CURRENTS

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Jacob's Ladder Memorial *(on the left and page 7)*

The American Merchant Marine Veterans' Memorial in San Pedro, CA was the first national memorial to merchant seamen in the United States having been commissioned by a group of local seamen to honor merchant marine veterans from all wars.

According to official statistics, more than 6,795 civilian merchant seamen lost their lives in World War II with a casualty rate higher than any service). In summary, 600 were taken prisoner; and more than 650 of their ships were sunk. Unofficial statistics cite 8,651 merchant mariners killed at sea, 11,000 wounded, 1,100 died from their wounds ashore, 604 taken prisoner and 60 died in prison camps.

The bronze statue depicts two merchant seamen climbing a Jacob's ladder after making a rescue at sea. The designer of the statue was the late Wilmington, CA sculptor, Jasper D'Ambrosi. His creation of the original design was finished and accepted in early 1986.

The bronze plaque on the memorial states: "The United States Merchant Marine has faithfully served our country in times of war and peace hauling cargo to every corner of the world. This Memorial is dedicated to those brave men and women of all races, creeds and colors who answered that call to serve."

MANAGEMENT CHANGES

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

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INTRODUCTION

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It has been a long, hot summer! Not just literally so here in the US North East (it was the hottest summer on record in southern Connecticut, where your correspondent lives), but also figuratively speaking, as the affairs of the International Group in general, and those of the American Club in particular, have generated much energy in pursuit of the shipowner interests they represent.

Members will be aware through press reports, various Club circulars and commentary from the International Group itself, of the recent investigation by the European Commission into certain aspects of the Group's operations.

Discussions between Group representatives and the case team at DGComp – the relevant directorate of the European Commission – are being progressed. Further news will be communicated to Members as circumstances demand over the months ahead. In the meantime, the Group's Secretariat has placed a briefing note on its website at *www.igpandi.org*. This sets out the current position and the issues relevant thereto.

Also on the regulatory front, Members will have seen the Club's Circular on CISADA and related European regulations involving sanctions on Iran. The Club continues to monitor events in this important area. Members are urged to be vigilant in making arrangements with counterparties that may involve Iranian trade and, generally, to make themselves aware of the broadly-drafted regulations which pertain to these matters both in the United States and in Europe.

As to the American Club's business specifically, and particularly as the renewal season beckons once again, there are grounds for cautious optimism as the Club moves into the final stages of the current policy year.

This optimism is based on the encouraging development of the Club's affairs over recent months. There has been steady growth in tonnage over the year, supported by commensurately strong premium income. Most significantly, the free reserves of the Club have grown by some 21% over the first six months of the policy year, with a figure of $58.7 million being recorded at June 30, 2010 by contrast to 2009's year-end $48.5 million.

The Club's pure underwriting results remain favorable – particularly by comparison with its peers elsewhere in the International Group. Its results in this respect place it among the Group's very best performers, while its combined ratio continues to be better than the market average.

So far as the development of the 2010 policy year itself is concerned, it is gratifying to note that a declining frequency of claims – a trend which has featured conspicuously over recent years – continues to be linked to a reduction in the average size of net claims. This has created circumstances where, at least at the end of the first seven months, claims development for the current year is fully 37% better than the previously best year at the same stage since 2004.

The steady strengthening of the Club's financial performance is also indicated by improving loss ratios in recent years where, since 2004, the gross loss ratio of the Club's business in general has reduced from about 83% to 69%. This continues to augur well for the future.

On the investment front, despite fragile global capital markets and a very soft patch which was encountered during the late summer, the Club's results – as at end-September – remain above benchmark, recording an overall return, year-to-date, of nearly 5%.

All in all, and although predictions inevitably give a hostage to fortune, there are grounds for a cautious view that the progress made by the American Club financially and otherwise over the past eighteen months is set to continue over the period ahead.

Over the forthcoming weeks, the focus of both management and board will center on forming budgets for 2011 with a view to offering renewal terms to Members for the next policy year.

In that context, Members will be hearing from us in due course. In the meantime, it only remains for us here to wish all our Members and many other friends at home and overseas, the very best of good fortune in their endeavors, and fair seas and following winds as we all anticipate, measure, confront and seek to overcome the challenges of the future!

UNITED STATES CONGRESS RESPONDS TO THE GULF OIL SPILL WITH A WAVE OF LEGISLATIVE PROPOSALS

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Oil is no longer flowing out of the DEEPWATER HORIZON well in the Gulf of Mexico, but the consequences of the spill for the maritime industry continue to move through the U.S. Congress. Whether time and the November elections will act as the dispersant for the many legislative proposals springing from the worst environmental disaster in U.S. history remains to be seen.

If all these proposals are enacted, the maritime industry would be subject to a major expansion in liabilities faced by parties responsible for oil spills, while at the same time one of the major protections for responsible parties facing major natural resource damages claims would be taken away.

EXPANDING LIABILITY FOR AN OIL SPILL

Offshore Facilities

Liability limits were expected to be a casualty of the spill, especially for offshore facilities. However, the initial calls for unlimited liability for offshore facilities, as compared to the current limit of $75 million for damages and unlimited liability for cleanup costs, have been muted by Members of Congress worried about the future of the oil and gas industry in the United States. More recent proposals would establish a mutual insurance scheme much like the one applicable to nuclear facilities in the United States, with the individual facility taking responsibility for the limit available from private sources, the second layer of up to $5 billion would be the responsibility of lessees as a group, and a third layer of up to $20 billion among all participants in the industry.

Vessels

Several initial proposals to increase liability limits for vessels have been modified to require the United States Coast Guard (USCG) to undertake a rulemaking to review those limits and to determine if more specific categories of vessels should be used to determine liability limits, such as separating tank barges from tankers so that the limit on tank barges can be increased as has been proposed by the Oil Spill Liability Trust Fund.

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Types of Damages

In addition to possibly increasing limits on liability, pending congressional proposals would expand the scope of damages for which a company responsible for a spill would be liable. Damages to human health, including mental health damages, would be added as a new category of damages. Cleanup costs, for which there is no limit on liability, would be expanded to include the costs of federal enforcement activities relating to removal costs. A company could therefore have to pay for the costs of the federal government bringing an enforcement action against it in a dispute over removal costs.

Applicable Parties

One of the (even more) extreme pending proposals would extend liability for spills to an entity (not individuals) that owns, directly or indirectly, 25% or more of the entity involved in the spill, if the assets of the responsible party are insufficient to pay damages. Such an expansion of liability would defeat long-standing protection from liability contained within corporate and other business structures.

Even the Chief Executive Officer of a company operating in the offshore oil industry could be directly affected by a proposal pending in the House of Representatives. The CEO would be required to certify that his or her company "is in compliance with all environmental and natural resource conservation laws." This certification is far more stringent, and therefore bears a far greater possibility of personal liability, than is required for other industries.

Personal Injuries

Liability for personal injuries has also come under substantial pressure as a result of the loss of eleven crew members from the DEEPWATER HORIZON. Several proposals would allow survivors causes of action under law as well as admiralty, resulting in the possibility of jury trials that have not previously been available to survivors.

In addition, loss of care, comfort, and companionship, as well as pain and suffering, would be added to recoveries under the Death on the High Seas Act. Under a Senate proposal, punitive damages could be sought in any maritime tort, and could be awarded without regard to compensatory damages unless otherwise provided in law. Other legislative proposals would add loss of care, comfort, and companionship to recoveries possible under the Jones Act and the Limitation of Liability Act would either be restricted or eliminated. Sympathy for the survivors of victims of the DEEPWATER HORIZON explosion is likely to sustain momentum on these issues whenever Congress turns again to legislation resulting from the spill.

RESTRICTING CHALLENGES TO NATURAL RESOURCE DAMAGE CLAIMS

Natural resource damage claims are often the most contentious and expensive part of the costs of a major spill. They are also often the most difficult to quantify. What is the value of an injured resource such as fish or birds? This has been a great source of debate and concern since the Oil Pollution Act of 1990 was first enacted, and many theories of how to quantify these losses have been proposed.

While a detailed natural resource damage assessment process exists under current law, if responsible parties who must ultimately pay these damages have substantive objections to the assessment, they retain the ability to present their own experts in a subsequent judicial proceeding for damages. Under current law, the government's estimate of the damages is entitled at best only to a "rebuttable presumption" that it is accurate. The responsible party can offer its own evidence that the estimate is incorrect.

Under a bill pending in the House of Representatives, the trustee's assessment could only be judged on the basis of whether it is "arbitrary and capricious" and the only evidence that could be reviewed by the judge in making that decision is the evidence developed by the trustee during the natural resource damage assessment process, not any alternative evidence presented by the responsible party.

REACHING EVEN WIDER

Clearly, spill response and expectations relating to spill response will be changed as a result of the DEEPWATER HORIZON spill. Given the more than twenty years since the EXXON VALDEZ spill and the much improved record of preventing and responding to spills as a result of the enactment of OPA, this spill brought the nation's attention once again to the potential impact of oil spills. Some believe that complacency was beginning to erode the vigilance of regulators and the industry. Whether or not this is true, the effect will be felt as the industry moves forward to the post-DEEPWATER HORIZON world.

Even if comprehensive legislation is not finally enacted in response to the spill, there will be renewed focus on spill response plans and testing of those plans and their referenced equipment. Legislation pending in the House of Representatives would require stricter standards for and review of oil spill response plans, including vetting by an impartial expert, as well as the inclusion of redundancies in response actions. The Senate would require oil spill response organizations to be licensed by the USCG.

Some of the other proposals would expand USCG inspections, create a citizen advisory group to monitor vessel and facility operations in the Gulf of Mexico, increase amounts required for certificates of financial responsibility for offshore facilities, and require more compliance with environmental laws. Whether any or all of these changes are mandated by legislation or driven by enhanced sensitivity to the issues as a result of the spill, the maritime industry is certain to be subject to even greater scrutiny and to be subject to even greater expectations as a result of the DEEPWATER HORIZON spill.

ARREST OF VESSELS IN INDIA

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With the US Courts recently holding that electronic fund transfers (EFTs) are no longer attachable property there has been a spurt in enquiries from foreign owners and charterers to secure their claims whether referred to arbitration or otherwise by way of vessel arrest in India and hence this article may prove of some use to them.

The details associated with arrests of vessels in India are very extensive and cannot be explained in detail within the limited space available. However, the following is a summary of the key issues which should be of interest to the Members of the American Club.

After the decision of the Supreme Court of India in the case of *M.V. Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa* (AIR 1993 SC 1014) the High Court of the State in which the vessel is present (located), has jurisdiction to order arrest of the vessel. Prior to this judgement, the courts exercising Admiralty Jurisdiction statutorily in India were the three High Courts at Calcutta, Madras and Bombay but several ago the Madras High Court has held that it does not have jurisdiction to order arrest of a vessel which is outside the state of Tamil Nadu. However, the Bombay and Calcutta High Courts continue to exercise territorial jurisdiction and arrest vessels located at any port in India.

The Supreme Court of India has, as in the case of *Liverpool & London S.P. & I Asson. Ltd. v. M.V. Sea Success I & Anr.* (2004, 9 SCC 512), upheld the provisions of the International Convention On Arrest of Ships, 1999 to be applicable to India. A vessel can hence be arrested for maritime claims defined in Article 1 of the Arrest Convention 1999.

An arrest is permissible of any ship in respect of which a maritime claim is asserted, if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is the owner of the ship when the arrest is affected.

A ship may also be arrested for the purpose of obtaining security by virtue of an arbitration clause in any relevant contract even though the arbitration is being held outside India. It is preferable for the arbitration to have commenced by the Plaintiff having appointed its arbitrator at the time the application for arrest is preferred.

Arrest of a sister ship is also permissible. In an unreported judgment *M.V. Mariner IV v. Videsh Sanchar Nigam Limited* (1998 (5) BomCR 312), an appeal bench of the Bombay High Court observed that the High Court does have jurisdiction to arrest a "sister ship" for securing any maritime claim. Other Indian Courts are following this judgement.

The Admiralty Rules of the High Courts having Admiralty Jurisdiction require that a suit shall be instituted by a plaint drawn up, subscribed and verified according to the provisions of the Civil Procedure Code 1908. In the case of a foreign plaintiff, it may be necessary for it to grant a power of attorney to a local individual(s) authorising them to institute the suit.

Indian law does not provide for security for costs and damages as a condition for the arrest. However, while applying for the arrest an undertaking is required to be given by the Plaintiff in writing to pay such sum by way of damages as the court may award as compensation in the event of a party affected sustaining prejudice by the arrest. Of late, the Gujarat High Court has been ordering the deposit of counter security in the region of INR 500,000 (US$ 11,000) which is to be deposited within one week of passing the *ex-parte* arrest Order.

