

THE AMERICAN CLUB

# CURRENTS

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## CARING FOR THE CREW

*The American Club outlines its healthcare strategy and discusses medical case management in the United States*



## AMERICAN CLUB NEWS

### Diary

June	3, 2004	Reception	Byzantine Estate, Athens
June	17, 2004	Annual Meeting	Marriott FC Hotel, New York
September	16, 2004	Board Meeting	Office of the Managers, New York
November	18, 2004	Board Meeting	Island Shangri-La Hotel, Hong Kong

### Management Changes

The following appointments have been made to the staff of Shipowners Claims Bureau Inc., the Managers:

#### New York

Hugh Forde	Claims
Edward Horbacz	Accounting
Stuart MacDonald	Claims

#### London

Andreas Maroulletis	Claims
Helen Todd	Administration

American Steamship Owners Mutual  
Protection & Indemnity Association, Inc.  
Shipowners Claims Bureau Inc., Manager  
60 Broad Street, 37th Floor  
New York, NY 10004, USA



American Club Managers Brian Davies and Mike Mitchell, with Karachi Correspondent Capt. Hashim Mujtaba, meet IMO Secretary-General Mitropoulos following the release of the 'Tasman Spirit' crew

## SAFETY FIRST

This edition of *Currents* is published shortly after the most recent – 2004 – P&I renewal. It is pleasing to report that February 20, 2004 saw new highs in entered tonnage and premium income. At the beginning of the new policy year, entered tonnage is now approximately 20 million gross tons with a projected premium volume for the forthcoming twelve months of about \$120 million.

These figures should be seen against the expiring policy year. 2003 represented the eighth consecutive annual period of new business development. Over the last twelve months, premium levels have moved upward as the pricing cycle has maintained its reaction to an earlier period of rating softness.

The regional diversification of the Club's membership progresses. The European proportion of total entered tonnage grew from 54% to 59% as of February 20, 2004 while that part of the membership domiciled in the United States remained solid and, indeed, increased from 23% to 25% over the period.

There was a small reduction in tonnage from the Asian region, largely as a function of a declining proportion of charterers' entries as part of the Club's entire portfolio. Indeed, as at the latest renewal, some 93% of all entries represented owned business and only 7% – in comparison with 13% a year earlier – comprised tonnage entered on behalf of charterers.

The Club continues to undertake several new initiatives in safety and loss prevention. Specifically, and as reported in greater detail in this edition of *Currents* – the provision of dedicated PEME clinics in the Ukraine and the Philippines has been a significant addition to the Club's engagement with its Members. This, coupled with the expansion of Club resources in New York and London, is a sign of its continuing dedication to the provision of unsurpassed service to the membership at large.

Indeed, the Club's enduring commitment to Member service is driven not only by its desire to be at center-stage of best practice, but also as a response to a liability climate which remains hostile. It is a matter of regret that, year after year, all clubs continue to report poor juridical standards, unreasonable government demands and the oppressive use of criminal sanctions against seafarers as a relentlessly negative characteristic of certain parts of the world which militate strongly against the rational implementation of P&I capabilities in support of world trade.

It was gratifying, therefore, in April 2004 to witness the safe return home of the eight seafarers held in Karachi since July 2003, after the grounding of the 'Tasman Spirit'. During the eight-month period of their detention by the Pakistani authorities, the American Club worked tirelessly to bring about their freedom, via the highest diplomatic channels and with the invaluable support of the wider maritime community. It is hoped that this successful outcome will offer encouragement to all those who believe that the criminalisation of seafarers is a discredited practice which should be universally resisted.

Nevertheless, despite geopolitical uncertainties, and as is typically its instinct, the American Club looks to encouraging prospects for the future, dedicating itself to being of service to all members in seeking to ensure its continuing success at the forefront of the P&I world.

# CARING FOR THE CREW

The American Club's Strategy for Reducing Personal Injury and Illness Claims

by Dr William Moore, Vice President of Loss Prevention and Technical Services

Addressing the human element in shipping is a key factor in enhancing safety and environmental protection. In particular, there is a growing concern regarding the health and safety of seafarers. As part of the American Club's loss prevention initiatives, we have recently instituted a long-term strategy for reducing the incidence of personal injury and illness in the light of observed injury and illness claims.

In the Fall of 2003 the Club performed an analysis of P&I claims to identify key risk areas related to the frequency and costs (excluding FD&D), as shown in Figures 1 & 2. It was determined that personal injury claims account for 34% of the frequency of claims and 22% of claim costs were the result of personal injury and illness claims, of which:

- illnesses resulting from possible pre-existing conditions accounted for as much as 24% of claims reported and 22% of illness/injury claims costs (USD 5.2 million); and
- slips, trips and falls accounted for 22% of all personal injuries reported and 23% of illness/injury claims costs (USD 5.4 million).

As a result of this analysis, the Club has implemented a three-part program in order to assist Members in reducing the frequency and costs of personal injury and illness claims as shown in Figure 3 through:

- (1) Selection of medically fit seafarers;
- (2) Prevention of incidents onboard; and
- (3) Mitigation of the consequences of incidents after occurrence.

