THE AMERICAN CLUB

CURRENTS

ISSUE NUMBER 20 MAY 2005

The American Club P&I Club of the Year

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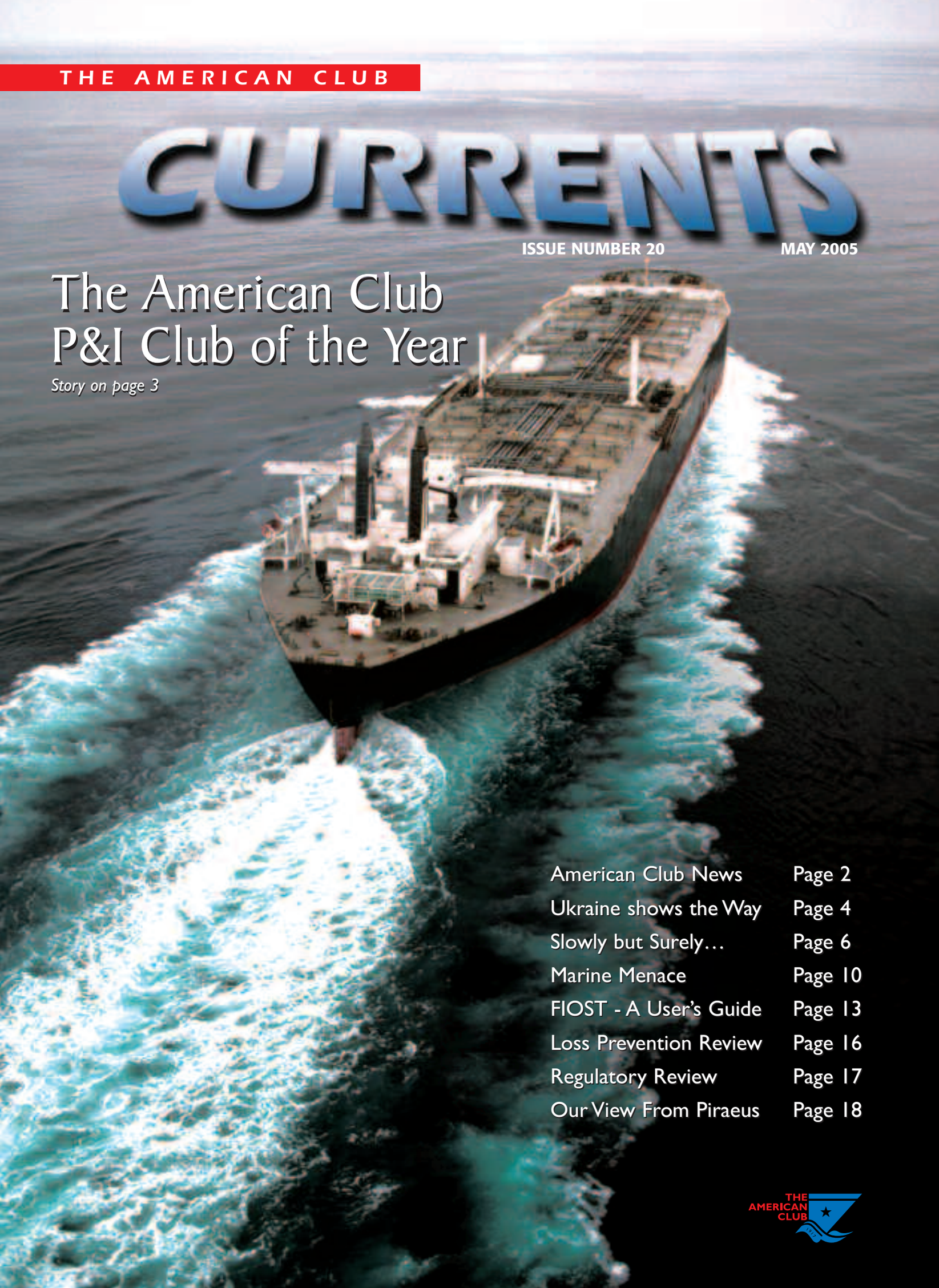


THE AMERICAN CLUB

AMERICAN CLUB NEWS

Diary

May 20, 2005	Reception	Piraeus Yacht Club
June 16, 2005	Annual Meeting	Ritz-Carlton Hotel New York
September 15, 2005	Board Meeting	Office of the Managers New York
November 16/17, 2005	Reception & Board Meeting	Hôtel Plaza Athénée, Paris

Management Changes

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

New York

Gary G. Gilbride	Underwriting
Tirsa Hoyos	Administration
Callie Leasure	Administration
Richard M. Maier	IT
Maria Maldonado	Administration
Darius M. Mitchell	Administration
Debra Seidel	Administration
Tierra M. Turman	Accounting

London

Anthony Debrousses	Claims
Patrick Jordan	Claims

Piraeus

Dorothea Ioannou	Claims
Victoria Liouta	Claims

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

Steady Progress - and a Signal Honor

This edition of *Currents* is published at an important time in the Club year. It comes not long after the February 20 renewal and shortly before the Annual Meeting of the Members. To that extent it occurs in the middle of the reporting season with its retrospective on the events of 2004 and its looking ahead to the circumstances of the new insurance year.

The last several months have seen the American Club making steady progress. Premium development has remained strong – net written premium for the 2004 policy year was more than 40% higher than the previous year. Tonnage was up too – 2004 saw entered tons exceed 20 million for the first time.

These trends continued at the 2005 renewal. Entered tonnage is now about 22 million gross tons on projected annual premium of about $150 million. Both these figures are historical highs for the Club.

A particularly pleasing feature of the last renewal was the fact that, within days of its conclusion, the American Club won the 2005 Lloyd's List P&I / Insurance Services Award, a signal honor. At a glittering occasion at the Banqueting House in London, before a large audience representing a broad range of dignitaries from the world maritime community, the Club's Chairman, Paul Sa, accepted the award on behalf of the Members.

Another recent high point – and a sign of commitment to the continuing expansion of the Club's service resources – was the opening this Spring of the Managers' new office in Greece. Situated on Akti Miaouli, in the heart of Piraeus's bustling shipping district, the office will provide a valuable liaison capability to the Club's membership in this important maritime center.

Some altogether exciting and highly positive prospects stand before the Club at present as it continues to work hard to ensure the highest levels of service to its Members and many other friends!

The American Club – P&I Club of the Year

Chairman Paul Sa accepting the P&I /Insurance Services Award

The American Club has been voted P&I Club of the Year.

At the Lloyd's List Awards 2005 ceremony held in London on February 24, 2005, Chairman of the Board Paul Sa received the P&I and Insurance Services Award before an audience of nearly 400 eminent guests invited from all sectors of the maritime community. The presentation was made at a dinner in the historic setting of the 17th century Banqueting House in Whitehall.

