THE AMERICAN CLUB

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ISSUE NUMBER 23 DECEMBER 2006

'A vessel is discharging cargo in West Africa and the cargo owners threaten arrest, for an alleged shortage claim. They require a bank guarantee, with French Law and Jurisdiction... What can the shipowner do?'

THE ANTI-SUIT INJUNCTION

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THE AMERICAN CLUB 1917

AMERICAN CLUB NEWS

Diary

December 15, 2006	Reception	Trinity House, London
March 15, 2007	Board Meeting	New York
June 14, 2007	Annual Meeting	New York

At the Annual Meeting held in New York on June 22, 2006, the following Director was appointed:

Ms Katia Restis — Enterprises Shipping & Trading S.A.

the following Director resigned:

Mr Victor C. Restis — Enterprises Shipping & Trading S.A.

Management Changes

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

New York

Thomas Hamilton	Claims/Underwriting
Sheriece Grant	Claims
Muge Anber	Claims

London

Kimberley Holmes	Underwriting
Francis Ebiangne	Claims
Pat Ross	Administration

Piraeus

Peggy Lemou	Claims
Katerina Papaionnu	Administration

Approved P.E.M.E. Clinics in Romania

The American Club's PEME program has recently been extended to include two more clinics in Bucharest and Constanza, Romania, as follows:

- *Bio-Medica International S.A.* Cal. Floreasca nr. 111-113, Sector 1, 014455, Bucharest, Romania. Contact Person: Magda Moghior, MD. Phone: +40-21-3117793, 3117794, 3117795, 3117796, 3117797. Fax: +40-21-3117798. E-mail address: office@bio-medica.ro.
- *Iowemed Medical Center.* I.C. Bratianu Str. No. 2-4, Constanza, Romania. Contact Persons: Teofil Ciortan, GM and Pazara Loredana, MD. Phone: +40-241-587676 or 40-722-250469. Fax: +40-241-559962. E-mail: iowemed@xnet.ro.

Members are advised to contact them at the earliest opportunity.

Additional clinics in Russia are expected to be authorized over the coming months and Members will in due course be informed of their details.

The mandatory use of Club-approved clinics – so far only applying to those in the Philippines and Ukraine – will in future apply to *all* Club-approved clinics in *all* locations.

For further information, please contact Dr. William Moore, Vice President, Loss Prevention and Risk Control, Shipowners Claims Bureau, Inc. Tel:+1 212 847 4542 E-mail: *wmoore@american-club.net*

American Steamship Owners Mutual
Protection & Indemnity Association, Inc.
Shipowners Claims Bureau Inc., Manager
One Battery Park Plaza – 31st Floor
New York, NY 10004, USA

LOOKING AHEAD

In earlier – some would say gentler! – times, the pace of the P&I world was notably less frenetic than it is today. There are several reasons for this. Most relate to the increased – and entirely justified – expectations which shipowners have of their Clubs, to say nothing of the rising demands of regulators and other agencies in their supervision and analysis of P&I activity.

This is a good thing. Higher expectations of Clubs lead to higher operational standards and the development of new initiatives in areas such as safety and loss prevention. In parallel, the closer scrutiny of Clubs encourages increased transparency in the conduct of their affairs.

What of the future? Most would agree that difficult conditions attend virtually every aspect of P&I business. High levels of ship utilization and steep commodity prices have had a negative impact not just on cargo claims, but generally. Equally, the mounting demands on shipowners by way of statutory liability, and the concomitant political consequences of maritime accidents, are unlikely to abate.

However, and more pleasingly, despite global uncertainties tending to create concern as to prospects for the freight markets in the long term, the recent uplift in shipowners' operating income suggests a favorable climate over the short run. By extension, this is good for the Clubs too.

Against this background, the value which the Clubs represent to their members has never been greater than at present, nor is it likely to diminish. And it is here that the important challenges of the future will emerge. This is true not just for the American Club, but also for the industry at large.

The Club has been busy over recent months in preparation for the forthcoming renewal. This has entailed a close analysis of the Club's business in its entirety with a view to making further progress toward the consolidation of its membership both in the forthcoming and future policy years. The process continues with the strategic involvement of Club's Board to whom regular reports are made.

The American Club is confident of its future. It is future defined by the provision of peerless service delivered in a cost-effective, sympathetic and energetic manner. It sees the added-value of P&I provision rising steadily. It is a future where, despite the difficulties of the recent past, insurance costs remain predictable. It will feature the Club's continuing outreach through the provision of localized service capabilities. Above all, it is a future colored and brightened by the Club's characteristic optimism in meeting the ambitious goals it has set itself in fulfilling its mission in the years ahead.

THE ANTI-SUIT INJUNCTION– WHERE DO WE STAND?

Andreas S. Maroulletis, Solicitor and Attorney-at-Law, of Shipowner Claims Bureau (UK) Ltd, explains the function of this important legal device

THE SCENARIO

A vessel is on time charter and heading for West Africa to discharge sugar or rice. Once there, and whilst still discharging cargo, the cargo owners and/or their cargo underwriters threaten to arrest the vessel for an alleged shortage claim. They require a bank guarantee, with French law and jurisdiction, otherwise the vessel remains where it is.

This demand has become more frequent in recent times as Belgian, French and Swiss companies have dominated the cargo insurance market in certain trades. It is made in the knowledge that issuing a bank guarantee is expensive and time-consuming – if not impossible – and, coupled with agreement to local jurisdiction, is tantamount to payment of the claim in full. The aim is to force the owners to pay in full or, failing that, to refer the matter to the cargo-friendly French courts or arbitrators, where the shipowner is more likely to lose any cargo shortage/damage claims.

Shipowners then, typically, offer a Letter of Undertaking via their Club, which provides for English law and London arbitration, since the relevant charterparty provides for English law and London arbitration and the Bills of Lading incorporate the charterparty. The cargo owners and/or cargo underwriters then refuse the Letter of Undertaking. What can the shipowner do? Does he have to give in to this (in effect) blackmail?

The answer is an Anti-Suit Injunction.

(continued on next page

BRIEF HISTORY OF THE ANTI-SUIT INJUNCTION

Put in its simplest terms, an anti-suit injunction is an order restraining a party from either commencing or pursuing proceedings before a foreign court.

The authority for an anti-suit injunction is now contained in the Supreme Court Act 1981, s.37 which provides:

"The High Court may by order grant an injunction in all cases which it appears to the Court to be just and convenient to do so."

The anti-suit injunction goes back a long way in English law, as early as the 19th century, if not before. The origin lies in the grant of injunctions by the English Courts of common law – thereby establishing the superiority of equity over the common law. Thereafter, the remedy of the injunction came to be used to restrain the pursuit of proceedings in other jurisdictions in the United Kingdom and overseas.

Anti-Suit Injunctions are a discretionary remedy. They are not directed at, or effective against, foreign courts but rather against individuals or companies. They take effect *in personam.*

BREACH OF ENGLISH COURT JURISDICTION OR ARBITRATION CLAUSES

A. Breach of an English Court Jurisdiction Clause

There is insufficient space for this paper to consider in detail the law on breaches of English Court Jurisdiction Clauses. Most charterparties, more often than not, will have London Arbitration Clauses, in any event. On this basis, only a very brief note on breaches of English Court Jurisdiction Clauses follows:

A distinction needs to be made between breaches in non-EU foreign courts and breaches in EU foreign courts.