Figure 1: Frequency of claims by type (2001-2003) excluding FD&D

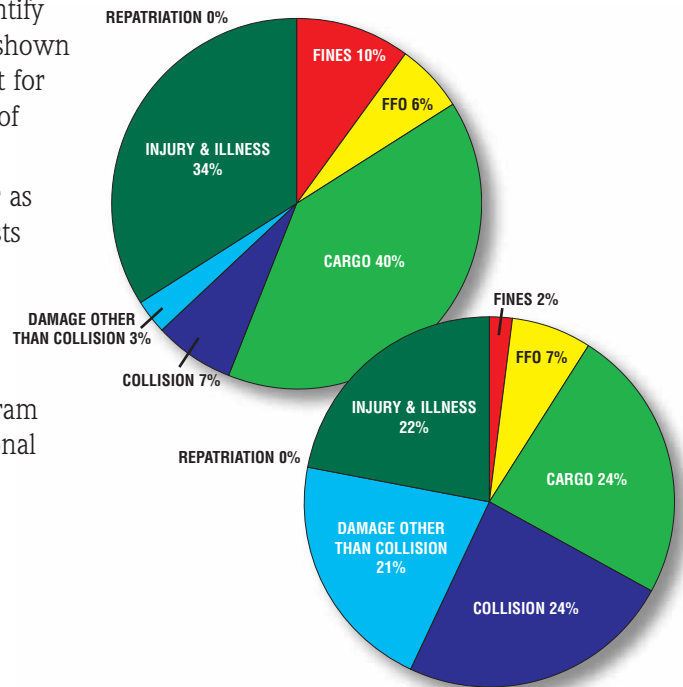
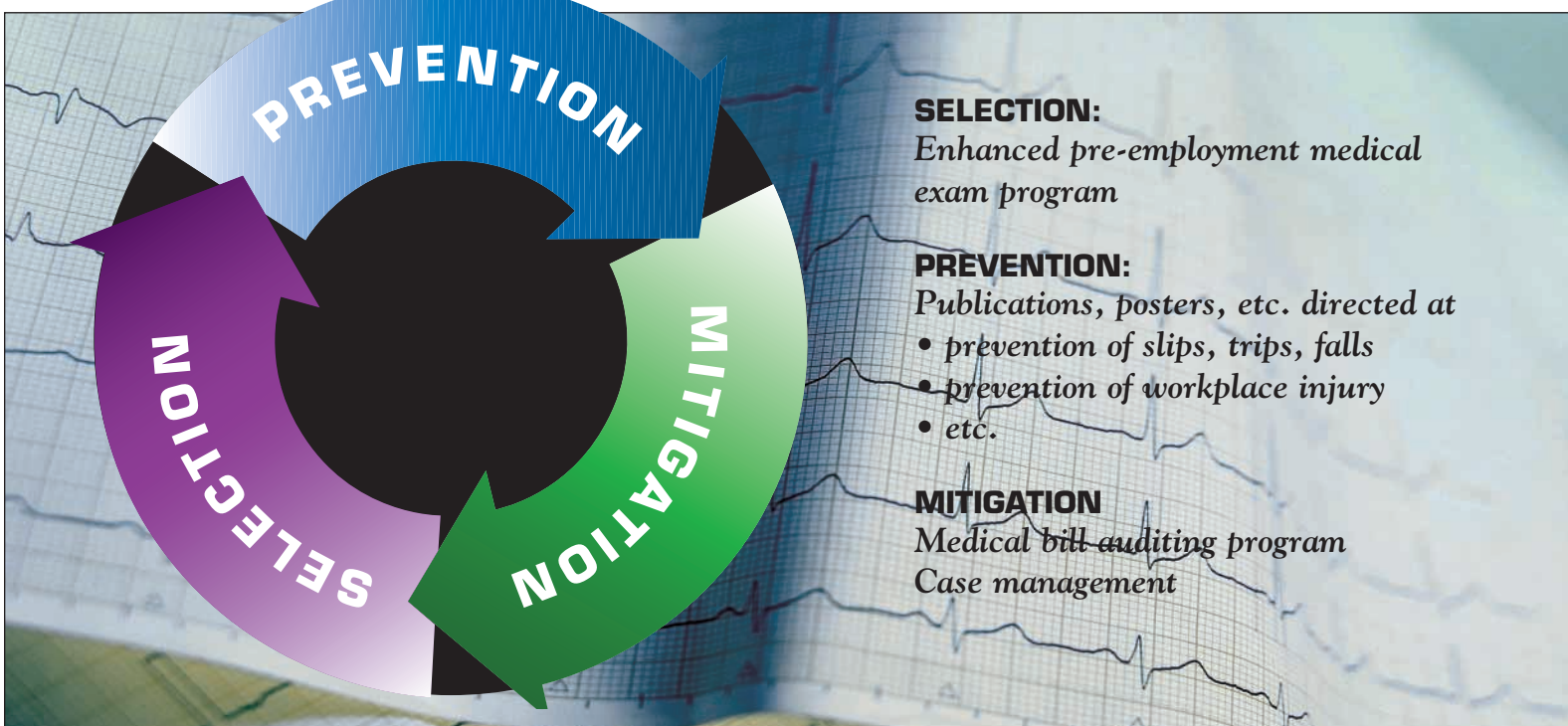


Figure 2: Cost of claims by type (2001-2003) excluding FD&D

Figure 3: Strategy for prevention and mitigation of injury and illness



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## Selection

We have seen the consternation amongst a growing number of Members regarding seafarers who have arrived onboard ship with medical certificates stating that they are fit for duty and who, within a very short time period, are treated for illnesses that should have been identified during the pre-employment medical examination.

We believe that it is time for the American Club to establish a program for designating quality clinics in key labor-supplying nations and steer Members towards requesting that their manning agents use these clinics for performing pre-employment medical examinations on seafarers destined for their vessels.

As from Spring 2004, we have commenced our program of designating 6 clinics in the Philippines and 4 clinics in the Ukraine that we are confident will have the capacity to perform quality pre-employment medical examinations. The Club has established a minimum list of 17 medical tests for the clinics to carry out, ranging from a physical examination to a stress test.

## Prevention

The first line of defense for all International Group Clubs is the condition survey. Of the many areas inspected by a marine surveyor during a P&I condition survey onboard a vessel, personnel safety is an overriding concern. While a marine surveyor is looking at the overall condition of the vessel and the specific equipment required to be on onboard, he is also inspecting areas that can cause personal injury to mariners. The Club has recently made a significant number of changes to our Condition Survey instructions and has updated our reporting forms to reflect our concerns regarding seafarer safety. In addition, we pay particular attention to the surveyor's recommendations relating to the safety of the onboard working environment.


Typical concerns may be that the crew are not wearing personal protective equipment such as hard hats and safety shoes, or slipping hazards such as oil on the deck, especially in the steering engine room where special wood gratings or non-skid coatings are required. Falling hazards include wasted or damaged ladders. Access entries throughout the vessel and proper rigging for gangways are also assessed. The surveyor also verifies the presence of proper guards on machinery operated by the crew such as grinders or belt-driven machinery. He also examines the condition of mooring wires and lines, while checking cargo gear for wear and tear.

The condition of safety equipment such as lifejackets, immersion suits, lifeboat equipment, falls, brakes, boarding ladders, and normal-use equipment such as pilot ladders are also examined. Surveyors also ensure that required safety equipment is onboard and check its condition. Finally, the surveyor observes the crew in action to make sure that they practice common sense safety rules during normal operations on board the vessel.

The incidence of slips, trips and falls onboard ships seems to be a particular problem across many industries and we believe that there is much to be learned and adopted from these industries. As a result, efforts are underway to see how the Club can best provide information to Members to prevent the incidence of these injuries onboard ship.

Consideration will be given to other key areas where the Club can assist Members in preventing onboard injuries and illnesses and we look forward to sharing these products and services with Members in the coming years.

## Mitigation

As with all Clubs, we are aware of the high cost of medical care in the United States. When a seafarer is injured, the costs may include air ambulance services, medical care and repatriation. Although we believe we cannot control all elements of these expensive services, there are third party services available which we believe shipowners should consider using, in order to reduce their costs and to ensure proper medical treatment. Such companies provide cost-effective services, such as medical bill auditing and medical case management, and we will be bringing them to the attention of our Members in the forthcoming months and encouraging Members to give them due consideration. 



# CARING FOR THE CREW

## Navigating The US Healthcare System

by Christina DeSimone, CEO Future Care, Inc, the leading US medical case manager

### Introduction

One of the most unpredictable areas of loss control for shipowners and their liability underwriters is the cost of medical treatment of ill or injured seamen in the United States. The primary difficulty is not necessarily that the treatment is expensive per se, but rather that the maritime industry is globally diverse and does not have a coordinated approach to medical management and cost containment when services are rendered in a United States medical facility. The reasons for this lie with the manner in which medical costs are assessed in the United States and the lack of a substantial presence by the maritime industry in any one market. An individual shipowner may only need treatment for a single crewmember in a port once in a while. Furthermore, the insurers of shipowners are not typically health insurers and cannot avail themselves of the purchasing power of health care and workers compensation insurers to influence charges for services rendered.



As a commercial venture, medicine is extremely competitive in the area of routine treatment, which includes common illnesses and injuries. Therefore, medical providers are responsive to commercial pressures. As a result, medical underwriters throughout the United States, as well as entire industries, have negotiated reduced rates for medical procedures and hospital costs. This has been possible because of the economic presence these entities have in the marketplace.