The application for arrest is normally moved and allowed *ex parte*. If an owner envisages the threat of an arrest to his vessel, he can enter in the Registry of the relevant court a caveat against arrest. The Rules of the Bombay High Court provide that within 3 days of the plaint filing, the party on whose behalf the caveat against arrest has been entered shall give security for the amount stated in the caveat.

Likewise, when a vessel has been arrested any person who desires to prevent the vessel's release can file, in the registry of the relevant court, a caveat against release.

The Limitation Act 1963 applies to all claims within the Admiralty jurisdiction of the High Courts. The Act provides a three year limitation period for actions for damage, wages, necessaries, salvage, and towage.

Security for the claim in the suit is furnished by means of a cash deposit into the registry or a bank guarantee for the amount stated in the warrant of arrest. The bank

guarantee is required to be from a nationalised bank or a foreign bank carrying on business in India and having an office at Calcutta, Madras or Bombay wherever the warrant of arrest is issued. The wordings of the bank guarantee are decided upon by the concerned officer of the relevant Court.

The bank guarantee, unless discharged, has to continue to remain in force until the suit is finally disposed of and for a period of six months thereafter. An initial cash deposit provided as security can be substituted by a bank guarantee. In the case of a cash deposit it is usual for the court, at the instance of the parties, to invest the amount on an interest-bearing term deposit, pending the disposal of the suit.

Only if the plaintiff agrees to accept a LoU of a P&I club, will it be accepted by the Court. If the suit is settled and payment is made, 1% of the settlement amount is to be paid as sheriff's poundage if the Warrant of Arrest is served upon the vessel by the Sheriff's office.

If the vessel owner wishes to challenge the arrest, he can do so by taking out a 'Notice of Motion' while the vessel is still under arrest (but this entails delays) or after posting security on a without prejudice basis. The Notice of Motion is supported by an affidavit, praying for an order that the warrant of arrest issued by the court be vacated or set aside and if security is furnished asking for the amount of the bail or guarantee furnished on behalf of the defendant be released.

If the ship under arrest before judgment has not been released by the defendant by putting in sufficient bail, and if the property is found deteriorating, the court has the power to order the sale of the property after notice has been duly issued to the parties.

With regards to the priority of claims, the Indian courts will decide questions of priority on the same principles as the Admiralty Court in England and a contractual claimant (i.e. with a low priority) may not benefit from suing or arresting the ship in India if there are prior claimants who will take away the whole of the sale proceeds of the ship. A statutory claimant enjoys the first right in the sale proceeds.

Under the Admiralty Rules of the Bombay High Court, the sale of ship must be carried out by the sheriff whether *pendente lite* or after adjudication on the plaintiff's suit. In order to ensure that the vessel fetches a fair price, invariably the court orders that the ship be appraised at its real value by a ship's valuer. The vessel is then auctioned at a price at least the appraised value unless the court orders it to be sold for a lesser price.

The sale is normally done via by public auction after publication of the notice of sale in both an English and local language newspaper as the court may direct.

The terms and conditions of the sale usually ensure that the successful bidder is required to pay a percentage, usually 15 per cent, of the purchase price forthwith and the balance of the price within a fixed period after the date of sale (usually within 15 days. The payment is to be made by means of bankers' draft or a certified cheque. Under the Rules, the sale is subject to sanction of the court and the sale is free and clear of all maritime or other liens and encumbrances.

CRIMINAL LIABILITY IN THE MARITIME INDUSTRY: THE COVER-UP IS WORSE THAN THE CRIME

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There can be no debating the fact that criminal liability, or at least the potential for criminal liability, has become a part of the reality which owners/operators must contend with in the present day maritime industry. This fact has been illustrated by any number of maritime casualty cases dating back to the *EXXON VALDEZ* up to the more recent *COSCO BUSAN* case.

The potential ramifications for owners/operators, not to mention crewmembers, arising from criminal liability under U.S. law have been widely publicized as a result of the steady drumbeat of media coverage relating to the myriad "Magic Pipe" prosecutions brought by the U.S. Department of Justice ("DOJ") in virtually every coastal state from California to Maine.

As such, it is essential that both shoreside management and vessel officers/crews have a clear understanding as to their potential exposure under U.S. criminal law, and equally important, what steps to take in the event they are confronted with a criminal investigation so as to not further compound the situation for themselves and the company.

At the risk of stating the obvious, the most effective way to avoid criminal liability is to avoid committing the crime in the first instance. Certainly, there are ample resources available to owners and operators regarding training for both shoreside and vessel personnel as to proper compliance with MARPOL and other environmental regulations.

While such measures are highly commendable and recommended to avoid, or at least minimize, criminal liability in the first instance, that is not the focus of this article. Rather, this article is premised on the proposition that no matter how extensive a company's safety and environmental training may be, the owner/operator is ultimately at the mercy of the weakest link in its personnel chain.

Thus, the most prudent and environmentally conscious owner/operator can find itself in the cross-hairs of a multi-million dollar criminal prosecution because of the actions of a single rogue chief engineer who decides, perhaps as a matter of short-sighted economy or his own convenience, that he will by-pass an oily water separator and fabricate entries in the vessel's logs. The purpose of this article is to provide the owner/operator with some practical guidance as to what steps should be taken when the owner/operator, without any intent on its part, finds itself the target of a criminal investigation, or worse, an actual prosecution by U.S. law enforcement.

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In order to provide some context to these recommendations, it is important to have an understanding of two concepts which have played a recurring role in almost all criminal prosecutions of owners/operators under U.S. law. The first of these is the principle of vicarious liability. This is a fundamental principle under U.S. criminal law and is often not fully appreciated by foreign vessel owners/operators conducting business in the United States.

In sum, this legal principle provides that a corporation may be held criminally liable for the acts and omissions of its employees, provided they were acting within the scope of their employment and for the benefit of the corporation. See *United States v. Richmond*, 700 F.2d 1183, 1195, n.7 (8th Cir. 1983). The corporation need not know, or have reason to know, of the conduct giving rise to the criminal liability. Moreover, the company may even be held liable if the actions of the employees were in violation of company policies or directives.

The second core concept can best be summarized by the old axiom that "the cover-up is worse than the crime." This has proven to be particularly true in the context of "magic pipe" cases, where the government has routinely brought obstruction charges against crewmembers and their employers, based on conduct ranging from destruction of evidence, (i.e., log books, pipes, hoses, etc.) to making false statements to Federal investigators.

In fact, more often than not, it is these obstruction related charges that have driven the multi-million dollar fines which have been so widely publicized throughout the industry. In order to support these charges and obtain such exorbitant fines, the Government has a wide array of statutes which it can, and does, rely upon where there is evidence of obstruction on the part of crewmembers or other employees:

(i) The False Statement Act, 18 U.S.C. §1001: As its name implies, the statute is premised upon the making of a false statement to a Federal investigator during the course of his/her investigation. The False Statement Act carries a potential fine as high as $500,000.00 per charge, or twice the amount of the gain obtained (or loss caused) by the offender, whichever amount is greater. See, 18 U.S.C. §3571(c)(3). The Act further provides for potential incarceration of up to five (5) years.

(ii) Obstruction of Justice, 18 U.S.C. §1512: These charges will often be pursued by the government where there is evidence that crewmembers have engaged in destruction of evidence, i.e., such as by-pass pipes, and hoses. The potential fine for obstruction of justice is the same as under the False Statement Act, i.e., up to $500,000.00. However, potential incarceration period is greater, i.e., up to 10 years. The government may also pursue similar charges for witness tampering, 18 U.S.C. §1505, and or destruction of evidence, 18 U.S.C. §1519.

(iii) Conspiracy, 18 U.S.C. §1001: This charge may arise where there is evidence two or more parties may have conspired in furtherance of the underlying criminal violation.

(iv) Sarbanes-Oxley, 18 U.S.C. §1519: Violations of the Sarbanes-Oxley Act are generally premised upon tampering with corporate records, and can carry fines up to $500,000.00 per charge, with jail terms of up to 20 years.

Notwithstanding the formidable arsenal of possible statutes available to the government, there are certain practical steps which an owner/operator can take in an effort to minimize liability in the event it finds itself facing a criminal investigation in the United States:

OWNERS/OPERATORS MUST BE MADE AWARE OF ANY CRIMINAL INVESTIGATION WITHOUT DELAY

While this may seem rather self-evident, it is often the case that vessel officers or shoreside personnel, such as Port Captains, fail to provide upper level management with a full and complete understanding of what is transpiring at the commencement of a criminal investigation. In many cases this may be due to the assumption on the part of those on the scene that the matter can be addressed in the same manner as any other issue involving Port State Control Authorities.

The problem is further compounded by the fact that the line between a routine Port State Control Inspection and the commencement of a criminal investigation is often difficult to discern. The vessel officers and shoreside personnel should be clearly instructed that when Port State Control Authorities are inquiring as to matters that could have potential criminal ramifications, company management should be made aware of the situation immediately.

In many cases the investigating authorities may be privy to information/evidence that the vessel's officers

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are not, often by way of "whistle blowers," and the authorities are attempting to obtain additional information/statements which will ultimately come back to haunt the company in a subsequent criminal prosecution. Thus, it is essential that upper level management be fully apprised of the situation as quickly as possible.

EARLY REFERRAL AND INTERVENTION BY COUNSEL

It is essential in any criminal matter to have counsel appointed and available to assist as early in the investigation as possible. In those instances where counsel are appointed to advise owners/operators, and their employees, of their respective rights and obligations at the commencement of a criminal investigation, the potential for damaging and costly obstruction charges can be greatly diminished. In most cases, it will be necessary to appoint counsel both for the owners/operator as well as independent counsel for the crew.

In fact, in many cases, depending upon the specific facts and allegations being made, it may be necessary to appoint separate counsel for individual crewmembers. A crewmember who is being provided with effective advice and representation by counsel will be much less likely to make the regrettable (and costly) decision to tamper with evidence, lie to investigators, etc. For this reason alone, the early involvement of counsel both for owners/operators and individual employees may potentially eliminate millions of dollars in criminal fines for the owner/operator.

EDUCATING CREWMEMBERS AND SHORESIDE PERSONNEL OF THEIR LEGAL RIGHTS AND OBLIGATIONS IN THE EVENT OF A CRIMINAL INVESTIGATION

The prospect of being interviewed, and perhaps even restrained, by law enforcement personnel as part of a criminal investigation is obviously a stressful experience for anyone. The experience may be all the more traumatic for a foreign crewmember who is far from home, possibly with limited English language skills and education, and who may originate from a country where law enforcement personnel are perhaps viewed with a certain degree of suspicion - if not outright trepidation. These factors combine to create a situation ripe for obstructionist conduct, false statements, etc., all of which may ultimately expose the owner/operator to significant criminal liability.

The most effective manner in which to minimize the likelihood of crewmembers exposing themselves to obstruction or false statement charges is for owner/operators to provide crewmembers (and shoreside personnel) with an understanding of their rights and obligations should they find themselves involved in a criminal investigation. These rights and obligations include the following:

(i) Crewmembers should understand that law enforcement powers may be exercised by a wide array of local, state and federal agencies. The most common interaction with law enforcement personnel for crewmembers will be in the form of the United States Coast Guard ("USCG"). Crewmembers should take note that the surest sign that the USCG is viewing the matter as a potential criminal investigation is the presence of Coast Guard Investigative Services ("CGIS") personnel aboard the vessel. These are personnel within the USCG that are expressly tasked with conducting criminal investigations. However, depending upon the circumstances of the case, crewmembers may also have dealings with local and state police officers, agents of the Environmental Protection Agency ("EPA"), Department of Environmental Conservation ("DEC") agents, Immigration and Customs Enforcement ("ICE") agents, and attorneys with both the U.S. Attorney's Office and local district attorney's office.
Given the wide array of agencies which may be involved in any given criminal investigation, crewmembers should be instructed to request and take careful note of the identification of any law enforcement personnel who comes aboard the ship and seeks to interview crewmembers.

(ii) Crewmembers should be advised that they do have the right to remain silen t if interviewed by law enforcement personnel in the United States. Moreover, crewmembers should understand that they have the right to consult with an attorney before they decide whether or not to provide any written or oral statements to law enforcement personnel and to have their counsel present during any questioning.