(i) Non-EU Foreign Courts:
The law on breaches of English Court Jurisdiction Clauses by commencing proceedings in non-EU foreign courts is straight-forward and owners can apply for an anti-suit injunction, which can be granted.

(ii) EU Foreign Courts:
However, with regard to breaches of English Court Jurisdiction Clauses by commencing proceedings in EU foreign courts, the European Court of Justice has recently decided that the granting of an anti-suit injunction to prevent a party acting in breach of the English Court Jurisdiction Clause from pursuing a claim in, for example, France would be *"contrary to the spirit and intention of the Brussels Convention."* See *Turner-v-Grovit* [2004] AER 485. It was decided in that case that such an injunction would run counter to the principle of "mutual trust" in the legal and judicial systems of other Member States, which underpins the whole fabric of the Brussels Convention.

In this regard, the Court "second seized" (e.g. in England, following the commencement of proceedings by the opponent in a foreign court) must hold or 'stay' its proceedings and await the outcome of proceedings in the first Court. No anti-suit injunction can therefore be granted to restrain proceedings in that first Court.

B. Breach of a London Arbitration Clause

As stated previously, most charterparties provide for London Arbitration in any event and therefore the law on breaches of London Arbitration Clauses is more important for the purposes of this article.

(i) Non-EU Foreign Courts:
If an opponent commences an action in a non-EU foreign court, in breach of a London arbitration clause, an anti-suit injunction can be obtained.

(ii) EU Foreign Courts:
If an opponent commences an action in a EU foreign court, in breach of a London Arbitration Clause, it appears that an anti-suit injunction can also be obtained. It appears that the decision in *Turner-v-Grovit* [2004] AER 485 did *not* extend

to “arbitrations”. There is a clear difference where an opponent starts an action in the court of another Member State in breach of a London arbitration clause.

This is based on Article 1 (4) of the Brussels Convention, which provides that the Convention shall not apply to “arbitration”. The Court “second seized” does not therefore have to stay its process pending the outcome of proceedings commenced in a foreign court, in breach of an arbitration clause. The Court “second seized” is therefore at liberty to decide the question of jurisdiction and furthermore can legitimately grant an anti-suit injunction, if it so wishes. See *Through Transport-v-New India* [2005] 1 Lloyd’s Rep 67; The *“Front Comor”* [2005] EWHC 454.

THE PROCESS OF OBTAINING AN ANTI-SUIT INJUNCTION

The court in London will issue an injunction obliging cargo interests and their underwriters, brokers, claims handlers and lawyers to arbitrate in London and not to maintain an arrest, if security has been offered and issued securing such London Arbitration. If an injunction is not obeyed promptly, the London court can impose fines on the companies and individuals and can even send the individuals to prison. Joining lawyers and claims consultants to the injunctions, at the same time as making an application to commit them and their clients for contempt of court, is particularly effective in situations where injunctions have not been obeyed immediately. The consequences of non-compliance may be grave i.e. jail!

Even if the offenders are not physically within the jurisdiction of the English courts, in terms of having an office or other property and cash assets, contempt of an English court should never be taken lightly and is always a deterrent. Directors of cargo companies and/or cargo insurance companies are likely to visit London at some point, even for a brief Christmas shopping trip, and may find themselves in the unfortunate position of being thrown in a prison cell for the night!

The first words of a typical anti-suit injunction are:

“This order prohibits you from continuing, instigating or commencing proceedings whether in rem or otherwise or from continuing to detain the vessel [name] for claims arising from alleged shortage/damage to cargo carried under bills of lading numbered [numbers] issued on [date] at [load port] in any jurisdiction other than before a London arbitration tribunal.”

Typically, the injunction then continues:

“If you disobey this order you may be found guilty of contempt of court and may be sent to prison or fined. In the case of a corporate correspondent, it may be fined, its directors may be sent to prison or fined or its assets may be seized.”

To save time, it is best that all the paperwork necessary to obtain the injunction is at hand, whereupon an anti-suit injunction can usually be obtained within 24 hours of first instructing a Club-recommended English solicitor.

If the demands of the cargo owners and/or cargo underwriters are not acceded to by the shipowner, and there is delay whilst an anti-suit injunction is obtained and obeyed, then:

- London arbitrators will generally make an award to the shipowners in respect of any legal and other related costs incurred where the cargo owners wrongly detained the ship. They will also make an award for all time lost to the vessel at the daily hire rate, for bunkers consumed during the arrest and for port charges. These counter-claims by owners can be set off against any part of the cargo claim that proves genuine.

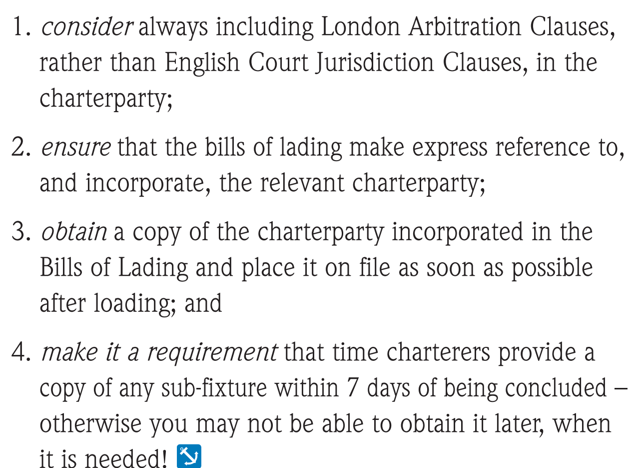
- The London court will potentially find cargo underwriters / brokers / claims handlers / lawyers liable for wrongful interference with the carrier’s right to arbitrate in London and will potentially award the same amounts described above. If an injunction is obtained but not obeyed promptly, one would normally expect to obtain a costs order against those disobeying it, on the indemnity basis.

In practice, those legal costs often form part of an overall settlement later on.

CONCLUSION / PRACTICAL ADVICE

Should a shipowner find his vessel detained and/or arrested and cargo interests refuse security based on a London Arbitration Clause in the relevant charterparty, which is incorporated in the relevant bills of lading, shipowners should consider the Anti-Suit Injunction as an effective tool to fight cargo interests and their unreasonable demands.

Shipowners should always remember to:



1. *consider* always including London Arbitration Clauses, rather than English Court Jurisdiction Clauses, in the charterparty;
2. *ensure* that the bills of lading make express reference to, and incorporate, the relevant charterparty;
3. *obtain* a copy of the charterparty incorporated in the Bills of Lading and place it on file as soon as possible after loading; and
4. *make it a requirement* that time charterers provide a copy of any sub-fixture within 7 days of being concluded – otherwise you may not be able to obtain it later, when it is needed!