Medical service providers have also agreed to a system of case management, stipulating which procedures are acceptable as initial treatment and which procedures require the underwriter's additional approval. The benefits of these agreed rates and management structures are obvious: not only do they allow insurers to obtain a substantial discount in price; they also afford a greater predictability in both the quality and cost of the care provided.

Contrast this regimen with the haphazard manner in which medical treatment of mariners is provided and assessed. The itinerant nature of the shipping business complicates the scenario because there is no established business volume in any one place to bring commercial pressure to bear. Shipowners are treated as if they were uninsured customers, who always pay the highest rates chargeable. There is no rate structure in place, nor is there mandatory case management when a seaman seeks medical treatment in the United States.

### The Problem

When an incident occurs, the shipowner's first point of contact is generally the ship's port agent. In the case of tramp ship operators, it is most often the charterer's agent who is responsible for making the necessary medical arrangements. While shipping agents are adept at getting seamen to medical service providers, they are not experts in patient support or medical case management. Agents are understandably reluctant to become involved in signing a crewman into hospital for fear that the hospital and the doctors will look to the agent for payment of the fees. Once delivered to the hospital or clinic, it is up to the shipowner (and his insurers) to address both the costs and the quality of the care after the fact.



In some of the larger, busier ports this reluctance has led to the creation of a cottage industry of medical outpatient facilities with finance rather than patient care being the driving force. Through aggressive marketing, agents are encouraged to refer the crewman to one of these facilities, which then assumes the initial financial responsibility with the hospital for the seaman's treatment in the event that hospitalization is required. Some of these facilities have sophisticated (and expensive) outpatient medical equipment and expertise. They endeavor to conduct much or all of the treatment in-house. These facilities are profit-oriented and bill on the basis of the number and complexity of the procedures performed. There is potential for abuse not only in the number, cost and necessity of these procedures, but in invoicing for 'extra medical' services. Here again the absence of agreed rate schedules and case management protocol places the seaman, the shipowner and his underwriter at a distinct disadvantage.

Furthermore, once the ill or injured mariner is admitted into the hospital or other facility, there is often no one with medical expertise looking after the ship owner's interests. Typically the agent, or in serious cases, the P&I Club's local correspondent will contact the mariner as an act of reassurance to the patient and perhaps the doctor, in an effort to obtain a preliminary estimate of the character, duration and cost of the treatment. Unfortunately, in the overwhelming majority


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of instances, neither the agent nor the correspondent are qualified to adjudicate on the medical issues involved in the seaman's treatment or on the cost.

The result is that after discharge, the hospital and doctors' bills are sent to the agent, who is eager to pass them to the shipowner in order to avoid an unprofitable and time-consuming dialogue with the hospital regarding payment. Sometimes, the invoice will be sent to the Club's correspondent, or the Club Manager, for review and negotiation with the provider. More often, this negotiation with the hospital consists of an effort to reduce the bill, based on a promise of speedy payment, usually resulting in a discount of 5% to 10%, even though the bill may have been inflated by a greater margin. In the cases outlined above, the shipowner and his Club start with a pronounced disadvantage: the services have already been rendered and billed. It is extremely difficult to persuade the doctor and the hospital that they have performed unnecessary procedures – at an excessive cost – after the fact, when the seaman has been discharged and repatriated.

### The Solution

The solution to the chaos currently confronting the shipowner over medical costs in the United States is to retain an expert medical case management firm. The key to securing the best medical care at the lowest cost is to obtain agreement with the hospital and doctor on the specifics of these two items before, or contemporaneously with, treatment. The qualified medical case management firm accomplishes both these goals by introducing independent medical expertise and by securing the hospital and physicians' acceptance of a greatly reduced fee schedule in advance of admission. Ideally, the qualified medical case management firm employs a Registered Nurse (RN) to supervise each individual case. The RN will assume responsibility for the case from inception, discussing with the patient and physicians the course of treatment as it is proposed, and will be capable of coordinating outpatient or rehabilitative treatment, if required, and of proposing a plan for recovery and repatriation. The qualified medical case management firm will also employ, or have access to, one or more independent physicians for advice, as and when needed.

The qualified medical case management firm also brings the financial advantage of membership in one or more preferred provider organizations (PPO's) that afford the shipowner reduced rates for hospital and physician charges. These preferred rates can result in savings of 40% to 50% or more, as compared with non-member charges, and are generally not available to individual shipowners outside of these PPO networks. Participation in a PPO network through a qualified medical case management firm thus allows the shipowner to benefit from the collective buying power of all the other members of the network, greatly reducing the costs of medical treatment. 



# THE ADA AT SEA

*Hugh Forde, an attorney in the Shipowners Claims Bureau, Inc. Claims Department, discusses the current conflict between two US Appellate Courts over the application of the Americans with Disabilities Act to foreign cruise ships*

The application of United States legislation to foreign-flagged vessels has always been a complex issue demanding a delicate balance among US domestic policies, sensitivity to questions of foreign sovereignty, and the benefits of international uniformity of laws governing vessels in international trade. US courts historically have struggled with these concerns in the effort to strike such a delicate balance, often succeeding but sometimes failing in notable fashion. Recent US legislation embodied in Title III of the Americans with Disabilities Act, 42 U.S.C. §12182 et seq. (hereinafter referred to as the “ADA” or “Act”), provides a useful example of the difficulties faced by US courts in deciding to what extent domestic laws should be enforced over foreign-flagged vessels trading in US waters. Specifically, a stark disagreement has arisen between two US Federal Appellate Courts – the Fifth Circuit and the Eleventh Circuit, which hold jurisdiction over many cruise ship embarkation ports in the US, such as New Orleans and Ft. Lauderdale/Port Everglades – with respect to the application of the ADA to foreign-flagged cruise ships at US ports of call.

In very general terms, the ADA was promulgated by the US Congress in 1990 for the purpose of mandating, among other things, that various public accommodations and modes of transportation be made accessible to people with disabilities including, for example, those who are confined to wheelchairs. The Act states that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” 42 U.S.C. §12182(a). It also applies to “specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.” 42 U.S.C. §12184(a). In very broad terms, entities falling within the scope of the above

pronouncements are subject to various regulations, including responsibility for undertaking certain specified modifications that must be implemented to permit access for disabled persons to regulated accommodations and modes of transportation. Recent decisions issued by the Fifth and Eleventh Circuits have reached divergent conclusions when grappling with the issue of whether the ADA should be applied to foreign-flagged cruise ships operating in US waters.



## **A. The United States Court of Appeals for the Eleventh Circuit: *Stevens v. Premier Cruises, Inc.***

In *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 2000 AMC 1976 (11th Cir. 2000), reh’g denied, 284 F.3d 1187, 2002 AMC 853 (11th Cir 2002), a disabled woman, largely confined to a wheelchair, brought suit against the defendant cruise line under the auspices of the ADA. Plaintiff alleged that she booked a cruise aboard the defendant’s ship, the *Oceanic*, with the assurances of her travel agent that her cabin would be wheelchair-accessible upon payment of a fee in excess of the cruise’s advertised price. However, after paying the excess fee and boarding the Bahamian-flagged vessel in Florida, it became apparent that neither the plaintiff’s cabin nor many of the ship’s public areas were in fact wheelchair-accessible. She thereafter brought suit under the ADA against the defendant in the United States District Court for the Southern District of Florida, alleging that she was “denied the benefits of services, programs, and activities of the vessel and its facilities” in violation of the Act. *Stevens*, 2000 AMC at 1977.

