operate on a naturally low sulphur alternative fuel, such as liquefied natural gas (LNG)
2. Install an exhaust gas cleaning (EGC) "scrubber" system
3. Burn low sulphur residual or distillate fuels in existing machinery

Cost, as always is the main consideration for an Owner when evaluating these options but there are also some practical issues to take into account such as with option 2, the non-ability of scrubbers to meet the 0.1 SECA limit and with option 3 the non-availability of low sulphur residual fuel in some areas. Fuel oil suppliers such as BP, Shell & Exxon Mobil are currently producing ultra-low-sulphur-fuel-oils (ULSFO) but at a premium cost and in limited quantities. Unfortunately the affect these fuels have on engines has not yet been determined.

The diesel engine supplanted steam boilers and turbines as the prime mover of choice because diesel engines were able to burn heavy fuel oil and therefore be economically competitive. There were physical, mechanical design issues that had to be addressed to allow distillate fuel engines to burn HFO. The sulphur content of a marine fuel depends on the crude oil origin and the refining process and when a fuel burns, sulphur is converted into various sulphur oxides. By far the main contributor to development of engines was the leading development of lubricating oils capable of neutralizing the acids produced, mainly by sulphur during combustion of HFO.

In medium speed diesel engines, these oxides reach the lubricating oil via gases that will get past the piston rings to some extent in even a well maintained engine. These oxides are corrosive, particularly to cylinder liners - which are usually of cast iron - and must be neutralized by the cylinder lubricant. Marine engine lubricants are developed to cope with this acidity by having a high 'base number' – i.e. alkalinity. If the correct lubricant is used, the affect of sulphur content and therefore acidity of a marine fuel can be controlled but may still have environmental implications.

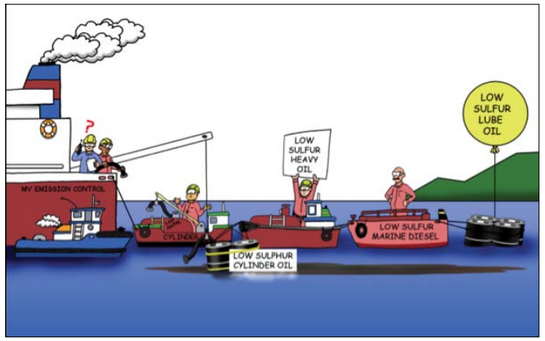
In the case of the slow-speed two-stroke engine this has meant using cylinder lubricating oil with a very high alkaline chemical constituent. Later, four-stroke medium speed engines also functioned burning HFO through use of crankcase oils also with high alkaline content. In both cases the quantitative element giving the measure of alkalinity is known as the Total Base Number or TBN. Cylinder oil can have a TBN of 80 and crankcase oil typically 40.

Quite ironically, because of the advances in lubricating oil technology, new problems affecting the reliability of existing propulsion and auxiliary engines have actually stemmed from the regulations noted above reducing the amount of sulphur in fuel. The reduction in sulphur content has had a negative affect on the balance that cylinder oil particularly strikes with the normally quite acidic products of HFO combustion.

The use of alkaline cylinder oils in two-stroke marine diesel engines (powering most cargo vessels) is to limit corrosion of cylinder liners – but not to stop it altogether. Corrosion is caused by sulphur trioxide formed during combustion, combining with water which is inherent in the scavenge air, to form acid. Cylinder oil alkalinity (through its calcium content) neutralises the acid to limit the corrosive effect of the acid. This limited corrosion ensures that the surface of the cast iron cylinder liners doesn't become polished and maintains a slightly rough, oil-retaining surface, therefore maintaining a protective oil film.

The very low sulphur levels therefore has in turn required the oil producers to supply lubricating oils with lower TBN's to restore a more neutral product of combustion generated during low-sulphur operation. Rates of supply of cylinder oils to the engine also may need to be adjusted downward during operation on low-sulphur fuels. Continuous operation with normal rates and high TBN cylinder oil can also cause heavy build-up of ash on pistons which will cause scuffing of the cylinder liners. These technical issues, in conjunction with regulations governing emissions in the ECA's has served to make life for the Owners and especially the crew somewhat difficult, to say the least … especially if an Owner is using more economical higher sulphur fuel globally then changing to low-sulphur fuel for operation in (S)ECA's.

