CURRENTS

Issue Number 30 • May 2010

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Shipyard Workers, Braehead (2000) *(on the left and page 46)*
By Andy Scott and Kenny MacKay
Clydebuilt, Scottish Maritime Museum
This sculpture was commissioned by Capital Shopping Centers as a feature for 'Clydebuilt', the Scottish Maritime Museum on the banks of the River Clyde in Renfrewshire, Scotland. It is composed of two shipyard workers hauling on the drag chains of a ship, pulling her towards the river.
The sculpture is intended to represent the past and the future of shipbuilding on the River Clyde, so one figure is clad in old fashioned dungarees, while the other wears modern overalls as worn in the Clydes remaining shipyards.

MANAGEMENT CHANGES

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

SHANGHAI	**JEFF LIU**	Claims Executive
PIRAEUS	**MARIA KATSADOURI**	Administrative Support Staff

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INTRODUCTION

by: Joseph E.M. Hughes
Chairman & CEO
Shipowners Claims Bureau, Inc.

Nearly fifty years ago, an edgy, satirical review began an iconic run on British television. Called *That Was The Week That Was*, or *TW3* for short, it launched the careers of several luminaries of the broadcast media, notably that of David Frost who later gained celebrity in the United States, not least for his interviews of former President Richard Nixon in 1977.

Your correspondent has vivid memories of being allowed to stay up on a Saturday night to watch the show. It was an exuberant confection of sketches, soliloquies and songs mocking establishment values and poking fun at the hypocrisies of contemporary politicians. It had all the precocious, self-confident cleverness of its Cambridge University *Footlights* origins in an era when *Private Eye* was just getting under way (Willie Rushton was a regular) and the stage was being set for the frolics of *Monty Python* later in the decade (John Cleese was a regular, too).

What happy nostalgia! But what does this have to do with P&I? The American Club cannot, after all, be described as "an exuberant confection of sketches, soliloquies and songs mocking establishment values ... etc", or at least does not knowingly seek to attract such a description.

The short answer is absolutely nothing, except that 2009 from a P&I perspective might be described as *That Was The Year That Was* or *TWTYTW*, which is admittedly not as catchy as *TW3*. And the appeal of nostalgia is because your correspondent, as he (sadly) ages, is becoming increasingly sentimental about the past and feels a need to write pretentiously about it. So bear with him, please.

And what a year 2009 was! It began with the market in a state of high anxiety as the financial meltdown of the previous twelve months continued to erode the collective capital base of clubs whose members had themselves experienced, only a few months earlier, the most precipitous fall in major freight indices in recent memory. By March, 2009 the equity markets had reached their nadir, and the way ahead looked grim. A nervous renewal season set the tone for gloomy market prognostications for the year ahead.

Yet things, thereafter, began to improve. The stock markets started to rise as government stimulus initiatives began to bite. Inflation remained a concern for the future rather than the present and, despite low yields on most fixed income securities, certain areas of the market performed rather nicely, in particular US municipal bonds.

With global trade in the doldrums, dollar weakness and concomitant commodity price inflation faded into the background of economic worries, although others, particularly that of sovereign debt, persisted. On the shipping front, utilization declined through the laying-up and scrapping of vessels, and this, combined with a reduction of cargo volumes generally, had the benign effect of moderating overall levels of P&I claims.

Indeed, from the American Club's perspective, 2009 is so far developing as a favorable claims year by comparison with its predecessors. This trend is being experienced, it seems, by other clubs in the International Group, although Pool claims have picked up substantially since 2008 and appear, unfortunately, to be tracking the results of 2006 and 2007.

December 31, 2009 saw the Club's GAAP and statutory surpluses comfortably in excess of $48 million, a 36% increase over the figures of twelve months earlier. Moreover, there are grounds for optimism that strengthening of reserves will continue to feature into the first quarter of 2010. In addition, the Club's investment return for 2009 was about 12.4%, a creditable performance by any standards, given the prevailing economic conditions over the period.

The Club enjoyed a good renewal at February 20, 2010. Renewing tonnage was up slightly, but year-on-year growth, aided by the significant organic

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development of business over the year, was fully 19% on the mutual P&I book and 33% in terms of FD&D entries. The American Club's membership, by reference to its domicile of management, grew substantially over the period in Asia where the proportion of tonnage entered from that region grew from 16% to 24% over the year. Europe remains the largest domicile overall – at around 58% of total tonnage – but its share reduced by about 7% in comparison with the position twelve months earlier. The Club's North American book – overwhelmingly sourced from the United States – remained consistent at 15% of the total.

By reference to vessel type, the dry bulk sector remains the largest constituency of the Club's overall entry at 67% of the total (59% at February 20, 2009), tankers make up 22% of the entry (26% in 2009), general cargo, container, Ro-Ro and passenger ships 8% (10% in 2009) and small craft, mainly tugs and barges, 3% (5% in 2009).

Most importantly, perhaps, the Club's emphasis on raising the quality of its entry continues to bear fruit. The historical lost ratios of premium against claims for the Club's own account on renewed business in the P&I sector improved from 64% to 59% during the year from February 20, 2009. Inclusive of results in the FD&D class – where there was an 8% improvement overall – the Club's current entries, on a five year look-back basis as of February 20, 2010, enjoy a 60% loss ratio by comparison with 66% in respect of tonnage entered a year earlier.

So, progress on many fronts! But there is no room for complacency. For example, recent results from Lloyd's are the best for some years, but commentary from within that market suggests a cautious outlook for the future.

The same approach must surely apply to the P&I world. As those who were the subject of *TW3* satire in the early 1960s came only too well to know, hubris in any form is always a perilous inclination! But let us continue to hope that the fortunes of our industry in general will remain on an upward trend over the years ahead and that the cautious optimism for the future created by a more benign recent past will ultimately be seen to have been justified!

WHAT OWNERS REALLY WANT:
THE CASE FOR DIVERSITY AND PLURALISM AMONG INTERNATIONAL GROUP CLUBS

by: Denzil Stuart
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Every so often, the a rgument is advanced that the number of P&I clubs in membership of the International Group (IG) should be lowered, which might be a good thing for shipowners and charterers. In February this year a large group of shipowners and insurance professionals heard this notion hotly debated at the Piraeus Marine Club's 10th P&I Conference which, for the first time, assumed this debating society format.

The debate centered on the motion: This house believes that variety of choice among P&I clubs is good for shipowners and that merging into a small number of 'mega' clubs would not be in the interests of the shipping community.

Speaking for the motion were Mr Hughes, Roger Ingles (Elysian Insurance Services), Lars Rhodin (The Swedish Club) and Steve Roberts (A. Bilbrough & Co.). Against the motion were Mike Salthouse (North of England) and Clas Ryden (Skuld).

Leading off the debate, Mr Hughes said the IG had a 'Goldilocks' design, incorporating clubs which were not too big and not too small, a character that suited all kinds of owners.

Conversely, the 'mega' club alternative was demonstrably bad, conjuring up a 'Brave New World' where choice was extinguished through the "tyranny of the majority," he argued.

By comparison, the variety of choice the IG represented was demonstrably good, he said, promoting

- differentiation of culture
- differentiation of operating philosophy
- differentiation of service
- specialization
- originality of thought
- flexibility
- mutuality
- democracy
- political acceptability
- competition
  and
- provides what owners really want!

In other words, the current IG structure reflected a balance that was "just right," he maintained. The group claims pooling arrangement provided 'super mutuality' benefits, while inter-club co-operation bestowed the benefits associated with a 'brains trust'. Among other advantages were:

- all clubs/members had a voice in IG policy decisions
- the IG was able to speak with a strong and confident voice – to the EC in Brussels, for instance
- the co-operative economic strength of the IG had unrivalled credibility
- group benefits of scale complements benefits of choice so
- the whole was even greater than the sum of its parts.

Whereas, he continued, the 'mega' club concept would have zero benefits of scale compared with the present system, it would incite negative reactions from regulators and politicians, and also incite conflict rather than harmony among insurers. Ultimately, it would prove pointless and harmful to owners' interests.

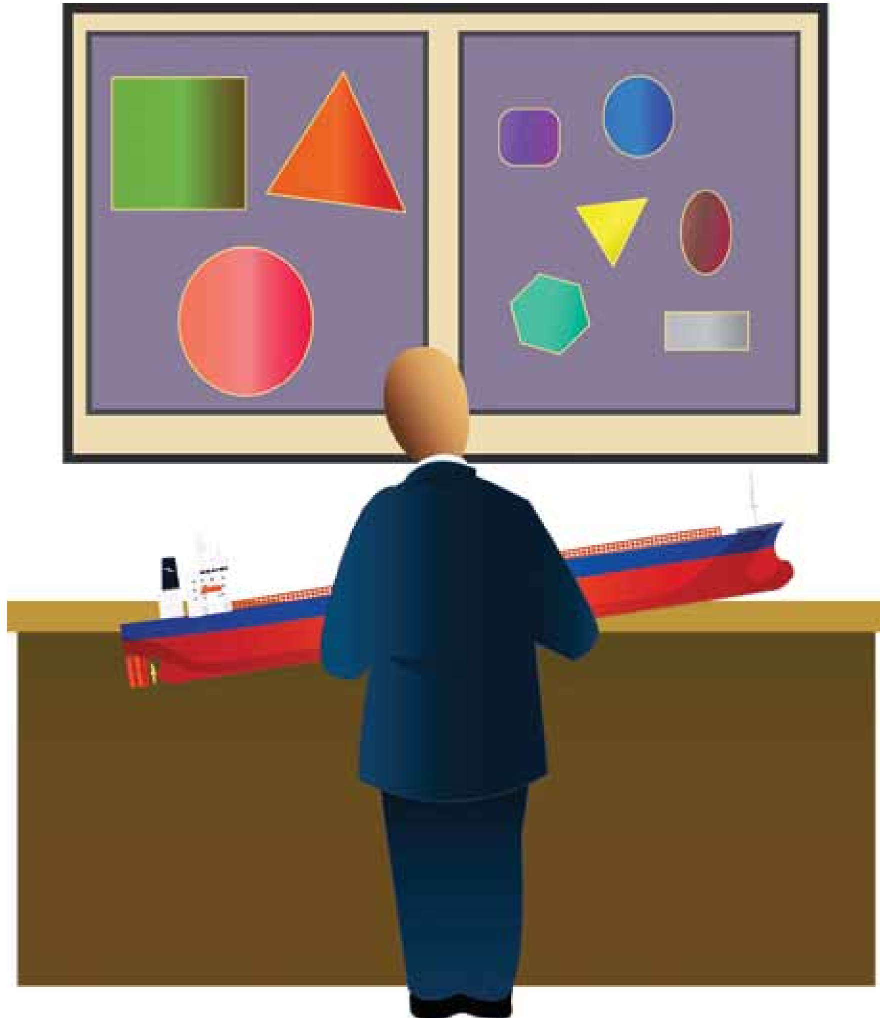
Such an alternative, Mr Hughes added, would lead to an Orwellian future viewed with suspicion by regulators and unloved by its constituents. Therefore, a vote for the motion was in the best interests of the shipping community.

Supporting him in speaking for the motion, Mr Rhodin warned there was no correlation between size and efficiency. P&I was all about execution and value for money. He also noted that the Swedish and London clubs, although relatively small, insured the largest vessels on average.

Mr Ingles said the claims pooling and collective reinsurance of the IG already delivered the economies of scale of consolidation. Mergers would therefore only be necessary if the IG broke up.

Leading against the motion, Mr Salthouse said the clubs could not afford to stand still and had to develop. Although he was not arguing for consolidation into four or five clubs, but perhaps nine or 10 (the IG has 13).

During a very lively discussion with the floor, veteran owner Spyros Karnessis said he preferred shopping from boutiques rather than department stores and the same



continued from page 5

principle applied when he purchased P&I cover. He was among a number of owners who expressed serious doubts about the merits of club mergers.

According to a report in *TradeWinds*, Mr Karnessis appeared to catch the mood of the packed event, saying he did not want the clubs merging like the banks where the customers suffered.

Dave Stockley from Stealth Maritime had much the same view, the paper said. It was no accident that owners often used three or four clubs, he said. They valued competition and a key benefit of the current diversity was that there was "somewhere for everyone." In a world of a few superclubs, there would be a proportion of fleets that had nowhere to go, he warned. The motion for *status quo* was carried.

The second half of the day featured two more debates. The first was: This house believes that pressure on clubs to build ever-larger free reserves does not reflect the best mutual interests of their shipowner members. For the motion were speakers from Gard and G. Bros Maritime SA, while the UK Club spoke against.

The final debate concerned: Piracy – This house believes there is a possible conflict of interest between the various insurance covers – i.e. P&I, FD&D, War, Kidnap and Randsom (K&R) and Loss of Hire (LoH). The proponents of the motion were A. Bilbrough & Co. and Hellenic Hull Management, and against was Lloyd's syndicate Hiscox.

CLEAN SEAS: COMPLYING WITH MARPOL 73/78

by: Dr. William Moore
Senior Vice President
Shipowners Claims Bureau, Inc.

The first in a series of web-based E-learning modules to assist seafarers and their companies to operate in compliance with the MARPOL Convention.

The American Club has released the first in a series of web-based E-Learning modules designed to familiarize seafarers with the six annexes to the MARPOL Convention. It is available to all American Club members.

Clean Seas: Complying with MARPOL 73/78 is the second loss prevention tool produced in cooperation with IDESS Interactive Technologies, (IDESS IT) Inc. based in Subic Bay, Philippines.

The first joint initiative between the Club and IDESS IT, Inc. was *Stranger on the Bridge*, a series of three case studies that focus on the responsibilities of the ship's bridge team, and the limitations of over-reliance on marine pilotage, in preventing accidents.

Clean Seas: Complying with MARPOL 73/78 was developed, in part, as a response to the ever-present universal concern and socio-political agenda of the international community at large to protect the marine environment. Although environmental claims have reduced in frequency over the past decades, the costs of individual claims have not diminished and the potential for owners and their crews to be subject to criminal and civil suits has also increased in many jurisdictions around the world.

The Club examined environmental incidents and claims by members and reviewed the results of vessel condition surveys. It found that there is a need to improve seafarer familiarity with mandatory requirements to protect the environment. Of great importance is their need to have a practical understanding of the MARPOL Convention and how it affects them. The Club also released a pamphlet, *Protecting the Marine Environment*, in 2006 and a series of posters that include environmental protection related topics such as *Bypassing the Oily Water Separator is a Shortcut to Jail!*

In jurisdictions such as the United States, the industry has witnessed the dire consequences, in both criminal and civil cases, related to the illegal discharge of oily water and false entries alleged to have been made in oil record books. Seafarers and shipping company executives found guilty of contravening the MARPOL regulations have been punished by the courts. Custodial sentences and heavy fines in the order of millions of dollars have been handed down. The damage to the livelihood and reputations of the individuals involved is severe, as well as the long term detrimental effect on business.

The Clean Seas: Complying with MARPOL 73/78 E-Learning Modules are specifically designed to be "user friendly" for seafarers, focused on the practical application of the MARPOL Convention onboard ship. The E-Learning Modules are accessible anywhere there is a connection to the internet, making it easy and convenient for seafarers to study the subject matter before they go aboard ship. The system also includes a secure online testing facility. Members can track their seafarers' knowledge and keep up to date records of familiarization training in compliance with both the STCW Convention and the company's safety management system requirements under the ISM Code.