The defendant moved to dismiss the plaintiff’s claims, arguing among other things that the ADA could not be applied as domestic legislation to foreign-flagged ships such as the *Oceanic*. The Southern District of Florida agreed with the defendant, dismissing the claims and holding that the Act did not extend to non-US-flagged vessels even where such vessels were trading in US territorial waters.

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The plaintiff thereafter appealed the decision to the United States Court of Appeals for the Eleventh Circuit, which has jurisdiction over appeals brought from federal courts sitting in Florida, Georgia and Alabama, and whose decisions are binding precedent on the federal courts in those states. The Eleventh Circuit reversed the district court, reinstated the plaintiff's claims, and held that the ADA may be applied to foreign-flagged vessels under certain circumstances.

In so doing, the Eleventh Circuit first found that cruise ships in general, whether US or foreign-flagged, may contain "public accommodations" covered under the text of the Act. It held that, because cruise ships "often contain places of lodging, restaurants, bars, theaters, auditoriums, retail stores, gift shops, gymnasiums and health spas," *id.* at 1980, and because such areas were explicitly enumerated in the ADA as included within its scope, then those existing aboard a passenger vessel were covered by the ADA regardless of the fact that they were not land-based.

The Eleventh Circuit then turned to the more controversial issue at the crux of the appeal, *i.e.*, whether the ADA's provisions extended to foreign-flagged vessels. It noted that the district court had declined to extend coverage of the ADA to such vessels on the basis that United States Supreme Court case law dictates that there must be a presumption against extraterritorial application of US legislation absent a clearly expressed intention to the contrary articulated by Congress in or accompanying the legislation itself. The Eleventh Circuit commented, however, that the district court's application of the presumption against extraterritorial application was misplaced under the circumstances before it. It reasoned that foreign-flagged vessels operating in US territorial waters were technically not extraterritorial *per se*, and were therefore not entitled to the benefit of the presumption.

The Eleventh Circuit also rejected another basis for denying application of the ADA to foreign-flagged passenger vessels, namely, the presumption that US law should not be extended to interfere with the "internal management and affairs" of foreign vessels in US waters. This principle has been most commonly articulated in jurisprudence involving the employment relationship between foreign vessel owners and their foreign crews. The Stevens court stated that this particular presumption was inapplicable to the circumstances before it since the

relationship between the defendant and the fare-paying US plaintiff could not be considered wholly internal. Instead, the Stevens court relied upon the antiquated decision of *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 1923 AMC 552 (1923). There, the Supreme Court held that the soon-to-be-repealed National Prohibition Act, enacted to enforce the 18th Amendment to the US Constitution, banned the importation of liquor aboard all vessels in US territorial waters, regardless of whether the vessels were US or foreign-flagged. The Stevens court reasoned that the rule enunciated in *Mellon* was appropriate in analyzing the question before it:

*As we already have explained, [the ADA] – like the Prohibition Act – was intended to have a broad reach. In addition, Congress made no distinction between domestic cruise ships and foreign-flag cruise ships in the statute. This factor seems especially important because, as we already have concluded, Congress intended [the ADA] to apply to at least some parts of some cruise ships. And, according to the Department of Transportation, "virtually all cruise ships serving US ports are foreign flag vessels." The idea*

*that Congress intended to apply [the ADA] to only domestic cruise ships, in light of the breadth of the ADA, seems strange. We, therefore, conclude that [the ADA] is not inapplicable, as a matter of law, to foreign-flag cruise ships in United States waters.*

Stevens, 2000 AMC at 1983 (citations and footnote omitted).

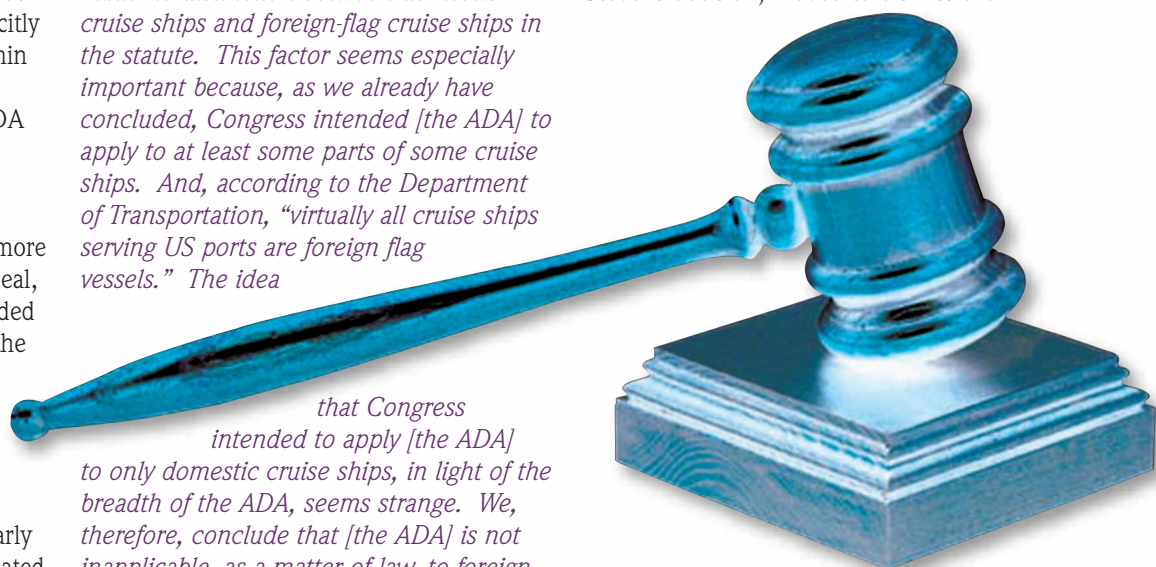
The Eleventh Circuit therefore vacated the decision of the United States District Court for the Southern District of Florida and remanded the matter for further proceedings consistent with its opinion.

## **B. The United States Court of Appeals for the Fifth Circuit: *Spector v. Norwegian Cruise Line Ltd.***

In *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 2004 AMC 254 (5th Cir. 2004), plaintiffs, disabled cruise passengers and their companions, took various cruises aboard the defendant's Bahamian-flagged vessels *Norwegian Sea* and *Norwegian Star*. All cruises taken originated in Houston, Texas bound for foreign ports of call.

Following the cruises, plaintiffs filed suit in the United States District Court for the Southern District of Texas, alleging various violations under the ADA, including (a) the presence of barriers restricting their access to emergency equipment and programs, to public facilities and elevators, and to cabins containing balconies or windows; and (b) the addition of a surcharge to their ticket purchase price for the use of disabled-accessible cabins and special crew assistance. In addition, the non-disabled companion plaintiffs alleged discrimination by the defendant's employees by being denied access to facilities and services based upon their "known association" with the disabled persons. *Spector*, 2004 AMC at 255.