Firstly, ships have to have separate tank capacity to store low-sulphur fuels and low-sulphur-friendly lubricating oils for the engines to operate on low-sulphur HFO or on low-sulphur diesel oil when entering or leaving and while operating in an ECA. The vast majority of ships weren't built with separate capacity for low sulphur HFO or MDO fuel storage or for storage of the respective lower TBN lubricating oils - so modification has been necessary in many cases.



Put it Where?

Bunkering, never a joyous time for the engineers on any ship then becomes even more complicated and more of a headache than just the usual list of problems with suppliers; with new reasons for checking delivery receipts to ensure the right specification of fuels is being delivered, making sure that the right fuel goes in the right tanks, taking samples of everything for analysis and then making sure the right lub oil goes in the right place. Oil manufacturers are now developing broader spectrum lubricating oils to avoid this issue but results are still awaited.

All simple enough... but most modern engines were designed to operate solely on HFO and aside from the lubricating oil issues, the fuel systems including the fuel pumps and injectors are designed for HFO temperatures and viscosity. There have been numerous cases of late of fuel pump damages and seizures stemming from switching over to ultra-low-sulphur diesel oil which does not have the same lubrication properties as the HFO. Of course the resulting breakdowns are occurring at the least opportune moment - in busy shipping lanes... On some medium-speed engines the use of the low viscosity low-sulphur fuel can cause excessive leakage past the fuel pump plungers and depending upon the engine design, possible dilution of the engine lubricating oil by the distillate fuel.

Sufficient problems are being encountered by vessels during the fuel-switching procedure that guidelines for changing over fuels have been produced by most Classification Societies as well as the engine builders. These guidelines are quite comprehensive and extend to fuel management generally. One thing that cannot really be entirely predicted however is the compatibility of two different fuels and how they behave when mixed which can occur during fuel-switching. Incompatible fuels, when mixed can form sludges capable of blocking system filters.

To add insult to injury, while trying to keep abreast of things and avoid complications, penalties for failing to comply with regulations can be severe. Not only will written records on board be closely scrutinised by governing authorities, in California for example the California Air Resource Board (CARB) is reportedly using drones to 'sniff' funnel gas to determine if emission compliant!

The Future?

There's no going back - the future is here! SOx at 0.1% in the designated areas now and a level of 0.5% aimed at globally in just 4 years from now.

The very composition of residual fuel oil dictates that it most probably ultimately will not be possible to use it as a fuel while meeting all of the developing environmental regulations governing emissions without investment in additional refinement ashore, further pre-treatment both on-board and ashore and on-board treatment of exhaust gas - all driving operational costs upward at a time when the industry can ill afford it.

The second part of the series will look at how environmental regulations will shape the future of marine fuels, including the alternatives.

THE PROFESSIONAL STOWAWAY

THE CORRESPONDENTS' CORNER

by: Mike Heads
P&I Associates (Pty) Ltd.
Durban, South Africa

At the International Group P&I conference in Amsterdam in 2009, we raised the difficulties which ship owners faced in dealing with stowaways, their removal from ships and the increased costs that were being incurred by both shipowners and P&I clubs in order to resolve the cases.

One would have hoped by 2015, that the number of stowaways gaining access to ships would have decreased now that ISPS has been fully implemented and with additional port security.

Yet despite all these additional measures, how are so many stowaways still able to gain access to ships - unfettered in numerous parts of Africa and why have we not seen a decrease in their numbers?

Our investigations from interviewing stowaways and observations in and around South African ports is that there is an organized network in operation which assists stowaways in obtaining access into ports and then on board ships. This intelligence gathering has revealed that in East, South and West Africa we have now moved away from the period of disenfranchised people seeking a better life, to the period of the professional stowaway. The latter is someone who looks to stowaway as a means of earning a living.

These professionals work in syndicates and share information. They know when and how to strike in order to achieve their objective.