COMPLYING WITH MARPOL ANNEX I

The series is divided into six installments based upon the six annexes to the MARPOL Convention. These deal with oil pollution, noxious liquid substances, noxious substances in packaged form, sewage, garbage and air pollution. The first installment in the series, *MARPOL Annex I—Prevention of Pollution by Oil*, focuses on the following areas:

- *About MARPOL*
- *Waste Oil Management—Oily Water Separators*
- *Keeping Records in the Oil Record Book*
- *Special Requirements for Tankers*
- *Shipboard Oil Pollution Emergency Plan (SOPEP)*
- *Best Practices*

ABOUT MARPOL

The first section provides a briefing on the International Maritime Organization, the history and origins of the MARPOL Convention, and fundamental information on how the Convention affects the design of ships.

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WASTE OIL MANAGEMENT—OILY WATER SEPARATORS

This section gives seafarers an understanding of the requirements of MARPOL Annex I for managing waste oil from machinery spaces in all ships. It includes information on bilge tanks, oil content metering, oily water separators (OWSs) including care and maintenance of the OWS. Of particular note in this section is a summary of key '"do's and don'ts" in operating the OWS system, and examples of incidents that have got seafarers into trouble during Port State inspections.

KEEPING RECORDS IN THE OIL RECORD BOOK

This section emphasizes the need for proper record keeping in the Oil Record Book (ORB) to ensure clear and transparent documentation of all waste oil management operations, as required by MARPOL Annex I. Experience has shown that ships' crews and their owners can run foul of port State control authorities during inspection of ORBs. This section of the learning module provides meticulous examples of how the ORB should be completed for all ships (*Part I—Machinery space operations*) and for tankers (*Part II—Cargo/ballast operations*) as laid out in detail in Appendix III to MARPOL Annex I.

SPECIAL REQUIREMENTS FOR TANKERS

This section focuses on the special requirements for handling residues from oil cargoes carried in tankers. It highlights how the MARPOL regulations affect the design and construction of tankers and their operations. It provides information and guidance on the particular regulatory requirements for tank cleaning, crude oil washing and ballasting and disposal of slops.

SHIPBOARD OIL POLLUTION EMERGENCY PLAN (SOPEP)

To effectively respond to an oil spill event, the SOPEP must be well formulated and documented and seafarers properly drilled to comply with the plan. This section highlights the purpose of the SOPEP, summarizes key elements to be included in the plan, how to respond to oil spills, and how to document and record any other additional information related to oil spill response. The seafarer will be better prepared to prevent discharge of oil to the sea in the event of a spill.

BEST PRACTICES AND PRACTICAL APPLICATION

The Club requires vessels of 10 years of age or older to undergo survey soon after they enter the Club to ensure that they meet the requisite standards for safety, construction, seaworthiness, cargo worthiness, crew management, and vessel management. As part of this effort, we have established a set of best practices based upon "hands on" experience that can assist in preventing and mitigating oil pollution related events.

This component includes general guidance on pollution prevention during bunkering and cargo operations, ship to ship transfer, proper environmental protection signage, minimum equipment and replenishment of SOPEP equipment, proper housekeeping and more based on seafaring experience.

IN SUMMARY

Clean Seas: Complying with MARPOL 73/78 is available to all Members for refresher and familiarization training of their seafarers. We will keep Members informed regarding the completion of future E-Learning Modules covering the other Annexes of MARPOL.

KEEPING WATCH: SOME RECENT RULINGS UNDER ENGLISH LAW REGARDING PIRACY

by: Dimitri Vassos
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and

Ciara Mellows
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LEGALITY OF THE PAYMENT OF RANSOM TO PIRATES

In the recent case of *Masefield AG v Amlin Corporate Member Ltd.*, [2010] EWHC 280, the English High Court considered the issue of the legality of the payment of ransoms to pirates, and of whether such payments should be considered as contrary to public policy.

This case arose out of the seizure of the vessel "BUNGA MELATI DUA" by Somali pirates in the Gulf of Aden in August 2008 during a voyage from Malaysia to Rotterdam. The vessel was released in September 2008 after the owners paid a US$2 million ransom.

However, a case was brought by the owners of two parcels of bio-diesel which had been shipped onboard the vessel against the defendant insurers of the cargo. It was common ground between the parties that both theft of cargo and the capture or seizure of the cargo by pirates were insured risks under the policy. Masefield claimed that on the capture of the vessel by the pirates and its removal into Somali waters the cargo became an actual total loss in that the assured had been "irretrievably deprived of the cargo". Alternatively, it claimed that there had been a constructive total loss in that the vessel and cargo had been reasonably abandoned on account of its actual total loss appearing to be unavoidable.

Masefield did not dispute that there always existed a possibility that the owners would successfully ransom the ship. However, Masefield argued that the Court, when considering whether or not the cargo was actually or constructively lost, should not take into consideration the likelihood of recovering the vessel and cargo through payment of a ransom because the payment of ransoms was contrary to English public policy.

The Court held that the cargoes were not totally lost, whether actually or constructively. The Court was "wholly unpersuaded that it would be right to categorise the payment of ransoms as contrary to public policy" and stated that the payment of ransom is not illegal as a matter of English law. Although the Court accepted that payments of ransom encourage repetition, "if the crews of the vessel are to be taken out of harm's way, the only option is to pay the ransom". The Court held that although the balance of convenience is not clear cut, where there is no clear and urgent reason for categorising the activity as contrary to public policy, and in the absence of parliamentary intervention, the court should refrain from doing so. The Court added to its conclusion by stating that kidnap and ransom policies should not be rendered unenforceable

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as they are a long standing and important feature of the insurance market, and that any contrary conclusion would render these policies unenforceable. They concluded by specifically stating that ransom payments are recoverable as a sue and labour expense.

OFF-HIRE ISSUES AND PIRACY

Other cases have dealt with the issue of whether owners or charterers in a time charterparty should be responsible for loss of hire when a vessel is seized and detained by pirates. Standard off-hire provisions in time charterparties allow for the payment of hire to cease for the period during which time is lost as a result of off-hire incidents such as detention by average accidents preventing the full working of the vessel, until the vessel returns to being fully at the charterers' disposal.

Charterers often argue that where a vessel has been seized and detained by pirates, this amounts to an accident or detention within the meaning of standard off-hire provisions and that as a result, the vessel should be off-hire and payment of hire should cease. Reliance has been placed on the dictum of Kerr J in *The "Mareva* AS" [1977] where it was stated that a detention requires some physical or geographical constraint upon the vessel's movements in relation to her service under the charter. This leads to an argument that where a vessel is detained by pirates, this amounts to a physical constraint upon her movements, so the detention should place the vessel off-hire.

In general terms, the way such arguments is being dealt with is that although a vessel is doubtless detained, the detention does not fall within the standard off-hire provisions. Since the full working of the vessel is not generally considered to be prevented during the period of detention, charterers should continue to pay hire throughout this period. However, such conclusions will depend on the wording of the specific charterparty, and therefore the result will differ from case to case.

Further, in situations where a charterparty includes a clause to the effect that there is an exception of liability for "money paid in advance and not earned" for acts of "enemies" and "all dangers and accidents of the Seas", it may be inferred from the inclusion of such a provision that parties have intended that losses resulting from the act of an "enemy" should lie where they fall. This being accepted, where losses are incurred as a result of the vessel being detained by pirates, it can be inferred that charterers should not be relieved of their liability to pay hire.

General opinion seems to be that where parties stipulate in the charterparty that a vessel is to proceed through the Gulf of Aden, charterers should be taken to be aware of what is now regarded as an accepted fact that there is a risk of a vessel being seized and detained by pirates, and their liability to pay hire should not be affected.

MP STILL THE BEST WAY FORWARD

The Courts in England are not alone in grappling with the myriad of issues spawned by a piracy incident. Recent regulations issued in the United States and the European Union have stepped up the debate regarding the permissibility of making ransom payments and the controversies associated with these new regulations are sure to continue in the months to come. Any analysis regarding compliance with such new requirements will require a painstaking due diligence investigation of the facts and parties involved in a piracy matter—from the corporate domicile of the vessel owner, to the vessel's flag, to the domicile of the vessel's various insurers, to the identity of the pirate or pirates involved or the supposed ultimate recipient of a ransom payment – and still, there will be many unanswered questions.

Piracy incidents continue to take place, and unlike incidents from over a year ago, they are occurring farther away from shore and, in some instances, over 500 miles from land. One consistent recommendation and advice that has been voiced throughout the last year in the maritime community has been to follow the Best Management Practices to Deter Piracy, which was attached to the Association's Circular No. 21/09 dated August 27, 2009. Members are encouraged to strictly adhere to these guidelines and train their crews in order to minimize the threat of an attack or, at a minimum, and make a potential attack more difficult for any attacking pirates. Both EUNAVFOR and U.S. Navy personnel have noted that the Somali pirates search for the easiest target and simple counter-measures such as using barbed wire at access points along the vessel, maintaining proper lookouts, and sailing at high speeds can discourage an attack. So, while the legal landscape may change with each issued decision or each promulgated law or regulation, the most influential factor in this entire debate will ultimately be the loss prevention and deterrence measures implemented by our Members while entering high risk areas.

George J. Tsimis, Senior Vice President & Head of Claims of Shipowners Claims Bureau, Inc.

CONSEQUENCES OF BREACH OF JURISDICTION AND ARBITRATION CLAUSES UNDER ENGLISH LAW

by: Nicholas Parton
Managing Partner, Jackson Parton
London, UNITED KINGDOM

It will be recalled that the American Club led the way with measures to clamp down on parties who sought to ignore London jurisdiction and arbitration clauses and thereby seek a more favourable outcome than they ought to have.

The American Club began systematically opposing these attempts, mainly in West Africa, to blackmail their members into abandoning their rights to have the English law they had negotiated taken away in ship arrest situations. This was achieved by Nicholas Parton of Jackson Parton, as solicitor and advocate (attorney and trial attorney), obtaining urgent "anti-suit" injunctions in the Commercial and Admiralty Court in London. If the injunctions were not obeyed, not only were "Contempt of Court" proceedings pursued vigorously, but also suit or arbitration was commenced in London for damages for breach of the jurisdiction or arbitration clause. Another dimension of these anti-suit injunction rulings was that Club Letters of Undertaking were deemed to be sufficient security and any refusal to accept them would similarly be punishable by contempt of court proceedings.

A typical anti-suit injunction order starts as follows:

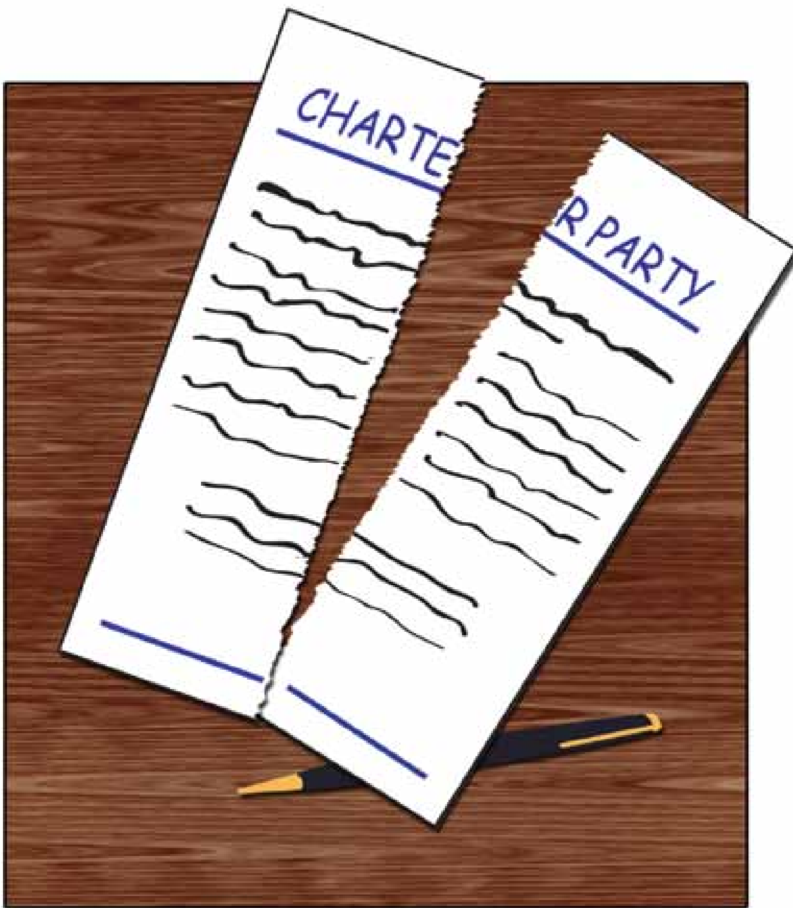
"You, the within named XYZ Ltd, must immediately withdraw the proceedings you have issued against ABC Ltd and must forthwith release the vessel MV "..." and if you do not do so your assets may be seized, you may be fined and your directors sent to jail"

Two of the many cases which the American Club fought, involving the vessels "Kallang" and "Duden", went to final hearings in the High Court in London because cargo underwriters, the Senegal subsidiary of AXA Group, had ignored the injunctions for considerable periods and had only obeyed them when it became apparent in Contempt of Court proceedings that they were about to be fined very large sums by Court in London as were those representing them in France.

In the "Kallang" [2009] 1 Lloyds Rep. 124, AXA were found liable for the time lost, and the expenses incurred by the vessel, and for most of the legal costs incurred by the Club in London and Senegal, which sums were recovered following a Rule B attachment in New York. In the "Duden" [2009] 1 Lloyd's Rep. 145, the same result in principle occurred although AXA escaped liability for vessel's time and expenses on a technicality that they had been paid by bareboat charterers and not by the owners of the vessel. The costs expended by the Club were, however, awarded against AXA and recovered.

Since the results of the "Kallang" and "Duden" cases, much has been written about them and they have become important precedents. Essentially, if a party ignores a London jurisdiction or arbitration clause validly found in a charterparty or bill of lading they will be found liable for the losses they cause thereby: time lost to owners or bareboat charterers whilst a vessel is arrested and a demand is being actually or impliedly made for security to secure a non-English jurisdiction; wasted port expenses; wasted legal and P & I Representatives' costs in the country concerned; and the costs of the London proceedings.

The cases were also important because they show that High Court judges in the Commercial Court in London will see through any "subtle" blackmail behaviour by a party arresting a ship which demands a local bank guarantee knowing that: first, such a guarantee will take a long time to arrange with the vessel meanwhile blocked; and, secondly, that a local bank will only issue a guarantee securing local jurisdiction and not London or non-local jurisdiction. Those acts were held by the judge in both the "Kallang" and the "Duden" to be breaches of the London arbitration clauses incorporated from the governing charterparties into the bills of lading.



> **The result of the judgments in the "Kallang" and "Duden" matters is that vessel owners and their P&I Clubs need not give in to undue pressure from cargo underwriters, or from those acting for them..."**

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During this period, a number of arbitration awards were obtained by my firm, Jackson Parton, mirroring the result in the "Kallang" case. Furthermore, in cases where the owners, with a close cancelling date on the next fixture to meet, who therefore had to give in to the blackmail, either paying cash or securing local jurisdiction, awards were obtained declaring those amounts repayable and/or the local jurisdiction agreement null and void for duress.

Since two decisions of the European Court of Justice, *Turner v. Grovit* (Case C-159/02) [2004] ECR I-3565 (for court jurisdiction clauses) and the "Front Comor" [2009] 1 Lloyd's Rep 413 (for arbitration clauses), the English courts have been unable to grant anti-suit injunctions ordering a party which has issued proceedings in a European Union or EFTA country to stop such proceedings.