The defendant, like its counterpart in the Stevens decision, moved to dismiss the



plaintiffs' claims, asserting that the provisions of the ADA could not be applied to foreign-flagged vessels because there was no evidence before the court that Congress intended or even considered that the reach of the ADA would extend so far. The district court disagreed, holding that the reach of the Act's provisions did indeed extend to foreign-flagged cruise ships trading in US waters.

Presumably because the district court realized the appreciable import its decision would have on the Texas cruising industry, it certified the matter for immediate appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit has jurisdiction over appeals brought from federal courts sitting in Texas, Louisiana and Mississippi, and its decisions are binding precedent on the federal courts in those states. The Fifth Circuit reversed the Southern District of Texas, holding that the provisions of the ADA may not be applied to foreign-flagged vessels. In so doing, the Fifth Circuit first stated that, while a foreign-



flagged vessel in US waters subjects itself to US law and jurisdiction by its mere presence, the application of domestic laws to such a vessel is discretionary, not mandatory. It went on to state that the test for the courts in exercising such discretion is to refrain from applying domestic laws to foreign vessels “absent an affirmative intention” expressed by Congress to do so. *Id.* at 256. Such an “affirmative intention” would need to be found either in the text of the legislation itself or in the legislative history generated while Congress drafted it.

The Fifth Circuit then proceeded to comment on the reasons underlying such a presumption against extraterritorial application of US laws. It stated that the presumption was necessary to avoid conflicts with other nations’ laws and the international legal regime. If Congress

a provision that exempted its enforcement from vessels traversing the Panama Canal, then within the jurisdiction of the United States. Without that exemption, then the US Government would be denying transport of liquor products aboard foreign vessels that were not to be discharged in the United States. The Spector court extrapolated that the inclusion of this exemption in the legislation itself indicated that Congress therefore affirmatively intended that the Prohibition Act would apply to all vessels not subject to the Panama Canal exemption in the territorial waters of the US, whether foreign or domestic. No such evidence of Congressional intent was present in Spector.

Second, and more importantly, the Fifth Circuit stated that there was no possibility of extraterritorial enforcement of the Prohibition Act because the purpose of the legislation was to regulate transport of liquor into US ports. Thus, the presumption against extraterritorial application of domestic legislation was never implicated. On the other hand, the presumption was implicated under the present circumstances. The court stated that, by requiring foreign-flagged vessels to comply with the Act,

the subject legislation would have to be, by necessity, applied outside of the territorial waters of the US:

*In the present case, many of the structural changes required to comply with [the ADA] would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters... Thus, potential conflicts with transnational or international law mandate that we construe the statute narrowly to avoid international discord. Id. at 261.*

Next, the Fifth Circuit discussed plaintiffs’ reliance on the Eleventh Circuit’s Stevens decision, a case the court repeatedly described as “unpersuasive.” *Id.* at 262-63. It first took issue with the Stevens court’s failure to conduct any analysis whatsoever concerning the extraterritorial effect of its holding, thereby ignoring its obligation to apply the anti-extraterritorial presumption as articulated in prior Supreme Court case law. It then further criticized the basis for the Stevens court ruling:

*The present case deals with the “internal management and affairs” of a foreign-flagged ship. As noted above,*

*the plaintiffs’ proposed accommodations, if applicable, would require [defendant] to adjust evacuation procedures and responsibilities of the crew, and would mandate structural changes to the ships. Thus, it is incorrect to suggest, as Stevens does, that the modifications do not involve the “internal management and affairs” of the ship merely because they were requested by a passenger rather than an employee. Id. at 263.*

The Fifth Circuit therefore found Stevens to have been decided wrongly and reversed the Southern District of Texas on the issue of whether the ADA could be applied to foreign-flagged cruise ships.

Many of the most popular cruise ship embarkation ports in the United States, including New Orleans, Houston, and Fort Lauderdale/Port Everglades, fall within the jurisdictions of the Fifth and Eleventh Circuits. However, as illustrated in the Stevens and Spector decisions discussed at length above, those two jurisdictions have interpreted the Americans with Disabilities Act in radically different fashions with respect to its application to foreign-flagged cruise ships. Unfortunately, unless and until the US Supreme Court resolves this conflict, as well as similar conflicts on the issue arising in other US jurisdictions from which cruises also embark, foreign-flagged cruise vessel owners should be aware that they are subject to different laws on the subject depending upon in which jurisdiction their vessels are present. The American Club shall continue to monitor and report significant developments in the area as necessary. 📖



were silent on the issue, then it must be assumed that it did not intend to risk “international discord” where “issues touching on other nations’ sovereignty are involved,” such as those implicated when a flag state may be forced to conform to U.S. laws in planning or building its ships, or where conflicts may exist between domestic legislation and the standards present in the International Convention for Safety of Life at Sea (“SOLAS”). *Id.* at 257-58, 259-60.

The Fifth Circuit then turned to the cases relied upon by plaintiffs in support of the argument that the scope of the Act properly encompassed foreign-flagged vessels. It first addressed *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 1923 AMC 552 (1923), the case heavily cited by the Stevens court as underpinning the Eleventh Circuit’s conclusions in that case. The Spector court found *Mellon* to be inapposite to the legal question before it. First, the court noted that the National Prohibition Act at issue in *Mellon* contained

# SAFEGUARDING THE SEAS

*Dr. William Moore, Vice President of Loss Prevention and Technical Services at the American Club, outlines the IMO's new Ballast Water Management Convention*

## Introduction

In February 2004, a new international convention to prevent and mitigate the effects from harmful aquatic organisms carried in ship ballast water was adopted by the International Maritime Organization (IMO). The International Convention for the Control and Management of Ships' Ballast Water and Sediments will enter into force 12 months after ratification by 30 States representing a minimum of 35 per cent of world merchant shipping tonnage. Although it may be some time before the Convention comes into force, Club Members should be aware of the details of these future requirements.

## The Convention Requirements

The Convention is comprised of articles and an annex that includes technical standards and regulations for control and management of ballast water and sediment. As with many other conventions, countries have the right to impose more stringent standards and measures for the prevention, reduction or elimination of the transfer of harmful aquatic organisms and pathogens through the control and management of ballast water and sediments. In addition, Parties to the Convention are to ensure that ports and terminals where cleaning or repair of ballast tanks occur, have adequate reception facilities for the reception of sediments.

Ships are also required to be surveyed and certified and may be inspected by Port State Control who may verify that the ship has a valid certificate; inspect the Ballast Water Record Book; and/or sample the ballast water. If there are concerns, then a detailed inspection may be carried out and steps may be taken to ensure that the ship shall not discharge ballast water or sediment until it can do so without presenting a threat of harm to the environment, human health, property or resources.

The Annex of the Convention is subdivided into 5 sections (A through E).

Section A includes the definitions, applications and exemptions to the Convention.

## Management and Control Requirements for Ships

Section B of the Annex requires that each vessel has and implements a Ballast Water Management Plan approved by the Flag Administration. The Plan is to include detailed descriptions of the actions to be taken to implement the ballast water management requirements and supplemental practices. This will include a Ballast Water Record Book to record when ballast water is taken onboard, circulated or treated for ballast water management purposes and discharged into the sea. Records will also be required for when ballast water is discharged to a reception facility or when there is accidental discharge of ballast water.