- Late at night or early hours of the morning
- Clothing easily blends-in with Stevedore Gangs
- Colours not easily seen at night
- Generally climb up berthing ropes, gangways and hide in empty containers and log-ships
- Many personnel working on vessel enables stowaway to blend in
- They pay money to Dock workers and Stevedores to enable them to get aboard vessel or empty containers
- Arrange provisions for part of the journey

Immigration laws in South Africa are dealt with in terms of our Immigration Act. Under the act, the Director General within the Department of Home Affairs can issue policy directives. In this regard, the Director issued a policy guideline dealing with stowaways and under this policy should any unlawful person gain access to a ship then that person is automatically deemed to be a stowaway unless evidence can be produced that the person is a South African citizen or that the person boarded the vessel in a South African port.

We have never had a South African stowaway. Foreigners who were living in South Africa legally and who were registered with the Department of Home Affairs were removed from ships and treated as trespassers. The organized network of stowaways soon realised that if they were found on board a vessel in possession of such a document it simply meant that they were removed from the vessel as a trespasser and handed over to the authorities for prosecution under local law. The stowaway was failing to meet his objective and the shipowner was under reprieve.

As syndicates work, they soon reorganized themselves and the document/permit was discarded or left with a friend before boarding the vessel. Without hard evidence to rebut the hardline approach from the South African Immigration officers, the trespassers achieved their objective and were categorized as stowaways.

It is common knowledge that the difficulty in repatriating and resolving stowaway cases is a topic which people do not discuss at the dinner table. Stowaways, especially professional stowaways, can be exceptionally aggressive in their demands and the way they expect to be treated. The professional stowaway is well read and is knowledgeable on which countries are prepared to assist in the resolution of stowaway cases and which countries will protect stowaways. They know where and when they can be difficult. It is not uncommon for a stowaway to arrive at the boarding gate and to kick up a scene before boarding the plane. They know how airlines and airport security will react. They are not afraid of the repercussions for their actions. Knowledge is power.

It is the strategy of the professional stowaway and part of their objective in stowing away to demand money from the shipowner in order to go home quietly. Shipowners often refuse to pay such money or travel allowance. The professional stowaway intimately knows the rules of the game. He is well versed in the tactics of the match. These are rarely first time players. They know what to expect and they know the outcome.

In most countries that allow stowaways to be landed, and South Africa is no exception, if the stowaway refuses to board the plane to be repatriated home, then he has to be returned to the ship. Often the international airport is far from the shipping port where the stowaway was landed. The stowaways may have been on board the ship for an extensive period of time whilst the P&I correspondent endeavours to obtain a travel document. The stowaways know the costs involved and the difficulty their being on board causes the shipowner.

We have experienced the tactics used by stowaways from removing their clothes at the boarding gate to even throwing faeces at the escorts. Airlines have strict policies in place regarding sedatives or restraints used to combat unruly stowaways. We have also experienced stowaways being repatriated from long distances from Africa arriving at a transit airport in Africa to become agitated and aggressive demanding money before boarding the plane for the final leg of their journey. They strike at these airports knowing full well that if their demands are not met that they are to be returned to the country of departure and put back on board the ship at huge expense to the shipowner. The professional stowaway knows how to play the game and win.

So how in this modern age of shipping are shipowners going to win the stowaway game? The answer is that as soon as the stowaway is able to gain access to the ship the owner is going to lose.

Owners must stay ahead of the game and must learn to defend their ships from stowaway attacks.

Prevention is better than cure. Stop stowaways getting on board is far easier than trying to get them off and is far less expensive.

In this regard, ship owners should consider appointing private security guards to act as the shore gangway watch and to monitor the security on deck

They should carry out properly coordinated stowaway searches prior to departure. The ship should remain at the port until the search has been completed which must be methodical and systematic.

Other additional measures include the following:

- They must recommend that the owners employ private security to patrol the quayside
- They must tell the ships security to take their desk to the bottom of the gangway.
- They must not allow anyone on board the ship who does not have a port permit. Every visitor should have ISPS clearance.
- All visitors should surrender their port permit to security and they should collect the same when they leave the ship.
- If they find someone who should not be on board the ship, they should be taken to the bottom of the gangway (not to the ships office) and they must call port security and advise them that the person in their custody at the bottom of the gangway tried to board the ship but they do not have a port permit.

The age of the professional stowaway is not going to go away unless the problem is stopped at the gangway or mooring ropes. The battle lines have been drawn and at the moment, the only winners are the stowaways. It's time for shipowners to take back control of their ships.