However, these decisions have no application whatever when the proceedings issued in breach of the jurisdiction or arbitration clauses are issued outside the European Union or EFTA countries. That was made clear by the Court of Appeal in February this year in *Midgulf International Ltd. v. Groupe Chimique Tunisienne*, (2010) 790 LMLN 1. Thus, the English Courts will, for example, still make an anti-suit injunction ordering a party to cease proceedings in the USA or Canada if it considers such proceedings to have been brought in breach of an agreement only to bring the proceedings concerned in England.

Furthermore, as the European Court itself made clear in the "Front Comor" judgment, it is a matter for the arbitrators seized of a case to decide whether or not the arbitrators have jurisdiction over the case under the principle "competence/competence".

The position is that an arbitration award finding a party liable for damages for breaching the arbitration clause itself and/or declaring the owners not liable for the underlying claim itself will be fully enforceable in any of the countries who are party to the New York Convention on the recognition and enforcement of foreign arbitral awards of June 10, 1958. Parties to that convention include all European Union and EFTA countries.

The result of the judgments in the "Kallang" and "Duden" matters is that vessel owners and their P&I Clubs need not give in to undue pressure from cargo underwriters, or from those acting for them, due to potential loss of earnings and expense whilst an injunction is obtained and then obeyed. These decisions, which the American Club had the foresight and courage to fight, have been and continue to be of considerable benefit to its Membership and to the vessel owning community at large. P & I clubs, as a whole, owe a substantial debt to the American Club for its initiative which has saved many of them, who have subsequently adopted the American Club's methodology, a very large amount of money.

by: Chester D. Hooper
Holland & Knight LLP
New York, NY

The Rotterdam Rules

An Overview of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: Part II

This is the second in a series of articles to be posted in CURRENTS introducing the Rotterdam Rules to our Members authored by Mr. Chester Hooper from Holland & Knight. The first of three Rotterdam Rules articles was published in the November 2009 issue of CURRENTS. It provided an overview of the Rotterdam Rules and it mentioned the effect of the Rotterdam Rules on choice of forum clauses.

This second article examines more closely the jurisdiction and arbitration provisions of the Rotterdam Rules, which affect choice of forum clauses and arbitration agreements.

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The jurisdiction and arbitration chapters, chapters 14 and 15, may be the second part of the Rotterdam Rules considered by a claims adjuster when he or she receives a new claim. The claims adjuster may look first to the time for suit provision of the Rotterdam Rules, Chapter 13, to determine whether the claim is timely. If the suit is timely, the adjuster may next ask whether suit was started or arbitration demanded in a place permitted by the Rotterdam Rules. If a claimant commences suit or arbitration in a place not specified by the Rotterdam Rules, the carrier has the choice of agreeing to that place or demanding that the claimant choose a Rotterdam Rules place. With some exceptions, which will be discussed further below, cargo interests may commence suit, according to Chapter 14, Article 66:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 66(b) allows, but does not require, cargo interests to start suit in a place designated in a choice of forum clause.

If the bill of lading includes an arbitration agreement, cargo interests may demand arbitration in any of the following places set forth in Chapter 15, Article 75, even though the arbitration agreement may call for arbitration in another place:

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement; or

(b) Any other place situated in a State where any of the following places is located:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

The jurisdiction and arbitration chapters were amongst the most difficult chapters to negotiate. Many nations did not want to include any jurisdiction or arbitration provision in the treaty. Some nations wanted to allow parties complete freedom to "agree" in the contract of carriage where claims would be litigated or arbitrated. Other nations wished to continue their own national law provision that required law suits or arbitration proceedings to take place in their own nations. If no jurisdiction or arbitration provision were included in the Rotterdam Rules, national law would have governed jurisdiction and arbitration as it is now.

The European Union added an additional complication to the negotiations. No member of the European Union could speak to the jurisdiction issue; only the European Commission could speak to that issue on behalf of the European Union members. The parties changed position when arbitration was discussed. The European Commission could not discuss arbitration, but the European Union members could.

The European Commission's participation in the jurisdiction issue would extend beyond the Working Group discussion. Members of the European Union could not ratify a treaty that contained a jurisdiction provision without the European Commission's approval.

A compromise was reached that solved the European Union problem and the problem created by the reluctance of some nations to have jurisdiction or arbitration provisions in the treaty. The Working Group agreed to treaty the jurisdiction chapter and the arbitration chapter as "opt in" chapters.

When nations ratify the Rotterdam Rules, they may choose whether to opt into the jurisdiction chapter, the arbitration chapter, both chapters, or neither chapter. A nation could at a later date opt into either or both chapters. If the European Commission later decided to

opt into the jurisdiction chapter, it could then do so on behalf of its members.

Some nations may decide to remain with their national law treatment of jurisdiction or arbitration. The law of some nations would not honor any choice of forum clause that would deprive those nations of jurisdiction over law suits filed in those nations. Other nations, including the United States[1], would enforce choice of forum clauses. It is expected that the United States will opt into both the jurisdiction and the arbitration chapters.

The UNCITRAL Working Group III on Transport Law included industry representatives in the form of Non-Governmental Organizations (NGOs) and as members of many nations' delegations. The Working Group also included professors, diplomats, and lawyers who have practiced or taught maritime law.

The industry representatives in particular wanted to make sure that disputes would be litigated or arbitrated in reasonable and convenient places. By reasonable, they meant places that would decide disputes fairly, predictably, and efficiently. Representatives of cargo interests realized that most damage is discovered at the port of discharge or the place of destination. They also realized that most contracts of sale placed the risk of loss or damage during transportation on the consignee. The consignee would probably be located at or close to the place of destination or the last port of discharge, and would want to be able to commence suit against the carrier at a place near the last port of discharge or the cargo's place of destination.

Many disputes are of course actually between a cargo underwriter and a P&I club that will indemnify its member after its member pays a settlement or judgment. The cargo underwriters may want to have disputes resolved where they know attorneys and the court, possibly near one of the cargo underwriter's offices. They may also want to resolve disputes in a forum whose law and procedure is familiar to them and is predictable. If cargo interests think the forum is favorable to cargo interests, they would probably be even more interested in litigating there. Carrier interests, not surprisingly, would probably use the same criteria as cargo interests. Several carriers have, however, chosen their home forum in which to resolve their disputes.[2]

There is not of course any perfect place in the world with someone akin to Plato's Philosopher King to resolve all cargo loss or damage claims. Plato did probably not even consider the subject. If Plato had been a member of UNCITRAL Working Group III on Transport Law, he almost certainly would not have been able to convince all members of Working Group to send all cargo claims to any one place. We certainly understood why the drafters of the original Hague Rules decided that they could not agree where disputes should be decided and left that question to national law.

The European Union added an additional complication to the negotiations..."

The Working Group, particularly the U.S. delegation, would not abandon the idea of including jurisdiction and arbitration guidelines in the Convention. We realized that places reasonable to each shipment would likely include its place of origin, the first port at which it was loaded on a ship, the last port at which the cargo was discharged from a ship, and the cargo's place of final destination. The domicile of the carrier was also listed as a place cargo interests could commence suit or arbitration if they wished.

The jurisdiction and arbitration chapters of the Rotterdam Rules represent a compromise between the carrier and cargo points of view. Cargo interests will have the choice of five places to resolve disputes concerning routine contracts of carriage. Exceptions to that general rule allow the carrier and cargo interests to choose where their disputes will be litigated or arbitrated. Those exceptions fall into two categories, volume or service contracts and charter parties.

VOLUME CONTRACTS

Volume contracts have been referred to in the United States as "service contracts." They are very popular in the United States, and have been said to apply to about 90% of the liner trade to or from the United States.

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They are not now regulated and have freedom to contract as they choose.

Parties to volume contracts were thought to be sophisticated parties of equal bargaining power. Many volume contracts negotiated in the United States at this time involve shippers with far greater bargaining power than carriers. Many states involved in the UNCITRAL negotiations, however, feared that carriers would impose unfair volume contract provisions on small shippers. Even though parties to service contracts now have complete freedom of contract, industry representatives wanted the Rotterdam Rules to govern volume contracts as a kind of default setting. Parties to volume contracts may derogate from some, but not all terms of the Rotterdam Rules.

Parties to volume contracts may choose any place they wish to litigate or arbitrate disputes between or amongst themselves. They may not, however, impose that choice on other parties unless certain guidelines are followed and certain places are chosen. If those requirements are not followed, a third party holder of a document or electronic record issued pursuant to a volume contract could choose an Article 66 place to litigate or an Article 75 place to arbitrate.

The requirements to extend the volume contract choice of forum or arbitration agreement to third parties are:

- the place chosen must be an Article 66 or 75 place;
- the choice of forum or arbitration clause must also be contained in the transport document or electronic record; and
- the holder of the transport document or electronic record must be "given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive..." [3]

The Convention does not define "timely and adequate notice," nor did the UNCITRAL Working Group III discuss a definition of those terms. A prominent statement on the face of a transport document or electronic record was thought by many involved in the UNCITRAL negotiations to constitute "timely and adequate" notice. The drafters realized that the purchaser of cargo often does not receive the transport document or electronic record until after it pays for the cargo. The cargo buyer may not learn of the choice of forum or arbitration provision until it has paid for the cargo, but either the cargo seller or buyer will probably be a party to the volume contract and will know of the clause.

If a purchaser of cargo does not want the carrier to choose the Article 66 place to litigate or the Article 75 place to arbitrate, the purchaser should specify in a contract of sale or letter of credit that such clauses in the transport document or electronic record are not acceptable.

The volume contract will have been negotiated between the shipper and the carrier. Article 1(5) defines a carrier as "a person that enters into a contract of carriage with a shipper." Article 1(8) defines a shipper as "a person that enters into a contract of carriage with a carrier." Under those definitions, a receiver of the cargo could be both the consignee and the shipper. It is common for large U.S. importers of cargo to negotiate service or volume contracts with carriers.

Unless a negotiable transport document or electronic record is negotiated from one non-party to the volume contract to another non-party, one of the parties to the purchase and sale contract will have negotiated the volume contract and will be aware of the choice of forum or arbitration agreement.

If the receiver of the cargo negotiates the volume contract with the carrier, the place of litigation or arbitration will likely be convenient to the receiver, which will become the holder of the transport document or electronic record. If the shipper is the seller of the cargo and negotiated a volume contract including a

choice of forum or arbitration clause with the carrier, the seller could advise the buyer of the clause.

These provisions are an improvement over of the current law in the United States. At this time, a carrier may choose any place it wishes to litigate or arbitrate by placing a clause on the reverse side of a bill of lading without giving notice.

After the Rotterdam Rules go into effect, the question of what constitutes time and adequate notice will probably be litigated. The carriers might want to include in their booking notes, notice that the volume contract choice of forum clause will also apply to bills of lading. The booking note could also include an agreement that the shipper will give notice of the choice of forum notice to anyone to whom it negotiates the bill of lading. The booking note could also include an agreement to indemnify the carrier if the carrier was unable to enforce the choice of contract term because the shipper had not given proper notice.

CHARTER PARTIES

The other exception to the jurisdiction and arbitration provisions concern charter parties. The Rotterdam Rules do not govern charter parties or other contracts for the use of a ship or any space on a ship. Parties to those contracts may of course choose any place they wish to litigate or arbitrate their disputes. That place may be extended to a holder of a transport document or electronic record that was not a party to the charter party if the transport document or electronic record incorporates the charter party by reference. This provision is similar to, but clearer than, the present charter party law in the United States.

Article 76(2) of the Rotterdam Rules specifies that to incorporate the charter party arbitration clause into the agreement, the transport document or electronic record must identify "The parties to and the date of the charter party or the contract (for the use of a ship or space on a ship and must incorporate) by specific reference to the clause in the charter party or other contract that contains the terms of the arbitration agreement."

MARITIME PERFORMING PARTIES

Stevedores, terminal operations, and other maritime performing parties will not have to litigate at all places the carrier may be sued. Article 68 of the Rotterdam Rules permits claimants to sue a maritime performing party at:

(a) the domicile of the maritime performing party; or

(b) the port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

The final article, which will be published in the next edition of CURRENTS will report the status of the ratification process of the Rotterdam Rules and aspects of the Rules being discussed at that time.

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1 The 1967 landmark case of Indussa Corporation v. S.S. Ranborg, 377 F.2d 200, 1967 AMC 589 (2d Cir. 1967) (en banc) (Friendly, C.J.) had held that a choice of court clause in a bill of lading violated COGSA. Between that opinion and Vimar Seguros Y Reasseguros S.A. v. M/V Sky Reefer, 515 U.S. 528, 1995 AMC 1817 (1995) choice of court clauses in bills of lading were not upheld in the United States. After the U.S. Supreme Court decided Sky Reefer, which overruled the S.S. Ranborg decision, choice of court clauses became prevalent. The cargo industry in the United States did not want choice of court clauses in bills of lading upheld and thus prevent cargo interests from resolving disputes close to cargo interests' homes.

2 Please see Chester D. Hooper, Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly be Sea, or the Definition of Fora Conveniens Set Forth in the Rotterdam Rules, Volume 44, Spring 2009, Number 3, Page 424 for a test of some of the forum chosen by carriers in their contracts for carriage.

3 The similar provision of Article 75 for arbitration reads as follows: (a) the place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article; (b) The agreement is contained in the transport document or electronic transport record; (c) The person to be bound is given timely and adequate notice of the place of arbitration; and (d) Applicable law permits that person to be bound by the arbitration agreement.

DUNNAGE AND HOW IT CAN DAMAGE CARGO

ARTICLE 2 IN A SERIES OF 3

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This is the second in a series of three articles on the proper use of dunnage. James Bilaut is is an Extra Master having sailed for 13 years, progressing to chief officer, on a wide range of ships — including general cargo and refrigerated liners, bulk carriers and container vessels. He joined Brookes Bell in 1983 and his work over 26 years has included, among many other types of problem, surveys of the various kinds of damage to cargoes which resulted from poor or inappropriate stowage and poor and inappropriate use of dunnage materials.

In the previous article, ***Dunnage: Types, Uses and Care*****, we looked at the various types of dunnage available, their uses and the basic problems which might be encountered if the dunnage is not of the required type or types and is not clean and/or dry. Here we look at particular types of cargo and how damage might be caused by the dunnage used.**

TIMBER AND STOWAGES OF STEEL PRODUCTS

Steel products include such items as steel plates, slabs and billets, structural steel including beams, angles, channels, merchant bars (small cross-section bars) pipes and tubes, and railway iron (steel sheet coils are dealt with later in a separate section below). These products are carried as individual units when their dimensions are large. Whereas small section products will be secured by steel bands or tied into bundles that might be wrapped in sheeting. Most are unfinished products, but some will be finished with an external paint coating. They are sometimes carried as large shipments such that each hold is filled with a single type of product. While on other occasions, a number of small shipments are carried together in tiers within a cargo compartment to form what is sometimes known as a "layer-cake" stowage as seen in Figure 1.

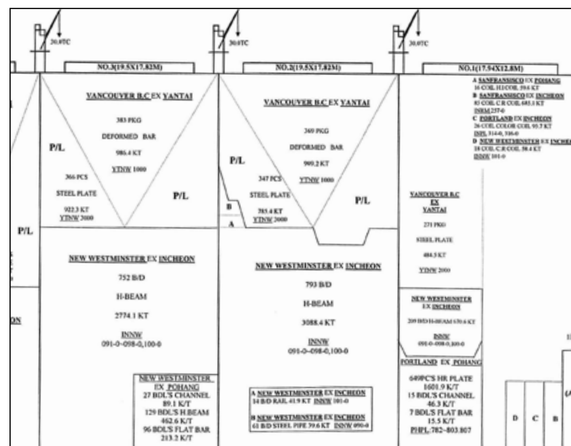

Figure 1: **Part of a stowage plan showing steel products stowed in a 'layer-cake' stowage.**

Steel products should generally be stowed in the fore-and-aft line of the vessel in appropriate tiers. In addition, the stowage should be compact so that there is a minimum of void space within the stowage area. Dunnage should be used on the tank top or deck plating, at the ship's sides and within the stowage. Stowages should be clear of end bulkheads as much as possible but if close proximity, dunnage should be put into place.