(iii) The crewmembers must understand that it is a serious crime to lie to law enforcement personnel in the United States. However, while they are not compelled to answer questions, if they do elect to speak with law enforcement personnel, THEY MUST TELL THE TRUTH. Crewmembers should be clearly advised, in writing, by the company that if they agree to speak with law enforcement officers and fail to tell the truth, they will be deemed to have acted of their own accord, not for the benefit of the company, and not within the scope of their employment. Crewmembers must understand that such conduct will result in immediate termination of employment.

(iv) If English is not the first language of the crew member, the crewmember may and should insist that a translator be provided before answering any questions.

(v) Crewmembers should be advised not to rely on any promises made by law enforcement officers that their statements will not be used against them in a criminal proceeding. Law enforcement officers do not have the authority to make such promises. Moreover, crewmembers should also understand that law enforcement officers are not permitted to threaten or intimidate witnesses into making statements. Any such conduct should be reported to counsel immediately. Any promise of immunity by law enforcement personnel to a crewmember must be in writing, reviewed by counsel, and will ultimately have to be approved by the Court.

(vi) Under no circumstances should senior officers or shoreside management "coach" or otherwise influence a crewmember in responding to questions by law enforcement personnel.

(vii) The USCG may have the right to remove certain documents from the vessel during the course of their investigation. In the event documents are removed from the vessel, the crew should be instructed to request copies and should keep a detailed inventory of all documents and/or other evidence removed from the vessel.

(viii) With the exception of certain documentation, the USCG and other law enforcement personnel will likely require a search warrant signed by a Judge to remove evidence from the vessel or search crewmembers' personal belongings. In the event crewmembers are asked to consent to the removal of such items or to having their personal

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belongings searched, they should immediately request an opportunity to confer with counsel.

(ix) While crewmembers are not required to give their consent to the removal of evidence or to a search of their belongings, they should under no circumstances use force or attempt to physically prevent law enforcement personnel from removing items from the vessel. The validity of any such removal will ultimately be contested before the Court – provided the crewmember did not give consent.

(x) The crewmembers must understand that under no circumstances should they tamper with, hide or destroy a document or evidence aboard the vessel as such conduct will rise to very serious criminal charges against them.

While the above recommendations will not immunize a company from criminal liability, they will go a long way towards minimizing the various obstruction of justice and similar charges which often make up a significant part of the government's case in any criminal prosecution.

COMPANY POLICIES AND PROCEDURES

In the course of evaluating a criminal case against a corporate entity, one of the first areas counsel will focus on is whether the company had policies and rules prohibiting the underlying criminal conduct allegedly committed by its employees. In this day and age, the vast majority of owners and operators will and should have extensive rules and requirements regarding compliance with MARPOL and other environmental regulations. In fact, many companies require crewmembers to sign affidavits attesting to their understanding of such requirements and agreement to comply with same as a condition of employment.

Nevertheless, the existence of company policies and procedures is only half the battle. In order for counsel to make an effective argument that the employees' conduct is contrary to company policy, and thus arguably outside the scope of employment so as to defeat vicarious liability on the part of the corporation, the company should be able to establish that its policies and procedures are effectively enforced. Thus, the company's position will be strengthened if it can document that the policies are in fact enforced, i.e., such as by producing evidence of employees having been reprimanded or terminated for previous incidents of non-compliance.

Finally, as noted above, it is recommended that the company provide crewmembers with written notice of their obligation to TELL THE TRUTH should they elect to speak with law enforcement personnel during the course of a criminal investigation. Such notice must make it clear that should crewmembers fail to tell the truth to law enforcement personnel, such conduct will be deemed to be for their own benefit, beyond the scope of their employment, and will result in immediate termination from the company. This notice should also cover the additional obligations addressed above, i.e. such as not tampering with or destroying evidence, coaching witnesses, etc. Crewmembers should be required to acknowledge their understanding of these obligations in writing, preferably by way of affidavit, as a condition of employment. By requiring such a written acknowledgement from the crewmembers, the company will be in a stronger position to argue that any future conduct involving obstruction of justice or false statements on the part of the crewmembers arose outside the scope of their employment and thus should not result in vicarious criminal liability.

CONCLUSION

As stated at the beginning of this article, the only fool proof way to avoid criminal liability is obviously to avoid the crime in the first instance. Nevertheless, the most environmental and safety-conscious company may still face the prospect of a criminal investigation or prosecution due to the wrongful conduct of a single employee or a small group of employees. It is hoped that the above recommendations and suggestions may provide an owner/operator with some guidance as to how best to proceed in that instance, and may serve to at least minimize a company's collateral damage in terms of obstruction of justice and similar charges.

DEATH BY ENCLOSED SPACE!

by: Captain Richard Gayton
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&

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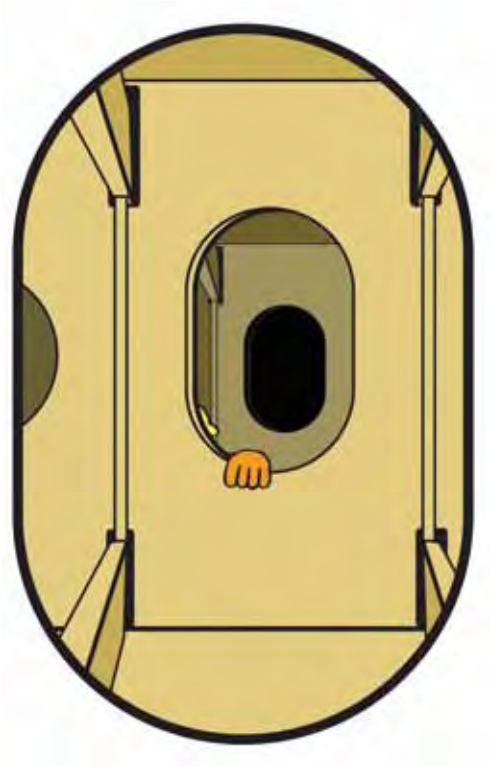

The International Maritime Organization (IMO) has declared 2010 to be the Year of the Seafarer. With that in mind, it is discouraging that too many seafarers have apparently not learned from the mistakes of their predecessors and are still losing their lives as a result of entering enclosed spaces unprepared.

Such occurrences are absolutely avoidable by following basic procedures. In 1997, IMO issued the *Recommendations for Entering Enclosed Spaces* (Assembly Resolution A.864 (20)) that contains advice on assessment of risk including testing of atmosphere and precautions to be taken during entry. This advice is aimed at protecting personnel, through safe and proper implementation of correct procedures and is enforced by flag state shipping acts.

Safety is clearly everyone's responsibility, but surely the individual who is about to step into an enclosed space has a higher responsibility to protect himself and the family members who depend upon his livelihood. One would hope that the same person would think twice about jumping off a cliff blindfolded! So what is still going wrong?

Maybe it is human nature to think that: "*Safety procedures are for others and nothing will ever happen to me*" Perhaps it is natural to believe oneself to be invincible, but the history of past fatalities has proven otherwise. The simple reality is that humans are not made to survive in an oxygen deficient environment without the appropriate breathing apparatus.

Enclosed spaces recognize neither experience nor rank. The Club's experiences in such cases has shown that even senior shipboard personnel, such as chief engineers (who should have known better), have died from their own negligence.

Recent statistics reported by the International Association of Classification Societies (IACS) indicate that more than half of deaths caused by entry into oxygen deprived enclosed spaces are actually caused by unprepared rescue attempts. Although it may be human nature to just "jump-in" and rescue a fallen colleague, this basic instinct must be resisted if future lives are to be saved.

The following reasons are generally recognized as key contributing factors for such casualties:

1) Identification of dangerous enclosed spaces
The definition of an enclosed space as given by IACS is:

> "*An enclosed space means a space that has any of the following characteristics:*
>
> - *limited openings for entry and exit;*
> - *unfavorable natural ventilation; and*
> - *not designed for continuous worker occupancy.* "

One can note from this definition that there is no specific reference to the size of an enclosed space and even the smallest inspection ports may be considered as enclosed spaces. All enclosed spaces should be properly marked by such signage below.

Signage is important and should be duplicated in the working language of the crew. Perhaps such signage

Figure: Signage is extremely important to identify enclosed space zones aboard ship

may be akin to removing the blindfold, but if so, do the individuals involved have the necessary training and tools to still prevent the imminent tragedy?

2) Lack of knowledge and training

Clearly, it is the shipowner's responsibility to ensure that the vessel's *safety management system* (SMS) incorporates any relevant advice provided by the IMO and the flag State. These safety procedures should include an appropriate permit to work system, enclosed space entry checklist, standard atmospheric testing and routine practical exercises and drills.

The existence on board of the SMS manual doesn't necessarily translate into a good safety regime. Too often, we are surprised to hear of surveyors reporting inoperative or absent oxygen testing equipment. Correctly functioning and calibrated atmospheric test apparatus is a crucial part of any vessels enclosed space entry procedure and the absence of such operational equipment immediately identifies crucial failures of the vessel's SMS and safety regime.

3) Complacency leading to lapse of procedure

A good safety regime starts at the top and a prudent shipowner should ensure resources are made available to properly train their seamen. Simply put, this increases the chance that there are fewer casualties that translate into fewer claims. Consequently, this means less time lost, which at the end of the day means more money for the shipowner.

An effectively implemented permit to work system should be incorporated into the routine vessel operations. There should also be a reliable means of measuring the success of these initiatives, as reflected in crew and company performance assessments. In this respect, third-party audits can be a valuable tool.

Second only to slips, trips and falls, working in confined and enclosed spaces has a greater likelihood of causing fatalities, severe injuries and illness than any other type of work or onboard.

At the end of the day, it is the shipowner's responsibility to ensure that effective safe entry procedures and protocols are in place onboard. It is therefore in the shipowner's own interest to be sure that everything is done to prevent these avoidable enclosed space fatalities.

In May 2005, the American Club released the poster, *Have Respect For Entry Into Enclosed Spaces*, as part of an initiative to reduce injuries and fatalities from such events.

by: Chester D. Hooper
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The Rotterdam Rules

An Overview of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules): Part III

This article is the third and final installment in a series of articles posted in CURRENTS introducing the Rotterdam Rules to our Members authored by Mr. Chester Hooper from Holland & Knight.

Chester Hooper practices in the Maritime Litigation Practice Group and focuses in the areas of collision, the defense of vessel interests against claims for cargo damage, multimodal carriage of cargo, and drafting bills of lading and other shipping documents. Mr. Hooper has published numerous articles on admiralty cargo issues. In addition, he has lectured on the subject of the carriage of goods at many seminars.

He was President of the Maritime Law Association of the United States from 1994 to 1996. He also served as a member of the United States delegation to the United Nations Commission on International Trade Law (UNCITRAL) working group that drafted the Rotterdam Rules, which will replace the present treaties governing the international carriage of goods that include a sea leg.

Finally, Mr Hooper wishes to acknowledge and thank a 2010 Holland & Knight summer law clerk, Jee Lee, for her research on the self-executing nature of treaties similar to the Rotterdam Rules.

The Rotterdam Rules treaty might be transmitted by the President of the United States to the United States Senate early in 2011 for the Senate's advice and consent. Once the Senate gives its advice and consent with a 2/3 vote, the President may ratify the treaty. It is anticipated that once the United States ratifies the treaty, many other nations will ratify it as well. The treaty will go into force one year after the twentieth nation ratifies it.

The State Department was in the process of completing a "ratification package" in October 2010, which will be transmitted from the Secretary of State to the President. That ratification package will consist of an article-by-article analysis of the treaty, an executive summary of the treaty, and a letter of transmittal to the President. The first draft of the article-by-article analysis was completed in September 2010.

Hopefully, the ratification package will be sent by the Secretary of State to the President in 2010. The Administration will ask U.S. agencies involved in maritime matters for their opinions. It is anticipated that President Obama will ask the Senate for its advice and consent early in 2011.

The ratification package will probably indicate that the Rotterdam Rules should be considered a self-executing treaty, a treaty that needs no legislation to implement it. The difference between a self-executing treaty and a treaty that needs implementing legislation was explained by the U.S. Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008). The Rotterdam Rules should be considered self-executing, because they will confer enforceable rights and obligations on parties to contracts of carriage without the need of any other legislation, just as the Warsaw Convention has applied to the aviation industry without any U.S. implementing legislation.

> The distinction was well explained by Chief Justice Marshall's opinion in *Foster v. Neilson*, 2 Pet 253, 315, 2L. Ed. 45 (1829) overruled on other grounds, ...which held that a treaty is "equivalent to an act of the legislature," and hence self-executing, when it "operates of itself without the aid of any legislative provision."... When, in contrast, "[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." ...In sum, while treaties "may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[1]

Even if the ratification package were not to include a statement that the Rotterdam Rules should be considered self-executing, the courts would almost certainly treat them as self-executing.