Eagle Ocean Marine

by: Sebastian Tjornelund
Market Liaison
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London, UK

"Survival of the fittest" or "race to the bottom"? The sustainability of the fixed premium market called into question.

In 2010 the American Club, in partnership with its co-venturers in Lloyd's of London, launched Eagle Ocean Marine (EOM) as a fixed price P&I alternative to the Club's standard mutual cover. The facility was created to address increasing demands from operators of small ships for a quality, competitively priced P&I product for owners of smaller ships not requiring the higher limits of liability offered by the traditional mutual Clubs.

EOM's insured's have benefited from the flexibility afforded by the fixed premium model combined with the Club's culture of first class service. EOM provides owners of small ships, who focus on domestic and near-coastal trades with a fixed price product as an alternative to the Club's mutual cover. Many of these owners would not traditionally have purchased mutual cover.

Today the non-IG commercial insurers account for over $400 million in gross premium income, which represents approximately 10% of the world's total tonnage. Brokers, Arthur J, Gallagher, anticipate if you add the IG Club fixed premium portfolios to the premiums written in the non-IG commercial market, then the total gross premium generated would be in the region of $700 million.

The fixed premium P&I market continues to evolve as new entrants re-shape the market environment, feeding from the established market players who continue to see premiums diminish over a five year period. The result has been an increasingly softer market, flooded with capital as commercial insurance companies continue to search for elusive returns.

For ship owners, charterers and operators this means more choice, buying power, certainty of cash flow and the ability to save money by opting to place their P&I cover in the fixed premium market. However, is this model sustainable for insurers and ship owners alike? Does the cheapest premium always mean the best value?

EOM's philosophy from the outset has been conservative underwriting combined with the best quality of service. By standing firm in a softening market and focussing on value over price, EOM has been able to enhance the strength and reputation of the American Club. Although this has come at the expense of rapid growth, EOM has been able to bring in a book of business that is fairly, but sensibly priced, well serviced and highly profitable to date.

With all fixed premium facilities, good year-on-year growth is essential. However, under current market conditions growth comes at a price. As profit margins for commercial market insurers begins to be squeezed by the incumbent ratings environment, the market will either have to look to consolidate or simply see some providers step out altogether. As such, EOM's conservative approach, stability of portfolio and good profitability should begin to pay dividends when the capital providers backing many of the competing fixed premium facilities can no longer make the numbers work and are forced to take action.

The soft ratings environment is not the only issue faced by the fixed premium market today. Although the market has been buoyant, encouraging new entrants, many of the available facilities occupy the same space and offer very little differentiation. This makes it difficult for fixed premium providers to control and maintain meaningful market share when there are so many insurers offering very similar products. With only a finite number of vessels with seemingly infinite opportunities to find cover, it seems unlikely that all can coexist in the long term as there is not enough business to go around.

With the American Club providing the security, EOM is almost uniquely placed within the fixed premium market. As the sophistication of emerging markets (where many fixed facilities have found success) continues to increase and premium levels begin to stabilise, the spotlight should shift away from pricing as owner's look for better value from their P&I product. Responsible and effective service, qualities which EOM has demonstrated by its handling of claims to date, will be the key to survival in the long term.

So, when will this shift away from price towards value happen?

Many brokers report that they expect the market cycle to continue on its current trajectory with the average rate per ton likely to reduce further in the region of 2% to 3% during 2015. However, with more compliance and regulatory measures (particularly Solvency II) coming into effect in early 2016, it must only be a matter of time before the fixed market sees some big changes in the form of consolidation or forced market exits.

EOM, with the backing of both the American Club and its Lloyd's partners, is well placed to both ride out the storm and take full advantage of opportunities as they arise.

If the claims environment becomes volatile, forcing the fixed premium P&I market to underwrite in a more sustainable way; the onus will shift towards quality and value over price.

EAGLE OCEAN MARINE

EAGLE OCEAN MARINE (EOM)

Eagle Ocean Marine provides attentive, competitively priced Protection and Indemnity and Defence insurance to the operators of smaller vessels who prefer a fixed premium approach for their P&I needs.

Backed by the American Club in conjunction with underwriters at Lloyd's of London, Eagle Ocean Marine offers the benefits of International Group club service at a fixed price, underpinned by the A-rated security of reinsurance at Lloyd's.