The prestigious award recognizes the exemplary service the Club has provided to its Members; in particular, its success in securing the release of the 'Karachi Eight' crewmembers, following the illegal detention of the 'Tasman Spirit' by the Pakistani authorities.

Acknowledging the award, Mr. Sa praised the Club's efforts, spearheaded by Managers Michael J. Mitchell and Brian Davies, 'in designing a strategy to bring political, diplomatic and industry pressure on Pakistan so that they had no choice but to release the men.'

Mr. Sa commented further: 'The plight of the 'Karachi Eight' captured the attention of the industry and highlighted the unfortunate trend of coastal states to detain and charge innocent seamen with criminal conduct upon the occurrence of an accident. The 1.2 million men and women serving at sea aboard merchant ships are the lifeblood of world commerce and deserve due process and equal protection under the law wherever their voyages take them. We deplore the ever-increasing instances of unfounded criminal prosecution of seamen and we commend Lloyd's List for highlighting this crucial issue.'

Club Managers Royston Deitch, Michael, Mitchell, Ian Farr and Vincent Solarino with Lloyd's List Editor Julian Bray

The Ukraine Shows The Way

Dr. William Moore, Vice President, Loss Prevention & Technical Services, reports that the American Club's healthcare and training initiatives in the Ukraine are yielding positive results.

PEME Program

In March 2004, the Club was the first and (so far) only P&I Club to a institute a program of approved clinics for pre-employment medical examinations, in the Ukraine. The approved clinics are the Academmarine Medical Centre, Archimed-T Medical Centre, Medmaritime Centre, and Zdorovye Medical Centre in Odessa.

The program has proved to be of mutual benefit to both the American Club and the clinics. Our regular interface with the approved clinics and the Club Members enrolled in the program has paid off through the increased quality of the pre-employment medical examination services provided to Members.

By even the most conservative estimates, the Club and its Members are reckoned to have saved at least US$ 1.27 million in potential illness claims since the program began.

During 2004, more than 8,700 examinations were performed in the Ukraine, to the American Club's medical standards; from these, 100 seafarers were identified as being permanently unfit for duty. Of these 100 cases, we believe that at least 15 would have resulted eventually in costly claims. In addition, we know that other less severe cases which were identified would also have incurred significant costs for Members in terms of medical treatment, repatriation and possible voyage deviation.

In response to the growing success of the program and the needs of our Members, we have recently added a fifth approved clinic to our program in the Ukraine: the Azov Central Seafarer's Clinic in Mariupol.

Marine Pilotage Training Seminars

In 2004, the American Club began an innovative initiative, in co-operation with the Odessa National Maritime Academy in the Ukraine, to provide instruction and simulator training for Club Members' deck officers.

To date, two training seminars have been performed, in December 2004 and March 2005. Each seminar takes the form of a 1-1/2 day training course, with lectures and simulator training focusing on the role, responsibility and authority of the Master and Officer on Watch (OOW) while the pilot is onboard.

The training includes such topics as the Master-Pilot legal relationship and responsibility, bridge resource management specific to the pilot, the planning and execution of ship maneuvers and human factors. Case study examples of pilot-induced accidents are provided, regulatory issues specific to the pilot's role are discussed and claims statistics analyzed.

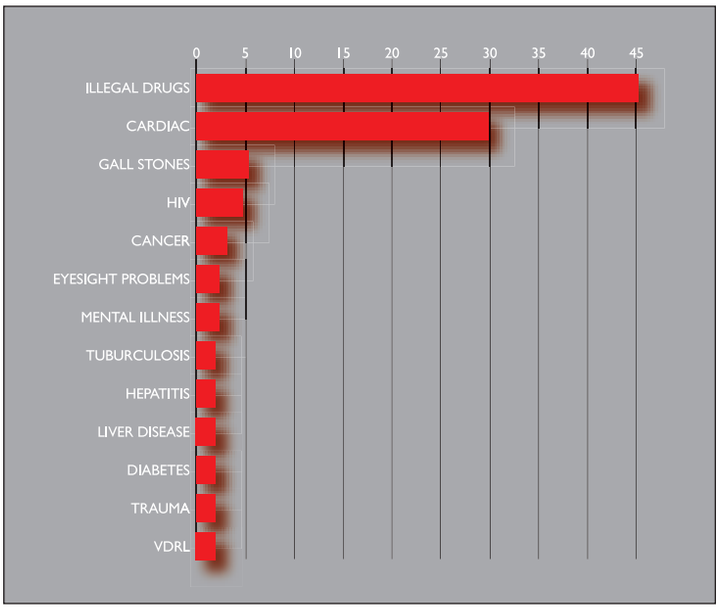
During the simulation part of the training course, the officers simulate a difficult passage in the port of Singapore. Odessa National Maritime Academy instructional officers play the role of the pilot, making particular errors that are to be identified and assessed by the deck officers, who are then expected to take corrective action.

After the simulation, the Academy's staff reviews the officers' decisions and actions. At the end of the seminar, it is the intention that the officers walk away with a new sense of awareness about the responsibility and role of the pilot, Master and OOW.

The next Club seminar on marine pilotage will be held later in 2005 (further details available). Members are encouraged to enroll their deck officers in these seminars, which are free of charge. Arrangements have been made to accommodate officers while they are on home leave in the Ukraine.

In addition, the Club will be starting a similar program in the Philippines later this summer.

P.E.M.E.'s identifying seafarers unfit for duty through specific illness



For more information on either the PEME program or the Marine Pilotage training course, please contact Dr. William Moore, Vice President, Loss Prevention and Technical Services for Shipowners Claims Bureau, Inc. at Tel: +1 212 847 4542 or wmoore@american-club.net.

SLOWLY BUT SURELY…

Chester D. Hooper,[1] a member of the United States Delegation to the UNCITRAL Transport Law Working Group, gives an insider's account of the painstaking development of the new UNCITRAL Cargo Rules.

The Hague Rules of 1924 govern many aspects of the maritime industry. The Rules only govern, with the force of law, contracts for the international carriage of goods that are evidenced by bills of lading or similar documents of title during the tackle-to-tackle portion of their carriage. The Rules' effect is, however, far more widespread. They are incorporated by reference into most maritime contracts and most multimodal contracts that include a sea-leg. They have become, in essence, the benchmark from which the negotiation of most maritime contracts of carriage begins.

The Hague Rules provided uniformity in 1924, but no longer do so. Many and probably most nations involved in maritime commerce today have enacted the Hague/Visby Rules. The Hague/Visby Rules increase the package limitation to a package or weight limitation and are in most other respects identical to the original Hague Rules. In 1978, the United Nations Commission on International Trade Law (UNCITRAL) drafted the Hamburg Rules. Those rules differ drastically from the Hague/Visby Rules but have not been enacted by major trading nations. The United States has ratified neither the Hague/Visby Rules nor the Hamburg Rules. In addition, interpretation of the Hague Rules and Hague/Visby Rules by the courts of many nations has created differences and thus harmed uniformity. A new uniform benchmark is therefore needed.