Even though legislation will not be needed to implement the Rotterdam Rules, legislation will be necessary to conform the present maritime law to function with the Rotterdam Rules. That conforming legislation will probably repeal the international aspects of the United States Carriage of Goods by Sea Act (COGSA)[2] and will state that the Rotterdam Rules will prevail in any conflict between the Rotterdam Rules and the Harter Act[3] or the Pomerene Act[4].

Only the international aspects of COGSA will be repealed, because COGSA will be left to govern domestic coastwise trade and inland river trade. At the present time, COGSA §13 permits a carrier to incorporate COGSA by reference into a contract for carriage in the coastwise trade. If the carrier does so, COGSA applies with the force of law and supersedes other law such as the Harter Act. The conforming legislation will probably state that COGSA may be incorporated by reference into the coastwise trade and/or the inland river trade and when it is so incorporated, it will apply with the force of law.

Under this system, COGSA would apply to domestic carriage as long as the carriage is not part of an international carriage. For example, COGSA would apply with the force of law to a domestic shipment from New York to San Juan if the bill of lading incorporated COGSA, but would not apply to a shipment from New York to San Juan that was part of an international carriage from Rotterdam to San Juan. The same system would apply to the inland rivers.

The Rotterdam Rules should also not apply with the force of law to carriage of goods within the Great Lakes even to carriage between the United States and Canada. The Rotterdam Rules apply "to contracts of carriage in which the place of receipt and place of delivery are in different States, and the port of loading of a sea carriage

> **The Rotterdam Rules treaty might be transmitted by the President of the United States to the United States Senate early in 2011 for the Senate's advice and consent."**

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and the port of discharge of the same sea carriage are in different States... ." *Rotterdam Rules*, Article 5(I). The Great Lakes are not, of course, "seas;" they are lakes. Although the Rotterdam Rules do not define sea, the application of the Rotterdam Rules to the Great Lakes was never discussed in the UNCITRAL Working Group III on Transport Law that drafted the Rotterdam Rules. No intent was expressed by the United States or Canada, or any other nation, to apply the Rotterdam Rules to the Great Lakes.

U.S. carriers should decide whether they wish COGSA or the Harter Act to govern their domestic trade with the force of law. Both COGSA and the Harter Act contain an error in navigation defense, but the Harter Act requires a carrier to prove that it exercised due diligence to make the ship seaworthy in all aspects, even aspects not connected with the loss or damage, before the carrier may rely on the error in navigation defense or on any other defense. On the other hand, the Harter Act does not establish a minimum amount for a package limit action. The parties governed by the Harter Act might want to agree on a package limitation lower than COGSA's $500.

U.S. Carriers could, of course, incorporate the Rotterdam Rules into their U.S. domestic trade bills of lading as terms of the contract if they wish.

Carriers in the domestic and in the international trade may want to amend their bills of lading and other documents to take advantage of certain provisions in the Rotterdam Rules when the Rotterdam Rules go into force. Carriers should study Articles 40 and 41 concerning clausing bills of lading and other shipping documents to use the shipper's weight load and count provisions. Those articles explain how a carrier should clause a bill of lading or other document to indicate that it has not inspected the contents of packages, including ocean containers, and is not responsible for the quantity or the quality of the contents it was not able to inspect.

Carriers and shippers should also realize that they will be able to agree that the shipper will be responsible to load, stow, and discharge cargo according to the free in and out ship (FIOS) terms of carriage described in Article 13(II). The carrier should also state in its bill of lading or other shipping documents that it does not promise delivery by a certain time. That statement should prevent the carrier from being held liable for consequential damages caused by delay pursuant to the terms of Article 21.

Now may be the time for all parties involved in U.S. domestic carriage or international carriage of goods that includes an international sea leg to study the Rotterdam Rules and plan any necessary changes in claims handling procedure and in shipping documents.

1 **Medellin**, 552 U.S. at 504-05.

2 Ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701.

3 The Harter Act, Act of Feb. 13, 1893, ch. 105, 27 Stat. 445 (1893) (codified at 48 U.S.C. §§ 30702-30707).

4 United States Pomerene Act of 1916, 49 U.S. Code App. 81-124, recodified in 1994 as 49 U.S. Code 80101-80116.

VENTILATION AND DUNNAGE

ARTICLE 3 IN A SERIES OF 3

by: Dave Anderson
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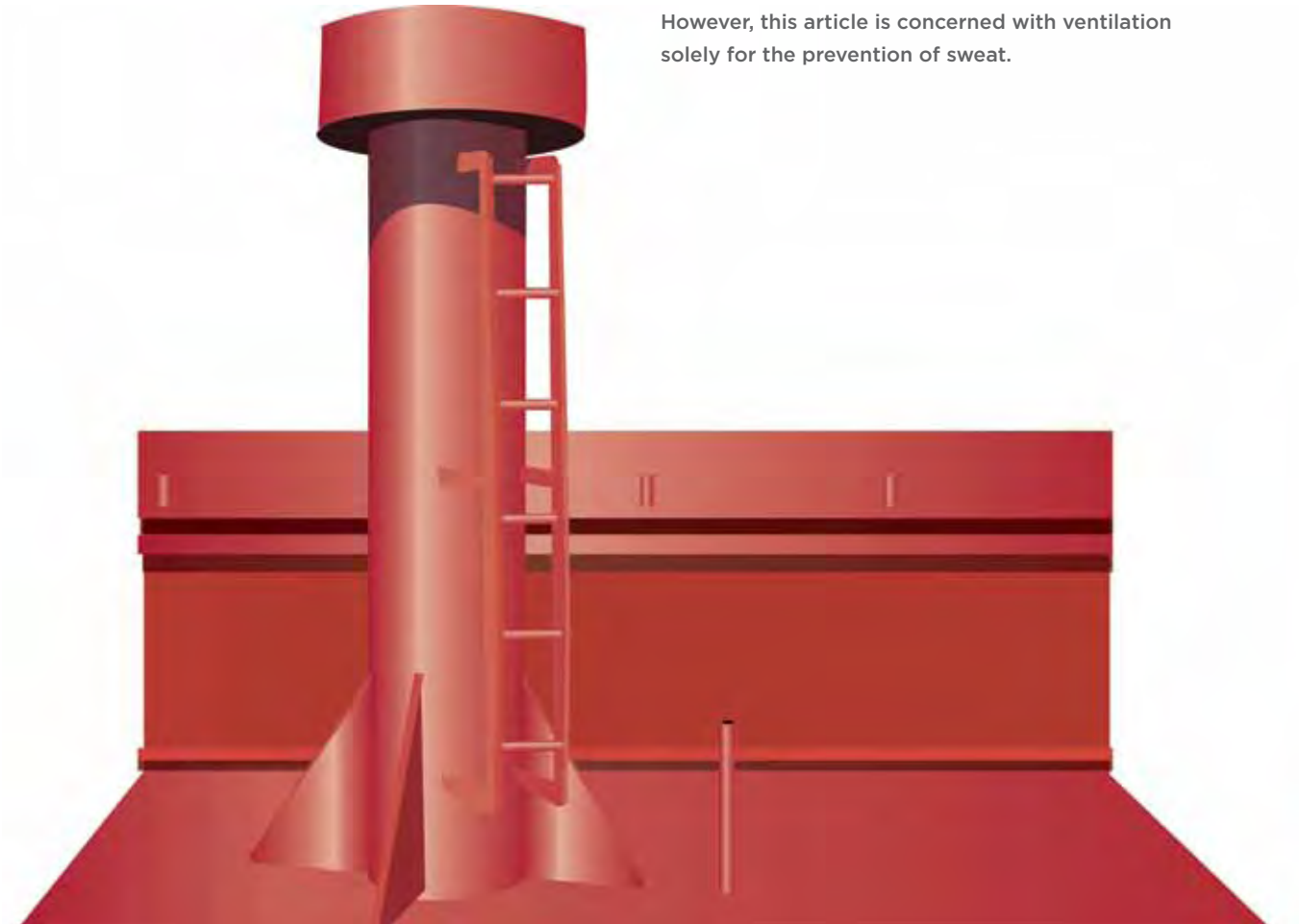
The following article is the third and final installment in a series of three articles on the uses of dunnage by representative of Brookes Bell. This third instalment is written by Mr. Dave Anderson, a Master Mariner with a degree in Nautical Studies. He joined Brookes Bell in 1982. He was partner from 1986 to 2010 and is now a consultant. Before becoming a marine surveyor, Dave was at sea over a 17 year period serving on a variety of vessels in all ranks up to and including Chief Officer. He advises on a range of navigational and cargo matters, cargo ventilation, personal injuries and fatalities, and also carries out cargo-related surveys in the UK and overseas.

Previous articles in this series have looked at dunnage and its various applications, including its use to help in protecting cargo against the effects of ship's sweat. Mention has also been made of the fact that, if it has a relatively high moisture content, the dunnage can be a source of moisture in the hold. This can itself lead to the formation of sweat. This article considers the theory and practice of ventilation as a means of preventing or at least limiting, the occurrence of sweat and revisits the use of dunnage in this context.

There are many reasons for ventilating a ship's hold that are quite unrelated to sweat (e.g. removal of explosive and/or flammable or poisonous gases). However, this article is concerned with ventilation solely for the prevention of sweat.



VENTILATION AND DUNNAGE

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SWEAT – DEFINITION AND CAUSE

"Sweat" is simply the deposition of condensation within a ship's hold. If the moisture forms on the ship's structure, then it is termed "ship's sweat". If it forms on the cargo itself, it is "cargo sweat". The circumstances under which the two types of sweat occur are different.

Ship's Sweat

The formation of ship's sweat occurs when a vessel loads in a warm, moist atmosphere, and then sails into much cooler weather. As the ship's steelwork cools, moisture from the humid atmosphere in the holds will tend to condense onto it. In general, ship's sweat only forms in significant quantities when a vessel is carrying a *hygroscopic cargo* (i.e. a cargo which has its own inherent moisture content) or, as explained below, when either green (unseasoned) or wet dunnage has been employed.

Cargo Sweat

This forms under precisely the opposite circumstances. When a vessel loads in a cold weather climate and the cargo is itself cold, and thereafter the vessel steams into warmer weather with higher humidity, if an attempt is made to ventilate, then moisture from the ventilating air condenses onto the cold cargo. Cargo sweat can affect either hygroscopic or non-hygroscopic cargo.

Ship's sweat causes the more widespread problems and controlled by proper ventilation. Cargo sweat, in contrast, is generally caused by ventilating when it is inappropriate to do so. The remainder of this article will, therefore, concern itself principally with ship's sweat.

THE EFFECT OF DUNNAGE ON SWEAT FORMATION

Wood is, of course, hygroscopic. Unless wood has been properly dried, timber dunnage can hold a significant quantity of moisture depending upon the ambient conditions during the voyage and may cause ship's sweat.

In theory, this can happen regardless of the type of cargo the ship is carrying. Where a hygroscopic cargo is involved (e.g. bagged cocoa), the 'reservoir' of moisture provided by the cargo will far outweigh them moisture provided from the dunnage. For example, consider the relative significance of 1,000 tonnes of cocoa with a moisture content of 12% and the relatively small quantity of dunnage used with that cargo where the contribution of the moisture from the dunnage to the formation of ship's sweat is negligible.

Depending upon the voyage conditions, green dunnage used in conjunction with a non-hygroscopic cargo may *cause* ship's sweat. But whatever the conditions, the same dunnage used with a hygroscopic cargo will not significantly *contribute to* sweat formation. It is also worth noting that improperly-dried dunnage does *not* lead to cargo sweat).

VENTILATION

The purpose of ventilating a hygroscopic cargo is to remove the moist air surrounding the cargo and replace it with cooler, drier air to minimize condensation onto the cold steelwork in the hold. It must be emphasised that, in these circumstances, it is *not* intended that ventilation will cool the cargo itself, and neither in practice will it do so. The temperature of the bulk of the cargo will remain essentially unaltered throughout the voyage.

With ventilation there are two basic questions to be answered: are conditions such that ventilation is appropriate and will the ventilation be effective? So far as the prevention of ship's sweat is concerned, ventilation will normally be required when the ship is on a voyage taking her into cooler weather and, in many cases, lower sea temperatures.

Comparison of Dew Points

The scientific rule is that if the dew point of the outside air (the air used for ventilation) is *lower* than that in the hold, then it is appropriate to ventilate. If the ambient dew point is not lower than that in the hold, so far as the prevention of ship's sweat is concerned, ventilation should be withheld. It should, however, be kept in mind that it may nevertheless be necessary to ventilate for other reasons such as fumigators' instructions when the cargo has been fumigated on board.