Flat board or square section timber should be laid out in athwartships lines on the tank top or deck plating and the timber used should be sufficient to support the weight of the whole stowage to be loaded. Outboard to port and to starboard, and adjacent to the end bulkheads if necessary, appropriate timber should be fitted to prevent any of the steel products coming into contact with the ship's structures while ensuring that a tight and secure stowage is produced.

Within the stowage, timber should be used at intermediate tiers to lock adjacent stacks together, to keep subsequent tiers separate, and to provide friction against athwartships and fore-and-aft movement during the voyage. Additional timber should be provided within a mixed stowage to ensure that tiers are level both athwartships and in the fore-and-aft line of the vessel and to chock void spaces where such void spaces are unavoidable due to the nature of the cargo.

The dunnage used should be good quality timber, softwood rather than hardwood. Efforts should be made to ensure the use of the same type of wood and at each location within the stowage; the timber should be of the same dimension, or combination of dimensions in the case of chocking.

The dunnage is there to support the stowage and prevent any of the products from moving significantly. During loading and the early part of the voyage, the products should 'bite' into the timber by a small amount and this will increase the frictional effect of the timber and aid the stability of the stowage as a whole.

If the timber is too soft, it might be completely destroyed during the voyage by the weight and movement of the stowage when it bites and mangles the dunnage to matchwood. If this occurs, excessive movement of the steel products can occur increasing the possibly partial

Figure 2: **The timber dunnage fitted between tiers of steel products has been mangled to matchwood.**

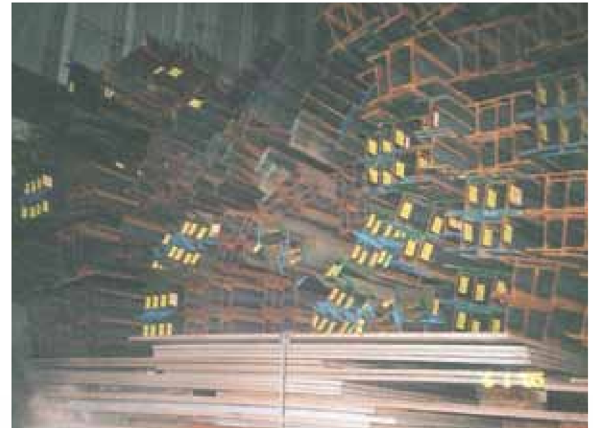

Figure 3: **A collapsed stow of steel products.**

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collapse of the stowage causing contact damages to the cargo items as seen in Figures 2 and 3.

Additionally, difficulties will be encountered during the off-loading process because the cargo products will then be in contact one with another rather than being separated in tiers and blocks. If the timber is too hard, the products will not bite into it as is necessary whereby there will be virtually no friction to stop products and, tiers or blocks within the stowage from moving over the timber in the fore-and-aft and athwartships line as the vessel rolls and pitches in the seaway. If this occurs, extensive damage to the steel products can be the result.

As mentioned above, the timber used in any particular situation should be of the same type. If some soft timber and hard timber are combined in use for stowage dunnage (e.g. between tiers within a stowage), the products will bite into the soft timber but not into the hard timber. In such cases, this will lead to waving of the flanges of beams or plates as a whole as seen in Figure 4.

TIMBER AND STOWAGES OF STEEL COILS

Coils of steel sheet, cold-reduced sheet and other types of sheets including pickled and oiled and coated sheets are shipped in a range of weights from around 2 tonnes

Figure 4: **Indentations to flanges caused by hard timber dunnage.**

Figure 5: **Steel coils stowed in the hold of a bulk carrier.**

up to as much as 35 tonnes per unit. Coils should be stowed with their axes in the fore-and-aft line of the vessel in athwartships rows. Those rows might be one, two or three tiers high, and can be stored as high as four tiers if the coils are smaller and lighter. Dunnage should be provided on the tank top and at the ship's sides in the rows if appropriate as seen in Figure 5.

It is usual practice for flat board timber to be used in athwartships rows, laid on the tank top plating, to spread the weight of the coils over an acceptable area of the tank top plating. The number of rows required will be dictated by the maximum permissible loading of the tank top and the weight of the coils in the row. However, the timber should be of good quality that can adequately spread the load. Otherwise, it will simply be squashed and bend when the coils are loaded and there will be virtually no distribution of the weight to even the load and prevent coil deformation.

At some loading ports square section timber, which has been scalloped to produce simple cradles, is now being used. Such square section timber, normally of cross-section about 4 inches (100mm), has the capacity to spread the weight of the coils further over the tank top plating. However, a sufficient number of these timbers

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should be used for each coil to avoid damage being sustained by the lower bilges of the coil. For example, if only two timbers are used per coil and the rows comprise two tiers of 25 tonne coils, the pressure exerted by the coils on the two lengths of timber might cause an impression of that timber to be made in the outer laps of the bottom coil.

Dunnage should be fitted outboard to port and to starboard to prevent contact between the outer coils and the ship's structures. Also, where void spaces within the upper tiers are unavoidable, timber should be put in place to chock the coils one against another to ensure that the stowage is kept rigidly secure. Such timber chocking at the ship's side structures and within the stowage should be securely fitted and cross-braced. This will ensure that the coiled cargo is not displaced as the vessel moves in the seaway.

If the chocking becomes displaced, the coils will move and contact one another or the ship's side structures and extensive damage is likely to occur. However, such chocking should not be fitted and wedged in place with excessive force where the coils might suffer indentations, or the impression of that timber, in the outer laps of the coils. Care should be taken to ensure that such chocking is of sufficient strength for the intended voyage but is not likely to cause damage to the cargo.

As mentioned above, coils should be stowed in athwartships rows. Each of those transverse rows should be separated from the next row by a gap of at least 6 inches (150mm), to prevent contact between coils in adjacent rows. Similarly, end rows should be kept well clear of bulkheads. Each row should be dunnaged and secured as an individual unit of cargo stowed. In some publications it is recommended that dunnage be fitted against transverse bulkheads and that coils may be stowed against such dunnaging. Also, it might be suggested that dunnage may be fitted between rows of coils, such that each row is stowed hard against that dunnage to produce a block stowage of coils.

However, it is recommended that these types of coil stowages be avoided. This is because all cargo in any

Figure 6: **These upper tier pipes have suffered wetting and rusting as a result of condensation which developed because timber dunnage used lower in stowage was damp.**

Figure 7: **The ship's side plating here has been covered with matting and the bags of rice are against the matting which is against the steel plating. As a consequence the bags of rice have suffered wetting from condensation running down the cold steel.**

stowage is likely to have some minor movement as the vessel rolls and pitches in the seaway during an ordinary voyage. It is not possible and not required to prevent that insignificant movement of the cargo. However, if coils are stowed and timbered against bulkheads and against each other, damage to side wrappers and to the sides of the coils may result from rubbing against such timber dunnage.

DUNNAGE AS A SOURCE OF WATER

Most dunnage is hygroscopic, that is it will easily absorb moisture, being timber, paper, natural fibre or bamboo products used in India and the Far East. Such dunnage products are widely used within stowages of general items, pallets, steel products, bagged cargoes as well as with stowages which are mixed. The general rule of thumb is that when dunnage is brought alongside if it is found to be wet or with high moisture content, it should be rejected for use. If, during the loading of cargo, it is found that some of the dunnage, despite earlier inspections, is damp and cannot be removed such that dry dunnage can be fitted, ventilation of the compartment should be carried out to reduce the moisture content as much as possible.

A large volume of moist dunnage used within the stowage can hold a significant volume of water. Thereafter, depending on weather conditions on passage, much of that water in the dunnage material may evaporate into the surrounding stowage area atmosphere during the voyage. In such circumstances, the moisture will condense to form 'sweat'. This will either ship's sweat on the structures of the vessel which will drip onto cargo in way, or cargo sweat which will form on the cargo itself and cause direct wetting and rust damage as seen in Figure 6. The most common method to remove atmospheric moisture from the cargo compartment is to ventilate it before it causes damage. Guidance on ventilation and how to limit sweat formation is dealt with in the third article forthcoming in the next issue of CURRENTS (November 2010).

Another means by which wet dunnage can cause damage to cargo is through the direct transfer of water moisture in the dunnage to the cargo in contact. For example, stowages of bags of rice, cocoa beans, sugar, and general items such as bales, pallets and cartons require dunnage in the form of flat board timber, poles or woven mats fitted outboard to port and to starboard adjacent to the ship's structures and against athwartships bulkheads and other steelwork.

If the dunnage is wet, or even excessively damp, moisture will move from the dunnage into the items of cargo and can likely cause wetting followed by mould growth and can possibly decomposition of part of the cargo. It is likely that ventilation of the cargo compartment could have little or no effect upon such a situation. Consequently, it is essential to ensure that the dunnage is dry before being used.

DUNNAGE AND BAGS OF RICE

Bagged rice cargoes should be provided with dunnage on the tank top, over the side structures of the hold and, if appropriate, around the inner surface of the hatch coaming. Rice is a hygroscopic product and it contains moisture and will absorb moisture from a damp atmosphere and will disperse moisture to a drier atmosphere. As a result, during an ordinary voyage, the cargo is likely to expel some moisture into the in-hold atmosphere.

If the vessel passes from a warmer to a colder climate during the voyage such that the ship's side structures and the steelwork of the upper part of the hold become colder than the dew point of the in-hold air, sweat will likely occur in these cargo holds. If the compartment is properly ventilated, the resultant sweat can be kept to a minimum. Any resultant sweat will run down the ship's structures to the tank top and should be run away to the bilges from where it can be pumped overboard if the stowage has been adequately dunnaged. If not, incidents such as those shown in Figure 7 can occur.

Bagged rice cargo requires flat board dunnage on the tank top plating to raise the bags clear of the steelwork and those boards should be sufficiently spaced in close

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proximity to prevent the bags from sagging between the dunnage planks. It is usual for two layers of planks to be laid out and placed at right angles to each other, with the bottom tier of planks aligned so as to allow water to drain to the bilges.

If the vessel is a bulk carrier with hopper tanks, the plating of those hopper tanks should be similarly dunnaged to keep the outer bags of the stowage clear of the plating and any run-off that may occur as a result of ship's sweat. Unless permanent spar ceiling is fitted, flat board dunnage or bamboo poles should be fitted together with kraft paper or bamboo matting, to keep the bags away from the ship's side structures. Flat board dunnage is often used within the coaming space. If this arrangement of dunnage is used, all bags will remain clear of the ship's side structures and away from any ship's sweat which might unavoidably form during the voyage.

If dunnage of the appropriate type, quantity and quality are not used, it can certainly result in wetting damage to bagged rice cargoes. For example, if only one layer of flat board timber dunnage is laid on the tank top and those boards are so widely spaced, bags on the bottom can sag between the planks and come into contact with the steel tank top plating.

At the ship's side, it is often the case that no flat board dunnage or poles are used and only bamboo mats or kraft paper are used against the ship's side frames whereby substantially reducing the effectiveness of this dunnage. During loading and the subsequent voyage as the vessel rolls and pitches, the stowage settles. During this time, outboard bags can settle or shift out between the ship's side frames and come into contact with the shell plating. When sweat forms during the voyage it runs down the shell plating and is soaked up by these bags in contact with the shell plating.

Cargoes of rice are carried worldwide but mostly from ports of the Indian sub-continent and the Far East to South-American ports and eastern and western African ports. During a voyage where there is only a slight little change of temperature, the possibility of ship's sweat will be small.

On the other hand, when there is likely to be significant changes in ambient and/or sea temperature during the voyage the possibility of ship's sweat increases. For example, when a cargo is carried either from a Far Eastern port or an Indian sub-continent port to West Africa via the Cape of Good Hope during the southern winter, there is a very high probability that ship's sweat will form. For such a voyage it is essential that the stowages are properly and adequately dunnaged to avoid cargo damage.

SHORING AND SUPPORTING OF CASES AND GENERAL ITEMS

Break bulk cargoes, which comprise of cases, cartons, reels, pallets, etc., require pre-planning in order that the pieces are stowed together correctly and so that appropriate dunnaging and securing can be achieved. The appropriate types and amounts of dunnage materials should be used to increase friction at the base of items of cargo and to protect, support and separate those items in stowage. When items of cargo are placed on top of each other, it might be necessary to provide flooring of timber or plywood to support the over-stowing cargo and avoid the collapse of cargo lower down in stowage.

Thus, it is necessary to establish the strength in compression from above of any cases, pallets or bags before other cargo is placed on top. When rectangular and rigid items are placed into stowage against each other (e.g. example pallets and cases) including flexible intermediate bulk containers, sometimes known as big bags, it might be appropriate and acceptable to simply place them hard up against each other without any dunnage in-between. However, items which are not of the same type and size should not be placed into stowage without dunnage being fitted to support and to separate the items.

A case containing machinery might, from the outside, look strong and rigid but it might be that the sides and ends of the case have very little strength because of a lack of any internal structure within the case. If such a case were to be placed against another, much smaller item, with only a minimal amount of dunnage to separate them, the items might move together when the vessel moves in the seaway and the cases might collapse under the horizontal pressure.

Cases stowed on top of each other but not squarely on top are likely to collapse if adequate flooring-off

dunnage is not fitted. If possible, the strengths and weaknesses of items of cargo should be established and dunnage should be fitted such that it spans weak areas so that loadings are only placed upon strength members which can carry the intended loads.

Similarly, when void spaces exist between items of cargo, those voids should be timbered carefully so that the chocks are fitted in way of appropriate and hardened rigid parts of the cargo in that the possibility of movement during the voyage can be kept to a minimum.

Alternatively, if chocks are positioned against weaker areas it is most likely that those weak areas will give way when the vessel rolls and pitches in the seaway, the chocks will simply fall away, and the items of cargo will shift and suffer damage.

SHORING AND SUPPORTING OF UNCASED UNITS

Units of cargo which are provided with little or no packaging come in a variety of geometrical shapes and sizes: from large and heavy but rigid transformers, tanks, bulldozers and other large pieces of equipment, or cranes with main parts and extension pieces. These are generally referred to as heavy lift items and project cargo. Many of these items are secured in place upon timber dunnage, by the use of lashings and/or sea fastenings only. Many items are, however, secured by a combination of lashings and timber shoring and supporting structures.

Those timber supports should be:

- be set up against strong parts of the item of cargo;
- of sufficient strength;
- braced such that they cannot move or fall away; and
- fitted, ideally, symmetrically on both sides and both ends of the unit.

If the timber supports are of insufficient strength, or they move while the vessel is at sea, the unit of cargo will shift and suffer damage. If the timber supports are set up against weak areas, those areas will give way and damage will be sustained by the unit of cargo.

At times, cargoes are comprised of a main body and an extension piece or overhanging section which is separate from and is not wholly supported by the main body. In such cases, those extending parts must be properly and adequately held and supported to avoid damage being sustained as a result of movement during the voyage. Such support structures are often referred to as cradles or cribbage supports. Such a structure should be of sufficient strength and size so as to support the load of the unit and to spread that load over the deck or tank top. Also, it should be of sufficient size so that the top of the structure has sufficient area to distribute the weight of the unit so that damage is not sustained by the unit when it is placed on the support.