The present drafts of that new benchmark can be examined at the website of the United Nations Commission on International Trade Law (UNCITRAL)[2]. This article will explain eight aspects of the new instrument in which the readers may be interested: (1) The scope of the instrument; (2) the package or weight limit of a carrier's liability; (3) elimination of the error of navigation or management of the vessel defense; (4) a more reasonable burden of proof for carriers; (5) a fair method to allow a carrier to avoid giving a receipt for a quantity of cargo which the carrier cannot verify; (6) choice of forum clauses; (7) freedom of contract for the carrier and the shipper to enter contracts similar to service contracts; and (8) the right to control the cargo during its carriage.

(1) Scope of the Instrument

The new instrument will not be limited to the tackle-to-tackle part of the carriage but will control, to a large extent, the door-to-door, multimodal part. It will probably govern, with one significant exception, the contract between cargo interests and the contracting carrier throughout all modes and locations of the carriage. The one significant exception is the jurisdiction of the European Road and

(continued on next page)

1 Member, Holland & Knight LLP; Past President, The Maritime Law Association of the United States.
2 http://www.uncitral.org. Working Group III Transport Law Papers WP 32 - 36.

Rail Convention, CMR and CIM/COTIF respectively, as in the following example:

Let us assume that a cargo container is shipped from Berlin to Chicago as a multimodal move governed by one contract of carriage. Let us further assume that the cargo is carried from Berlin to Antwerp by truck, from Antwerp to New York by sea, and from New York to Chicago by rail.

If suit were brought against the party who agreed to transport the cargo from Berlin to Chicago - the "contracting carrier"- the instrument would govern the entire move, except for the move by road from Berlin to Antwerp, which would be governed by the CMR.

This exception will probably be in the instrument for political rather than logical reasons. Many European nations and non-governmental organizations insist that the CMR should govern European truck carriage and that CIM/COTIF should govern European rail transportation. They insist that these conventions apply to the contracting carrier as well as the trucking company or railroad during that part of the carriage.

In the example, a suit brought against the contracting carrier or the ocean carrier for loss, damage, or delay that occurred during, or was caused by, the ocean carriage would be governed by the instrument. Suit brought against the contracting carrier for loss, damage, or delay that occurred during, or was caused by, the rail transportation from New York to Chicago would also be governed by the instrument.

Suits directly against the railroad may not, however, be governed directly by the instrument. The United States railroads and trucking companies do not want to be governed by the instrument. The railroads' position and the recent United States Supreme Court decision of Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., 125 S.Ct. 385, 2004 AMC 2705 (2004) may allow a railroad to take advantage of the instrument's defenses, or at least the limitation of liability, if they are extended to the railroad by the contract of carriage. The railroad may also take advantage of the defenses, or at least limitations of liability in the railroad's own contract, even though that contract is not between the railroad and cargo interests.

In addition to the contracting carrier, "maritime performing parties" will probably be governed by the instrument. A "maritime performing party" will probably include all parties, i.e. stevedores, watching service, terminal operators etc, who help perform the port-to-port portion of the carriage.

(2) Package or Customary Freight Unit Limitation

The Hague/Visby Rules limitation, or a limitation similar to the Hague/Visby Rules, will probably be part of the instrument. The Hague/Visby rules limit a carrier's liability to SDR 666.67 (US$1,000 approx.) or SDR 2 per kilo (US$3 approx.), whichever limitation provides the higher recovery.

There is some sentiment in the UNCITRAL Working Group to increase the package limitation beyond the Hague/Visby limits. It is to be hoped that the Hague/Visby limits will be chosen by the Working Group. A limitation adjustment factor for inflation or, in the unlikely event, deflation will probably be part of the instrument. That provision would enable the limitation to be examined periodically and if necessary, increased or decreased.

(3) Elimination of the Error of Navigation or Management Defense

The error of navigation or management of the vessel defense has been extremely unpopular with cargo interests. Its elimination was a condition precedent to bring those who favored the Hamburg Rules to the negotiating table at the beginning of the Maritime Law Association of the United States (MLAUS) efforts, which began in approximately 1992, to modernize COGSA. The elimination of this defense without a change in burdens of proof would, however, leave the carrier with complete liability whenever an error of navigation or management combined with an excused event to damage cargo.

(4) The More Just and Fair Burden of Proof Applied Against the Carrier

The change in the burden that was made necessary by eliminating the error of navigation defense will also assist the carrier in other situations. The new instrument will apply a proportional fault rule, similar to the rule in grounding and collision cases, when more than one event causes damage. If damage were caused by two events, one for which the carrier is liable, and the other for which it is not, each party - cargo interests and carrier interests - would share an equal burden to prove the proportion of fault. At the present time, the courts have imposed an insuperable burden on the carrier to prove precisely which damage was caused by the event for which the carrier is not liable.

(5) Shipper's Load, Count and Weight Clauses

An interpretation of COGSA by the U.S. courts - wrongful, in the author's opinion - has led to the refusal to honor shipper's load and count clauses placed on bills of lading. The courts have reasoned that the carrier must strike the quantity description from the bill of lading rather than clause the bill of lading with language such as shipper's load, weight and count. Carriers are now issuing bills of lading for quantities of cargo they may be unable to confirm and are, in certain instances, being held liable for cargo they never received. The new instrument will probably uphold the intent of the original drafters of the Hague Rules, by requiring courts to honor shipper's load, weight, and count clauses.

(6) Choice of Forum

For many years, courts in the United States had refused to uphold choice of forum clauses in bills of lading. They reasoned that a choice of forum clause would violate COGSA, because it might force a plaintiff to accept an unreasonably low settlement rather than incur the extra expense of having to litigate in a foreign forum. That line of cases was overruled in 1995 by the United States Supreme Court in the landmark case of Vimar Seguros y Reaseguros, S.A. v. Sky Reefer, 515 U.S. 528, 1995 AMC 1817 (1995). Sky Reefer upheld a Tokyo

arbitration clause in a bill of lading for a shipment of oranges from Morocco to Boston. The opinion was worded broadly enough to uphold litigation choice of forum clauses as well. The Court noted that Congress could have passed legislation limiting the use of choice of forum clauses but had never done so. We hope that by ratifying the new treaty, Congress will, in effect, pass that missing legislation.