Also, and at the risk of stating the obvious, even if comparison of dew points indicates ventilation is appropriate, this should still not be done if, for example, the ship is taking spray across the ventilator openings.

Comparison of dew points is usually made by taking readings from wet- and dry-bulb thermometers on deck and in the hold. Obtaining the ambient readings is generally easy where most ships have a box containing a pair of thermometers which may be hung in a shaded spot on the windward side of the bridge. But obtaining the same readings in a ship's hold can be problematic.

During the voyage, it may not be safe for the ship's personnel to enter the hold to obtain temperature readings. If the cargo has been fumigated after loading it certainly *will not* be safe, even if the compartment has been ventilated. If the wet-bulb thermometer is simply lowered into the hold from outside, there will be difficulty obtaining a sufficient air-flow across its wick.

VENTILATION AND DUNNAGE

Figure 1: **Bamboo poles and bamboo mats used in dunnaging a cargo of bagged rice from Thailand to West Africa. Many of the poles are flimsy, they are widely-spaced, and the dunnaging is inadequate.**

Figure 2: **The same cargo as shown in (1). Bags were able to fall between the poles and, where they came into contact with the shell plating, even though there was a lining of matting the bags became wet and mouldy, as can be seen on the bag in centre view.**

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In the event that the crew is able to safely enter cargo holds, to obtain meaningful readings it may be necessary to stop ventilating to allow the in-hold atmosphere to stabilise. If this is not done, the crew will be measuring the parameters of the ventilating air rather than those of the true in-hold atmosphere – but, of course, suspending ventilation in this way rather negates the purpose of ventilating in the first place.

The 3° Rule

A convenient alternative, which removes the need to measure the in-hold dew point, is to apply what is called "*the 3° rule*". This states that, if the temperature of the outside air is at least 3° Celsius cooler than the air in the hold, then the cargo should be ventilated. Owing to the difficulties of obtaining reliable in-hold temperatures during the voyage, it is normal to obtain the temperature of the cargo at the time of loading. Because the temperature of a large mass of cargo will hardly change over the course of a voyage, it will then suffice to compare the initial temperature of the cargo with the current temperature of the outside air on a regular basis (say, once per watch).

The 3° rule is sometimes referred to, rather pejoratively, as a rule of thumb. Although it is indeed a simple and readily-remembered rule, the description is not accurate. The 3° rule is scientifically-based, and relies on essentially the same principles as the dew point rule. Indeed, so long as the data for each have been accurately determined, the application of either rule should lead to the same conclusion.

The Efficacy of Ventilation

It is one thing to refer to "removing the moist air surrounding the cargo and replacing it with cooler, drier air"; it is quite another thing to do it. If a vessel has a powerful and sophisticated mechanical ventilation system she may be able to ventilate effectively enough to prevent ship's sweat (although even then adverse weather, by leading to the suspension of ventilation, may defeat the best of efforts to prevent it!). But a handy-size bulk carrier with natural ventilation carrying,

for example, bagged Thai rice around the Cape of Good Hope in the southern winter may not be able to avoid ship's sweat no matter how well the holds are ventilated. There simply will not be sufficient airflow.

We should also mention the practice of constructing ventilation channels within a stow of bags with the intention of 'improving' the circulation of air. Also, it is counter-productive since the ventilating air is required around the periphery of the stow and not in its heart.

THE USE OF DUNNAGE

If it proves impossible to prevent the formation of ship's sweat (as will frequently be the case), then the next best thing is to try to ensure that the cargo is prevented from coming into contact with the moisture. This is one of the principal functions of dunnage and the opportunity will be taken here to summarise the use of dunnage for this purpose.

The aim is to lay dunnage against all of the surfaces in a hold where ship's sweat may form, or to which it might drain. The former involves dunnaging the side-shell and lower-wing tanks (and possibly also the upper-wings), together with the insides of the hatch-coamings. The latter requires the tanktops, and again the lower-wings, to be dunnaged.

Traditionally, "dunnaging" implied the positioning of wooden planks (referred to as flatboard dunnage) against the areas of steelwork mentioned in the previous paragraph. The planks would be positioned sufficiently closely that, for example, a bagged cargo could not bulge or sag between the boards and thus make contact with the wet steel. On the tanktop it was normal to use two layers of boards to lift the cargo clear of the plating, the lower one aligned athwartships to permit any water to drain to the bilges at either side.

These days, flatboard dunnage is rarely available, can be expensive, and may also be difficult to dispose of at destination because of such reasons as quarantine regulations. A common alternative is the use of bamboo poles which are used almost exclusively in the bagged rice trade from Thailand to West Africa. The conventional wisdom is that bamboo poles are not as effective

Figure 3: **Kraft paper used on its own to dunnage a cargo of bagged cocoa. This was inadequate; staining and mould can be seen on the paper.**

Figure 4: **Mould damage where a bag in (3) has come into contact with the shell plating.**

Figure 5: **A further example where bags have come into contact with the shell plating and been wetted.**

continued from page 25

as good flatboard dunnage and apart from anything else, they offer less support.

Nevertheless, if high quality sound poles of sufficient scantling are supplied and are closely positioned against the appropriate areas of steelwork, they can protect bags against contact with the steel and consequential wetting. In any case, the ship can only work with what is available and in much of the Far East what is available is bamboo. The key here is to ensure it is of good quality and that a sufficient quantity is supplied.

Bamboo poles are often used in conjunction with bamboo mats ('dunnage mats') and/or kraft paper. Commonly, the bamboo poles against the ship's sides are lined with mats or paper, held in position by the weight of the bags. It is also common for sheets of kraft paper, or mats, to be laid across the upper surface of stowage. Partly this is intended as a protection against ship's sweat dripping from overhead steelwork.

With edible cargoes such as bagged rice or cocoa, the lining materials are also intended to protect the bags from loose dirt and rust which might transfer itself to the bags, for example, from overhead beams or the flanges of side-frames.

On balance, from the viewpoint of sweat, the use of such materials as a lining against the side dunnage is probably beneficial by providing an additional barrier, albeit not a particularly substantial one. Concerns that such lining prevents circulation of air to the cargo are inappropriate since the goal is to replace the humid air around the cargo, not circulate air through it.

However, if any but the lightest of sweat forms on overhead steelwork (the underside of the weather-deck or hatchcovers), bamboo mats or kraft paper are unlikely to provide any useful protection. In both locations, sheet materials can provide a useful barrier against dirt contamination.

In certain trades, kraft paper is used, not in addition to, but *instead of* dunnage. For example, when loading bagged rice in some regions it is common to use poles on the tanktop, but only kraft paper against the sides, and of course atop the cargo. While the paper assists in keeping the bags clean, it serves no useful purpose in protecting them against any ship's sweat which may form.

Finally, it should be mentioned that one of the major charterers in the bagged rice trades has for some time been lining the holds of its vessels with rigid polystyrene sheets with an additional lining of flexible polythene sheeting. Although the company concerned claims promising results for this system, it appears these depend to a significant extent on the circumstances of the voyage.

GLOBAL CLIMATE CHANGE GREENHOUSE GAS EMISSIONS INITIATIVE

by: Dr. William Moore
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EMISSION CONTROL AREA (ECA) PROPOSAL PUT FORWARD TO NEXT SESSION FOR ADOPTION

At the most recent meeting of the Marine Environmental Protection Committee (MEPC), the Committee approved a proposal to designate certain waters adjacent to coasts of Puerto Rico (United States) and the Virgin Islands (United States) as an ECA for the control of emissions of nitrogen oxide (NOx), sulphur oxide (SOx), and particulate matter as described under MARPOL Annex VI regulations (prevention of air pollution from ships). The Committee agreed to consider the proposal for adoption at its next session.

Currently, there are two designated ECAs under Annex VI, the Baltic Sea area and the North Sea area, while a third area, the North American ECA, was adopted in March 2010, with expected entry into force in August 2011.

The US-Caribbean ECA is expected to be formally adopted at the next meeting of the MEPC during the summer of 2011 and could come into force as early as 2014. Further measures have been agreed so that in 2015, fuel used by all vessels operating in the two North American ECAs cannot exceed 0.1% fuel sulphur content. Furthermore, by 2016, new engines on vessels must use emission controls that achieve an 80% reduction in emissions of nitrous oxide.

UPDATE ON THE STATUS OF THE BALLAST WATER CONVENTION

The International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 is moving towards entry into force. To date, 27 States, with an aggregate merchant shipping tonnage of 25.32 per cent of the world total, have ratified the Convention. 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.

MEET THE STAFF AT SHIPOWNERS CLAIMS BUREAU (UK), LTD IN LONDON

Front (L-R): **Chris Lowe, Royston Deitch. Rear (L-R): Fiona Clarke, Joan Goslin, Brian Davies, Patricia Ross, Linda Halliday, Jessie Carvalho, Gustavo Gomez Acevedo and Ian Farr.**

The American Club opened its first overseas representative office in London in December 1998.

The opening was a key element of the Club's development strategy at the time – "Vision 2000" – which sought to internationalize and grow the Club's membership outside its traditional US homeland.

Initially resources focused on the marketing of the Club to shipowners and insurance brokers in the UK, European and Asian markets. However, it quickly expanded to provide claims handling services and advice to Members in all time zones East of New York.

Today, SCB (UK) Ltd continues to provide marketing and claims handling services on behalf of the Managers of the Club. It is a representative office (not a branch) and is regulated by the Financial Services Authority in the UK as an intermediary. All services are provided for and on behalf of SCB, Inc. and are subject to ratification by the Managers on a case by case basis.

In common with the Club's other representative offices which have opened more recently in Greece (in 2005) and Shanghai (in 2008), SCB (UK) Ltd does not handle any Club funds. All payments to and from the Club continue to be handled by the Managers' office in New York.

In addition to providing services to the Members of the Club and their brokers, SCB (UK) Ltd also represents the Club at meetings of the International Group of P&I Clubs and other industry bodies and meetings.

It continues to fly the flag for the American Club in this important marine centre.

IAN FARR

MANAGING DIRECTOR

Ian graduated from the University of Plymouth with a BSc in Nautical Studies in 1982. He initially trained in the claims department of London insurance brokers Wigham Poland Ltd before moving to the placing department at Jardine Glanville Ltd in 1983. Ian specialized in the placing of P&I insurance with London based clubs on behalf of Asian shipowners. In 1994 he moved from London to head Jardine Insurance Brokers marine division in Singapore. In 1998 Ian returned to London in order to join the American Club and to open the first of the Club's overseas liaison offices. In addition to managing the office, he is responsible for local marketing efforts, representation of the Club on various International Group subcommittees and the continuing compliance with the requirements of the UK's Financial Services Authority.

CHRIS LOWE

MARKET LIAISON

Chris graduated in 2007 from the University of Plymouth with a BSc in Maritime Business with Maritime Law. After further study, he qualified as a yachtmaster and spent some time delivering yachts in European waters. Chris completed his first transatlantic crossing by competing in the ARC before joining the insurance Industry with a small marine broker based in Kent, UK. He joined the Club's London liaison office in 2008 and now assists Ian with marketing and underwriting services with special interest in Members from the Asia Pacific region and Europe.

BRIAN DAVIES

HEAD OF LONDON CLAIMS DEPARTMENT

Brian commenced his career in 1978 sailing as a deck officer on various vessels for a major liner operator which was based in Liverpool. In 1987 Brian returned to university and graduated in maritime business and law. He joined Ince & Co., London where he qualified as a solicitor. In 1994, Brian moved to P&I claims with the managers of the UK P&I Club. He joined the J L Jones Lloyd's P&I Syndicate 329 in 1998. He was claims manager for the syndicate facility from inception until that business merged with British Marine. Brian returned to practicing law with Norton Rose in 2001 before joining the American Club in 2003. As Claims Manager of the London liaison office, Brian is responsible for P&I and FD&D claims activity in the office and has managed a number of the largest and highest profile claims involving vessels entered with the American Club.

ROYSTON DEITCH

DEPUTY MANAGER OF CLAIMS DEPARTMENT

Royston read French at King's College, London and in 1986 joined the marine department of Commercial Union Assurance. As part of his work-study program, Royston qualified as an Associate of the Chartered Insurance Institute. In 1990 he joined the law firm of Holmes Hardingham and qualified as a solicitor in 1995. After qualification, he joined the West of England P&I Club for whom he worked in London and Hong Kong before joining the American Club in 2000. Royston handles all types of FD&D and P&I claims (except personal injury), dealing with Members, brokers and claimants thoughout the world.