It should also have sufficient rigidity so that it does not buckle or move during the voyage and there should be a sufficient number of supports to prevent any distortion in the piece by twisting and buckling. If the cradles or cribbages are insufficient in any way, the extension piece of overhanging section will suffer movement and become damaged as a result.

In summary, when sufficient dunnage of the appropriate type, quality and quantity is used in the correct place and in the correct manner, the amount of dunnage used will be kept to a minimum and the chances of the cargo shifting during the voyage will also be kept to a minimum.

In the third article forthcoming in the next issue of *CURRENTS*, we will look at particular types of cargo and how dunnage might cause damage.

GLOBAL CLIMATE CHANGE GREENHOUSE GAS EMISSIONS INITIATIVE

by: Dr. William Moore
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Shipowners Claims Bureau, Inc.

MORE WORK TO BE DONE TO PROGRESS GREENHOUSE GAS INITIATIVES

The Marine Environment Protection Committee (MEPC) met in March for the first time since the December 2009 climate talks in Copenhagen. The Committee concluded that more work needs to be done before it completes its consideration of the proposed mandatory application of technical and operational measures designed to regulate and reduce emissions of greenhouse gases (GHGs) from international shipping.

Draft text on mandatory requirements for the *Energy Efficiency Design Index* (EEDI) for new vessels and on the *Ship Energy Efficiency Management Plan* (SEEMP) for all ships in operation had been prepared. However, issues concerning ship size, target dates and reduction rate in relation to the EEDI requirements all required finalization.

The Committee agreed on the basic concept that a vessel's attained EEDI shall be equal or less than the required EEDI. It also noted and that the required EEDI shall be drawn up based on EEDI baselines and reduction rates that have yet to be agreed using data from existing ships in the Lloyd's Register Fairplay database.

In addition, as noted in the last issue of CURRENTS, there was a general preference for the greater part of any funds generated by a market-based instrument under the auspices of IMO to be used for climate change purposes in developing countries through existing or new funding mechanisms under the *United Nations Framework Convention on Climate Change* (UNFCCC) or other international organizations.

An Expert Group on the subject to undertake a feasibility study and impact assessment of the various proposals submitted for a market-based instrument for international maritime transport will be reported back to the Committee at its next session.

MARPOL CONVENTION AMENDMENTS ON NOx AND SOx EMISSIONS IN NORTH AMERICA

The Committee adopted amendments to the MARPOL Convention to formally establish a North American Emission Control Area, in which emissions of sulphur oxides (SOx), nitrogen oxides (NOx) and particulate matter from ships will be subject to more stringent controls than the limits that apply globally.

Another new MARPOL regulation, to protect the Antarctic from pollution by heavy grade oils, was also adopted.

These amendments on the North American Emission Control Area and Antarctica are expected to enter into force on August 1, 2011.

BALLAST WATER MANAGEMENT CONVENTION

The Committee noted that to date the International Convention for the Control and Management of Ships' Ballast Water and Sediments, has been ratified by 22 countries representing 22.65 per cent of the gross tonnage of the world's merchant shipping. The Convention will enter into force twelve months after the date on which not fewer than 30 States, the combined merchant fleets of which constitute not less than 35 per cent of the gross tonnage of the world's merchant shipping, have become Parties to it.

GARBAGE SPECIAL AREAS

May 1, 2011 is the date on which the discharge requirements for the Wider Caribbean Region Special Area under MARPOL Annex V Regulations for the prevention of pollution by garbage from ships have taken effect. This Special Area, including the Gulf of Mexico and the Caribbean Sea, were designated as a Special Area under MARPOL Annex V in July 1991. Most countries in the region have now given notice that adequate reception facilities are provided in most relevant ports, so that the 'Special Area' status are now made effective.

Special Areas as designated under MARPOL Annex V stipulate that the disposal of all garbage into the sea, including plastics, is prohibited. Other special areas under Annex V are: the Baltic Sea (effective since October 1989); the North Sea (February 1991); the Antarctic area (south of latitude 60 degrees south) (March 1992); the "Gulfs" area (August 2008); the Mediterranean Sea (May 2009); the Black Sea (not yet effective); and the Red Sea (not yet effective).

SUDDEN DEATH IN YOUNG SEAFARERS — HEART PROBLEMS OFTEN THE CAUSE

by: Vijay Belani, M.D.
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The Directorate General of Shipping in India has recently expressed its concern over the increasing incidence of sudden deaths of young Indian seafarers whilst employed at sea.

The Indian community is probably one at the highest risk of heart disease, whether resident in India or overseas.

A natural disaster hits, the power goes off and the lights go out. It's a common scene that plays out during hurricane and tornado seasons in India, and it's very similar in trying to explain sudden cardiac arrest. The heart sustains a disruption, the electricity is short circuited, the heart can't pump, and the body dies.

The heart is an electrical pump, where the electricity is generated in special 'pacemaker' cells in the upper chamber (or atrium). An electrical signal is carried through pathways in the heart so that all the muscle cells contract together at once and produce a heartbeat. This pumps blood through the heart valves and into all of the organs of the body so that they can do their work. The mechanism can break down in a variety of ways, but the final pathway in sudden death is the same: the electrical system is irritated and fails to produce electrical activity that causes the heart to beat.

If the heart muscle can't supply blood to the body, particularly the brain, and the body dies. Ventricular fibrillation (V Fib) is the most common reason for sudden death in patients. Without a coordinated electrical signal, the bottom chambers of the heart (ventricles) stop beating and instead, fibrillates. Ventricular fibrillation is treated with electrical shock that needs to be given within four to six minutes to be effective and minimize brain damage from lack of blood and oxygen supply.

HOW CAN SUDDEN CARDIAC ARREST BE DIAGNOSED?

What are the symptoms of sudden cardiac arrest?

Sudden cardiac arrest is an unexpected death in a person who had no known previous diagnosis of a fatal disease or condition. The person may or may not have heart disease. In sudden cardiac arrest the heart stops beating and blood is not supplied to the body. The presentation is not subtle. Almost immediately, loss of consciousness occurs and the affected person cannot be aroused. The person will fall or slump over with no pulse and there will be no signs of breathing.

WHAT CAN CAUSE SUDDEN CARDIAC DEATH IN YOUNG PEOPLE?

Sudden death is most often caused by heart disease. Sudden death may also be the first presentation of heart disease. In the majority of autopsies following death, it was heart abnormalities are found.

For a variety of reasons, something — such as a structural heart defect — causes the heart to beat out of control. This abnormal heart rhythm is known as ventricular fibrillation.

Some specific causes of sudden cardiac death in young people include:

- Hypertrophic cardiomyopathy (HCM). This is a disease in which the heart muscle (myocardium) becomes abnormally thick, making it harder for the heart to pump blood. Hypertrophic cardiomyopathy, while usually not fatal in most people, is the most common cause of heart-related sudden death in people under 30 years of age. It's the most common cause of sudden death in athletes. HCM often goes undetected.
- Coronary artery abnormalities. Sometimes people are born with heart (coronary) arteries that are connected abnormally to the heart. The arteries can become compressed during exercise and not provide proper blood flow to the heart.
- Long QT syndrome (LQTS). LQTS is an inherited heart rhythm disorder that can cause rapid and chaotic heartbeats. The rapid heartbeats, caused by changes in the part of your heart that causes it to beat, may lead to fainting, which can be life-threatening. In some cases, the heart's rhythm may be so erratic that it can cause sudden death. Young people with LQTS have an increased risk of sudden death.

There are many other causes of sudden cardiac death in young people. They usually affect the structure of the heart or the heart's electrical system.

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Pulmonary embolus, a blood clot to the lung, can also cause sudden death. Clots form in the leg or arm and may break off and flow to the lung where they decrease the lung's ability to get oxygen from the air to the body. Risk factors for blood clots include surgery, prolonged immobilization (for example, hospitalization, long car rides or plane trips), trauma, or certain diseases like cancer.

When blood vessels narrow, the heart muscle can become irritated because of lack of blood supply. In heart attack (acute myocardial infarction), a blood vessel becomes completely blocked by a blood clot, and there is enough irritability of the muscle to cause ventricular fibrillation. In fact, the reason many people with chest pain are admitted to the hospital is to monitor their heart rate and rhythm for signs that might lead to ventricular fibrillation.

There's another rare cause of sudden cardiac death that can occur in anyone, though it's usually heard about in young people who play sports. It occurs as the result of a blunt blow to the chest — such as being hit by a baseball or hockey puck — at just the right time (its medical name is commotio cordis). A blow to the chest can trigger ventricular fibrillation if the blow strikes at exactly the wrong time in the heart's electrical cycle.

ARE THERE SYMPTOMS OR RED FLAGS TO BE ON THE LOOKOUT THAT SIGNAL A YOUNG PERSON IS AT HIGH RISK OF SUDDEN CARDIAC DEATH?

Many times these deaths occur with no warning, but there are three symptoms to watch for:

- Unexplained fainting (syncope). Sudden and unexplained fainting that occurs during physical exertion could be a sign that there's a problem with your heart. Seizures can also occur.

Syncope, or loss of consciousness, is a significant risk factor for sudden death. While some reasons for passing out are benign, there is always a concern that the reason was an abnormal heart rhythm that subsequently spontaneously corrected. The constant concern is whether the next episode will be a sudden cardiac arrest.

Depending on the healthcare provider's suspicion based on the patient's history, physical examination, laboratory tests, and EKG, the healthcare practitioner may recommend inpatient or outpatient heart monitoring to try to find a clue as to whether the passing out was due to a deadly heart rhythm. Unfortunately, the potentially suspect rhythm may not recur and depending on the situation, prolonged outpatient monitoring lasting weeks and months may be necessary. Use of electrophysiologic testing may help identify high risk patients (the electrical pathways are mapped using techniques similar to heart catheterization).

- Family history of sudden cardiac death. Another major warning sign is a family history of unexplained deaths before 50 years of age. This obviously isn't a physical symptom like fainting, but deaths like this in a family history should prompt you to pay close attention and perhaps talk with your doctor about screening options.
- Shortness of breath or chest pain may also be a sign that you're at risk of sudden cardiac death, but these are rare and may be a sign of other health problems in young people, such as asthma.

Hyperhomocystenemia

- Above 15 micromoles/L is a known risk factor.
- This chemical damages the arterial blood vessel lining (Endothelium).
- B Vitamins, Folic Acid, B6 and B12 are beneficial.
- Avoid heavy intake of red meat.

CAN SUDDEN DEATH IN YOUNG PEOPLE BE PREVENTED?

It sometimes can be prevented. If you're found to be at high risk of sudden cardiac death, your doctor will usually suggest that you avoid competitive sports activity or any unaccustomed physical activity and that you be screened regularly for any evolving symptoms.

Death is best treated through prevention! Most sudden death is associated with heart disease, so the at-risk population remains males older than 40 years of age who smoke, have high blood pressure, and diabetes (the risk factors for heart attack). Other risks include syncope (fainting or loss of consciousness) and known heart disease.

In people with chest pain, aside from making the diagnosis, monitoring both the heart rate and rhythm are emphasized. The purpose of watching people with chest pain in a hospital setting is to prevent sudden cardiac arrest.

WHO SHOULD BE SCREENED FOR SUDDEN DEATH RISK FACTORS?

Through the American Club Pre-Employment Medical Examination (PEME) Program, all Indian seafarers require electrocardiogram (ECG, or EKG) testing which records the electrical signals present in the heart. In addition, seafarers of 40 years or older require stress testing.

There are some things you can do if you're worried about your risk factors. For example, if someone in your family dies young, it's important that all first-degree relatives of the deceased should be tested for heart problems that could cause sudden cardiac death — that means parents, siblings and children.

B VITAMINS REDUCE STROKE, HEART DISEASE DEATHS: BENEFITS OF FOLATE AND B6 APPLY TO MEN AND WOMEN

Medical research in Japan has found that foods rich in B vitamins such as folate and vitamin B-6 may reduce the risk of death from stroke and heart problems. Their primary findings state that:

- folate and vitamin B-6 may reduce the risk of heart failure in men; and
- these same vitamins seem to reduce the risk of death from stroke and heart disease in women.

Sources of folate include vegetables, fruits, whole or enriched grains, fortified cereals, beans, and legumes. Vitamin B-6 sources include fish, vegetables, liver, meats, whole grains, and fortified cereals.

VITAMIN B-6, FOLATE FIGHT HEART DISEASE

Researchers found that higher consumption of folate and vitamin B-6 is associated with significantly fewer deaths from heart failure in men. In women, they detected significantly fewer deaths from stroke, heart disease, and total cardiovascular deaths.

The newer assessor of the risk of heart disease that has recently come into light is homocysteine: an amino acid in the blood that is not only affected by diet, but also heredity. Researchers say vitamin B-6 and folate may fight cardiovascular disease by lowering levels of homocysteine that is believed to cause damage to the inner linings of arteries that can promote blood clots.

> "In India we continually assess the risk of heart disease only by cholesterol points. To compound the confounded mind, we are still guided by myths which directly contradict medical research and statistics".

CONCLUSION:

In summary, it is always important to be honest in sharing your true medical history with the doctor and, in particular, sharing the family history is a very critical contributory factor in heart disease.

The following simple points should be adhered to when considering reducing factors that can lead to heart failure:

- Deal with stress factors proactively.
- Include activities for rest and recreation in your daily routine.
- Eliminate/control high risk factors (blood pressure, diabetes, smoking, foods rich in fats and red meat).
- Exercise (walk) at a minimum, for 30 minutes daily
- Include greens and fruits in your daily diet
- Consume a handful of nuts on a daily basis (avoid cashew nuts).

MARITIME ARBITRATION IN INDIA

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There has been a steady increase in the number of maritime arbitrations in India over the last few years involving foreign owners or operators and Indian charterers. Charterparties which provide for Indian arbitration inevitably provide for Indian law to apply. If arbitration agreement is governed by Indian law, in the absence of any other express choice of law, Indian law would also apply to the substance of the disputes.

Whilst Indian law largely follows English law and this assists in interpreting the contractual provisions and considering the substantive issues involved, when it comes to the arbitration procedure including appointment of arbitrator and conduct of the reference as well as challenges to the award, the similarity ends. Hence the focus in this article is going to be on the effectiveness of arbitration in India and the enforcement of an Indian arbitral award as well as measures for obtaining security pending arbitration and recent developments pertaining to enforcement of foreign awards in India.

The Indian legislation applicable to arbitrations is the Arbitration & Conciliation Act, 1996. This is based on the *United Nations Commission on International Trade Law* (UNCITRAL) model. Although the English Arbitration Act, 1996 is also based on the UNCITRAL model, England has made changes in the statute which deal with many of the problems that arise during the course of arbitration as well as for the purposes of challenging the arbitration award.

The Indian legislation in contrast has not, as a result of which there are some lacunae in the act which unfortunately have led to substantial delays in the setting up of the arbitral tribunal as well as in the conduct of the arbitration proceedings and in matters of challenge to the arbitration award.

KEY ISSUES

Some of the key issues involved in connection with arbitration in India which need to be highlighted and considered by a potential claimant are as follows.

CONSTITUTION OF THE ARBITRAL TRIBUNAL

The Act provides that the parties are free to agree on a procedure for the appointment of arbitrators and free to determine the number of arbitrators provided that such number shall not be an even number. Hence in an arbitration providing for two arbitrators and an umpire, the provision will be read to mean that the umpire would act as the third arbitrator. If the parties have not agreed on the appointment procedure, then the default procedure prescribed in the Act will apply.