The instrument will probably give the claimant the discretion to commence suit in certain places, even if a choice of forum clause were contained in the bill of lading or other transport document. The instrument will probably allow the claimant to start suit in the place of receipt of the cargo by the carrier, the place of delivery of cargo by the carrier, or the principal place of the carrier's business. If the bill of lading happened to include a choice of forum clause, the claimant could, but would not be required to, start suit in that place. If the bill of lading included an arbitration clause, that clause would not deprive cargo interests of any place that cargo could commence suit with one slight exception. If cargo wished to resolve the dispute in the place chosen for arbitration, cargo could only arbitrate, not litigate in that place. If the place chosen for arbitration were not one of the places in which the instrument allowed the claimant to start suit, the claimant could, but would not be required to, choose to arbitrate in the place chosen to arbitrate.

(7) Service Contract or Ocean Liner Shipping Agreement (OLSA)

Freely negotiated service contracts with confidential terms have become extremely popular contracts. It has been estimated that up to 90% of the liner trade to and from the United States today involves service contracts. Parties to those contracts wish to enjoy freedom of contract under the new instrument, but they want to start their negotiations with the terms of the instrument. The instrument may cover OLSAs in a non-mandatory manner to allow an OLSA to differ from the instrument. The United States has proposed a definition of an OLSA, which is narrower than the definition of service contract[3].

The freedom of contract enjoyed by parties to an OLSA would also, of course, allow the parties to choose any forum they wished in which disputes would be litigated. The parties to an OLSA could extend a choice of forum to a third party to the OLSA, if they specified in the OLSA: (1) that the choice of forum would be extended to third parties; (2) if clear notice were given, probably on the face of the bill of lading, that the OLSA chose a forum and extended it to third parties; (3) if the OLSA chose either the place of receipt of the cargo by the carrier, the place of delivery of the cargo by the carrier, or the principal place of the carrier's business.

(8) Control of the Cargo

The instrument will describe the rights of parties to transport documents or electronic records. It will clarify who has control over the cargo during the voyage and will thus tell the carrier from whom the carrier may take instructions during the carriage.

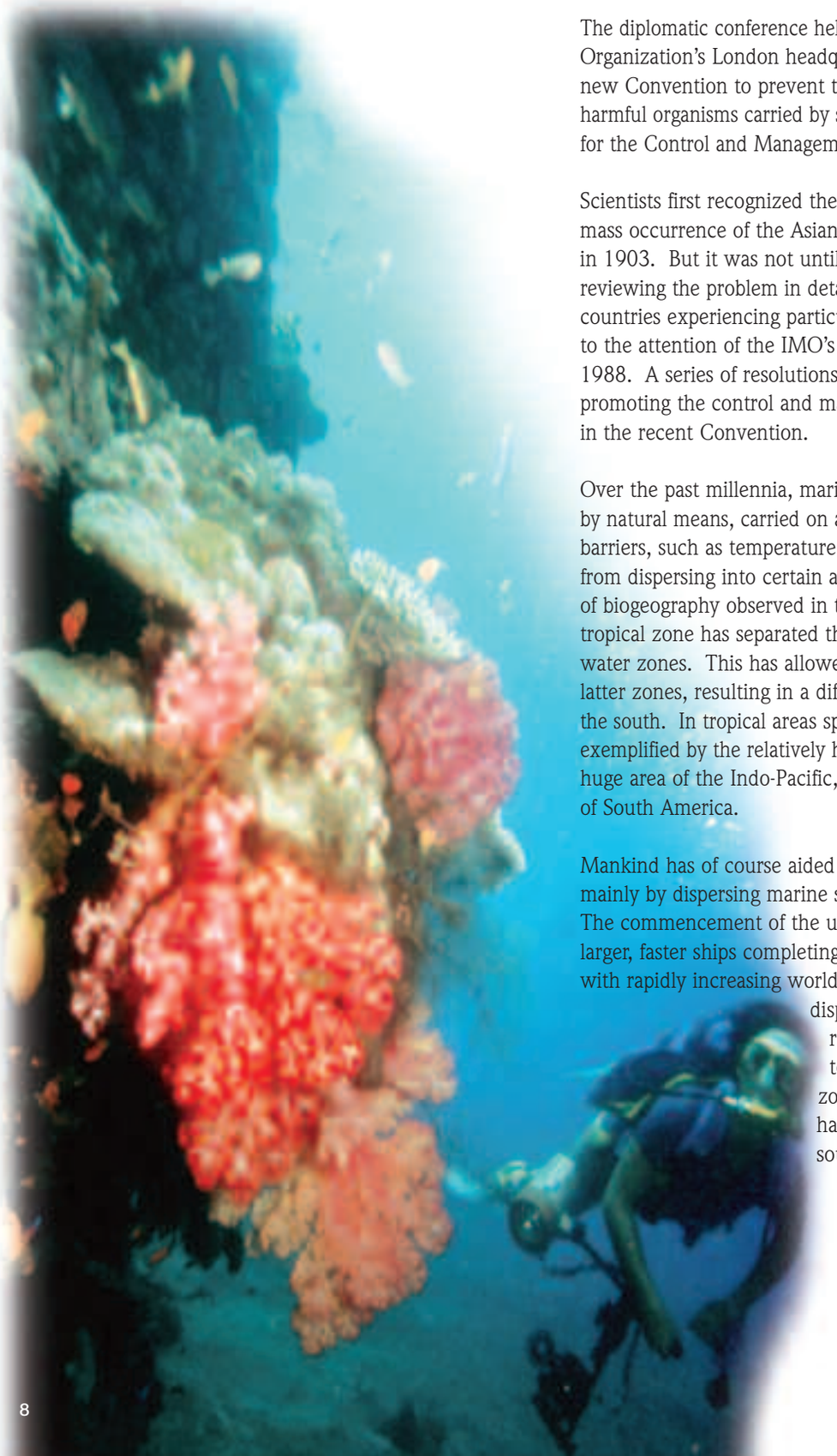
It is hoped that the UNCITRAL Working Group will complete the new Cargo Rules in 2007 and that they will become a treaty shortly after their completion by the Working Group. The Working Group has not yet discussed the number of nations that will be required to ratify the treaty before it will go into force. However, it is hoped and expected that various nations, including the United States, will ratify the new instrument shortly after it becomes a treaty so that uniformity will be achieved once more.

The views expressed in this paper are the personal views of the author. They may not be the views of the MLA or of the United States

3 UNCITRAL Working Group III Transport Law Paper WP 34

MARINE MENACE

The recent International Convention for the Control and Management of Ships' Ballast Water and Sediments has highlighted a significant environmental hazard, according to the IMO



The diplomatic conference held in London at the International Maritime Organization's London headquarters in February 2004 formally adopted a new Convention to prevent the potentially devastating effects of the spread of harmful organisms carried by ships' ballast water - the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

Scientists first recognized the signs of an alien species introduction after a mass occurrence of the Asian phytoplankton alga *Odontellaij* in the North Sea in 1903. But it was not until the 1970s that the scientific community began reviewing the problem in detail. In the late 1980s Canada and Australia were countries experiencing particular problems and they brought their concerns to the attention of the IMO's Marine Environment Protection Committee in 1988. A series of resolutions were adopted over the next decade, aimed at promoting the control and management of ships' ballast water, culminating in the recent Convention.