JESSIE CARVALHO

CLAIMS EXECUTIVE

Jessie qualified as an advocate in India in 1995 and was later admitted as a solicitor in England and Wales. She also holds a Masters Degree in maritime law from the University of Southampton. Jessie worked with leading law firms in England and India gaining broad practical experience in shipping cases, including P&I and FD&D matters. Jessie then joined Carnival UK Ltd. as a solicitor where she dealt with personal injury claims made by passengers and crew alleging medical or occupational negligence. She joined the American Club in 2007 as a claims executive with primary responsibility for claims involving all types of crew, passengers, stevedores & stowaways.

GUSTAVO GOMEZ ACEVEDO

CLAIMS EXECUTIVE

Gustavo studied law and qualified as a lawyer in Mexico in 2003. He worked as general and legal correspondent in Mexico for various P&I Clubs. In 2005, after obtaining a Masters degree in maritime law from the University of Southampton, he joined SCB in London as a claims executive. He moved to Paris, in 2009 and worked in the claims department of the French office for Raets Marine. He re-joined SCB in July 2010. Gustavo speaks Spanish, English and some French. He handles P&I and FD&D claims.

LINDA HALLIDAY

ADMINISTRATION MANAGER

Linda has been with the London office since its opening in 1998, She played a key role in establishing the office in the first instance and is now responsible for general office management, HR, local accounting and health and safety matters.

JOAN GOSLIN

OFFICE ADMINISTRATION

Joan has been with SCB since 2002 and provides administration support to the marketing and claims department.

FIONA CLARKE

RECEPTIONIST / OFFICE ADMINISTRATION

Fiona joined SCB from the Bahamas Maritime Authority in London in 2004. She provides administration support to the marketing and claims department and part-time reception assistance.

PATRICIA ROSS

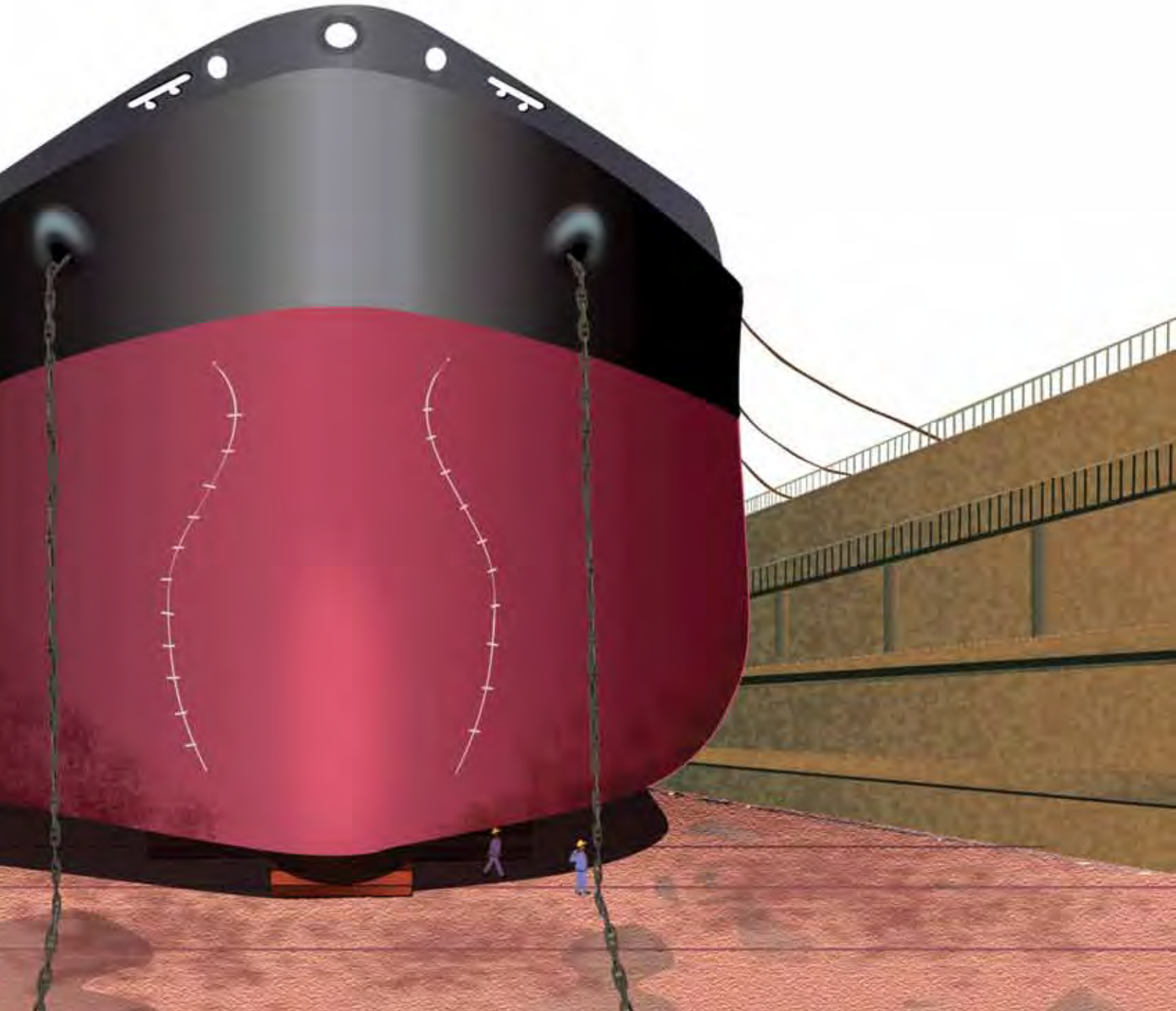
FILING / OFFICE ADMINISTRATION

Pat has been with SCB since 2006 and in addition to her filing duties, provides administration support to the marketing and claims departments.

THE CURD DECISION: UNDERMINING THE ROBINS DRYDOCK DOCTRINE AND THE UNIFORMITY OF GENERAL MARITIME LAW

by: David J. Horr, Esq.
Horr, Novak & Skipp, P.A.
Miami, FL

Mr. Horr wishes to thank Eduardo J. Hernandez, Esq., Nicholas A. Applin, JD '11, and Nicolas A. Pelleya, JD '11 for their assistance.



INTRODUCTION

In *Curd v. Mosaic Fertilizer, LLC*,[1] the Florida Supreme Court recently held that Florida Law recognizes a common law theory whereby commercial fishermen may recover for economic losses proximately caused by negligent release of pollutants despite the fact the fishermen do not own any property damaged by the pollution. At first blush, this decision appears to conflict with the long standing General Maritime Law *Robins Drydock*[2] "rule" which precludes recovery in this context absent direct physical damage to property or to a proprietary interest. In *Curd*, the Florida Supreme Court also recognized a private cause of action in favor of the commercial fishermen premised on a Florida Statute despite the fact the fishermen did not own any property damaged by the pollution. This aspect of the Court's opinion arguably conflicts with the uniformity principles underlying General Maritime Law.

THE CURD DECISION: FACTS

Mosaic Fertilizer operated a phosphogypsum storage area near Archie Creek in Hillsborough County (near Tampa, Florida), including a pond enclosed by dikes, containing wastewater from a phosphate plant. The wastewater contained pollutants and hazardous contaminants. It was contended that in the summer of 2004 Mosaic was warned by Florida regulatory agencies that the quantity of wastewater in the storage facility was dangerously close to exceeding the safe storage level and that only an inch or two of additional rain during the tropical season would raise the level of pollutants in the pond to the top of the dike. Mosaic did not act on these warnings. On September 5, 2004, the dike gave way and pollutants were spilled into Tampa Bay.

The commercial fishermen claimed that the spilled pollutants resulted in loss of underwater plant life, fish, bait fish, crabs and other marine life. The fishermen did not claim ownership of the damaged marine or plant life, but instead claimed damage to the "reputation" of the fishery products resulting from the pollution. The fishermen alleged statutory liability under Fla. Stat. § 376.313 (3); a claim for common law strict liability based on Mosaic's use of its property for an ultra hazardous activity; and a claim for simple negligence.

The trial court and later the Second District (an intermediary Florida Appellate Court) found that it the fishermen failed to state a cause of action because they neither sustained bodily injury or property damage and the statutory, strict liability and negligence claims sought purely economic damages unrelated to any damage to the fishermen's property.

THE FLORIDA'S SUPREME COURT'S RULING AND BASIS

Statutory Cause of Action

The Florida Supreme Court sought to effectuate the intent of the Florida legislature by examining the language of the statute. The Court concluded that the statutory language was clear and unambiguous and did not "prohibit any person from bringing a cause of action…for all damages resulting from a discharge or other condition of pollution."[3] Under the definition of damages in the statute, recovery was allowed for "damages to real or personal property" but one can also recover damages to "natural resources, including all living things."[4] The pertinent statutory language also specified that the only defenses are those listed in Section 376.308.

Inasmuch as the statute did not specifically list the lack of property ownership as a defense, the Court concluded that the legislature deliberately omitted this as a potential defense to the statutory claim.

The Majority opinion concluded that the "the Legislature has enacted a far reaching statutory scheme aimed at limiting, preventing and removing the discharge of pollutants from Florida's waters and land. To effectuate these purposes, the Legislature has provided for private causes of action to any person who can demonstrate damages as defined under the statute. There is nothing in these statutory provisions that would prevent commercial fisherman from bringing an action pursuant…" to the statute.[5]

The Economic Loss Rule

The "second issue" examined by the Florida Supreme Court was whether Florida recognizes a common law theory under which commercial fishermen may recover for economic losses proximately caused by the negligent release of pollutants despite the fact the fishermen do not own any real or personal property damaged by the pollution. This issue appears similar to the *Robins Drydock* rule. However, the Florida Supreme Court

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examined the issue strictly in the legal context of Florida's economic loss rule and general tort law principles. The General Maritime Law was not specifically argued and was only indirectly cited during the Court's examination of decisions from other jurisdictions involving arguably analogous circumstances.

The Florida Supreme Court determined that the plaintiff fishermen in this instance "brought traditional negligence and strict liability claims against a defendant who polluted Tampa Bay and allegedly caused them injury,"[6] and concluded that Mosaic owed a duty of care to the fishermen which was not shared by the public as a whole.[7] Here the Florida Supreme Court recognized that as a general principle of common law negligence, "some courts have not permitted recovery for purely economic losses when the plaintiff has sustained no bodily injury or property damage."[8]

The Court cited *Union Oil Company v. Oppen*[9] and recited the reasoning behind this general rule is that "if courts allowed compensation for all losses of economic advantages caused by a defendant's negligence, the defendant would be subject to claims based upon remote and speculative injuries that he could not foresee."[10] *Oppen* is a case which carves out an exception to the *Robins Drydock* rule for commercial fisherman. The Florida Supreme Court did not discuss *Oppen* in this context. We will do so *infra*.

The Court also cited to *State of Louisiana ex Rel. Goste v. The M/V Testbank*[11] as an instance where the interests of commercial fishermen were recognized and claims permitted notwithstanding the lack of property ownership or proprietary interest. The Florida Supreme Court concluded after surveying these cases that Mosaic owed a duty of care to the commercial fisherman and that the commercial fisherman had a cause of action sounding in negligence,[12] as a result of the nature of Mosaic's business and the special interests of the commercial fisherman in the use of the public waters.[13]

It was foreseeable that the pollutants and hazardous contaminants Mosaic stored would cause damage to marine and plant life and human activity if released to the public waters. The commercial fishermen had a special interest within that zone of risk, an interest not shared by the general community. The fishermen were licensed to conduct commercial activities in the waters of Tampa Bay and were dependent on those waters to earn their livelihood. The Court found that the breach of duty by Mosaic gave rise to a cause of action sounding in negligence. However the Court noted that to be entitled to compensation for any loss of profits, the commercial fishermen must prove all elements of their causes of action, including damages.[14]

Dissenting Opinion

Justice Polston concurs with the majority's determination that commercial fisherman may recover damages for the loss of income pursuant to Fla. Stat. § 376.313. However, he disagreed with the majority's determination that commercial fishermen may recover economic losses proximately caused by the negligent release of pollution under Florida common law. Justice Polston did not believe that under Florida common law commercial fishermen have a unique or special interest that creates a duty to protect the purely economic interest in a healthy ocean. Justice Polston cautioned that the far reaching breadth of the majority's opinion violated the notion that "Courts must be mindful of the precedential and consequential future effects of their rulings and limit the legal consequences of wrongs to a controllable degree."[15]

Justice Polston further cautioned that Courts have generally recognized that foreseeability in the duty context is not unlimited.[16] Generally "defendants must have an independent duty to protect [a] plaintiff's purely economic interests . . . and if this Court allows commercial fisherman to recover under the foreseeability analysis, . . . then liability will be limitless."[17]

Justice Polston argues that commercial fishermen in Florida do not have a "special" interest within the "zone of risk" the majority found Mosaic to have created.[18] The Dissent reasons that because the commercial fishermen did not demonstrate that Mosaic owed a specific unique duty to protect their purely economic interests, he would disallow common law recovery in order to "avoid subjecting defendants to limitless liability to an indeterminate number of individuals conceivably injured by any negligence."[19] The Dissent concludes that Mosaic did not owe an independent duty of care to protect the fisherman's purely economic interests – that is, their expectations of profits from fishing for healthy fish."[20]

PROSPECTS FOR SUCCESSFULLY ARGUING THE GENERAL MARITIME LAW OF THE UNITED STATES GOVERNED TO THE EXCLUSION OF FLORIDA LAW

Curd does not address whether General Maritime Law governs the claims urged by the commercial fishermen. It does not does not appear an argument that the General Maritime Law controlled was presented.