The specific requirements for ballast water management are as follows:

- ships constructed before 2009 with a ballast water capacity of between 1500 and 5000 cubic metres must conduct ballast water management that at least meets the ballast water exchange standards or the ballast water performance standards until 2014, after which time it shall at least meet the ballast water performance standard;
- ships constructed before 2009 with a ballast water capacity of less than 1500 or greater than 5000 cubic metres must conduct ballast water management that at least meets the ballast water exchange standards or the ballast water performance standards until 2016, after which time it shall at least meet the ballast water performance standard;
- ships constructed in or after 2009 with a ballast water capacity of less than 5000 cubic metres must conduct ballast water management that at least meets the ballast water performance standard;
- ships constructed in or after 2009 but before 2012, with a ballast water capacity of 5000 cubic metres or more shall conduct ballast water management



that at least meets the ballast water performance standard;

- ships constructed in or after 2012, with a ballast water capacity of 5000 cubic metres or more shall conduct ballast water management that at least meets the ballast water performance standard; and
- other methods of ballast water management may also be accepted as alternatives to the ballast water exchange standard and ballast water performance standard, provided that such methods ensure at least the same level of protection to the environment, human health, property or resources, and are approved in principle by IMO's Marine Environment Protection Committee (MEPC).

With regard to ballast water exchange all ships must comply with the following:

- whenever possible, conduct ballast water exchange at least 200 nautical miles from the nearest land and in water at least 200 metres in depth, taking into account Guidelines developed by IMO; and
- in cases where the ship is unable to conduct ballast water exchange as above, this should be as far from the nearest land as possible, and in all cases at least 50 nautical miles from the nearest land and in water at least 200 metres in depth.

When these requirements cannot be met, areas may be designated where ships can conduct ballast water exchange.

### *Additional Measures*

The provisions of Section C of the Annex allow a Party or group of Parties to the



Convention to impose on ships additional measures to prevent, reduce, or eliminate the transfer of harmful aquatic organisms and pathogens through ballast water or sediment. In these cases the Party(ies) should consult with

adjoining nearby States that may be affected by the standards or requirements and the IMO within 6 months of their intention of establishing additional measures beyond the scope of the Convention, except in emergency or epidemic situations.

### *Standards for Ballast Water Management*

Section D of the Annex focuses upon standards for ballast water exchange, performance approval requirements, prototype ballast water treatment technologies and IMO review standards. Ships performing ballast water exchange shall do so with an efficiency of 95 per cent volumetric exchange of the water. For ships exchanging ballast water by the pumping-through method, pumping through three times the volume of each ballast water tank shall be considered to meet the standard unless the ship can demonstrate that pumping through less than three times the volume of each ballast water tank meets the agreed standard.

Requirements have been adopted by the Convention related to the number of viable organisms based on their size. Discharge of the indicator microbes shall not exceed the

specified concentrations. The indicator microbes, as a human health standard, include, but are not be limited to:

- toxicogenic vibrio cholerae (O1 and O139) with less than 1 colony forming unit (cfu) per 100 ml or less than 1 cfu per 1 gm (wet weight) zooplankton samples;
- escherichia coli less than 250 cfu per 100 ml; and
- intestinal enterococci less than 100 cfu per 100 mls.

The Flag Administration, in accordance with IMO Guidelines, must approve the ballast water management system, including systems that make use of chemicals or biocides or biological mechanisms or alter the chemical or physical characteristics of the ballast water.

In addition, the Convention allows ships participating in a program approved by the Flag Administration to test and evaluate promising ballast water treatment technologies and prototypes, to have a leeway of five years before having to comply with the requirements.

IMO is required to review the ballast water performance standard, taking into account a number of criteria. The review should include a determination of whether appropriate technologies are available to achieve the standard, an assessment of the above-mentioned criteria, and an assessment of the socio-economic effect(s) specifically in relation to the developmental needs of developing countries and, in particular, developing small island States.

### *Survey and Certification Requirements for Ballast Water Management*

Section E of the Annex gives requirements for initial renewal, annual, intermediate and renewal surveys and certification requirements. Appendices give the form of the Ballast Water Management Certificate and the form of the Ballast Water Record Book.

### *Summary*

The International Convention for the Control and Management of Ships' Ballast Water and Sediments will have a significant impact on the shipping community. The Managers of the American Club will update the Members on this new Convention as necessary. 📄

# LOSS PREVENTION REVIEW

## STOWAWAYS

On 8 April, the Club issued a Member Alert entitled Stowaways Hiding in Rudder Stock Recess, addressing the growing number of stowaways hiding in the rudder stock recess (or rudder trunk) of ships. As a result, we would like to reiterate the Club's recommendations on what actions should be taken to prevent against this type of problem. The Club would like to thank Pandi Liquidadores S.R.L., in Buenos Aires and Technical Maritime Associates, Inc., in Louisiana for their assistance. For a copy of the Member Alert on this subject, please refer to our website at [www.american-club.com](http://www.american-club.com).

### Recommendations

The ship's crew should make all efforts to check that stowaways are not hiding in the rudder stock recess, particularly when loading or discharging cargo at ports or terminals in Africa. In general, it is the crew's first priority to check for stowaways onboard ship. However, attention should also be paid to ensure that no stowaways have accessed the rudder stock recess.



Figure 1: Stowaways climb the rudder stock into the rudder stock recess



Figure 2: Rudder stock recess area where stowaways are hiding

Typically, the crew can only access the rudder trunk via a manhole cover fitted in the aft peak tank. Since this tank is normally in ballast and/or filled with freshwater, examination of the rudder stock recess during a pre-departure stowaway search is not always practical. If access to the rudder stock recess cannot be gained via the aft peak tank, it is recommended that the crew utilize a small boat, such as the rescue boat or paint raft, in order to check for stowaways in the rudder stock recess.

We would like to remind Members that as of July 1, 2004 the International Ship and Port Security (ISPS) Code shall come into effect. We advise Members to seriously consider appropriate measures to be included in the Ship Security Plan (SSP) to prevent stowaways gaining access to the vessel and/or going undetected.

## I TOPF REPORT

The latest oil spill statistics published by the International Tanker Owners Pollution Federation Ltd (ITOPF), show a marked decline in the frequency and size of oil spills between the years 1970-2003. There were 6 spills recorded of 7-700 tonnes and 29 spills of over 700 tonnes in 1970, compared with 15 spills of 7-700 tonnes and 4 spills of over 700 tonnes in 2003. The average number of large oil spills during the 1990s was about one third of those recorded during the 1970s. The total quantity of oil spilled in 1970 was estimated at 330,000 tonnes in 1970 compared with 42,000 tonnes in 2003.

It was noted that a few very large spills were responsible for a high percentage of the oil spilt. For example, in the ten-year period 1990-1999 there were 358 spills of over 7 tonnes, totaling 1,140,000 tonnes, but 830,000 tonnes (73%) were spilt in just 10 incidents (under 3%). Also, the figures for a particular year were often severely distorted by a single large incident. This is clearly illustrated by 1979 (Atlantic Empress – 287,000 tonnes), 1983 (Castillo de Bellver – 252,000 tonnes) and 1991 (ABT Summer – 260,000 tonnes).

Most spills from tankers resulted from routine operations such as loading, discharging and bunkering which usually occurred at ports or oil terminals. The majority of these operational spills were small, with some 91% involving quantities of less than 7 tonnes. Accidents involving collisions and groundings generally

gave rise to much larger spills, with almost a fifth involving quantities in excess of 700 tonnes.