Over the past millennia, marine species have dispersed throughout the oceans by natural means, carried on and attached to floating logs and debris. Natural barriers, such as temperature and land masses, have prevented many species from dispersing into certain areas. This has resulted in the natural patterns of biogeography observed in the oceans today. In particular, the pan-global tropical zone has separated the northern and southern temperate and cold water zones. This has allowed many species to evolve independently in these latter zones, resulting in a different marine biodiversity between the north and the south. In tropical areas species have not faced the same barriers. This is exemplified by the relatively homogenous marine biodiversity spanning the huge area of the Indo-Pacific, from the east coast of Africa to the west coast of South America.

Mankind has of course aided this process for as long as ships have sailed, mainly by dispersing marine species that have attached to the hulls of vessels. The commencement of the use of water as ballast and the development of larger, faster ships completing their voyages in ever shorter times, combined with rapidly increasing world trade, means that the natural barriers to the dispersal of species across the oceans have been reduced. In particular, ships provide a way for temperate marine species to pierce the tropical zones. Some of the most spectacular introductions have involved northern temperate species invading southern temperate waters and vice versa.

There are thousands of marine species that may be carried in ships' ballast water: essentially, any species small enough to pass through ships' ballast water intake ports and pumps.

It is estimated that at least 7,000 different species are being carried in ships' ballast tanks around the world. These include bacteria and other microbes, small invertebrates and the eggs, cysts and larvae of various species. The problem is compounded by the fact that virtually all marine species have life cycles that include a planktonic phase.

Even species in which the adults are unlikely to be drawn into ballast water - because they are too large or live attached to the seabed, for example - may be transferred in ballast during their planktonic phase. The vast majority of marine species carried in ballast water do not survive the journey, as the ballasting and deballasting cycle and the environment inside ballast tanks can be hostile to organism survival. Even for those that do survive a voyage and are discharged, the chances of surviving in the new environmental conditions, including predation by and/or competition from native species, are further reduced. However, when all factors are favorable, an introduced species may survive to establish a reproductive population in the host environment, where it may even become invasive, out-competing native species and multiplying into pest proportions.

It has been established that between 3 and 5 billion tonnes of ballast water are transferred globally each year, potentially transferring from one location to another species of sealife that may prove ecologically harmful when released into a non-native environment.

The IMO gives the following prime examples of the hundreds of aquatic bio-invasions which have had major impacts around the world:

Cladoceran Water Flea, a native of the Black and Caspian Seas, has been introduced to the Baltic Sea, dominating the local zooplankton community and clogging fishing nets.

European Green Crab, a native of Western Europe, has been introduced into Southern Australia, South Africa, the United States and Japan. It displaces native crabs and depletes a wide range of other species.

Mitten Crab, a native of Northern Asia, has been introduced to Western Europe, the Baltic Sea and West Coast North America. It preys on native fish and inverterbrate species, wiping out local populations, and burrows into river banks and dykes causing erosion and siltation.

North American Comb Jelly, a native of the Eastern Seaboard of the Americas, has been introduced to the Black Sea, Azov and Caspian Seas. It feeds excessively on local zooplankton stocks, disrupting the local food-chain.

North Pacific Seastar, a native of the North Pacific, has been introduced into Southern Australia. It feeds off shellfish, including commercially important scallops, oysters and clams.

Round Goby, a native of the Black, Azov and Caspian Seas, has been introduced into the Baltic Sea and North America. It competes for food and habitat with native fishes and preys on their eggs and young.

Zebra Mussel, a native of Eastern Europe has been introduced into Western and Northern Europe and the Eastern half of North America. It displaces native aquatic life, disrupts the food chain and fouls pipes, sluices and ditches. In the USA, it has infested over 40% of internal waterways and is estimated to have cost US$750 million- US$1 billion in control measures between 1989 and 2000.

The IMO's International Convention for the Control and Management of Ships' Ballast Water and Sediments requires all ships to implement a Ballast Water and Sediments Management Plan, to carry a Ballast Water Record Book and to carry out ballast water management procedures to a given standard.

Under Regulation B-4 Ballast Water Exchange, all ships using ballast water exchange should:

Whenever possible, conduct ballast water exchange at least 200 nautical miles from the nearest land and in water at least 200 meters in depth, taking into account Guidelines developed by IMO;

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 meters in depth.

When these requirements cannot be met areas may be designated where ships can conduct ballast water exchange. All ships shall remove and dispose of sediments from spaces designated to carry ballast water in accordance with the provisions of the ships' ballast water management plan (Regulation B-4).

The specific requirements for ballast water management are contained in regulation B-3 *Ballast Water Management for Ships:*

- Ships constructed before 2009 with a ballast water capacity of between 1500 and 5000 cubic meters 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 meters 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 meters 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 meters 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 meters or more shall conduct ballast water management that at least meets the ballast water performance standard.

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).

'FIOST' – A User's Guide

John Habergham, Partner with Hull-based lawyers Andrew M. Jackson, details recent developments in the UK courts' interpretation of this familiar charterparty acronym

The recent decision by the House of Lords, in November 2004, to uphold the the Court of Appeal's decision in Jindal Iron & Steel Co Limited and Others v Islamic Solidarity Company Jordan Inc. [2003] LLR 87 serves as a timely reminder to vessel owners that at common law, the liability for loading, stowing, trimming and discharging cargo rests with the vessel owners and that clear and unambiguous steps must be taken if this liability is to be passed to another party, for example, the charterer.

In this case, one of the clauses in the charterparty contained the acronym 'FIOST' (free in and out stowed and trimmed). The court held that responsibility for cargo operations could only be transferred to the charterers if clear words had been used and that the use of the acronym on its own would not always suffice. The court rejected the vessel owners' contention that 'free' meant 'free of risk and expense'.