COMPENSATION UNDER GREEK LAW 551/15

Victoria D. Liouta, Attorney-at-Law, LL.M. of Shipowners Claims Bureau (Hellas), Inc, discusses the applicability of Law 551/15 to the employment of foreign seamen by Greek shipping companies

The Greek maritime community seems unable to shrug off the concept of the applicability of Greek Law, in contracts of employment between seamen and ship owners, which provide expressly for law other than Greek Law to apply, in cases of a dispute between the parties. That concept is largely found in recent maritime cases heard in Greek courts which apply the Greek Law 551/15, when they decide the amount of compensation that has to be paid by the employer shipowner to the injured seaman or, in case of death, to the next-of-kin.

In Greek Law, compensation awarded to injured seamen or next-of-kin, in case of death, is traditionally understood to concern partial or permanent disability, or death of Greek seamen, following an accident at work, who are registered with the Greek Seaman's Fund. In general, an employee, according to Greek Law, who suffers partial or permanent disability resulting from an accident while performing his services at work, is entitled to choose either compensation under the Greek Civil Code, which applies in case of breach of safety regulations or malice on the part of the employer, or compensation under Greek Law 551/15. These are not different bases for classifying or calculating compensation to seamen; however, the distinction is important when ascertaining the circumstances of the accident and to what extent it is considered to be due to the fault of the employer.

Serious pitfalls await the employer when a claim for compensation is brought by a plaintiff seaman or next-of-kin, in case of death, who is not Greek or registered with the Greek Seaman's Fund. Close consideration should be given in cases where the legal action filed by a foreign seaman before the Greek courts may be also based on the Greek Civil Code, which provides for loss of income for the seaman's remaining working years, on the basis of his salary, and additional compensation for pain and suffering. Alternatively, Greek Law 551/15 may apply, where legal action under the Civil Code has been dismissed.

Greek Law 551/15 is principally a guideline and standard logistical basis for calculating compensation that arises from an accident, or death, of an employee whilst at work. In general, however, it is necessary for the following conditions to be satisfied:

According to Art.1 of Special Labor Law 551/15, an employee who is injured during his work is entitled to compensation as per Law 551/15. Art. 2 of this Law states that its provisions apply *inter alia* to any business engaged in sea trade as well as construction, work-sites and factories. Reflecting the writs of action that are filed before Greek courts, whilst Law 551/15 mainly applies to seamen, non-seamen may also seek compensation under Law 551/15 which, under current precedent, may also apply to rail workers, truck-drivers, employees of the Greek National Electric Company etc. Thus the Law primarily embraces seamen in the strict sense and, infrequently, employees who work ashore, such as superintendents (Port Captains or Port Engineers) who are registered with the Greek Seaman's Fund.

Provided that there is liability on the part of the employer, a foreign seaman may bring a claim for compensation against that employer before the Greek courts, under a contract of employment with a shipping company owned by "Greek interests" – even if the contract states that law other than Greek is applicable, in case of dispute, – by allowing the foreign seaman to make use of the terms and conditions and provisions of the Greek Collective Agreement that govern the contractual relationship of Greek seamen and Greek shipowners.

It is a curious feature of Greek Law that it focuses on the competency of the Greek courts, by holding and hearing a writ of action filed by a foreign plaintiff seaman or next-of-kin, without scrutiny of the plaintiff's entitlement to generate liability under the contract of employment before the Greek courts. This Law considers four issues, notwithstanding any different provisions under the contract of employment:

(i) the parties of the contract have selected an applicable law to govern their relationship, which, however, cannot deprive the seaman of his rights under the *jus cogens*, namely, the forum of law that would be applicable, if the parties had not selected the law of the contract of employment;
(ii) the parties have selected a forum of law in their contract which cannot affect the application of the law that would be applicable in accordance with other "national" elements of the legal action; for example, the employer having its place of business in Greece, or the ship being owned by Greek interests;
(iii) where there is no selection of applicable law in the contract, it will be the one most closely linked with the place of business of the employer; for example, Piraeus;
(iv) the seaman employee, who works on board ships under a flag of convenience, is entitled to chose the forum of law in which the "real" seat of the employers' business is found, namely, the headquarters of the company where the decisions are taken by the Directors and the Shareholders.

More cautiously, it can be said that the acts of foreign seamen before the Greek courts must have been expressly included and undertaken in the contracts of employment. Since Greek judges hear these cases, then it is they who should decide whether or not additional arguments are required for applying Greek Law and jurisdiction. This leaves many questions to be answered. However, it is sufficient, in order to apply Greek Law, that the employer has its place of business in Greece and that the ship belongs to Greek interests. The exact limits of the requirements, as mentioned hereinabove, can be found in the provisions of the Rome Convention as well as the Brussels Convention and San Sebastian Convention, which are all ratified in Greece and thus formulate internal Greek Law.

Similarly, if a party or next-of-kin files a writ of action before the Greek courts for compensation for death, Greek Courts are competent to hear the case, since the choice of law and jurisdiction clause between the deceased and the employer in the contract of employment will not to be binding upon the next-of-kin who was not party to the agreement, even if the contract of employment expressly provides that law other than Greek is applicable. This view has found acceptance and any foreign next-of-kin is entitled to file a lawsuit under Greek Law 551/15. There has also been support for the view that Greek Law applies when an injured foreign seaman or next-of-kin, in the case of death, files a lawsuit for compensation under Civil Law, under Art. 297, 298, 914 of the Civil Code. However, it may certainly be arguable that the accident or death happened as a result of the failure or omission on the part of the employer to apply and observe safety measures on board the vessel or is in breach of safety regulations provided by SOLAS, IMO, ILO and the ISM Code, which provide for the protection of seamen on board vessels.

One view is that where the circumstances of an accident remain unclear, the Greek judge may apply Greek Law and, at his absolute discretion, may consider the compensation issue under Greek Law 551/15 and reduce the compensation up to a maximum 50%. This view is questionable insofar as it is based on evidence collected by the person obliged to pay compensation, since in those cases the employer has to prove that the accident was due to contributory negligence by the injured seaman. It is generally accepted that according to Greek Law 551/15 contributory negligence is considered when the employee is injured being unjustifiably in breach of safety regulations or laws on board the vessel. In principle, the law accepts that in the case of a breach of safety regulations or malice on the part of the employer, the Court does not take into consideration any contributory negligence on the part of the employee.

Without prejudice to any other requirements that foreign seamen may have to consider, the standard rules to qualify for compensation under Greek Law 551/15 provide that a lawsuit must be submitted in the Greek courts by a foreign seaman or next-of-kin, in case of death, with the intention of proving the competency of the Greek courts. However, there is commonly a right or discretion to avoid such a procedure, whereby shipping companies owned by Greek interests (including our members) can protect their rights under the contract of employment before any dispute arises, by settling, as a priority and on the best possible terms, any claim under the provisions of a law other than Greek that governs the contract of employment.

Training – Where Do We Go From Here?

John Poulson, Vice President, Technical Services of Shipowners Claims Bureau Inc., highlights the growing shortfall in manpower and expertize throughout the maritime industry

The following article was adapted from the author's address at the Annual General Meeting of the American Association of Average Adjusters in October 2006, in his capacity as outgoing Chairman.

The title of my address takes the form of a question; it is actually "where do we go from here"?

Now, by "we" I mean, of course, the collective professionals that make up the Underwriting and Legal professions and the Average Adjusting and Surveying professions, and their collective involvement in our day-to-day industry; and by extension, to Classification, Regulatory Bodies and shipowners, without whom we would obviously not have a function.