Eagle Ocean Marine's primary security is 100% American Club:

- Allowing Eagle Ocean Marine to issue American Club Blue Cards to our clients, which are accepted by Flag States world-wide
- Eagle Ocean Marine can draw on American Club letters to facilitate security when claims arise; other fixed premium providers security is not always accepted

Eagle Ocean Marine is a truly global facility, with associated offices in New York, London, Piraeus, Hong Kong and Shanghai, benefiting from the American Club's world-wide network of correspondents.

THE AMERICAN CLUB ANNUAL GENERAL MEETING & DINNER
JUNE 2015 - NEW YORK, NY, US

The 2015 American Club's Annual Dinner was hosted by its Board of Directors the day after the Annual General Meeting on June 18, 2015 in New York City at the Rainbow Room. The event was well attended by Members, brokers, correspondents and industry leaders from around the world.

Arnold Witte, *Chairman of the Board, The American Club,* addresses the guests

SAILING WEEK
AUGUST 2015 - ISLE OF WIGHT, UK

The Club's managers organised once again a sailing week off Yarmouth, Isle of Wight, UK for brokers and members. With a 10 metre sailing yacht, crewed by SCB's London office, each day we set sail out of Yarmouth into the Solent. The RIB offered an alternative for those petrol heads amongst us. All those who attended thoroughly enjoyed their day with SCB providing a great opportunity to spend quality time together in a relaxed marine setting.

CLUB PRESENTATION & COCKTAIL RECEPTION
OCTOBER 2015 - DALIAN, CHINA

Joe Hughes, William Moore, Katherine Wang, Carol Wang were on site in Dalian welcoming members, brokers and marine professionals in the region with presentations on the Club's performance, on the collapse of the OW Bunker Group as well as on steel cargoes and loss prevention techniques, once again showng their dedication to the greater China region.

AMERICAN CLUB EVENTS

GREEK MARKET PRESENTATION
DECEMBER 2015 - PIRAEUS, GREECE

The American Club hosted almost 300 guests at the traditional December pre-Christmas gathering held at Piraeus Marine Club on Tuesday, December 8th, who came to hear the latest news and the developments of the Club, which included an update with intimate details on the structure and status of its recent investment in the American Hellenic Hull Insurance Company, Ltd., (Cyprus), in addition to the traditional year in review of the IG Club's P&I business, presented by Joe Hughes, Vince Solarino, Ilias Tsakiris and Dorothea Ioannou.

Joe Hughes, *SCB Inc.*

Ilias Tsakiris, *Hellenic Hull Management Ltd.*

TRINITY HOUSE MARKET PRESENTATION
DECEMBER 2015 - LONDON, UK

The American Club hosted their traditional pre-Christmas gathering and market presentation in London at the Trinity House on Friday, December 14th 2015. Vince Solarino, President and COO of SCB Inc., led the audience through the latest exciting developments of the Club leading into the synergy with the Hellenic Hull Management headed by Ilias Tsakiris, which gave birth to the investment by the Club in the new commercial underwriting marine hull company American Hellenic. Dorothea Ioannou also spoke briefly about the Club's business development model. Ilias Tsakiris presented and elaborated on the underwriting philosophy of the American Hellenic.

Dorothea Ioannou, *SCB Hellas Inc.*

Vince Solarino, *SCB Inc.*

"IN THE SPOTLIGHT"

25th Biennial Tulane Admiralty Law Institute Symposium

March 2015 - New Orleans, LA, USA

Boriana Farrar debated Martin Davies, Tulane Law Professor and Director of Tulane Admiralty Faculty regarding pros and cons of the Jones Act.

35th WISTA International Conference

October 2015 - Istanbul, Turkey

The American Club had an overwhelming presence with presentations and moderating at both the AGM and conference level by Dorothea Ioannou, Muge Anber-Kontakis and Maria Mavroudi.

Nautical Institute Seminar

October 2015 - Hong Kong, China

John Wilson of our Hong Kong office gave a speech on the "Risks associated with new technologies" at the seminar which took place on board mv "Star Pisces".