A good example of a clause which would, probably, transfer responsibility is contained in Part II, Clause 5 (b) of the 1976 GENCON which reads:

> *(b) F.i.o. and free stowed/trimmed*
> *The cargo shall be brought into the holds, loaded, stowed and/or trimmed and taken from the holds and discharged by the Charterers or their Agents, free of any risks, liability and expense whatsoever to the Owners.*
>
> *The Owners shall provide winches, motive power and winchmen from the Crew if requested and permitted; if not, the charterers shall provide and pay for winchmen from shore and/or cranes, if any. (This provision shall not apply if the vessel is gearless and stated as such in Box 15).*

Whether this would be sufficient to provide the vessel owners with a defense in the face of a claim by a bill of lading holder, which incorporates a charter party, is more problematic. Generally, English law has it that if the bill of lading itself has terms which specifically impose upon the owners the obligation to load, stow or discharge the goods, the provisions of any charterparty which imposes that duty on a charterer will be rejected on the grounds of repugnancy. However, if the bill of lading is silent then, in the GENCON example referred to above, the court would go through the exercise to see whether the reference in clause 5 to 'charterers' could be read as a reference to the 'bill of lading holder'. This is not an automatic consequence. The test is wider[1].

This aspect caused the court some difficulty. As the court noted, how could responsibility for cargo work at the loading port be the responsibility of the receivers, if the receivers were not there to do it and, at the time the vessel was loaded, might be absolutely unaware

of the terms of the bill of lading ? It was for this reason that the judge at first instance had accepted that performance of cargo work at the port of loading had been transferred to the shippers and for cargo work at the port of discharge, to the receivers.

This had the following consequences: where a claim was brought under the bill of lading by a receiver in respect of damage done during loading operations, the vessel owner could defend the claim on the grounds that, whilst the he was not able to say that responsibility

[1] *The Miramar [1984] A.C.646, House of Lords.*

for that damage had been transferred to that receiver, he had not agreed to carry out cargo operations at the load port or at the discharge port; therefore, any damage done during loading or stowage was caused by an act or omission of the shipper, for which he was not liable pursuant to Article IV Rule 2 (i) of the Hague-Visby Rules. Conversely, if the claim was brought by a shipper in respect of damage done during discharge, the vessel owner would have a defense if he could prove that the damage was due to a cause arising without actual fault or privity of the owner or without fault or neglect of his agents, for which, pursuant to Article IV Rule 2 (q), he had no liability.

The vessel owners had cross-appealed this issue of split liability. Fortunately for the owners, one of the relevant clauses (clause 17) read: 'Shippers/charterers/receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel…'

The court was of the opinion that this clause, together with the freight clause which incorporated the acronym 'FIOST – lashing/securing/dunnage…', were intended to relieve the vessel owners of all responsibility for cargo operations, and that they were incorporated into the bills of lading.

The court, to an extent, felt justified in this approach by reference to the Carriage of Goods by Sea Act 1992. Section 2(I) has the effect of transferring to a consignee all rights of suit under the contract of carriage as if he had been a party to that contract of carriage.

Therefore, a consignee could be in no better position than the shipper who had entered into the contract evidenced by the bill of lading. In effect, the receiver is fixed with the contract terms formed by the shipper, and if that meant that the receiver bore the obligation to discharge and not the vessel owner, then so be it.

The court also commented, albeit briefly, that even if there were clauses, the effect of which was to transfer loading operations to another party such as the charterer, there could be some residual liability upon the owner under what the court called 'the intervention proviso'. This concept arose from an earlier House of Lords decision in *Canadian Transport v Court Line* [1940] A.C 934, in which it was suggested that (a) a master has the right to supervise cargo operations[2], even without an express clause to that effect often found in charter-parties; and (b) a master would be under a duty to intervene in the proposed method of stowage if that method would render his ship unseaworthy. The claimants in this case had suggested that they may well rely on the 'intervention proviso' if their arguments on the construction of the clauses failed.

Whilst it would appear that the owners are responsible if a master actually directs the loading, stowing or discharging of a vessel in a certain manner and if the damage is directly attributable to that intervention, the extent of the master's *duty* to intervene is not certain. The court noted this uncertainty but found that it did not have to resolve this particular issue for the purposes of this appeal.

Practically speaking, what owners should *not* do if they truly want to ensure that responsibility for cargo operations is borne by, for example, charterers, is to insert clauses containing provisions that cargo operations are under the 'master's supervision and responsibility'. It has been held that the effect of the inclusion of the term 'responsibility' has been to, *prima facie,* re-impose the common law position that the owners have responsibility for cargo operations[2].

The other point at issue was this: the Hague Visby Rules do impose a duty upon a carrier to 'properly and carefully load, handle, carry, keep, care for and discharge' goods (Art IV). Should clauses transferring liability for cargo operations to charterers be struck down by Article III Rule 8, which makes null and void any clause or agreement lessening in the liability of the carrier under those Rules ?

The cargo owner claimants tried to argue this by reference to the *Travaux Preparatoires* which preceded the Hague Rules. But the court found, with some ease, that they were bound by precedent and that there is no obligation upon the carrier to conduct the cargo operations, but that if the carrier does, it should do so properly and carefully[3].

In short, vessel owners should ensure that, if they wish to transfer cargo operations to the charterer, clear words should be used. If they wish to ensure that this binds bill of lading holders, the relevant clause in the charterparty should also be widely drafted to catch shippers, consignee's, receivers and the like.

[2] *The Shinjitsu Maru No. 5* [1985] 1LLR 568

[3] The House of Lords in *G.A Renton & Company –v- Palmyra Trading Corporation [1956] AC146* approving Devlin J in *Pyrene Co –v- Scindia Navigation [1954] ILLR 321.*

LOSS PREVENTION REVIEW

Safety Publications

The American Club is pleased to announce that its latest publication on shipboard safety culture and awareness will be issued in June 2005. It will focus attention on safety equipment, life-saving appliances as well as the prevention of a large range of personal injury-related accidents. The publication will be accompanied by a series of safety posters, to be released at regular intervals to Members.

This represents the second in the series of shipboard safety publications to be issued by the American Club and follows *Preventing Fatigue,* published in December 2004, which addressed the problem of fatigue on board vessels. The series' user-friendly and humorous format has received an excellent reception in both the market-place and the maritime press.

For more information regarding the series, please contact Dr. William Moore, Vice President, Loss Prevention and Technical Services for Shipowners Claims Bureau, Inc. at +1 212 847 4542 or wmoore@american-club.net.

Revised phase-out schedule for single-hull tankers

A revised schedule for the phasing out of oil tankers entered into force on 5 April 2005. Regulation 13G of MARPOL Annex I brings forward the phase-out schedule for existing single-hull tankers that was first established in 1992 and was subsequently revised in 2001, following the Erika incident. It specifies that tankers of single hull construction should be phased out or converted to a double hull, according to a schedule based on their year of delivery.

Under the phase-out schedule, Category 1 single-hull oil tankers will not be able to trade after 5 April 2005 (for ships delivered on or before 5 April 1982 or earlier) or after their anniversary date in 2005 (for ships delivered after 5 April 1982). Category 1 oil tankers include oil tankers of 20,000 tonnes deadweight and above carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and tankers of 30,000 tonnes deadweight and above carrying other oils, which do not comply with the requirements for protectively located segregated ballast tanks.