I worry that the Captains of our industry may be asleep at the wheel, unaware of what course we are actually on if we are on any consciously chosen course; I get the feeling sometimes that we are perhaps just slow steaming waiting for orders.

We all here are dependent upon each other and the professional input of each – all different areas of expertize but nonetheless each a vital component of our industry. But do we take the time to actually reflect upon the collective state of our industry and where we are going? I think not.

Decline in certain areas of profit, albeit sometimes serious, has driven many individuals and companies in our industry to take a self-centred look at their world and concentrate on their escape route. The resulting lack of investment in people and training of individuals in the disciplines of our industry has become, quite frankly, shocking and unacceptable.

There are at present more questions facing our industry than we have answers for. This is nothing new; solving problems has been key to driving development of industries forward over many years. The problem comes when we have no one willing to tackle those questions and that means young people entering our industry. Where do we go from here? Without the application that comes from engaging young minds… nowhere.

Over the past year I had the good fortune to be able to briefly discuss training and motivational issues with the UK Minister of Shipping and members of his department and also met with several shipowners; I also had the opportunity to discuss the contrasting approach to training presented by the US, UK and Greek shipping industries with current trainees and recent graduates of their respective programs. There is no doubt that the level of education being offered is indeed, attractive in all cases. However, in all cases it is the educational element being sought – not necessarily the opportunity to pursue a career at sea.

A small portion of training may still include some sea time but the career at sea is just not attractive to young people, except perhaps in those countries where shipping and seafaring are still important to the economy and possibly becoming more so. But having said that, of the 1,300 available berths available to Greek deck and engineer cadets for the 2006 / 2007 entry year not even half have been filled at present, causing serious worry among Owners. Worldwide, it is generally accepted figure is that the world merchant fleet is already 20,000 seafarers short of a full deck.

Perhaps we have just gone soft and are always looking for an "easier way". But who would want to go to sea these days? The quest for profit in a strong market has seen manipulation of areas of operation – particularly affecting crews, that has tangibly lowered quality of life and standards generally. Ships have been pushed hard, maintenance and repairs deferred and lines have been crossed where margins have compromised decisions regarding safety of life at sea. It has to be appreciated that a major reason for the traditional source of surveyors rapidly drying up is simply that seafaring is becoming a Third World occupation.

Too many ships of poor standard allowed to continue trading when they should have been scrapped; leading in turn to greater competition due to too many ships; leading to cheaper and cheaper crews in an effort to remain competitive. A self-defeating vicious circle, if, ever there was one. Given this perilous state of play at sea, what our own industry needed to do was maintain higher standards regardless, but how?

Unfortunately, we have seemingly been dictated to by the lowest common denominator; poor ships equals lower insured values and less risk; lower insured values and less risk means no need for "expensive" surveys and reporting; no need for "expensive" surveys and reporting means no need for "expensive" adjustments and so on; a gradual eroding of standards compromising professional standards at each level.

Chief Engineers are presented with 30-year old technology and machinery that, for example, is miraculously supposed to separate oil from water by switching on a pump and opening some valves. Can we be surprised when they are led off to jail because it doesn't work? It didn't work when it was put in the ship twenty odd years ago. Can we possibly expect the next generation of surveyors, or superintendents, for that matter, to come from these beleaguered ranks? I think not.

So in the future, *who will* determine for Underwriters whether the fractures in the hull of a tanker are the result of heavy weather or are actually the accumulation of years of trans-Atlantic trading fatigue? *Who will* look at the carnage following a main engine bottom end bolt failure and determine whether crew negligence was the proximate cause or whether the prime cause was actually the fact that the Owner had failed to supply the necessary spares to the vessel six months earlier; and *who will* assess the condition of a vessel while still aground at Tierra Del Fuego and competently and confidently advise Underwriters as to the next and best course of action to minimize their loss?

It's possibly surprising to some that the linchpin of the whole process, the surveyor, has needed no professional surveying qualification in order to start a report with the usual "THIS IS TO CERTIFY". But there is good reason for this. This has been because the qualification of individuals as Master Mariners and Engineers together with on the job training has always been deemed sufficient. As this supply of surveyor material dries up, however, this will not continue to be the case.

I am the first to say that protectionism for any group ultimately is usually counter-productive. However, there appears to be little doubt in future that with the natural free source of surveyors rapidly drying up, the "blue chip" surveying companies remaining will be charged with finding and training suitable candidates for surveying duties. In this respect, Underwriters of all disciplines, H&M, P&I, Cargo etc., must be prepared to pay a premium for services that will allow such companies to train the individuals needed to fulfill these roles.

There *must* be investment. It is not now speculation but a dire need.

When Classification Societies came under the spotlight towards the end of the 1980's, following the unacceptable and frequent loss of bulk carriers and their crews, the anticipated improvements from the declared intentions of IACS were lauded. Unfortunately, the collated results of vessel inspections today would suggest that the initial improvements in Classification performance have not been maintained. In some respects a cynic could easily be misguided into thinking that the formation of IACS has resulted in economic protectionism as much as the intended improvement in standards to be derived from a common approach to standards and technical issues.

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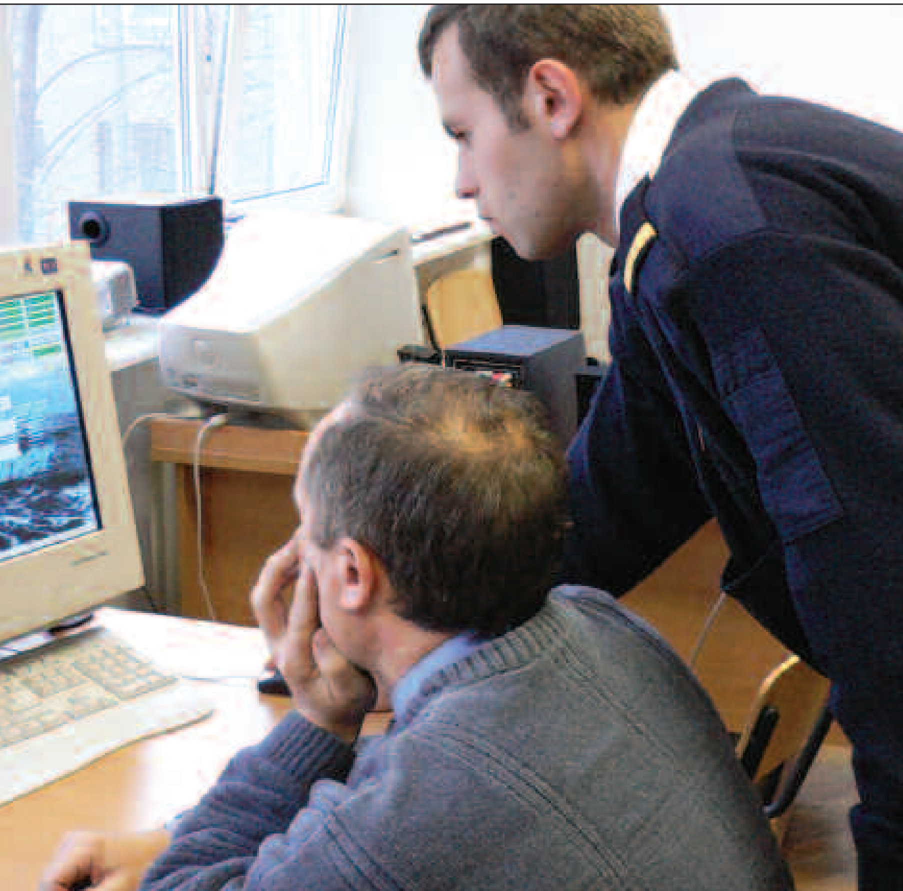

The most recent Class survey is the starting-point of many a claim presented on Underwriters. It may be bit perfunctory but in some cases there is insufficient information available to take any other approach. Recent practice concerning the treatment of deficiencies in Class certificates and reports has further highlighted the lack of confidence that might presently be placed in this approach. It must be said, however, that IACS has been very responsive to this negative development in the field and positive corrective measures have at least been implemented. This is something that needs continued vigilance; the first box checked by Underwriters is still “Class Maintained” – it needs to mean something.