2015 Fall Meeting of the Maritime Law Association

October 2015 - Southampton Bermuda

Joe Hughes was part of the P&I Perspectives Panel together with Andrew Bardot, Executive Officer of the IG of P&I Clubs and practitioners, John Woods, Antony Pruzinski and David Doyle. Boriana Farrar moderated Insights of the In-House Counsel Panel.

Sailor Society Shipping Gala Dinner

November 2015 - Singapore

The dinner was supported by the Club with Chris Hall of our Hong Kong office and Steve Ogullukian of our New York office in attendance.

Career4Sea 2015

December 2015 - Athens, Greece

Dorothea Ioannou was invited to present the advantages of following a career in shipping to students and young graduates in the region.

"IN THE SPOTLIGHT"

Massachusetts Maritime Academy

November 2015 - Buzzards Bay, MA, USA

Muge Anber-Kontakis lectured on the topics of P&I and FD&D insurance.

5th Annual Capital Link Shipping & Offshore CSR Forum

November, 2015 - London, UK

Joe Hughes participated as speaker. This panel discussed how the consistent implementation of CSR practices could lower the cost of capital (bank financing) for shipping companies, improve stock market valuations and decrease insurance premiums.

2nd Naftemporiki Shipping Conference

January 2016 - Athens, Greece

SCB Hellas team attended the conference where representatives of the Greek Shipping community and various entities and international organizations shared their views about the current state of international shipping and the prospects going forward.

Admiralty & Maritime Claims and Litigation Conference

January, 2016 - Houston, TX, USA

Boriana Farrar participated in a cruise-ship industry panel together with counsel for Carnival Cruise Lines, Valentina Tejera and practitioners Robert Gardana and Carlos Chardon. Jana Byron was part of the insurance round table

15th International P&I Conference

January 2016 - Piraeus, Greece

Joe Hughes participated as a panelist and spoke against the motion that ***"The Club fixed-premium vehicles are a threat to the mutuality system and not a credible alternative. Is this the end of the IGA?"***. The P&I Conference takes place every year and attracts the interest of the shipowning, legal and insurance sectors. It should be noted that our Joe Hughes gained a land slide vote in his against the motion!

Shanghai Marine Insurance Conference 2016

January 2016 - Shanghai, China

Dr. William Moore gave a speech to marine professional delegates on the differences between fixed and mutual P&I liability coverage including the pro's and con's to big and small shipowners.

"IN THE PRESS"

2 October 2015 TradeWinds NEWS 3

INSURANCE

US-Greek insurance tie-up aims for 2,000-vessel fleet

New insurance venture aims to build on shipowner connections and mutual roots of American and Hellenic Hull clubs

Jim Mulrenan London

A bid for a slice of the world hull insurance market is to be made by an ambitious new venture with strong shipowner connections.

The American Hellenic Hull Insurance Co, being established in Cyprus, starts with the portfolio of the Hellenic Hull Mutual but will be wholly owned by the American Club.

The new company is the brainchild of Angelos Kostakos of Athens-based bulker owner Oceanstar Management, who is a director of both the Hellenic Hull and American clubs.

The venture has unanimous backing from the owner directors of both clubs, with ambitious plans to rapidly build up to insuring a worldwide fleet of at least 2,000 vessels. American Hellenic, awaiting a final sign off by the Cyprus authorities, will be a subsidiary of the New York-based American Club protection-and-indemnity (P&I) mutual but run as a standalone commercial venture.

The plan is to take an initial $10m subscription share on hulls and build on its mutual roots and shipowner connections, so not be just another provider of commoditised hull cover. American Hellenic will also write war risks and mortgagee interest insurance and, as business develops, the ambition is to become a lead underwriter.

The American Club has committed to providing sufficient capital to ensure American Hellenic gets off to a good start and be Solvency II compliant from the outset. The amount of investment is not being immediately disclosed to avoid pre-empting what regulators in Cyprus will require.

It is expected that members of both clubs will be attracted to the new insurance company but the plan is to move beyond the eastern Mediterranean to attract owners globally, including the Far East and China, where the American Club has operations in Hong Kong and Shanghai, with an office due to open shortly in Dalian.

There are also hopes of winning back big name Greek owners, such as Evangelos Marinakis, once Hellenic Hull Mutual's biggest member who left when the club's security became unacceptable to mortgage banks.