The Act provides for an arbitrator to be appointed within thirty (30) days of being given notice of the appointment of the arbitrator of the other party. However, in the event the other party fails to appoint an arbitrator, then the Act does not provide for the arbitrator already appointed to act as a sole arbitrator. The remedy then is to apply to the court for appointment of an arbitrator. This often causes a substantial delay in the constitution of the arbitral tribunal.

RECOURSE TO COURT DURING THE ARBITRAL PROCESS

The Court exercises limited supervisory jurisdiction over the arbitral tribunal. In the event the defending party disputes the jurisdiction of the arbitrator, or seeks to challenge the appointment of an arbitrator by the claimant on the ground of any bias or irregularity, the remedy of the party is to apply to the tribunal itself who will then decide on the objection.

If the party is aggrieved by the decision of the arbitrator, it does not have recourse to court at that point of time and must proceed with the arbitration. The party can then raise this ground in an application to the court for setting aside the award. This is unlike English law where a party aggrieved by a decision on jurisdiction can appeal to the English High Court and is not bound to wait until the tribunal has decided the merits of the award.

Whilst this denial under the Indian law of the right to challenge jurisdiction until after the award appears to have been incorporated to avoid delays in the arbitral process, it also results in a party having to go through the whole gamut of the arbitration proceedings before he is in a position to challenge the tribunal's jurisdiction.

On the other hand, the Act provides for an appeal from an order of the tribunal granting or refusing interim measures of protection. This is of particular advantage

when seeking security in respect of the claim from the tribunal. However, in practice security actions are often made to the court since the powers of the tribunal are limited in this regard.

SECURITY ACTION PENDING ARBITRATION

This is an excellent feature of the Indian Arbitration & Conciliation Act, 1996. Section 9 of the Act permits an application to be made to the court for securing the amount in dispute in the arbitration. This provision has been interpreted to mean that a party can apply to the court for security in respect of its claim before the commencement of the arbitration or during the arbitral process or after the award is made but before it is declared as enforceable under the Act.

The normal principles applicable for a case for security to be made out apply and inevitably the ground is the likelihood of dissipation of assets by the defending party. However, courts are quite liberal in granting interim protection to claimants by passing some interim protective orders which although may not amount to securing the claim, would ensure that the defendant is not permitted to dissipate its assets. This provision is also applicable to arbitrations held outside India and hence it is open for a foreign shipowner involved in London arbitration against an Indian charterer to apply to the Indian court for security pending arbitration in England.

CHALLENGES TO THE AWARD

The Indian Act does not provide for any right of appeal to the court against an arbitral award. What the act provides is for several grounds on which an arbitral award can be set aside. Whilst the grounds are limited, much depends on how the court interprets the grounds and there is a tendency to interpret the grounds liberally depending on the facts and circumstances of the case. Whilst courts generally do not substitute the view of the arbitrator with their own view if two views are possible, the courts will interfere if the view taken by the arbitrator is palpably erroneous or contrary to law and such that it cannot be considered as a possible or reasonable view.

> **"It is very rare that Indian Government charterers pay up on an award without an attempt to have it set aside by the court."**

Even on a matter involving a question of law or interpretation of a contractual provision, the court will not interfere unless it is shown that the view taken by the arbitrator cannot be a possible view under any circumstances or is contrary to law. In theory the scope of interference with an arbitral award is limited, but in practice courts are seen to interfere more liberally than they should be allowed.

However, it is not the interference as such with an arbitral award by the court that is disheartening, but the delay in getting the court to decide a potential challenge to the arbitral award. Under the Indian Act, the time period within which proceedings for setting aside an arbitral award are required to be filed is 90 days, a delay of up to 30 days beyond the 90-day period can be condoned. There is a mandatory bar to entertaining any such application after this period of 120 days has expired. If the challenge is within time, then the court process can be time-consuming and frustrating.

It is very rare that Indian Government charterers pay up on an award without an attempt to have it set aside by the court. It is also very rare for Indian charterers to pay up in the event they lose the first round in the court. It is often the case that the charterers will run the award right through the appeals process until the very end when there is no further recourse available. This can take several years.

The only saving grace is that in the event the challenge to the award is dismissed by the court at the first instance, then the losing party will have to secure the amount if they choose to appeal. However, there is no provision for securing the amount pending the challenge before the court of the first instance which is where the maximum delay occurs.

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IMPORTANCE OF THE VENUE IN INDIA

In disputes under charterparties and bills of lading, maritime arbitration is often the norm. Most commercial shipping arbitrators are based in Mumbai and some in New Delhi. Most charterparties with Indian Government charterers provide for arbitration to be conducted under the Maritime Arbitration Rules of the Indian Council of Arbitration. If these rules are applicable and the parties are not agreed on the venue, then the default venue is New Delhi.

In view of the limited availability of commercial arbitrators in New Delhi and the substantial delays in the event the award is challenged in the Delhi courts, it is advisable that such clauses providing for Indian arbitration must specify the venue as Mumbai where commercial expertise in shipping and experienced commercial shipping arbitrators are easily available.

The Bombay High Court is also well-equipped to deal with commercial shipping disputes and follows a two-stage process in deciding any challenge to an arbitral award. At the first stage, the court will only admit the petition in the event a strong case is made out for setting aside the award; otherwise the petition will be dismissed at the threshold. This is unlike the procedure adopted in most other courts in India where the court will hear the petition finally and this could take several years.

ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

India is a signatory to the New York Convention on Recognition & Enforcement of Foreign Arbitration Awards. Part II of the Indian Arbitration & Conciliation Act, 1996 enacts the provisions of the Convention. These offer very limited scope to oppose the enforcement of a foreign arbitral award. However, much to the disappointment of many of us in India, the Supreme Court of India has taken a view that in certain circumstances, it is open to a losing party to apply to a court in India for setting aside a foreign award.

Whilst the interpretation of the judgment leaves much scope for debate, currently there are a large number of cases where an English arbitration award is challenged under the provisions of the Indian Act which apply to domestic arbitral awards. Whilst this anomaly needs to be corrected very quickly, until this happens claimants who have obtained a London arbitration award against an Indian company will often find themselves faced with a spate of applications to courts in India for setting aside the award even if there is no challenge under the English Act and the award is otherwise final, binding and enforceable.

RECOMMENDATIONS

To get around these problems it is recommended that in contracts where one of the parties is from India and there is an English arbitration clause, the arbitration agreement should provide that the provisions of Part I of the Indian Arbitration and Conciliation Act 1996, save and except for Section 9, are expressly excluded and shall not apply. Section 9 allows a foreign claimant to apply to the Indian court for security pending arbitration and hence it is advantageous to retain the applicability of this section if security measures are intended in India.

Maritime arbitrations in India are quick and cost effective. Most arbitrations are conducted on a full day basis and procedural formalities are limited. Arbitrators are not bound by strict rules of evidence and most commercial shipping arbitrations take no longer than 12 to 18 months to finalize. The delays in obtaining payment on the award are largely due to attempts made to set aside the award by taking recourse to courts. Arbitration in India is largely ad hoc and not institutionalized. There are proposals to amend the arbitration act to provide for speedier resolution of disputes and to limit challenges to the award. However, until this happens, speedy recovery will often remain an area of concern for any claimant seeking to arbitrate in India.

DAMAGE OF STEEL WIRE ROD COILS

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One of our Members recently experienced problems while carrying a cargo of steel wire rod coils, from Turkey to the USA. After reviewing the case in hand, we think that it would be of value to record the salient points that resulted in the loss.

The vessel involved was a geared bulk carrier, with three self trimming cargo holds fitted with conventional hopper topside and double bottom ballast tanks. The cargo involved was described as "Prime newly produced steel wire rods" with a total weight of 10,516 metric tonnes in 6,832 coils, giving an average weight per coil of 1.54 metric tonnes.

Our Member had prudently arranged for a preload tally survey at the Turkish load port. The holds were passed fit for loading and the subject cargo was correctly loaded in a fore and aft direction from "shell to shell" and from forward to aft bulkheads, in all three cargo holds. The cargo hatch covers and ventilators were also tested and found satisfactory and upon completion of loading, the surveyor recommended that the Master should sign the cargo documentation as clean on board.

The vessel proceeded on passage to the discharge port of New Orleans during which no inclement weather conditions were encountered. Upon arrival at the discharge port, the cargo holds were opened up and the holds found free from water ingress, but significant physical damage soon became apparent. A joint survey was subsequently arranged and the following findings were concluded:

- The cargo had naturally settled on passage, which had resulted increased pressure in way of the ship's structures.
- The coils in way of the tank tops and sloping hopper plates had been correctly loaded over flat timber dunnage and as such had suffered no damage.
- However, correct dunnaging had not been installed in way of the hull side frames and the load port stevedores had simply installed cardboard cartons between the cargo and the vessel's frames, in order to prevent possible sweat damage.
- The cartons had no ability to spread the increase in pressure due to settling and had simply given way.
- This resulted in approximately 384 coils being crushed against the vessel's side frames and these coils were rejected by receivers due to their subsequent deformation.

The Club would therefore like to reiterate the importance of using the correct dunnage for the task in hand. Wire rod coils should be loaded in a similar manner to sheeting coils, with cores facing fore and aft in an athwartships stow. Flat dunnage should be used to keep the coils from touching the hold plating and framing.

A tight stow is essential, and slack bundles may make it impossible to achieve a tight stow. It is therefore critical to inspect coil banding to ensure that there has been no slippage or loosening of the coils. It is preferable that this type of cargo is stowed in complete tiers, but when the stow has any open faces, the upper tiers should be suitably lashed with wire rope fastenings.

For further guidance regarding correct dunnage uses, Members may want to refer to the dunnage articles in both this issue and the last issue of Currents written by Brookes Bell.

Figure 1: **Stowage of steel coils in the cargo hold with cardboard dunnage provided along the bulkhead.**

Figure 2: **Steel coils compressed against the cardboard dunnage on the bulkhead.**

Figure 3: **Steel coils damaged by compression against the bulkhead.**

Figure 4: **Deformed steel coil after removal at discharge port.**

RECENT ENTRY INTO FORCE OF POLLUTION REGULATIONS IN THE PEOPLE'S REPUBLIC OF CHINA

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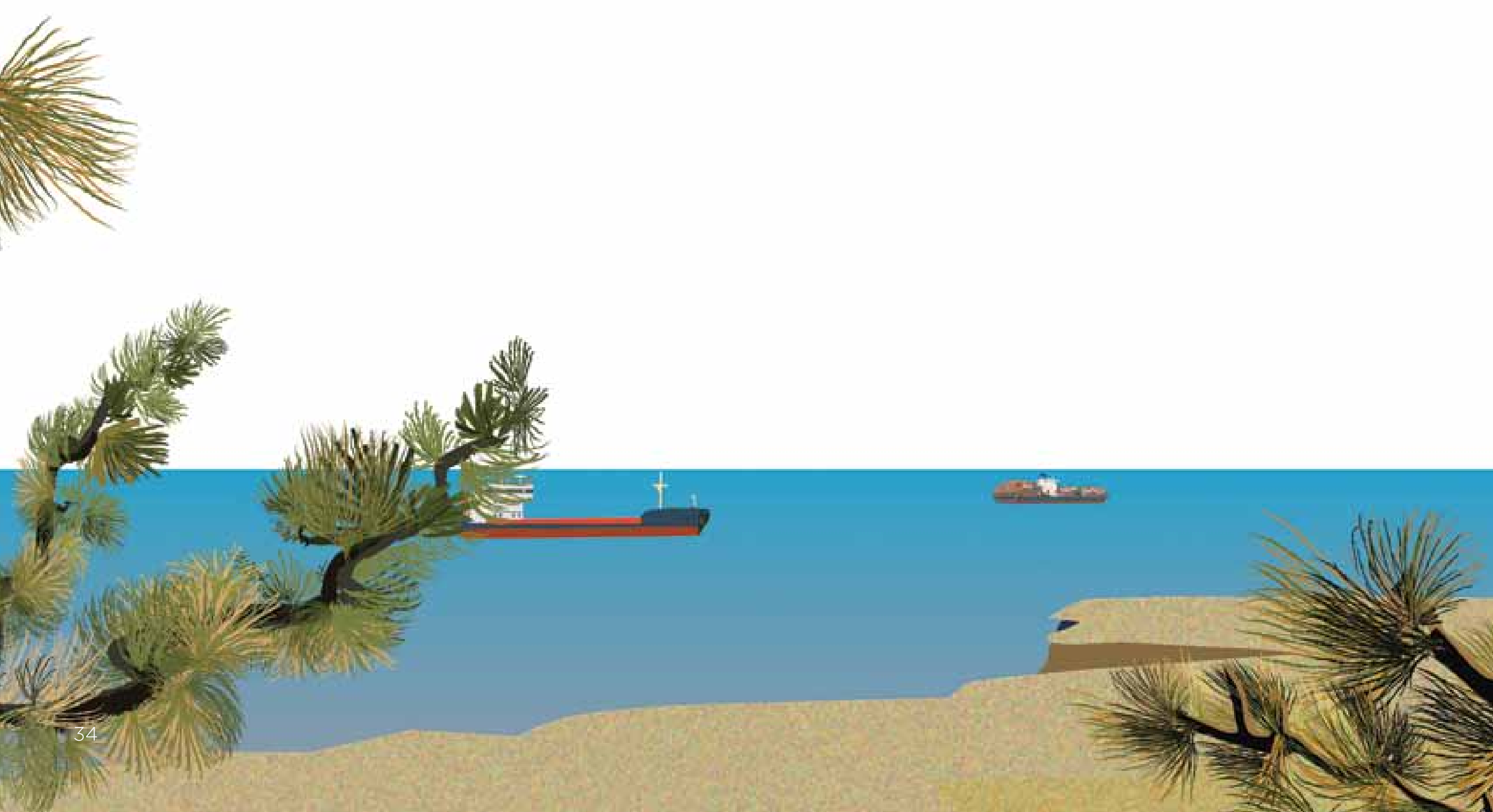
2009 and 2010 are bound to be the busiest years in the last two decades for the People's Republic of China (PRC) maritime authority in its efforts to bring into force a number of legislations in relation to marine pollution from ships. On March 31, 2010, the Prevention and Control of Marine Pollution from Ships ("Pollution Regulations") came into force replacing the 1983 version. The Pollution Regulations do not apply to Hong Kong.



In addition, as of March 9, 2009, the International Convention on *Civil Liability for Bunker Oil Pollution Damage*, 2001 entered into force making all requiring vessels calling Chinese ports to possess insurances covering the pollution liabilities up to the Convention's limit.

The Pollution Regulations consist of 9 chapters of 78 articles having a wide effect on PRC flagged vessels as well as foreign vessels entering into the Chinese waters.

CHAPTER ONE: GENERAL PRINCIPLES

Articles 1 through 9 define the competent authority responsible for the enforcement of the Pollution Regulations, namely the Maritime Safety Administration.

CHAPTER TWO: GENERAL REGULATIONS FOR THE PREVENTION AND CONTROL OF THE MARINE POLLUTION FROM RELEVANT SHIP OPERATIONS ACTIVITIES

Articles 10 through 14 require all PRC flagged ships to have the safety management system for the prevention and control of marine pollution, and to set up emergency response plan.

CHAPTER THREE: THE DISCHARGE OF SHIP POLLUTANTS AND RECEPTION OF THE POLLUTANTS

Articles 15 through 19 apply to all vessels both domestic and foreign flagged, and set out the requirements for the discharge and reception of ship pollutants.