ISM, on the other hand, has been said by some to be, in many respects, nothing but a band aid, covering over the real malaise of a desperate shortage of competent seafarers. Instead of tackling the standard of training, the system has shifted the focus of responsibility to management ashore. Whilst originally the Safety Management System was custom designed and developed for individual companies and their fleets, it was not long before systems could be bought off the shelf to save costs. The results are predictable and clear to see from the results of vessel inspections by other parties.

Moreover, from personal experience I can tell you that the worst casualties I have ever surveyed in terms of quantum and loss of life all occurred on vessels with immaculate ISM paperwork. But let’s be clear, regardless of regulatory body intervention, be it Classification, ISM audits, or Port State Control inspection or whatever – the responsibility for the upkeep, seaworthiness, cargo-worthiness, safety and competent crewing of a vessel is the Owner’s; no-one else’s.

It is here that Underwriters have such an important role to play. The industry needs Underwriters to stay tough. Yes, “Class Maintained” should be the first box checked but it’s not enough; the Classification system allows plenty of scope for abuse. I would appeal to Underwriters everywhere when considering their rating to encourage the efforts to re-establish National Maritime Registries and the properly administered Flags of Convenience.

I would also appeal to everyone including Underwriters to support the formation of a properly regulated, safe and prosperous scrapping industry, which will be key to the health of the world fleet in the future.

Primarily, there is woefully insufficient recruitment of young people into the industry and, secondly, the lack of investment in people over the last two decades has left us short of the mentors and teachers needed within, if and when new recruits are taken on. Think back to whom it was you learned your trade from. And if you consider yourself a potential mentor and a teacher, who are *you* training right now?

In the surveyors world, silence on a subject is taken to mean tacit acceptance. Tacit acceptance of the state of the industry will result in there being no voice at all.

Wherever we do go from here – let’s not go *there!*

The ISPS Code in Operation

Thomas Hamilton, of Shipowners Claims Bureau, Inc., offers an up-to-date perspective on the use of the ISPS Code Security Clause

Maritime security has been an issue for as long as mariners have plied the sea. In fact, part of the reason navies were established was to protect merchant vessels sailing on trade routes. With this in mind, it is not surprising that following the terrorist attacks on the *USS Cole,* the World Trade Center, and the *Limburg,* IMO sought to codify a convention to help make sea-going trade more secure. As of July 1, 2004, all SOLAS vessels over 500 GT were required to comply with the International Ship and Port Facility Security (ISPS) Code as enacted by the IMO.

As the deadline approached, and the promise that non-compliance would result in detention, care of local Port State Control authorities, vessels and port facilities moved quickly to get up to speed with the requirements of the Code. Sure enough, and in large part because of the diligence of shipowners worldwide, the July 2004 deadline passed without much ado. This proved again what the maritime industry is capable of accomplishing; we established global standards for security, in spite of almost certain economic drawbacks.

Initially, and aside from port authorities, the most impacted group in the security effort were the shipowners. They were coerced to meet standards that were outside the traditional requirements of operating a fleet. Vessels were now required to have a Ship Security Officer (SSO), a dedicated person who collaborates with the Master to design, implement, and amend a Ship Security Plan (SSP). Additionally, the SSO and Master interact with the Company Security Officer (CSO) to perform functions such as identifying security levels, ensuring Ship Security Assessments (SSA) are completed, and providing effective communication outlets and training. Despite the addition of personnel with security-enabled title roles, it is important to remember that the Master is responsible for the security of the vessel.

Anticipating potential liability disputes, BIMCO drafted ISPS time and voyage charter party clauses. The clauses serve three functions: (1) provisions for application and communication, (2) outline of liabilities, and (3) a requirement that each party will indemnify the other as necessary.

As a matter of disclosure, both clauses require Owners to give Charterers "full style contact details of the CSO." Similarly, the Charterers are required to supply the CSO and SSO with their own contact details. This is a critical element as effective communication provides the most basic level of security. The only way to guarantee lines of communication are open is to contractually obligate parties to disclose their contact information.

Regarding an equitable degree of liability, BIMCO has limited Charterers' and Owners' liability based upon the arena of the infraction. The purpose of this portion of the clause is to ease the difficulties of determining the seat of liability.

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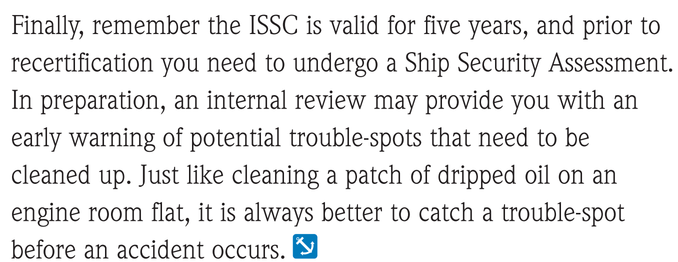
Part (a) (ii) of the standard wording of the BIMCO ISPS Clause states that, *"except as otherwise provided in the Charter Party, loss, damage, expense or delay, excluding consequential loss,"* resulting from the Owners' failure to comply with the ISPS Code, shall be for Owners' account. The significance of this sub-part is that application may be subject to stipulations in other parts of the charter party. Moreover, expenses debited for Owners' account, as provided in the clause, include all measures necessary for compliance with the SSP. Including this section of the clause is favorable for Charterers who, although operating the vessel, do not have means to amend or maintain the SSP as a document. This is consistent with Part (A) (6.1) of the ISPS Code, providing that the Master, as an extension of the Owner, is solely responsible for the security of the vessel.

Conversely, part (c) of the clause includes a significant section concerning liability under the ISPS Code mandates for the Owner. As per part (c), *"Notwithstanding anything else contained in this Charter Party all delay, costs or expenses whatsoever arising out of or related to security regulations or measure required by the port facility or any relevant authority in accordance with the ISPS Code"* is for Charterers' account. This section has two fundamental points: (1) confirming dominance in the Charter Party, and (2) the fact that apportionment of items which may be required by any other authority are for Charterers' account, unless they are a result of Owners' negligence or derived from the SSP.