## PIRACY

The International Chamber of Shipping and the International Shipping Federation have launched an updated edition of 'Pirates and Armed Robbers: Guidelines on Prevention for Masters and Ship Security Officers'. The Guidelines have been expanded to take account of the IMO ISPS Code and update practical advice on where attacks occur, including new regional maps and data. They also contain guidance on how to prevent attacks and what to do in the event of an incident, taking account of the Ship Security Plan now required by the ISPS Code.

## 'BRAER' REPORT

A recently published report on the Braer casualty in Shetland in 1993 has found that the sinking of the tanker and subsequent loss of 77,000 tons of light crude oil did not in fact result in the environmental catastrophe portrayed by the media at the time. The report, by the Aberdeen Institute of Coastal Science and Management, concluded that much of the Shetland ecosystem had recovered within one year of the disaster and that the local bird population actually increased. Because of the severe weather conditions prevailing at the time, the greater part of the cargo was dispersed into deep water, minimizing shore pollution and the toxicity of in-shore waters. The report noted that a similar recovery took place in the local ecosystem at Milford Haven, following the grounding of the Sea Empress in 1996.

## FLAG STATE PERFORMANCE

The Round Table of international maritime associations (Bimco, Intertanko, Intercargo, International Chamber of Shipping and the International Shipping Federation) has recently published its 'Shipping Industry Guidelines on Flag State Performance.' The intention of the Guidelines is to encourage operators to consider carefully the merits of a flag before adopting it and to put pressure on flag administrations to effect such improvements as may be necessary to ensure maritime safety, environmental protection and proper working conditions for seafarers. The Guidelines include a list of the responsibilities that a shipping company might reasonably expect of a flag state, including adequate infrastructure, ratification and implementation of maritime treaties, proper supervision of surveys and arrangements to ensure that seafarers can be repatriated to their home countries in cases of need.

According to the accompanying performance table, the following flag states accumulated 12 or more negative performance indicators: Albania, Belize, Bolivia, Costa Rica, Congo, Honduras, Jordan, Madagascar, Sao Tome & Principe, Surinam and Syria. 📄

# REGULATORY REVIEW

## SINGLE-HULL TANKER PHASE-OUT

An extraordinary session of the IMO's Marine Environmental Committee was convened in December 2003 as a direct response to the loss of the tankers *Prestige* and *Erika* within the territorial waters of EU Member States Spain and France. At this session amendments were made to Annex 1 of the MARPOL 73/78 Convention related to the accelerated phase-out of existing single-hull tankers (regulation 13G) and restricting carriage of heavy grade oil as cargo (regulation 13H).

The Club has published the document Report from the 50th Session of the IMO Marine Environmental Protection Committee (MEPC 50) for Members. Copies can be obtained electronically from the American Club's website or by contacting the Managers.

## HARMFUL EMISSIONS

As of 31 January 2004, 12 Member States representing 54 per cent of the world's tonnage had ratified Annex VI to MARPOL 73/78, Regulations for the Prevention of Air Pollution from Ships. The Annex will come into force exactly 12 months after three additional Member States have ratified the Convention. At least three Member States have indicated that they will ratify the Convention in 2004, thus enabling it to become law in 2005. Annex VI was adopted to limit the sulphur oxide and nitrogen oxide emissions from ship exhaust in addition to prohibiting any deliberate emissions of ozone-depleting substances.

## FRANCE

New anti-pollution legislation has been introduced in France to combat oil spills by international shipping in French territorial waters. The PERBEN II Act, which came into force in March 2004, can impose fines of up to Euro 1 million, or up to four times the value of the cargo, on shipowners found guilty of deliberate pollution and imprisonment for up to 10 years for masters. Where the pollution is accidental, fines of up to Euro 700,000, or up to four times the value of the cargo, can be imposed and up to 7 years imprisonment for masters.

## IMDG CODE

Uniform rules for the safe transport by sea of dangerous goods and marine pollutants in packaged form are now compulsory, following entry into force on January 1, 2004 of the International Maritime Dangerous Goods Code. The IMDG Code was developed as an international code for the transport of dangerous goods by sea, covering such matters as packing, marking, labeling and stowage of dangerous goods, with particular reference to the segregation of incompatible substances.

## CLC LIMITS

From 1st November 2003, tanker owners' limits of liability for pollution damage under the 1992 Civil Liability Convention have been increased by 50.37 per cent. The new limits for tankers are as follows:

- not exceeding 5,000 GT – SDR 4.51 million (US\$6.1 million).
- between 5,000 and 140,000 GT – SDR 4.51 million (US\$6.1 million), plus SDR 631 (US\$858) per GT in excess of 5,000 tons.
- exceeding 140,000 GT – SDR 89.77 million (US\$122 million).

The 1992 Fund Convention limit was similarly increased by 50.37 per cent from 1st November 2003, to SDR 203 million (about US\$276 million).

A diplomatic conference held at the IMO in June 2003 adopted the Supplementary Fund Protocol, which provides additional compensation funded by cargo receivers. The total compensation available for damage in States that have ratified the Protocol will be SDR 750 million including amounts paid under the 1992 CLC and Fund Conventions. The Protocol is expected to come into force by late 2004 or early 2005.

In order to maintain a balance between compensation funded by the oil industry and that funded by ship owners, a voluntary scheme to raise the 1992 CLC limit for small tankers from SDR 4.51 million to SDR 20 million in States which implement the Supplementary Fund has been approved in principle. The Small Tanker Oil Pollution Indemnification Agreement (STOPIA) is expected to take effect when the Supplementary Fund Protocol comes into force.


## HNS CONVENTION

The target date for ratification of the HNS Convention, which will impose upon shipowners strict liability to compensate damage (including loss of life, personal injury, property damage, contamination, and preventive measures) resulting from the carriage of Hazardous and Noxious Substances by sea, is June 2006. The ratification of 12 States, together receiving in the preceding year 40 million tonnes of HNS, four of which have at least 2 million tonnes of registered shipping, is required. To date only four States have ratified the Convention. Liability under the Convention is limited on a sliding scale tonnage basis, with a minimum limit for ships below 2,000 tonnes of SDR 10 million and a maximum limit of SDR 100 million for ships above 100,000 tonnes. A second tier provides additional compensation up to a maximum of SDR 250 million (including the shipowners' contribution) through the HNS Fund, contributed to by HNS cargo receivers.

## UNCLOS

The US Commission on Ocean Policy has recommended that the United States reorganize the management of its maritime policy and regulations, which is at present parceled out among numerous government agencies and departments, if it is to have a coherent voice in international maritime affairs. A key recommendation of the Commission's report, published in April 2004, is that the US speed up ratification of the United Nations Convention on the Law of the Sea (UNCLOS), which is presently before the Senate.

## ATHENS CONVENTION

In April 2004, four more countries (Finland, Germany, Sweden and the United Kingdom) signed the 2002 Protocol to the Athens Convention, which aims to raise the level of compensation to SDR 250,000 for death or injury to passengers caused by maritime accidents and to SDR 400,000 in cases where the carrier is unable to discharge the presumption of fault or neglect. Full ratification of the Protocol will be effected through national legislation. A total of six States have now signed, including Norway and Spain. So far no State has proceeded to full ratification of the Protocol and a minimum of 10 States are required as signatories in order for it to become law. 