Category 2 oil tankers, which have some level of protection from protectively located segregated ballast tank requirements, will be phased out according to their age up to 2010. The year 2010 is also a final cut-off date for Category 3 oil tankers which are generally smaller oil tankers. Category 2 oil tankers include oil tankers of 20,000 tonnes deadweight and above carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and oil tankers of 30,000 tonnes deadweight and above carrying other oils, which comply with the protectively located segregated ballast tank requirements. Category 3 oil tankers are oil tankers of 5,000 tonnes deadweight and above but less than the tonnage specified for Category 1 and 2 tankers.

Heavy grade oil ban

Another MARPOL regulation, Regulation 13H of MARPOL Annex I, banned the carriage of heavy grade oil (HGO) in single-hull tankers of 5,000 tons deadweight and above from 5 April 2005, and in single-hull oil tankers of 600 deadweight and above but less than 5,000 tons deadweight, not later than the anniversary of their delivery date in 2008. HGO is defined as any of the following:

- crude oils having a density at 15°C higher than 900 kg/m^3;
- fuel oils having either a density at 15°C higher than 900 kg/ m^3 or a kinematic viscosity at 50°C higher than 180 mm^2/s;
- bitumen, tar and their emulsions.

ITOPF Oil Spill Statistics

ITOPF has published its oil tanker spill statistics for 2004. Analysis of the data reveals that there were 5 major spills of over 700 tonnes, all of which occurred during the last four months of the year. The largest spill was from the *Al Samidoon,* which grounded in the Suez Canal on 14 December 2004, spilling some 9,000 tonnes of Kuwaiti crude oil. This accounted for well over half of the 15,000 tonnes total quantity of oil spilled from all tanker accidents during the year.

California Ocean Protection Plan

California Governor Arnold Schwarzenegger has unveiled an ocean protection plan intended to set a national standard for the management of ocean and coastal resources:

The action plan has four primary goals:

- Increase the abundance and diversity of California's oceans, bays, estuaries and coastal wetlands.
- Make water in these areas cleaner.
- Provide a marine and estuarine environment that Californians can productively and safely enjoy.
- Support ocean-dependent economic activities

Specific measures include:

- Regulation and restriction of bottom trawling in California's waters.
- Prohibition of cruise ships conducting onboard incineration within three miles of California's shore.
- Microbiological contamination monitoring at various public beaches and recreation sites in the San Francisco Bay Area.
- Prohibition of the discharge of grey water by cruise ships within three miles of California's shore.

EU Marine Fuel Directive

The European Parliament has adopted a new EU marine fuel directive on the sulphur content of marine fuels. The directive will limit the sulphur content of marine fuels to 1.5% for ships in the North and Baltic Seas as well as for ferries everywhere in the EU and follows the implementation of Marpol Annex VI on 19 May, 2005.

Sulphur dioxide is an air pollutant which acidifies lake and forest ecosystems and harms human health. Particles can cause serious breathing problems and premature death. Ships are stated to be the single biggest source of sulphur dioxide in the EU and this agreement aims to reduce ship sulphur dioxide by over 500,000 tonnes a year.

REGULATORY REVIEW

Two notable decisions affecting US maritime commerce have been handed down recently by the United States Supreme Court:

Americans with Disabilities Act

The United States Supreme Court has agreed to resolve a conflict among the Federal Appeals Courts on the issue of whether the Americans with Disabilities Act ("ADA") applies to foreign-flagged cruise ships in U.S. waters by granting certiorari in *Spector v. Norwegian Cruise Line Ltd.,* 356 F.3d 641 (5th Cir. 2004), *cert. granted,* 2004 U.S. LEXIS 5002 (U.S., September 28, 2004). As discussed at length in the May 2004 issue of *Currents,* the U.S. Court of Appeals for the Fifth Circuit held in *Spector* that the ADA did not apply to foreign-flagged cruise ships, expressly declining to follow the contrary holding reached in the Court of Appeals for the Eleventh Circuit in *Stevens v. Premier Cruises, Inc.,* 215 F.3d 1237 (2000), *reh'g denied,* 284 F.3d 1187 (11th Cir. 2002). Legal briefs have been submitted to and oral arguments have been made before the Court, but no decision has yet been rendered as of the time of this writing. The Club will discuss the opinion promulgated by the Supreme Court on this issue after it has been published.

Cargo

In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.,* __ U.S. __, 125 S.Ct. 385 (2004), the Supreme Court considered whether Himalaya Clause limitation provisions may be extended to cover sub-contractor in-land carriers under through bills of lading. In that case, James N. Kirby, Pty Ltd. ("Kirby"), an Australian machinery manufacturer, contracted with International Cargo Control ("ICC"), an Australian NVOCC, to arrange the transport of containerized machinery from Sydney, Australia to Huntsville, Alabama. ICC issued through bills of lading to Kirby which designated Sydney as the port of loading, Savannah, Georgia as the port of discharge, and Huntsville as the place of destination. The ICC bills also contained Himalaya Clauses that specified that the defenses and limitations of liability set forth in the bills were extended to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform this contract."

ICC, in turn, contracted with Hamburg Sud, a German ocean carrier, to transport the containers. Hamburg Sud issued its own bills of lading to ICC that also designated Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the place of destination. Those bills of lading contained Himalaya Clauses extending the bills of lading defenses and limitations of liability to "all agents … (including inland) carriers … and all independent contractors whatsoever." Hamburg Sud in turn hired Norfolk Southern Railroad ("Norfolk") to conduct the inland transportation of the containers from Savannah to Huntsville.

The containers were thereafter transported from Sydney to Savannah without incident. However, during the inland portion of the carriage on a Norfolk train, the cargo was severely damaged after the train derailed, allegedly resulting in a loss to Kirby in the amount of $1.5 million dollars. Kirby brought suit against Norfolk for that amount in the United States District Court for the Northern District of Georgia.

Norfolk argued that it was entitled to limit its liability pursuant to the Himalaya Clauses contained in both sets of the bills of lading (i.e., the ICC bills and the Hamburg Sud bills) and, by extension, the package limitations afforded by the bills. The District Court agreed with Norfolk but the Eleventh Circuit Court of Appeals reversed, holding the ICC bill Himalaya Clause was not drafted with sufficient detail to permit Norfolk to limit its liability with respect to Kirby, and the Hamburg Sud Himalaya Clause could not apply because Kirby was not in privity with Hamburg Sud when those bills were issued.