The American Club, with a free reserve of about $85m, has a "BBB-" investment grade rating. The club marks its centennial in 2017 and as an International Group P&I mutual, with the right to make calls on its membership, is financially secure.

The American Club was largely for US owners until 25 years ago, when it decided to internationalise under a Vision 2000 project.

Today, the club has a strong Greek membership, that includes the Restis group, Eurotankers, Polembros and Phoenix Shipping, as well as New York-based Greek operations such as Delta Navigation.

But its roots as a national mutual has meant the American Club has lagged behind those that internationalised earlier. The American Hellenic project is seen as the start of a Vision 2020 plan to close the gap.

The investment in American Hellenic is viewed as the most significant development in the American Club's recent history. The project marks a commitment to diversification that already includes Eagle Ocean Marine, providing $500m of fixed-premium cover, and Eagle Ocean America, utilising Lloyd's security to provide P&I cover for tugs and barges, as well as other small craft.

American Club chairman Arnold Witte hails the project as a unique opportunity to prudently expand that bodes well for the future.

A key attraction of the American Hellenic link-up is that it is not a start-up but builds on existing operations, without the costs and administrative burden of establishing a new Lloyd's of London syndicate, while offering exciting cross-selling opportunities, according to American Club chief executive Joe Hughes.

The American Club is adopting the model of diversified rivals, such as Gard, Skuld and the Standard Club, that commercial business should have a pay back for mutual P&I members.

Vincent Solarino, the American Club chief operating officer, says the target is for American Hellenic to be successful in a short period of time, with investment by external capital a possibility that might then be considered.

"We think there will be a pay back sooner than five years. We are actually projecting on a three-year basis," he added.

American Hellenic builds on business developed by Hellenic Hull Mutual over more than ... years. But the club ran into problems as a result of mortgage ... rejecting its security following a sequence of events. These ... with the financial troubles in Cyprus, followed by the ... Laiki Bank, reserves taken ... cut' and exchange controls ... all culminated in cash ...

Hellenic Hull Mutual managing director Ilias Tsakiris ... out that the troubles were of an external nature, claims were paid and the loss ratio of 67% in a highly competitive hull market compared very favourably to other underwriters who mostly lost money.

"Despite the difficulties we have managed to maintain business and we haven't been sued. Our members and clients have been extremely loyal, and I have to publicly say a big thank you to them for being so supportive," added Tsakiris.

The Hellenic Hull Club has seen an insured fleet of 920 vessels ... about 300 but is still of- ...