# Sunderland

*Distressed passengers and rescued hostages are all in a day's work for 'people claims' expert Marine Response Ltd, the American Club's correspondents in Sunderland*

Based in the North-East England port of Sunderland, Marine Response Ltd provides P&I correspondent services which range far beyond Tyneside and the North Sea. From its purpose-built offices in a former shipyard, the company has acquired a growing reputation not only as an effective regional correspondent but also as an international expert in 'people claims' management.

From the date of its establishment in 1998, Managing Director Patrick Bond made a conscious decision to develop Marine Response into a global consultancy, rather than rely solely on traditional correspondence services. Bond's own background as a former seafarer, lawyer and accredited mediator enabled him to offer that combination of flexibility and specialization essential for the modern-day P&I correspondent. Six years on, with the help of his colleagues Kevin Barry and Graham Long, Bond has gone a long way towards achieving his goal of providing an international fast-response facility for handling marine personal injury and illness claims.

As well as general P&I correspondent services, Marine Response offers specialist advice and assistance in looking after marine crew, passengers and stowaways, on a world-wide basis. Typically, this involves troubleshooting at the scene of marine accidents, organizing medical care for patients, arranging their repatriation and handling any subsequent claims. To this end, the company retains the services of its own in-house doctor for on-the-spot advice on crew illness and injury matters. An increasing part of its activity is devoted to the inspection and assessment of overseas clinics and the formulation of pre-employment medical checks for seafarers. Acting in this dual capacity, this past year has seen members of the team travel to Miami, Manila, Seattle, Odessa, Dubai, South Africa, Sri Lanka and Singapore in its medical claims handling role, while attending vessels throughout the North of England and Scotland in its technical role.

The company's twin services have proved to be attractive to the company's clients, who comprise a wide range of shipowners, port

authorities, terminal operators and their insurers. Recognizing that personal injury and illness are among their most significant cost elements, they value the speedy attendance Marine Response provides and the high level of expertise and sensitivity it applies in resolving cases, to the benefit of all parties concerned. Moreover, the company's regional location ensures that its fees remain low, compared with London-based competitors.

There is a wide variety in the type of cases undertaken by Marine Response. Recently, the company was retained to forcibly repatriate an elderly lady passenger who had been found wandering late at night, in a state of undress, in the engine room of a German cruise ship. More dramatic, however, was the company's attendance at an incident in the North of Scotland, on a snowy January day, after the Ukrainian chief mate of a Dutch coaster had run amok.

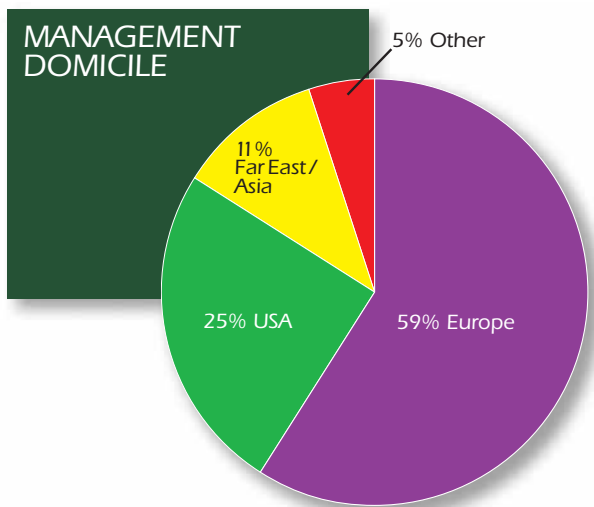
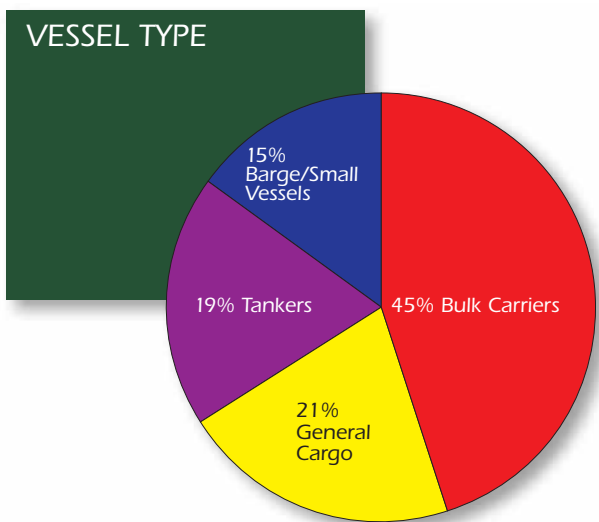
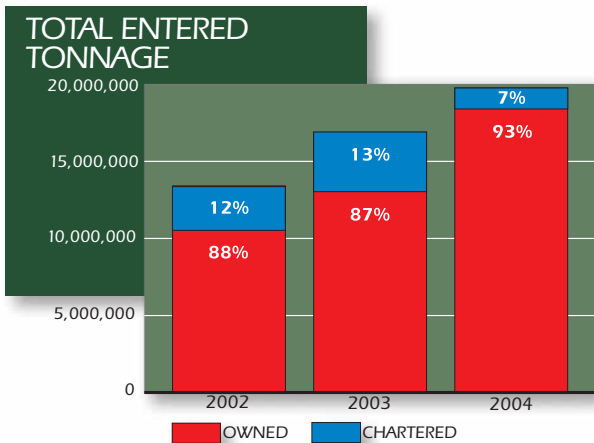
'After attacking the master on the bridge,' Bond recalls, 'he chased the Filipino crew along the foredeck and trapped them behind the anchor windlass. He fired rocket flares at the lifeboat and the police helicopter which had been summoned to assist, then forced the crew overboard into the sea. Finally, after trying to sail the ship away single-handed – but failing because he had omitted to slip the anchor – he set fire to the ship instead.'

Marine Response arrived at this scene of mayhem in time to take care of the crew, who had narrowly escaped death in the icy waters. The worst cases were hospitalized, a hotel provided and new clothing purchased. After being given their wages, ex gratia compensation and their plane tickets home, the crew went safely on their way – as well as could be expected after their grim ordeal.

'Because we were called in at an early stage, we were able to defuse a potentially fraught situation, to everyone's satisfaction,' Bond observes. 'In this business, you have to be prepared for everything – and you never stop learning.'



# AMERICAN CLUB FLEET 2004



**THE AMERICAN STEAMSHIP OWNERS MUTUAL  
PROTECTION & INDEMNITY ASSOCIATION, INC.**

**SHIPOWNERS CLAIMS BUREAU INC., MANAGER**

60 Broad Street, 37th Floor  
New York, NY 10004 USA  
Tel: +1 212 847 4500  
Fax: +1 212 847 4599  
Email: [info@american-club.net](mailto:info@american-club.net)

3rd Floor, Latham House  
16 Minories  
London EC3N 1AX UK  
Tel: +44 20 7709 1390  
Fax: +44 20 7709 1399

Pacific Marine Associates Inc  
200 Webster Street, Suite 200  
Oakland, CA 94607 USA  
Tel: +1 510 891 9011  
Fax: +1 510 891 0275

Website: [www.american-club.com](http://www.american-club.com)