The clause, as drafted for voyage charter parties, is very similar to the time charter version, with the chief exception of part (c). The first subpart in this section relates the issue of security clearance by the port facility or relevant ISPS authority. Importantly, this subpart has supremacy over any potential contradiction in the Charter Party and states that the vessel may tender Notice of Readiness even if it has not been cleared due to security reasons imposed by port facility or a relevant authority. This clause directly impacts the commencement of laytime and can have a significant impact on potential demurrage/despatch. The second subpart elaborates on the issue of laytime, demurrage, and despatch. According to the clause, a delay which results from measures taken by a port facility, or by a relevant authority under the ISPS Code, is counted as laytime or time on demurrage, if so applicable. In the event that a delay occurs before laytime begins, or after laytime or demurrage ceases, the clause states that the delay shall be compensated by the Charterers at the demurrage rate.

For Owners and Charterers alike, the operation of vessels in compliance with the ISPS Code, coupled with a standard BIMCO ISPS charter party clause, will help ensure that liability for claims related to security are limited under charter parties. The risk of operating a ship in non-compliance is very serious and has the potential to be nightmarish. The hurdle of the July 2004 Code compliance deadline has passed and so quickly, it seems, we are nearing the two-and-a-half-year anniversary of operation under the Convention. Resultantly, it may be a good time for owners to review their record under the ISPS Code and identify areas for improvement. Also, if not already in practice, including the BIMCO ISPS Clause in your charter parties may provide clarification for disputes of liability under the ISPS Code.



Finally, remember the ISSC is valid for five years, and prior to recertification you need to undergo a Ship Security Assessment. In preparation, an internal review may provide you with an early warning of potential trouble-spots that need to be cleaned up. Just like cleaning a patch of dripped oil on an engine room flat, it is always better to catch a trouble-spot before an accident occurs.

THE LEGAL IMPLICATIONS OF THE ISRAEL / LEBANON CONFLICT

Charles Weller, Partner, Shipping Group, and Diane Galloway, Partner, International Trade & Commodities Group, at Richards Butler, assess the legal implications of the recent Israel / Lebanon conflict

On 13th July 2006, in response to the capture of two of its soldiers by Hezbollah the previous day, Israel announced an air/sea blockade of Lebanon. Warships enforced a full naval closure of access to and from Lebanese ports (apparently, because these were perceived as a conduit for incoming weapons – particularly in containerised cargoes). The situation quickly escalated. Israel mounted air strikes on the port cities of Beirut, Tyre and Tripoli. On the other side of the border, the Israeli port of Haifa was closed due to retaliatory rocket attacks, missiles reached Nazareth, 33 miles into Israel, and with threats by Hezbollah to attack Israel "beyond Haifa", Tel Aviv was placed on missile alert. Evacuation of foreign citizens from both sides of the border followed.

The commercial consequences were serious and echoed those grappled with during the Iraq wars. The blockade was particularly significant given Beirut's recent rise as a commercial trading hub, handling more than 3,000 ships in 2005 and capable of handling 700,000 containers a year.

Initially, about 50 cargo ships were trapped inside the Israeli blockade, with a similar number on the outside, and numerous more on their way, with the prospect of their voyages being suspended by the blockade. Furthermore, the hostilities meant an 80-fold increase in insurance premiums for ships due to call at certain Lebanese ports.

This initial phase created various legal issues in respect of shipping contracts for commodities destined for Lebanon and Israel, the sale contracts for those commodities, as well as the hull and cargo insurance policies for the carrying ships and their cargoes. Most of those shipping, trade and insurance contracts would have been governed by English law, and given the exigencies of international trade, most will have legislated for the impact of war, hostilities or terrorism with clauses which, when engaged, redefined the parties' obligations or excluded the consequences altogether.

Shipping contracts often include "war risks" clauses, usually of a standard form. Contracts for the international sale of goods usually deal with war and associated risks in a *force majeure* clause. In marine insurance policies, war risks are usually excluded from standard hull and cargo cover and, where covered, they are usually accompanied by a cancellation clause allowing the underwriters to cancel at short notice, often with an offer of reinstatement at higher premium. Thus specialist war cover is frequently purchased and many shipping contracts will provide for the increased hull insurance cost to be passed on to the charterers. This will often be mirrored in the commodity sale contract, with the increased cost being passed from Sellers to Buyers – although, sadly for Sellers, this is usually restricted to extra premia on cargo insurance, not hull insurance.

Several oil tankers were among those ships either trapped on the inside or blocked on the outside of the Israeli blockade. Many of these were carrying petroleum products traded internationally. These ships are mentioned in particular because (a) many were carrying fuel for the Lebanese power plants, so the cargoes soon came to be characterised as "aid" by the UN, as the consequences of both the blockade and air strikes on oil storage facilities conspired to create an acute shortage, (b) the consequences of a missile hit on a fully laden oil tanker could be catastrophic for crew, ship, cargo and the local environment, (c) the rates for the use/hire of these ships (whether payable under the shipping or commodities contract) are high by comparison with the other types of commercial ships caught up in the conflict, and (d) the value of these commodities is also comparatively high.

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Depending upon the terms of the shipping contract, typically the conflict might have impacted upon the charterer's rights to insist that the ship wait to proceed to the original destination; alternatively, it might have triggered rights of the shipowner to require instead that the charterer give fresh orders to proceed to an alternative (safer) destination; it might have impacted upon the responsibility for paying for the daily use of the ship in the interim and for paying for the extra insurance cost as a result of trading to that area; and, possibly, even triggered rights of cancellation of the contract itself. Only in limited circumstances might the facts have given rise to issues of frustration.

For commodities contracts, the facts might mean the contract is discharged if war, warlike activities or the inability to ship goods to the Lebanon constitutes a "frustrating event", so excusing the performing party from further performance. Given the duration of the recently lifted blockade, but depending upon the commodity, performance of a "delivered Lebanon" contract was impossible until at least early August. For that type of contract to be "frustrated", the blockade would have to continue throughout the contract shipment/delivery period.

However, most commodities contracts will have a *force majeure* clause, which is usually considerably wider in application than frustration. The effect of such a clause is usually to excuse non-performance so no damages are payable. Much like the application of a typical war clause in a shipping contract, the application and operation of a *force majeure* clause depends on its terms and the particular facts; however, such clauses typically provide for a suspension of performance for a period – not immediate termination. Therefore, in each case one must look at whether the facts come within the definition of the f*orce majeure* event. Unlike war risk clauses, examples of "one-off" clauses intended to deal with *force majeure* issues are common.

Resolving many of the above issues will therefore be dependent upon whether there is a war relevant to the contract. It will be of no surprise that the exact meaning of the word "war" depends upon the presumed intention of the parties, but guiding factors as to whether a state of war exists were set out in *Spinney's (1948) Ltd v Royal Insurance Co* [1980] 1 Lloyd's Rep 406;

(i) whether one can identify a conflict between opposing "sides";

(ii) the existence of objectives of these "sides", and the means of pursuing them; and

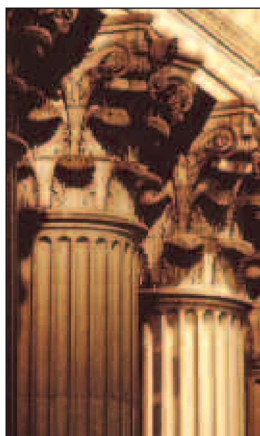
(iii) the scale of the conflict, its effect on public order and the life of the inhabitants.