34 PEOPLE TradeWinds 23 October 2015

American Club boards 'ting ting' tram in Hong Kong

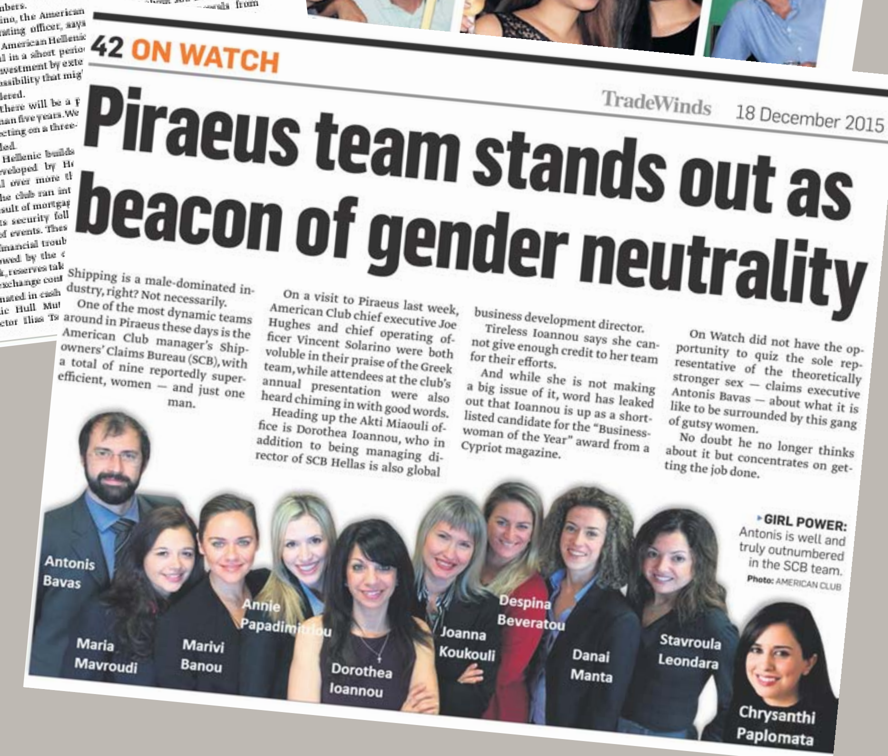
Jon Chaplin Hong Kong

The American Club entertained clients and contacts on a Hong Kong party tram during a flying visit by chief executive Joe Hughes.

Partygoers boarded the "ting ting car" in Sheung Wan rounding Happy Valley racecourse before alighting in Central.

The club's local managers, Chris Hall and John Wilson, worked hard as hosts passing around drinks and canapes during the two-hour journey.

Grateful guests included Bernhard Schulte Shipmanagement corporate manager LPSQ Captain Umesh Lulla, Fleet Management director Captain Aga Nagarajan, Anglo-Eastern Ship Management fleet director Anand Sharma. Local broking interests were represented by Marsh's Iris Lee and Vicky Cheng, and Martin Ham of FP Marine Risks.



42 ON WATCH TradeWinds 18 December 2015

Piraeus team stands out as beacon of gender neutrality

Shipping is a male-dominated industry, right? Not necessarily.

One of the most dynamic teams around in Piraeus these days is the American Club manager's Shipowners' Claims Bureau (SCB), with a total of nine reportedly super-efficient, women — and just one man.

On a visit to Piraeus last week, American Club chief executive Joe Hughes and chief operating officer Vincent Solarino were both voluble in their praise of the Greek team, while attendees at the club's annual presentation were also heard chiming in with good words.

Heading up the Akti Miaouli office is Dorothea Ioannou, who in addition to being managing director of SCB Hellas is also global business development director.

Tireless Ioannou says she cannot give enough credit to her team for their efforts.

And while she is not making a big issue of it, word has leaked out that Ioannou is up as a shortlisted candidate for the "Businesswoman of the Year" award from a Cypriot magazine.

On Watch did not have the opportunity to quiz the sole representative of the theoretically stronger sex — claims executive Antonis Bavas — about what it is like to be surrounded by this gang of gutsy women.

No doubt he no longer thinks about it but concentrates on getting the job done.

STEAMING AHEAD...

by: Vincent Solarino
President & COO
Shipowners Claims Bureau, Inc.
New York, NY, USA

I hope you like our new version of ***Currents*** that Business Development Manager Maria Mavroudi in our Piraeus office has produced for the first time, taking over the project responsibility from William Moore in New York. The articles are interesting and informative and the presentation is exciting.

The shift of the Currents production to our Business Development department, headed by Global Business Development Director Dorothea Ioannou, enhances the market message that the American Club is certainly on the move and steaming ahead to a larger presence in the maritime insurance and services sector.

The below highlights present a few of the Club's more significant initiatives for 2016. I look forward to reporting on these, as well as other Club and market activities in our next Currents issue later this year.

Regards,

Vince Solarino

- The Club will be opening a new office in Houston, Texas during first half of 2016. This office will provide enhanced service to members, as well as new business development opportunities in an important maritime market in the U.S. The office will be headed by Jana Byron, a U.S. qualified lawyer who comes to the Club with expertise in P&I and FD&D claims matters.

- New Managing Director, Dimitris Seirinakis, has taken the helm in our Shanghai office. Dimitris is an English qualified solicitor with extensive maritime claims experience and will be supported by an enhanced, service oriented and qualified team of claims handling professionals.

- American Hellenic Hull Insurance Company, Ltd. continues on its move forward into the hull and machinery market and is planning a Grand Opening in Cyprus in the months to come.

- The Club will be celebrating its 9th consecutive participation in Greece's Posidonia International Shipping Exhibition, and has set its reception for Thursday, June 2, 2016.

- The Rainbow Room will once again be the venue for the Club's Annual Dinner reception, celebrating its 99th year in operation and *"Steaming Ahead"* to its Centennial celebration in 2017!

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