CHAPTER FOUR: THE PREVENTION AND CONTROL OF THE MARINE POLLUTION BY SHIPS' RELEVANT OPERATION

Articles 20 through 34 set out the rules on how to prevent pollution during operations of ship or ship-related operations and applies not only to those vessels, but also service providers including bunker providers, ship repair, wreck removal, scrapping activities, etc.

Article 33 requires the ship's operator of a ship to sign a cleanup contract with an approved cleanup contractor. This applies to ships carrying hazardous or dangerous bulk liquid cargoes or ships of 10,000 GT or above. Such contracts must be entered into before the operation or entry or departure of the ship.

The detailed requirements for enforcing these articles are still in the draft form as of the date of this issue of CURRENTS. According to the draft version of *Regulations of the People's Republic of China on the Emergency Prevention and Disposal of Marine Pollution from Ships* ("Disposal Regulations"), there are 4 categories of cleanup organizations: Coast I, Coast II, Port I and Port II. As per the Draft Disposal Regulations, contractors shall have:

(1) The capacity of emergency pollution cleanup in line with the Capacity of Emergency Prevention of the Ship Pollution Cleanup Units;
(2) Safety and anti-pollution management system; and
(3) The pollutant cleanup and disposal plan."

CHAPTER FIVE: THE EMERGENCY HANDLING OF THE SHIP POLLUTION ACCIDENT

Articles 35 through 43 provide for the handling of the accident when a marine pollution does occur.

The pollution accidents are classified into 4 categories according to the severity: from escape of oil of less than 100 tons or direct economic loss of less than RMB 50 millions (approximately US$ 7.2 million); to those in excess of 1,000 tons or RMB 200 millions (approximately US$ 29.3 million).

There are requirements on ships and their operators as well as relevant departments and organizations (e.g. including external third party contractors and government agencies). By Article 42, the maritime

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administration may take all the necessary actions including cleanup, removal and towage, etc. in order to reduce the pollution. The polluters are liable for the incurred costs, and in case of ships, the ships should pay for all the costs or provide guarantees before they are allowed to sail.

CHAPTER SIX: THE INVESTIGATION OF THE SHIP POLLUTION ACCIDENTS

Articles 44 through 49 empower the relevant competent authorities to investigate accidents, obtain relevant documentation, or even detain the ship as necessary. A report shall be produced within 20 working days upon completion of the investigation and served on the relevant parties. In Chinese legal practices, the conclusion of the investigation will likely be followed by the Chinese courts in their determination of liabilities.

CHAPTER SEVEN: COMPENSATION FOR SHIP POLLUTION ACCIDENTS

Articles 50 through 57 require the polluter to dispose of the pollution and liable for the damages, except where the pollution is completely caused by a 3rd party including the authority for navigational lights or aids; act of war or natural disaster.

Article 53 requires compulsory insurance for vessels over 1,000 gross tons, the details of which are to be laid down by further detailed regulations.

According to the draft (the March 15, 2010 version) of Regulations of the People's Republic of China on the Management of the Civil Liability Insurance for Ship Oil Pollution ("Draft Liability Insurance Regulations"), ships less than 1,000 gross tons but more than 20 gross tons shall be required to obtain insurance for the pollution liability.

There are also requirements whereby insurers of Chinese flagged vessels are subject to annual approval of the maritime authority.

For the first time ever, Article 56 requires cargo owners receiving persistent oils by sea to contribute to an oil pollution fund ("Domestic Fund"). China has ratified the International Convention on *Civil Liability for Oil Pollution Damage* (CLC), 1976 and the CLC 1992 Protocol. However, China has never ratified the International Oil Pollution Compensation Fund Convention (Fund), 1971 or the Fund 1992 Protocol, which provides for compensation in excess of the CLC limitation.

Unlike the CLC where the liability of a ship will have to be paid by each shipowner or their P&I insurers, the liability covered by the Fund Convention are financed by contributions paid by any entity which receives, in a calendar year, in excess of 150,000 tonnes of crude oil or heavy fuel oil (contributing oil) in ports or terminal installations in a Member State, after carriage by sea. The levy of contributions is based on reports of oil receipts in respect of individual contributors, which are submitted to the Secretariat by Governments of signatory Member States.

Although the IOPC Fund requirements have been in force for more than 20 years, neither the PRC nor United States have ratified the CLC or Fund Conventions (although Hong Kong has ratified the Fund Convention 1992).

On part of the Chinese government, there is fear that the Chinese contribution will be greater than the benefit of the IOPC Funds compensation based upon studies by the Chinese government and the IOPC Funds secretariat supported by the statistics of the transported oils and the number and scale of pollutions. In contrast, Japan has been the largest contributor and beneficiary of the IOPC Funds.

The Chinese government is currently considering a domestically based "China Oil Pollution Fund" that is believed to be able to overcome their concerns regarding balancing contributions and benefits. Furthermore, it is intended to combat against pollutions from small coastal tankers which are not otherwise covered by the Pollution Regulations.

CHAPTER EIGHT: LEGAL LIABILITIES

In spite of the heading, this Chapter (Articles 58 through 74) deals only with the penalty that may be imposed by the maritime administration.

Parties or persons that have reached the Pollution Regulations can be fined from RMB 2,000 (approximately US$ 290) up to RMB 500,000. (approximately US$ 73,000). Those that have concealed or made false report of the pollution accident are subject to the highest fines of between RMB 250,000 (approximately US$ 36,500) to RMB 500,000.

In addition to fines, the maritime administration may also confiscate seafarer's competency certificates for up to 6 months.

CHAPTER NINE: SUPPLEMENTARY PROVISIONS

Articles 75 through 78 specify the relevant authorities responsible for pollutions occurred in fishing ports or are caused by military ships.

THE GROWING ROLE OF THE INDIAN SEAFARER IN INTERNATIONAL SHIPPING

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HISTORY

Seafaring was traditionally not the forte of Indians. In early times, seafaring was limited to a few small sailing vessels and dhows carrying Indian spices and silk and dry onions to the nearby coastal countries and returning with dry fruits and other similar commodities. In addition, given the long coastline, there was of cross border smuggling of gold.

With the opening up of sea lanes by Britain with her colonies, the Indian sailor was a natural choice to be employed and was limited mostly to the catering and hospitality sections of maritime trade. With their flair for serving up a tasty and mouth-watering spicy meal, their docile nature and ever willing attitude to please, it suited everyone fine. Ships' masters were generally pleased with Indian seaman who was well rewarded with continued employment and good wages. He was a hero in the eyes of the locals at home and could flaunt his "foreign" purchases and tell colorful tales of his exploits overseas.

INDIAN SEAFARERS IN THE 1970'S

Internationally, national shipping companies were formed to trade within their own service area interests. Countries such as Japan, China, Korea, India, Norway, and the USSR sometimes went it alone or were part of a group of maritime nations as a "Bloc". In the late 1970's world trade started opening up, and in the aftermath of conflicts in and around the oil rich nations, the oil prices increased dramatically and affected shipping profits. Shipowners from gradually replaced a costly European seafarers with Indian seafarers that were less demanding and more economically viable.

Britain had trade interests worldwide, well covered by a strong naval presence at key locations, and so peaceful world trade was the order of the day. China was a closed nation and building up its maritime strengths internally, fuelling itself into a growing power. On the other hand, there was the Soviet merchant fleet operating within with their area of influence. Smaller colonizing countries, such as France and Germany, had their own areas of colonial Influence and trade.

Other western countries, with a broadly open-market system of trading, soon were also able to grow their shipping fleet exponentially. In these countries, workers were finding well paying and improving lifestyle jobs, making seafaring no longer attractive, and their numbers began shrink dramatically. Fast expanding fleets suddenly faced a shortfall of ship crew, and shipowners had to look towards Asian countries to fill the void. This was found in captive colonies and India. The country had a benefit of a large labor supply of manpower to fill the void at that time. Indian seafarers were already accepted in the commonwealth, had a history of working on board British merchant navy vessels, and were well familiar and fluent with the English language.

Culturally having a pleasant nature and always eager to learn and willing to rise to the challenge, Indian seafarers started slowly climbing the ladder in every field there was a shortage. Indian seafarers benefited from good wages in high value foreign currencies that were always at a premium at home. Access to foreign goods, fancy shopping, and greater purchasing power was enough alluring to keep the manpower supply chain moving. During this time, the Philippines also became a cost effective source of manpower.

A generally accepted idea in the 1970's was to banish the naughty, mischievous laggard in studies and a veritable black sheep of the family to sea in order to 'straighten him up"! Those with an average schooling and ready for the challenge responded to the call of the sea.

INDIAN SEAFARERS TODAY

So, what's the difference now? A rapidly changing technological world of gadgets, higher level requirements for math and physics, smart equipment, has increased the need for technically competent seafarers. The Indian seafarer today is selected from amongst the tops of their class, tech-savvy and economically street smart, knowledgeable of computers and able to operate and troubleshoot all the technical 'gizmos' on board ship. He is being trained to have a professional approach to efficiently carry out the task with minimum effort.

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Maritime training institutions, egged on by a stern government authority, have started upgrading the training modules, installing the latest simulators and in a concerted effort, monitoring the quality of the seafarer entering the international maritime field. Major shipping companies have set up operations in India and fitted their in-house training systems to comply with highest order of industry requirements. They are not satisfied with the "minimum" standards of *Standards of Training Certification and Watchkeeping* (STCW) Convention (which itself is in a revision mode)!

Then, what is the quality so appealing about the Indian seafarer that almost every ship-owner sees in him? Is it still his docile attitude? Or is his greater understanding of wading through a problem using every trick known to somehow get through with least expense? Or is it the continued cheap cost of crewing by a skilled and semi-skilled labor force? Almost all owners today have Indian superintendents in high positions who flog themselves, as much as those they control, to perform to ever rising standards.

The Indian is seen as Innovative, willing to surmount or go around obstacles with verve, and a high commitment to the industry. He is now trained with the cutting edge technology and to use the tools through workshops, seminars, brain-storming sessions and any other means to better his abilities.

Continuously monitoring his invested assets, shipowners explore any and all avenues to maximize his earnings and reduce his costs. The cost of crewing is one of the largest expenditures and he will change the composition of his crews across nationalities and cultures to suit the vessel type and the trade pattern. The earlier explanation by some, "I will some how manage" is gone and replaced by a behavioral climate to ensure safety, security and environmental protection management while simultaneously maximizing profits and minimize costs.

The seafarer is an investment in a long term perspective, and has to be encouraged to excel to greater heights. It is important to note that while maritime institutes in India are charging almost one fourth the fees as those in the United Kingdom and elsewhere; their faculty quality and teaching standards are striving to be the best in their fields. The students are tutored rigorously and with a strict examination regime, the turnout quality is quite high.

TODAY'S CHALLENGES

Sometimes to stem the high attrition rate due to lure of better salaries and perks, a planned systematic management system incorporating good training principles and loyalty is discarded for immediate short term gains. The young seafarer is suddenly getting higher than usual wages, quick money, and shorter contracts and with a laissez- faire attitude, and in many cases retiring at a young age to other pursuits. The Indian Maritime University now provides a broad umbrella to cover all aspects of maritime training and also introducing several new courses till now not within the purview of fractured education systems (e.g. port logistics and management, etc.). A holistic view is being taken to nurture this national asset which will bloom as the information technology industry did in the recent past.

We are seeing the lower support-level crew mobilization numbers filled with generally unskilled labor and a stagnant, if not depleting, skilled work force of officers and crew. I have been attached to several institutes as lecturer for modular and other courses and the general impression is that "minimum" certification is done only because it is enforceable through the STCW Convention! A lack of rigor, both in the teacher and taught is sometimes clearly visible, the end result is a plethora of certificates in the hands of so-called "skilled" persons, leaving the few who really do the hands-on work to take on the burden of chores of others in order to complete the job at hand. This leads to dissatisfaction on board, and an unhealthy work environment.

Amongst some of the drawbacks are that the Indian seafarer is seen to be spending most of his holiday time ashore in classrooms or in the hallowed portals of government authority to revalidate or renew his license and certificates. He wonders why there are still some courses to be undergone which are already covered during his training syllabus. Once taught in the course of his licensing, there in no need for the agony of sitting through mundane and boring repetitive lectures.

There are countless sites on the internet and enough information available to serve the new knowledge requirements of the industry. On the contrary, there should be more simulators for every line of the industry where a 'hands on' upgrading can be done. Most training institutions are now already "up to date" with value added materials and training to achieve the ever increasing higher goals and requirements desired by the industry. The "minimum" is far too low in today's day and age. A thorough system of verification and authentication is in place to ensure the weeding out of those not qualified to meet minimum standards.

Having a sweet tooth and fondness for rich oily food, some medical infirmities creep in with age and life style of the seafarer in respect to his food and dietary habits. More cases of early diabetes, ulcers, and associated obesity and stress problems are seen and it is necessary for greater medical counseling and healthcare is needed. Most P& I Clubs are strict about entry health standards (such as the American Club's PEME program.

Young seafarer entrants today are generally not from traditional seafaring communities. They come from such locations as Bihar, Uttar Pradesh and Jharkhand have a different "take" on life at sea life given their lack of maritime culture. With fewer seafarers on board with reduced manning, there is no one on board with the extra time available to upgrade his practical training. Inspections, surveys, vetting and other activities that are common in this age of shipping keeps them from training their shipmates.

In my daily interactions with seafarers, I have also found that a common complaint is they do not receive their wages on time at home. The problem can be traced to the Indian banking system. Some banks in cities and larger urban areas are swift. On the other hand, in the villages and small towns the funds take a really long time to reach their beneficiary loved ones. This leads to stressful situations for seafarers and their families all around.

SUMMARY

All in all, it is observed today that not only is "Safety" is a buzzword, but "Cleaner Environment and Seas" with "Improved Healthcare" conditions are given added importance to Indian seafarers. Foreign shipowners are no longer reluctant to give their newer generation vessels to be crewed and technically managed by Indians. Indian crewing companies are today offering "Total Ship Solutions" at highly competitive rates. And I remain confident that the Indian seafarer will ensure that highest standards are maintained for shipowners around the world.

THE VIEW FROM INDIA:

JAMES MACKINTOSH & CO. PROVIDING SERVICES TO THE INDUSTRY FOR OVER 150 YEARS

James Mackintosh & Company is a name quite familiar in shipping circles all over India. The recorded history of James Mackintosh goes back over 15 decades when an English Man, James Mackintosh started a proprietorship business at Mumbai (then Bombay) in 1854, which gradually transformed in to a partnership and then a Company. Mumbai, the present commercial capital of India was a cluster of Islands owned by the Portuguese until 1661 and was eventually acquired by the British East India company way back in 1668.

The English turned Bombay in to an important port in Western India and James Mackintosh thus was one of the very early business houses in the shipping Industry. James Mackintosh is today a Parsi owned company involved in a cross section of shipping activity including Agency, Forwarding, Ship Broking and P&I representation.

P&I correspondence has been one of the mainstays of the James Mackintosh business in the past continues to be so in the present.

As the commercial capital of India, Mumbai (so re-named by the city fathers in 1998) is a city that never sleeps, and James Mackintosh is part of this city culture. Many are the phone calls received from anxious owners and concerned claims handlers from the Far East quite early in the day, as well as calls and emails from claims handlers in Europe and of late even from the United States.

Homi Commissariat, the Chairman of the James Mackintosh Group, inherited the mantle from his father FH Commissariat several decades ago; Farokh Commissariat is the company's MD and George Jacob is an Executive Director on the company's board.