Applying this test to the facts of the 34-day conflict and, specifically, Israel's objective in eliminating the political and military power of Hezbollah, the latter's objective of eliminating the state of Israel, the scale of the forces actually deployed by Israel in the Lebanon, the attacks in either direction, the blockade of Lebanese ports, the casualties and the extent to which life in Lebanon was impaired and disrupted, there could be no doubt that a state of war existed. But it was still for the lawyers to determine the impact of that conclusion on the terms of the particular contract, as well as the precise factual circumstances which prevailed at the relevant time.

After the war came the peace, albeit still a fragile one. UN Resolution 1701 brought the ceasefire which came into effect on Monday 14th August, and indications are that it has generally held. However, Israeli fears of arms supplies resuming to Hezbollah meant the Israeli blockade continued until a month after the ceasefire, when monitoring of sea traffic was handed over to the UN peace-keeping authorities. In that second phase, came new uncertainties for the lawyers, with some important elements of typical war and *force majeure* clauses disappearing in the absence of actual or threatened hostilities but with the continuation of the blockade which, in many cases, still prevented ships and cargoes proceeding to their destination.

FD&D REVIEW

by George J. Tsimis, Managing Director, Shipowners Claims Bureau (HELLAS) Inc.



"Rule B or not Rule B..."

We have been using Supplemental Rule B maritime attachments of electronic funds transfers (EFTs) through New York intermediary banks with great success in recent months, both to obtain security in aid of New York and London arbitrations and to enforce awards already obtained against our Members' opponents.

This mechanism (discussed previously in *Currents No.17, November 2003*) has recently become the subject of much debate in the U.S. District Court for the Southern District of New York, the jurisdiction through which nearly all worldwide U.S. dollar wire transfers pass.

In the case of *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., S.D.N.Y.,* Case No. 05 Civ. 6929 (Sept. 4, 2005), Judge Jed Rakoff decreed that the maritime attachment of an EFT should only be permitted as a matter of necessity, even though there is no such requirement within the language of Supplemental Rule B to the Federal Rules of Civil Procedure. Several other S.D.N.Y. judges thereafter issued similar decisions, adopting this so-called "needs" test in the Rule B context. The *Aqua Stoli* decision was thereafter appealed to the U.S. Court of Appeals for the Second Circuit, which just recently handed down its decision on this crucial issue. In *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.,* 2006 WL 2129336 (2d Cir. 2006), the Second Circuit in *Aqua Stoli* specifically eliminated the purported "need" requirement and severely restricted the circumstances under which a Rule B writ of attachment can be vacated.

This conclusion was consistent with the language of the Rule itself, encourages a more predictable, uniform interpretation and application of Rule B, and eliminates any confusion that the "needs" requirement had spawned during its brief existence. So, in the aftermath of the *Aqua Stoli* decision, Rule B attachments of EFTs appear to be alive and well, and will continue – at least for the time being – to be a key weapon in a claimant's arsenal to obtain security for its maritime claims against companies with little or no identifiable capital assets.

"Parting is such sweet sorrow..."

Finding the right words to say goodbye is never easy, and apparently the same principle applies in the context of withdrawing from a charter party. In a recent English Court decision, *The LI HAI,* [2005] Lloyd's Rep. 389, the vessel owner attempted to withdraw from its time charter agreement due to the charterer's failure to remit outstanding hire in the amount of $500.00.

One of the Rider Clauses to the NYPE form time charter was an Anti-Technicality Clause which required the owner to give 72 hours notice to the charterer in writing that it would not withdraw the vessel if the outstanding hire is paid and the alleged breach is rectified within that 72-hour period. The owner's notice of withdrawal merely advised the charterer that it had breached the payment of hire clause and that the vessel would be withdrawn within 72 hours.

The Court ruled that the notice did not comply with the Anti-Technicality Clause and, consequently, the vessel owner was deemed to have repudiated the contract. The moral of this story is that such clauses must be strictly complied with and any notice of withdrawal should explicitly state that the hire has not been paid on time, that the outstanding hire must be paid within the 72 hour period (or other applicable period in the clause in question), failing which the vessel will be withdrawn from the charterer's service. While the notice was deemed to be deficient, it is interesting to note that the Court essentially held that the vessel owner was entitled to withdraw from a charter party, due to charterer's wrongful deduction from hire, even if the amount is question is minimal.

"You've Got Mail... and You've Been Served!"

In a recent decision by the London Commercial Court, it was held that service of a notice of arbitration by e-mail was proper, despite the fact that charterer contended that it had not seen it.

In *The Eastern Navigator* (2006) LMLN 1, the vessel owner – through its counsel – had sent the charterer a notice of arbitration, wherein it asked the charterer to agree to the appointment of a sole arbitrator to arbitrate in a dispute subject to the LMAA small claims procedure. When the charterer had failed to respond to the notice, the owner proceeded to send its submissions via e-mail. The arbitrator also sent subsequent notices to the charterer at the same e-mail address, and eventually the arbitrator issued his award on the dispute and sent it both by e-mail and by first class mail to the charterer.

The Court ruled that charterer had in fact received the e-mails in question – a point which charterer did not deny. The Court also held that the Arbitration Act of 1996 provides in pertinent that "a notice or other document may be served by any effective means" and that service by e-mail constituted such effective means. Lastly, it was noted that the LMAA small claims procedure specifically states that communications may be made by e-mail.

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So the *caveat* to our Membership is two-fold. First, please make sure that all e-mails are reviewed to avoid the prospect of missing any such notices or other significant messages. Second, when serving any key notices or other documents relating to an arbitration dispute, the following points should be considered:

(1) If you are serving a notice of arbitration, please do not rely solely on an e-mail transmission to effect service. A telefax letter and hard copy letter sent by mail (e.g. first class mail or courier with tracking or return receipt capability) should always be used.

(2) Do your utmost to obtain your opponent's direct fax number, e-mail address and postal address.

(3) Do not rely on serving notices through a broker, but if you must, please make sure that the broker has truly forwarded any notices, submissions or other paperwork to your opponent, and that you or the broker has obtained a written acknowledgement of receipt of service from the other party.

(4) Make sure that the above principles are followed, especially when sending key documentation in support of a demurrage claim which may be subject to a 60-day or 90-day time bar, as per any applicable charter party terms.

"It's Tool Time... Fine Tune Your Ship Repair Contract"

In recent months, we have seen a number of contract disputes between our Members and ship repair yards. In these disputes, the repair contracts in question contained onerous terms (from our Member's point of view) and in at least one case, no contract at all was used. While we acknowledge the harsh realities that

a ship owner faces especially when repairs are needed in a far off locale, we do believe that an owner can minimize its potential exposure to any improper repair, negligence or contractual breach by the yard.

For example, in situations where no contract has been proffered by the yard, the Member should consider using a standard repair contract. BIMCO has recently issued such a standard contract in the form of the REPAIRCON, a copy of which can be accessed from its website at www.bimco.org. While the REPAIRCON has apparently not yet gained widespread acceptance yet, it is a viable alternative to the lack of any repair contract at all.