The Supreme Court reversed the Eleventh Circuit, finding that Norfolk was afforded the benefit of both Himalaya Clauses in both bills of lading. With respect to the ICC bill of lading, the Court held that the wording of the Himalaya Clause ("any servant, agent" etc.) was sufficiently broad to include an inland carrier after discharge of the containers at Savannah because "the parties must have anticipated that a land carrier's services would be necessary for the contract's performance. It is clear … that a railroad like Norfolk was an intended beneficiary of the ICC bill's broadly written Himalaya Clause." As for the Hamburg Sud bills, the Court found that, in such circumstances, a NVOCC such as ICC acted as the agent of the cargo owner for "a single, limited purpose: when [the NVOCC] contracts with subsequent carriers for limitation of liability." Thus, privity was established between Kirby and Hamburg Sud sufficient to bind Kirby to the Hamburg Sud Himalaya Clause.

Piraeus

SCB Hellas opens its new Greek office

The American Club and its Managers, Shipowners Claims Bureau, Inc. ("SCB"), are pleased to announce the opening of Shipowners Claims Bureau (Hellas), Inc. ("SCB Hellas"), their claims liaison office in Piraeus. SCB Hellas commenced operations in April 2005 and is located on the 4th floor of No. 51, Akti Miaouli, a well-known building in the heart of Piraeus. With its burgeoning membership in Greece and elsewhere in the Mediterranean, the capabilities of SCB Hellas will complement and assist SCB's New York and London offices in providing first-rate claims handling and representation for its Membership.

George Tsimis, the current FD&D Manager and a member of SCB's board of directors, has moved to Greece with his family to manage SCB Hellas. George will continue to oversee the American Club's FD&D department while in Greece and will further assist the Membership with all categories of claims. As a Greek-American with strong ties to the Greek shipping community, George will be an invaluable asset to SCB Hellas.

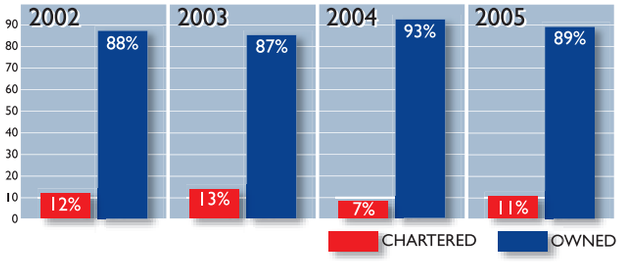
Joining George in the new office will be two claims adjusters, Dorothea Ioannou and Victoria Liouta. Dorothea Ioannou, who comes to SCB Hellas from Allied Insurance Brokers Ltd. of Piraeus, is familiar to many American Club Members, as well as to the Greek shipping community at large. Dorothea was Allied's marine insurance claims department manager from January 1998 until February 2005, where she assisted vessel owners and insurers alike in countless maritime claims involving a wide range of P&I, FD&D, Hull & Machinery and LOH matters. Prior to her employment at Allied, Dorothea practiced maritime and commercial law in New York City and Piraeus. Dorothea is a graduate of Queens College in New York City and earned her Juris Doctor degree at St. John's University School of Law in New York. Dorothea has been a member in good standing of the Bar of the State of New York since 1996 and is currently sitting her law examinations to become a member of the Athens Bar.

Victoria Liouta is also a familiar face in the Piraeus shipping community and brings thirteen years of maritime law experience to SCB Hellas. During the six years prior to joining SCB Hellas, Victoria served as the head of the legal and insurance department at Tomasos Brothers Inc. and Tomasos Shipping Inc., where she acted as in-house counsel in the handling and overseeing of a wide variety of P&I, FD&D, Hull & Machinery, ship sale and purchase, shipbuilding contracts, as well as Greek Maritime Court cases and administrative matters. Prior to her service at Tomasos Brothers, Victoria served as in-house counsel at IMS S.A./Project Shipping Inc. for three years, and Adriatic Tankers Shipping Co. from 1993 to 1996. Victoria has been a member of the Athens Bar since 1992. She graduated from the Law School of the University of Athens in 1991, and earned an LLM degree in maritime law from the University of Southampton in the United Kingdom in 1992.

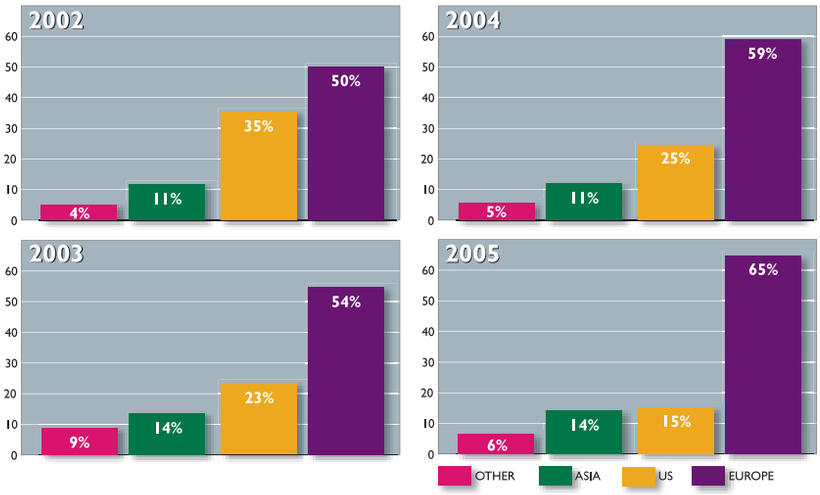
An opening celebration to be held at the Piraeus Yacht Club on May 20, 2005, will mark the commencement of operations at Shipowners Claims Bureau (Hellas) Inc. - an event which the American Club's many Members and friends in the Greek maritime community have been warmly invited to attend.

American Club Fleet 2005

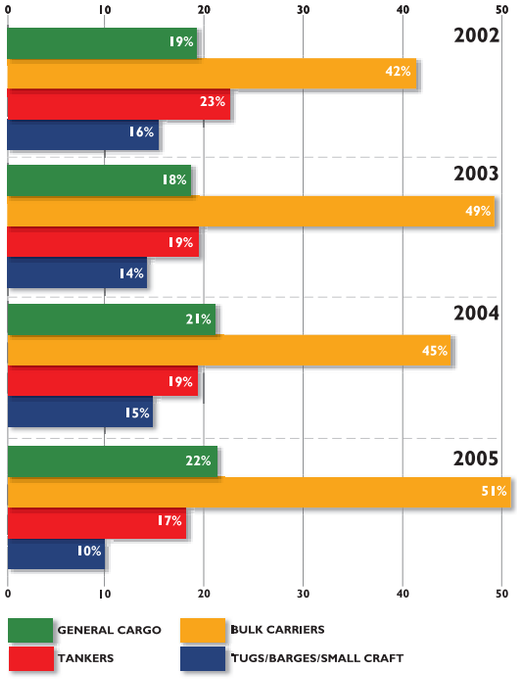
Owned and Chartered Entries



Owned and Chartered Tonnage by Management Domicile



Owned and Chartered Tonnage by Vessel Type



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