The James Mackintosh core P&I team at Mumbai – Sunil Dsouza. Joe Varghese, George Jacob, Farokh commissariat and Homi Commissariat at Mumbai, supplemented by Mr. D.K. Murali Rao, Mr. Sanjib Chakraborty, Mr. Shibin V.P., Mr. Robert William, Mr. Keshav Shetye at other locations in the country – with a collective claims handling experience of several decades, ensures that Clubs and Members are provided with effective and timely service regardless of the hour of the day and regardless of the location in the country.
In addition to Mumbai the company has offices at the ports of Kandla, Mundra, NhavaSheva, Goa, Mangalore, Kochi, Tuticorin, Chennai, Vizag, Kakinada, Paradip, Kolkotta, and Haldia.

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Although P&I is handled out of Chennai, Kochi and Kolkotta the operations offices at the other ports mentioned above provide an excellent support for vessels in distress and needing urgent intervention. A recent case which has benefited the owners and the club relates to a ship at Paradip discharging coal when the Mumbai office received a phone call from the Greek member in respect of smoke emanating from one of the holds whilst at berth.

The Kolkotta office which was the closest claims handling office worked with the Paradip operations office to take immediate steps including appointing surveyors. Within minutes of first notification urgent steps like contacting the port authorities, ensuring availability of fire tenders, appointing surveyors and reporting to the club were initiated and in a few hours what could have been a potentially serious situation was averted.

A typical day at Mumbai may witness up to half a dozen new matters extending through the west coast of India covering Mumbai, Jawaharlal Nehru Port and the Gujarat coastline.

At Goa, Mangalore and the east coast ports a typical day would mean at least one matter pertaining to handling of iron ore from these ports. The rather large quantities of export of iron ore has foisted on the P&I offices the necessity to become well versed with the intricacies of iron ore loading. Learning to assess surveyors initial reports and understanding concepts like moisture point (MP) and transportable moisture limit (TML) have become the norm at these offices. Explaining to some owners the need for proper survey, which may seem expensive is a job by itself.

A variety of matters are handled from a typical steel loading survey to emotionally charged crew matters, matters relating to recovery of charter hire or simply owners requiring information to help them in a difficult local situation, the list of services desired and provided is endless. One distinct trend is the clear increase in crew matters, undoubtedly arising out of the growing employment of India seafarers over the past decade or so.

The advent of the monsoons brings with it the possibility of grounding's along the long Indian coast. The last few years have seen a few grounding's where our offices have been involved in assisting the clubs to handle issues ranging from appointing experts, liaison with the government authorities, ship breakers, etc.

“In addition to Mumbai the company has offices at the ports of Kandla, Mundra, NhavaSheva, Goa, Mangalore, Kochi, Tuticorin, Chennai, Vizag, Kakinada, Paradip, Kolkotta, and Haldia.”

With meeting agents, surveyors, officials and the occasional Club representative, the day is a bee-hive of activities. Of late, with the authorities becoming more environmentally conscious, it is part of the day's business to receive calls from the port authorities enquiring on whether a ship entering a port is adequately covered by insurance. Traditional cargo claims handling is supplemented by more proactive involvement, including identifying buyers for cargo which may have been rejected by receivers and potential arrest of ships that may lead to huge delays and ever-increasing legal costs.

The 24-hours job and hurried lunches notwithstanding, the members of the P&I team love their routine and would not part for another line of work for anything! In a group with over 300 employees involved in a cross section of shipping activity, the P&I business continues to hold centre stage and remains at the core of the group's activities today. The P&I division is trusted by several ship owner's across the globe and some member's have converted this trust in to established relationships. This has prompted the company to start its first overseas office at Dubai with primary focus on P&I and allied claims services. James Mackintosh is today an Experienced, Efficient and Progressive partner with a pan India spread geared to meeting the needs of the American Club and their membership.

FD&D CORNER

by: Parker Harrison, Esq.
Vice President and FD&D Manager
Shipowners Claims Bureau, Inc.

LOOK BEFORE YOU LEAP: EARLY REDELIVERY DOES NOT GUARANTEE DAMAGES

In these turbulent economic times, the Managers are frequently asked to assist Owners in claims for early redelivery of vessels under charter. When these claims arise, aside from showing that the redelivery was indeed a breach of the charter party, Owners must also be able to quantify and document their losses. In the recent case of *Dalwood Marine Co. v. Nordana Line A/S* (The "Elbrus"), (Com Ct) (Teare J), Charterers redelivered the vessel 39 days early and in West Africa. Owners had already arranged a follow-on fixture at a higher rate and with a laycan based on redelivery at the end of the original time charter period. Also, the follow-on fixture required that the vessel be drydocked before delivery. Owners had arranged for the drydocking to take place in Portugal at the conclusion of the original time charter period.

When the Charterers redelivered the vessel early, the Owners were unable to find employment from West Africa back to Portugal for the drydocking. Instead, they ordered the vessel to proceed to the drydock in ballast and were then able to deliver it for the next employment seven days earlier than expected.

The Charterers commenced arbitration to recover US 233,755 in hire that they claimed was overpaid, and the Owners counterclaimed seeking damages for the early redelivery.

The Charterers argued that instead of suffering any loss, the Owners had in fact profited from the early redelivery: they were able to drydock the vessel earlier than planned and deliver it into the service of the next charterers at a higher rate than they would have if the vessel had been redelivered on time under the original charter. The Owners countered that in cases of early redelivery, where there is no available market for the vessel, Owners' loss is measured by the hire they would have earned during the remainder of the original charter period, less any earnings actually received during that same period.

The arbitrators agreed with Charterers' argument and awarded the claim for overpaid hire. On appeal, the Commercial Court concluded that the arbitrators had not erred. While the Court agreed that the usual measure of Owners' losses for early redelivery are as Owners had asserted, the fact that Owners in this case had mitigated their damages so successfully, with the result that charterers' breach had in fact worked to Owners' benefit, was something that the arbitrators properly took into consideration. In this case, in fact, the vessel likely would not have met its cancelling date under the follow-on fixture if Charterers had redelivered it on time and the vessel had proceeded to drydock as scheduled. There was no guarantee, moreover, that the next Charterers would have agreed to extend the cancelling date, as the market had fallen by that time. In the end, the Charterers' early redelivery had worked to Owners' benefit, so the Court upheld the award.

VESSEL NOMINATION CLAUSE NOT A BASIS FOR TERMINATION: HASTA LA VISTA, BABY

In a recent New York arbitration, the tribunal issued its final award in favor of Disponent Owners and against Charterers arising from the cancellation of an AMWELSH 79 charter party *Strategic Bulk Carriers Inc. v. Traxys North America LLC,* SMA 4064 (January 15, 2010). At issue was whether a charter party contract had been concluded between the parties and, if so, whether the nomination clause in that charter party permitted the Charterer to cancel the fixture.

The charter party called for the carriage of met coke in bulk from Sparrows Point, Maryland to Iskenderun, Turkey. The nomination clause provided:

"Owners to nominate performing vessel or similar sub latest 14 days prior first layday at the same time narrowing the laycan to a seven days spread. Seven days prior first layday, Owners to nominate the actual performing vessel together with full itinerary, ETA, description, cargo intake and transit time to the discharge port at the same time narrow the laydays to five days spread. Charterer's, Receiver's, and Shipper's approval of the vessel nomination to be declared latest within 24 hours after vessel nomination has been received by Charterer."

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The charter party also included a specific cancellation provision.

Although the Disponent Owners timely nominated a vessel conforming to the charter party requirements, Charterers cancelled the fixture within the 24-hour period stipulated by the nomination clause on the basis that the cargo supplier had cancelled its contract with Charterers. Consequently, the vessel was never "approved" by the Charterers, Receivers, and Shippers.

Disponent Owners commenced arbitration against Charterers in New York and sought damages for lost profits resulting from Charterers' wrongful cancellation of the charter party. Charterers defended the claim, arguing that no charter party was ever formed because the vessel nomination had never been "approved" by Charterers, Receivers, and Shippers as required in the nomination clause; therefore, Charterers were free to cancel the charter party with impunity. Significantly, Charterers never suggested that the nominated vessel was unsuitable for the intended carriage.

The panel rejected Charterers' arguments, finding that a charter party had been concluded. More specifically, it found that the nomination clause did not entitle Charterers to cancel the fixture. Instead, that clause merely sets out an approval process whereby the interested parties can ensure that the nominated vessel conforms to the terms of the contract. The panel seems to have been particularly persuaded by the fact that Charterers' cancellation was motivated entirely by their own inability to comply with their obligation to provide the agreed cargo.

In the end, the panel awarded Disponent Owners their lost earnings based on the revenue they would have earned had the voyage been performed, less the estimated expenses that would have been incurred, plus interest.

TODAY IS YOUR BERTH-DAY: DEMURRAGE AND SAFE BERTH CLAUSES

Demurrage disputes put the "D" in FD&D and typically involve questions such as whether a Notice of Readiness, or NOR, was validly given. In the recent case of *Novologistics SARL v. Five Ocean Corporation* (The "Merida"), QBD (Com. Ct.) (Gross J), however, whether the Owners were entitled to roughly US$ 500,000 in demurrage depended on the more fundamental issue of whether the charter party at issue was a port charter party or a berth charter party.

The recap provided for loading at "one good and safe chrts' berth terminal 4 stevedores Xingang." A subsequent clause provided further details as follows:

DETAILS TO THE C/P CLAUSE 2

(1) The vessel to load at one good and safe port/one good and safe charterers' berths Xingang...

(2) Shifting from anchorage/warping along the berth at port of load and at ports of discharge to be for owners' account, while all time used to count as lay time.

The vessel's berthing was delayed by 20 days at Xingang. If this was a port charter party as Owners contended, laytime would begin to count on arrival at the loadport on March 10th when Owners tendered NOR, and thus Owners were entitled to a sizeable demurrage payment. If instead this was a berth charter party, laytime would only begin to run when the vessel was all fast at the berth and ready to load on March 30th.

In a documents-only arbitration, the Tribunal found this to be a port charter on the basis that the reference in clause 2[2] to time shifting from anchorage to berth qualified the earlier reference to the Charterers' berth. In the Tribunal's view, this clause would have been unnecessary if indeed this was a berth charter party.

On appeal, Charterers argued that the opening language alone, which expressly called for Charterers to nominate the berth at the load port, made it clear that this was a berth charter. Clause 2[1] did not conflict with this interpretation and simply added a safe port warranty, but had nothing to do with the contractual destination

and counting of laytime. In other words, the opening term expressed the contractual destination, which was relevant to the allocation of the risk of delay; clause 2[1] focused on the separate matter of the safety of the ports and berths and imposed additional obligations on Charterers. With respect to clause 2[2], Charterers argued that a provision addressing shifting time was only necessary in a berth charter party because in a port charter party, time would count from arrival in any event.

The Court agreed and found that the charter was indeed a berth charter as Charterers alleged. The arbitration award was thus reversed and Owners' demurrage claim failed.

BIMCO'S NEWEST PIRACY CLAUSES: PARLAY!

As noted in the article *Keeping Watch: Some Recent Rulings Under English Law Regarding Piracy* by Dimitri Vassos on page 9 of this edition of CURRENTS, piracy in the Gulf of Aden has spawned a number of recent legal battles between Owners and Charterers regarding charter party interpretation, including Charterers' obligation to pay hire after a vessel is highjacked. Fortunately, last November, after several months of intense discussion and consultation, BIMCO published its revised Piracy Clause for Time Charter Parties 2009, which was originally published only eight months previously. Two other clauses – one addressing single voyage charter parties

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and the other addressing consecutive voyage charter parties – were also released.

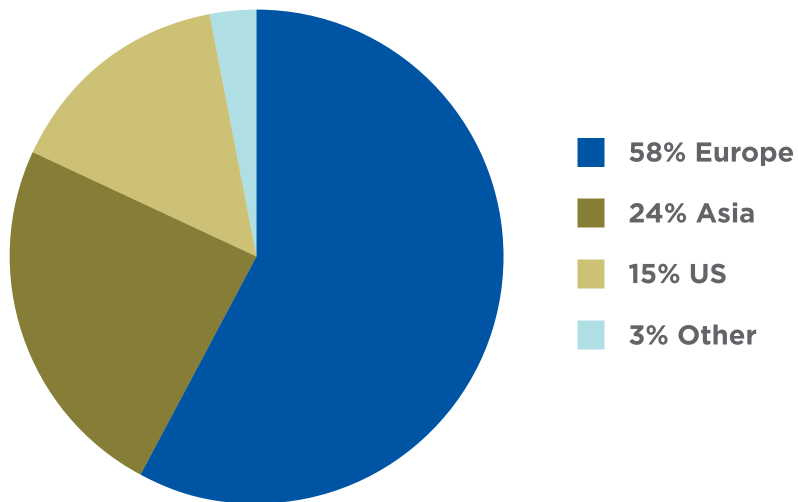
BIMCO intended the version of the time charter clause released in March 2009 to address the issue of "obligations, costs and responsibilities in respect of trading to, or proceeding through areas where there is risk of piracy." But that version of the clause was patently Owner-oriented insofar as it imposed no limit on Charterers' obligation to continue paying hire in the event that the ship is seized. Charterers' complaints about this heavy pro-owner slant, combined with reports from some Owners who claimed that the clause made it more difficult to fix their vessels, prompted the substantial overhaul.

In its new incarnation, the clause limits Charterers' liability for payment of hire to 90 days, after which they are no longer responsible, even if the vessel remains under seizure. The revised clause also broadens the definition of piracy so that the clause applies in regions beyond the Gulf of Aden. Hopefully the use of these new standard clauses will help clarify the parties' respective rights and obligations in the event of a highjacking and thus reduce the number of legal disputes that arise in such trying circumstances.

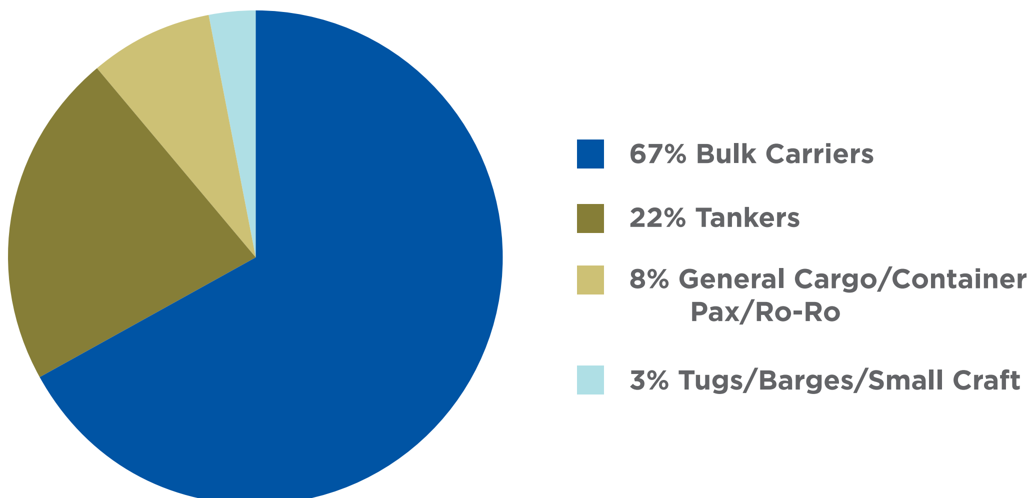
The text of the new clauses, in addition to commentary and explanatory notes, may be found at www.bimco.org.

ALL CLASS GT BREAKDOWN

GT BREAKDOWN BY REGION



GT BREAKDOWN BY VESSEL GROUP



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