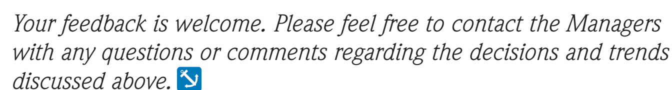
In those situations where the yard imposes its own contract wording, the owner should review and attempt to negotiate terms that are more favorable to it. There are certain provisions that the yard typically seeks to impose, and some of these provisions include the following:

A common clause that is forced upon an owner is one that either sets a monetary limit to any damages claim by the vessel owner (say $100,000), or one that limits the extent of the owner's redress to the performance of the repairs or cost of the repairs. Such provisions should be eliminated if possible because they unnecessarily and dramatically reduce the yard's exposure, even if the repairs effected were faulty and resulted in extensive down-time for the vessel and subsequent remedial repairs, in order to correct the errors made by the yard. Consequential damages can easily reach six figures when one considers the current freight and charter hire rates in today's market.

The owner should also review the choice of law and jurisdiction clause to avoid the prospect of being subject to the laws and courts of a forum not known for its fairness or consistency in decisions. Opting for a forum such as London or New York arbitration would be preferable to a hometown court in a remote jurisdiction.

Another common term found in contracts proffered by yards is an indemnity provision which holds the yard and its contractors harmless for any of its acts, omissions or conduct, or a companion provision which calls for the waiver of the owner's insurers' subrogation rights against the yard or its sub-contractors. Such clauses are not only unreasonable, but would likely prejudice a Member's P&I or FD&D cover insofar as it may violate the Association's Rules. (See Class I, Rule 3, Section 2(8). Such clauses should therefore be avoided altogether.

Clearly, every ship repair contract has a different context and the circumstances surrounding each one are unique, so we encourage the Membership to consult the Managers with any questions regarding prospective ship repair contracts.



Your feedback is welcome. Please feel free to contact the Managers with any questions or comments regarding the decisions and trends discussed above.

The View From

Cyprus

A pragmatic and proactive approach is essential for loss prevention and dispute resolution in the Middle East, according to Elias Marine Consultants Ltd, the American Club's Correspondents in Cyprus

Based on the sunny Eastern Mediterranean island of Cyprus, the true maritime crossroads of the EU and the Arab Middle East, Elias Marine Consultants Ltd (known as EMCO) is strategically placed to provide assistance to vessels calling at Arab countries in the Middle East and North Africa.

EMCO was founded in 1992 by its Managing Director, Imad Elias. Coming from a shipowning background and having worked as a maritime lawyer in a leading London City firm, he had identified the need for the provision of a sound, pragmatic and proactive service to shipowners in the region. The service that EMCO introduced understands and bridges the cultural differences – and even the mistrust – that can sometimes arise when East meets West on the water.

EMCO is currently staffed by a team of 23 personnel at its Cyprus head office and its regional offices in Arab countries. In addition, it operates a UK office headed by Phil Parry. The company's 15 consultants consist of lawyers, shipping consultants and surveyors, from a wide variety of cultural backgrounds. EMCO's location in Cyprus is ideal, due to the presence of a very large shipping community and its close proximity and easy access to Arab countries, to which the company's consultants travel regularly.

In addition to its role as a P&I correspondent, the Company is retained as a marine consultant to a number of shipowners, regarding almost all aspects of their operations.

As a Correspondent, EMCO operates by taking a proactive rather than a defensive approach and relies heavily on its track record and its transparency in dealing with opponents. This approach has proven, over the years, to be much more productive in resolving potentially convoluted and complex situations. Being able to understand each individual claimant's circumstances, needs and grievances and being able to deal with them without alienating the claimant, is essential. EMCO takes the view that the interests of shipowners are, in most cases, best served by taking a pragmatic stance rather than becoming entrenched in legal arguments which, instead of leading to a quick resolution, may simply serve to create more confrontation and dissatisfaction on the part of the Member, particularly in such jurisdictions where legal proceedings may be very long-drawn, with consequent mounting legal expenses.

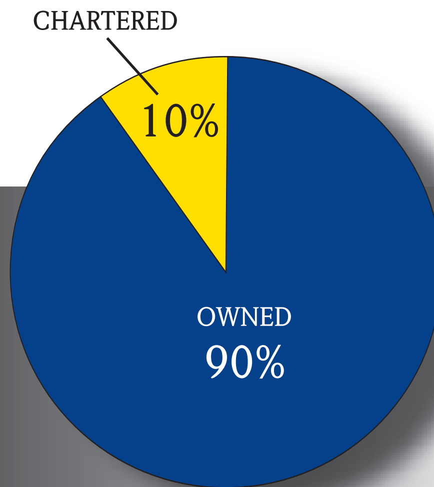
A unique function which the Company offers in the region is the management and coordination of casualties. EMCO has been involved in a number of casualties, such as the loss of, or fires on, containerships, resulting in a multitude of claims which have been dealt with – and finalized – without the need for legal proceedings. Local knowledge, reputation and expertize are paramount.

Managing Director Imad Elias explains that EMCO has witnessed a number of cases where simply adopting a legalistic approach has only served to produce an avalanche of legal actions and claims, where a proactive approach might have produced a moratorium on legal proceedings and an amicable resolution, enabling the parties to maintain their commercial relationships. It is extremely important to attempt to resolve a situation without prejudicing Members' legal rights, whilst at the same time striving not to irrevocably destroy commercial relations. EMCO believes that this is the primary role of a Correspondent.

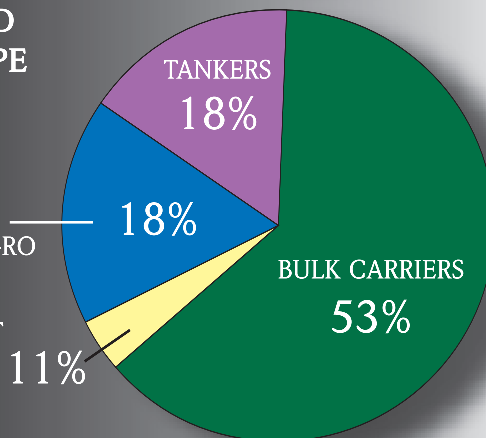
American Club Fleet 2006

SPLIT BETWEEN OWNED AND CHARTERED ENTRIES

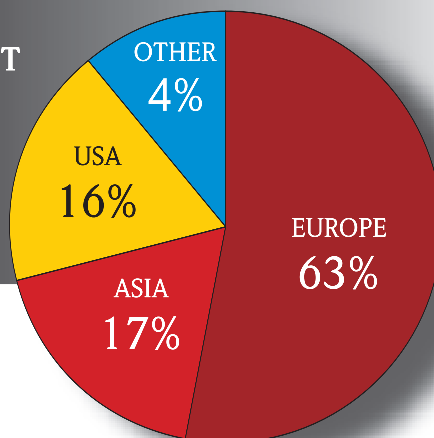
Pie chart represents a total of 22.4 million gt



OWNED AND CHARTERED TONNAGE BY VESSEL TYPE



OWNED AND CHARTERED TONNAGE BY MANAGEMENT DOMICILE



THE
AMERICAN
CLUB

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