However, the recitation of the facts adopted by the Florida Supreme Court appears to create basis for arguing Admiralty Jurisdiction exists. Tampa Bay, into which the

pollutions spilled, is unquestionably a navigable waterway with links to interstate commerce.

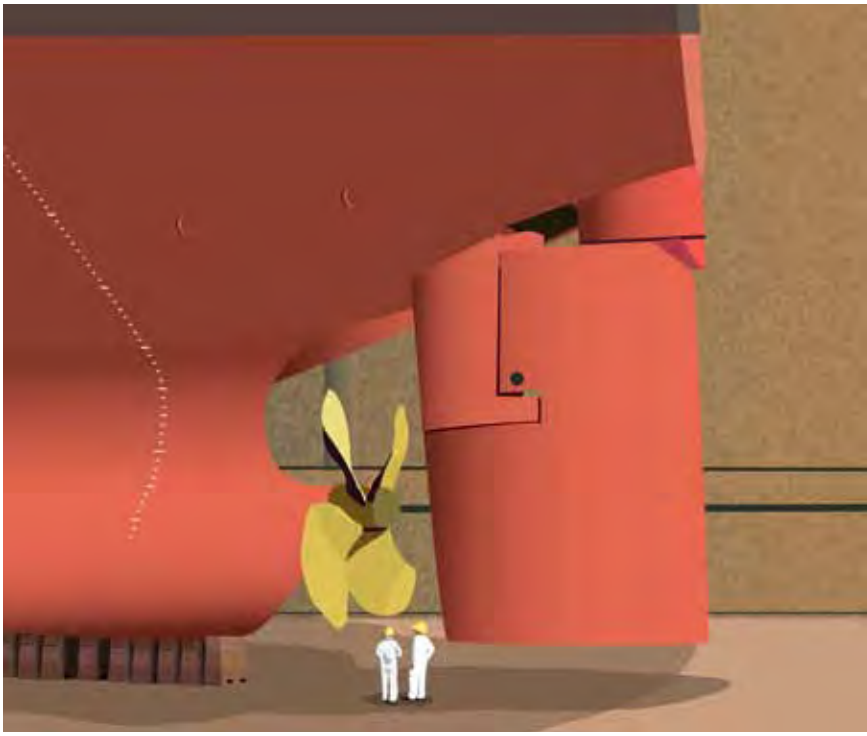
The U.S. Supreme Court has set forth two factors to consider in determining whether a claim is governed by the general maritime law: the first factor, or "locality" test, asks whether the alleged injury occurred in navigable waters; the second factor, or "nexus" test, asks whether the alleged tort has a significant connection to traditional maritime activity.[21]

The alleged incident occurred in navigable waters.
To satisfy the locality test, an alleged tort need only occur on navigable waters.[22] It is undisputed that Tampa Bay is a navigable waterway.

The alleged incident bears a significant connection to traditional maritime activity.
The nexus test, raises two inquiries: (1) "whether the incident alleged has a potentially disruptive impact on maritime commerce," and (2) "whether the general character of the activity giving rise to the incident alleged shows a substantial relationship to traditional maritime activity."[23]

1. The alleged incident had a potentially disruptive effect on maritime commerce.
The commercial fishermen plying the waters of Tampa Bay alleged that the pollution has harmed the environment, particularly "underwater plant life, fish, bait fish, crabs, and other marine life." This harm has caused their catch to decrease directly affecting their income and the availability of seafood for sale. The harvest and sale of seafood is a traditional maritime activity and this activity can and will be disrupted if the waters from which the seafood is harvested is polluted.

2. The incident bears a substantial relationship to traditional maritime activity.
This question requires determining what actually constitutes "the incident." One argument may be that the incident is harming the environment. Another may be that the incident is leaking chemicals into the ocean, and another may be that the incident is killing the sealife. Adopting one characterization over the rest becomes crucial as it would be difficult to say that harming the ocean environment would not have any substantial relation to a number of traditional maritime activities. However, unless a court is willing to impute this relationship based on the proximity of the dangerous substance to a navigable waterway, it would be hard to say that a fertilizer company negligently maintaining its wastewater holding pond is substantially related to any maritime activity.



GENERAL MARITIME LAW IMPLICATIONS

Robins Drydock
Under the General Maritime Law claims for purely economic losses are not recoverable, absent direct physical damage to property or a proprietary interest pursuant to a rule initially exposed in *Robins Drydock and Repair Company v. Flint*.[24] The rationale underlying the *Robins Drydock* rule is a practical one. Indirect economic consequences of negligence are open-ended and there is no realistic test for limiting damages if purely economic losses are allowed. Thus, under *Robins Drydock* economic losses can be recovered only where a plaintiff has suffered physical damage to a proprietary interest.

This rule represented a "tightening" of general damage recovery limitations traditionally applied in admiralty. These are based on the recognition that maritime disasters, such as an oil spill, may have very broad economic impact and cause harm to a wide variety of interests and persons.

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The limitation on maritime tort recovery imposed by the *Robins Drydock* rule has been applied even to damages that pass the test of foreseeability.[25]

The policy underlying the *Robins Drydock* rule coincides squarely with the concerns articulated by Justice Polston in his dissent.

The *Robins Drydock* rule has unquestionably been the subject of criticism. However, it has been applied in several of the United States Circuit Courts of Appeals.[26] However, the Fourth and Sixth Circuits have demonstrated a "leaning" to follow a foreseeability approach to allow economic loss damages if they are sufficiently direct.[27]

Commercial Fishermen's Exception

Commentators on maritime law recognize a special exception to the principle of no recovery for economic losses unaccompanied by physical damages carved out in favor of commercial fisherman.[28] This line of cases allows recovery for lost profits to commercial fishermen whose activities are disrupted as a result of pollution or other casualty. The exception is said to be justified because of their "particular and special nature" and the fact that their losses are especially foreseeable and a direct consequence of a casualty such as an oil spill.[29]

The basis for this exception seems to arise from historical notions that "seaman are the favorites of admiralty and their economic interests [are] entitled to the fullest possible legal protection."[30] However, in *Miller* the Eleventh Circuit expressly commented "This Circuit has yet to address the issue and we approach its resolution cognizant that not all courts have embraced the Ninth Circuit's view."[31]

The commercial fishermen exception has arisen in two contexts: 1) when a vessel has been physically incapacitated due to the negligence of another party and fishing operations are suspended; and 2) when negligent actions cause marine environmental damage and fishing yields are diminished as a result.[32] The circumstances in Curd arguably fall under the second situation, most often illustrated through citation to *Union Oil Co. v. Oppen*.[33] In *Union Oil*, the Ninth Circuit refused to apply the *Robins Drydock* rule to prevent commercial fisherman from recovering lost profits after an oil spill caused damage to fish and the marine ecosystem because the offshore driller owed a duty to commercial fisherman to conduct its operations "in a reasonably prudent manner so as to avoid the negligent diminution of aquatic life."[34]

> **"The Robins Drydock rule has unquestionably been the subject of criticism."**

Even more analogous is *Pruitt v. Allied Chemical Corp.*,[35] which involved a chemical company discharging pollutants into the Chesapeake Bay. In that case, the affected commercial fisherman were held to be able to pursue claims for economic losses in admiralty, but not the businesses purchasing or marketing the seafood; sport fishermen; boat, tackle, and bait shop owners; and marina owners.

The generally recognized limitation here is that the exception to the rule applies only to fishermen holding state commercial fishing licenses.

Florida Statutory Claim

Many states allow recovery for economic loss damages according to a statute.[36] However, whether state law recovery is preempted if it conflicts with the *Robins Drydock* rule is not clearly decided. In *MV TESTBANK*, the court held that *Robins* preempted Louisiana law.[37] However, in the case of *In re Glacier Bay*[38] claimants were allowed to recover economic loss damages under Alaska law.

RETROSCOPE

It appears neither the prospect for the General Maritime Law applying/controlling or the impact of the *Robins Drydock* rule were considered in *Curd*.[39] Given the facts articulated in the opinion, most notably that pollutants were spilled into Tampa Bay, there appears to have been a fairly strong argument for Admiralty Jurisdiction over the claims made and corresponding application of the General Maritime Law of the United States.

If the General Maritime Law applied, a strong argument that the claims premised on Florida Statutes are pre-empted based on *State of Louisiana ex rel. Guste v. M/V TESTBANK*[40] could be made. However, the claims for purely economic losses under common-law negligence notions would have presented different considerations if the General Maritime Law applied.

The initial argument is that recovery for the fishermen's economic damages is barred by the *Robins Drydock* rule. The strength of this argument would appear to be bolstered by the 11th Circuit's adherence to the *Robins*

Drydock rule.[41] The rationale underlying *Robins Drydock* addresses the concerns for "limitless exposure" raised in the dissent. Therefore, at least that jurist should have been susceptible of being persuaded to apply the *Robins Drydock* rule. Nonetheless, the 11th Circuit Court of Appeals' "discussion" in *Miller Industries v. Caterpillar*[42] at least creates a prospect the commercial fishermen's exception under the General Maritime Law might be applied to circumvent the *Robins Drydock* rule. While the outcome is not clear, the circumstances warrant making the argument.

GOING FORWARD

Curd is now unquestionably the law in Florida and prospects for success by raising the arguments discussed in the "retroscope" to overturn the decision in its entirety are likely dim. As the dissent points out, however, *Curd* should be limited to recognizing claims for commercial fisherman only.

Curd can be construed as an "adjustment" in judicial thinking, at least in the context of pollution claims, to "shift" from a rationale premised on limiting the scope of a tortfeasor's potential liabilities to one positing responsibility squarely on the "polluter" regardless of breadth. In jurisdictions other than Florida, zealous representation of commercial maritime interests should mandate urging application of the General Maritime Law and its "safeguards" against overbreadth for potential damage exposure.

1. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010).
2. *Robins Drydock v. Flint*, 275 U.S. 303, 48 S. Ct. 134, 1928 A.M.C. 61 (1927).
3. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d at 1221.
4. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d at 1222.
5. *Id*.
6. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d at 1223.
7. *Id*.
8. *Id*.
9. *Union Oil Company v. Oppen*, 501 F.2d 558 (9th Cir. 1974).
10. *Id*. at 563.
11. *Louisiana ex. rel Guste v. The M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981).
12. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d at 1227.
13. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d at 1227-28.
14. *Id*.
15. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d at 1232.
16. *Id*.
17. *Id*.
18. *Curd v. Mosiac Fertilizer, LLC*, 39 So. 3d at 1233.
19. *Curd v. Mosiac Fertilizer*, LLC, 39 So. 3d at 1234.
20. Id.
21. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); *Sisson v. Ruby*, 497 U.S. 358, 360-61 (1990); *Becker v. Harken, Inc.*, 2007 WL 473089, *4 (S.D. Fla. 2007) ("To determine whether [a] case falls within the Court's admiralty jurisdiction the Court must decide whether the facts satisfy conditions of location and connection with maritime activity.") (citing *Grubart*, 513 U.S. at 534).
22. *See Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1545 (11th Cir. 1994); *Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 256 (9th Cir. 1973).
23. *Alderman v. Pacific Northern Victor, Inc.*, 95 F.3d 1061, 1064, 1997 AMC 70 (11th Cir. 1996) (citing *Grubart*, **115 S. Ct. at 1048**; *Sisson*, 497 U.S. at 362-64 (n.2)); *Becker v. Harken, Inc.*, 2007 WL 473089, *4 (S.D. Fla. 2007).
24. *See* n.2, *supra*.
25. *State of Louisiana ex. rel.Guste v. M/V TESTBANK*, 752 F.2d 1019, 1027 (5th Cir. 1985) (en banc).
26. The First, Third, Fifth and Eleventh Circuits have all applied the rule without a great deal of discussion. The Second, Eighth and Ninth Circuits have applied the rule but with some commentary which might be construed as criticism.
27. *Marine Navigation Sulfur Carriers, Inc. v. Lonestar Industries*, 638 F.2d 700, 702 (4th Cir. 1981); *In Re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980); *National Steele Corp. v. Great Lakes Towing Company*, 574 F.2d 339 (6th Cir. 1978); *Venore Transporation Co. v. M/V Struma*, 583 F.2d 708 (4th Cir. 1978). This is apparently akin to the approach adopted by the majority incurred.
28. THOMAS J. SCHOENBAUM, 2 ADMIRALTY AND MARITIME LAW PRACTITIONER TREATISE SERIES, § 14-7, (4th ed. 2004), pg 127.
29. *Id*. at n.15.
30. *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984) (quoting *Carbone v. Ursich*, 209 F.2d 178, 181-82 (9th Cir. 1978)).
31. *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 819 (11th Cir. 1984)
32. *See Channel Star Excursions, Inc. v. So. Pac. Transportation Co.*, 77 F.3d 1135, 1138 (9th Cir. 1996).
33. *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).
34. *Union Oil Co. v. Oppen*, 510 F. 2d at 570.
35. *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975 (E.D. Va. 1981).
36. THOMAS J. SCHOENBAUM, 2 ADMIRALTY AND MARITIME LAW PRACTITIONER TREATISE SERIES, § 14-7, (4th ed. 2004), pg 127.
37. *State of Louisiana ex. rel.Guste v. M/V TESTBANK*, 752 F.2d at 1027 (5th Cir. 1985) (en banc).
38. *In re Glacier Bay*, 746 F.Supp. 1379 (D. Alaska 1990), *aff'd.* 944 F.2d 577 (9th Cir. 1991).
39. This is not intended to "slight" the Florida Supreme Court for the lawyers incurred. The Court generally renders decisions based on the arguments presented by the lawyers for the respective parties. The lawyers focus on what they deem to be the pertinent legal issues in framing their arguments. Nothing in this particular article should be construed as a "second-guess"; rather, what is offered here is simply an alternate view/interpretation of the issues from a considerable "distance" and undoubtedly different perspective.
40. *State of Louisiana ex. rel.Guste v. M/V TESTBANK*, 752 F.2d at 1027 (5th Cir. 1985) (en banc).
41. Florida catered within the 11th Circuit.
42. *Miller Industries v. Caterpillar*, 733 F.2d 813 (11th Cir. 1984)

A VIEW FROM ARGENTINA:

AFTER 40 YEARS OF SERVICE TO THE INDUSTRY, PANDI LIQUIDADORES. SLR IS STILL GOING STRONG

by: Alberto Trigub
Pandi Liquidadores S.R.L.
Buenos Aires, ARGENTINA

This year, Pandi Liquidadores SRL is very pleased to celebrate its 40th Anniversary of permanent service to the shipping industry and, particularly, to the P&I Clubs and their members.

The company was founded in July 1, 1970 by the late Mr Constantino Clover as a commercial correspondent for P&I Clubs. Mr. Clover was well known in Argentina for his experience in handling P&I claims where he had previously worked for different ship agencies and ELMA, the Argentine State owned fleet eventually reaching the position of Manager of its claims department.

Since 1970, Pandi Liquidadores SRL, has been at the service of the maritime industry, working exclusively as a P&I correspondent not only in Buenos Aires, but also in all the ports around Argentina. However, due to the increase of the brown water business in the waterways, known as Hidrovia, the company expanded its services to the shipping community in Bolivia, Brazil, Paraguay, Uruguay and Argentina.

Nowadays, the company is correspondent for most of the P&I Clubs within the International Group, as well as for non-group clubs in the UK, Continental Europe and the Far East.

The firm is located in the heart of the business district of Buenos Aires, very close to the port area, and has a permanent staff of 14 people dealing with the broad range of incidents and claims. Our services are available 24 hours round the clock.

As the late 1980's and 1990's have produced enormous changes in the industry thus enlarging our area of influence with the consequence so that we had to widen our knowledge not only of the laws, but use and practice of neighborhood countries and knowledge of relevant international conventions.

For example, significant changes have taking place lately in South America where some of the countries have entered on a huge program of privatization and others are following this trend. These changes are modifying all aspects of the trade, laws and jurisprudence and, in this regard, we have a duty to make these changes available to our principals and also to address the chain of multimodal transport. We are not dealing any longer only with ocean carriage, but also with inland transportation by road and rail and all the added complications this brings about.

On the other hand, some regional countries have become part of important international conventions such as CLC and Fund following major casualties which have taken place in their territorial waters in the recent years. This has allowed us to enlarge our knowledge of such a sensitive matter as oil pollution incidents and have closely with ITOPF and the concerned Club in such instances.

Through the years we have also gained vast knowledge in dealing with other major casualties such as damages to fixed and floating objects, groundings and collisions. All this incidents are directly related to the peculiars and

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particulars of the navigation in the River Plate area and its waterways, especially the Parana River where most of the grain port terminals are located.

Apart from dealing with a number of dock damages, groundings and collisions, we regularly handle customs fines resulting from the fiscal voracity of local Customs Authorities and suggesting the steps to be taken by ships' Masters upon arrival when presenting the store list and other relevant documents to Customs. At times, discrepancies are found when ships are boarded by search gangs. These incidents give rise to customs proceedings and fines for such differences in the quantities of paints, chemicals bunkers and other goods and materials onboard.

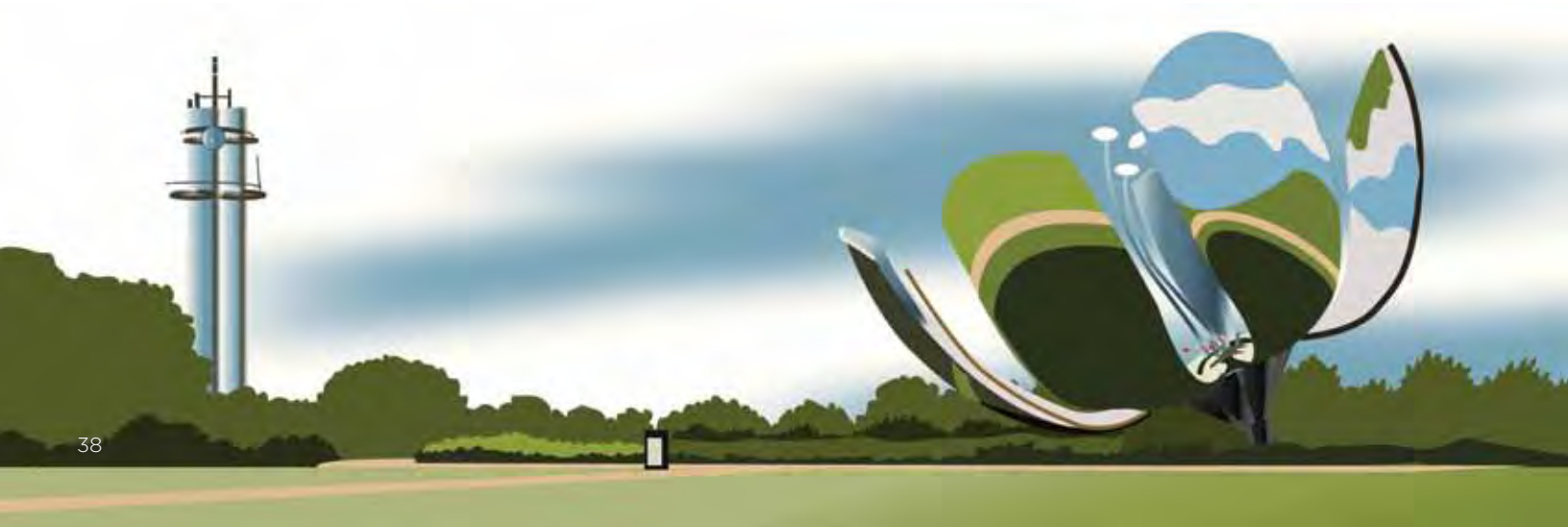
In Argentina, the port or ship agents are jointly and severally responsible with the carrier in respect of customs and migration infringements. It is usual for the agents to require a letter of undertaking for the supposed infringements before vessel's departure so as to cover themselves from future fines.

The same occurs, as mentioned, in respect of fines from immigration authorities especially dealing with the increasing number of stowaways mainly from the West Africa countries.

"the company expanded its services to the shipping community in Bolivia, Brazil, Paraguay, Uruguay and Argentina."

The office also keeps in close contact with maritime and other relevant governmental authorities such as coast guard and environmental compliance authorities, and local OSROs (oil spillage response organizations) with whom we have dealt with on behalf of P&I clubs.

Through the years, we have adapted ourselves to the changing world of handling P&I claims and look forward to future challenges.



FD&D CORNER

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

THE SALDANHA DECISION: VESSEL SEIZURE BY SOMALI PIRATES NOT NECESSARILY AN OFF-HIRE EVENT UNDER NYPE CL. 15

As the Membership is well aware, the problem of pirate attacks on commercial shipping, both in the Gulf of Aden and elsewhere, persists despite multinational efforts to ensure safe transit through these busy waters. While the number of successful pirate attacks has dropped considerably in the last year, the number of attempts is still quite high. And when a pirate attack is successful, the question whether the vessel remains on-hire during the period of detention, if not clearly addressed in the governing charter party, is often fertile ground for disputes between Owners and Charterers. As the period of detention increases, the consequences of this dispute can become very costly.

In the recent matter of *COSCO Bulk Carrier Co., Ltd. v. Team-Up Owning Co. Ltd.* [2010] EWHC 1340 (Comm) (*The SALDANHA*), the Owners delivered the vessel into the time charterer's service on about July 5, 2008 for a period of 47 to 50 months at a rate of US $52,500 per day. Clause 15 of the NYPE form provided:

> *That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of...stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost....*

On January 30, 2009, charterers ordered the vessel to load bulk coal in Indonesia for carriage to Slovenia. While transiting the Gulf of Aden en route to the discharge port, the vessel was seized by Somali pirates on February 22nd and taken to Eyl, where she was detained until April 25. On May 2nd, the vessel reached an equivalent position to where she had been seized. The charterers refused to pay hire for the entire period of detention and repositioning – i.e., from February 22nd until May 2nd. Given the daily hire rate, the value of the off-hire claim was significant.

The London tribunal found that the vessel remained on-hire during the entire period, since the pirates' acts had not prevented the "full working" of the vessel.

On appeal to the London High Court of Justice, charterers advanced several arguments in an attempt to bring themselves within one of the enumerated causes of clause 15. First, they argued that the hijacking amounted to a detention by average accidents to ship or cargo. Emphasizing the need for certainty in commercial law, and referring to the language of Kerr J in *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368, the Court agreed that "average accident" meant an accident that causes damage. As the hijacking had not resulted in any damage to the vessel, the Court rejected charterers' argument on this point.

Second, charterers argued that the officers' and crew's failure to take standard anti-piracy measures was a significant cause of the loss of time and thus constituted "default of men" under clause 15. On this point, the tribunal had concluded that while the term "default" might conceivably include the master's and crew's negligent or inadvertent performance of their duties, the history of the clause and the specific problems it was designed to address made any such construction untenable. The Court agreed.

Finally, charterers contended that the catch-all "any other cause" was sufficiently broad to encompass detention by pirates. The tribunal, and likewise the Court, rejected this argument, finding that the act of piracy had nothing to do with the condition or efficiency of the vessel, its crew, or cargo. The appeal was thus dismissed.

Subject to any further appeal, the law is now settled that, absent express wording, a charterer cannot validly place the vessel off-hire under clause 15 if the vessel should be hijacked. Since the problem of Somali pirates has yet to be eradicated, the Managers urge the Membership to decide in advance, and to clearly establish in each charter party, which party will bear the risk of the vessel being detained by pirates.

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IF AT FIRST YOU DON'T SUCCEED, TENDER NOR AGAIN, AND AGAIN, AND AGAIN....

Disputes between owners and charterers regarding responsibility for delays at loading and discharge ports are nothing new, and the Managers are often called upon to advise members about the validity of NORs, when time began to run, and the merits and value of potential claims for demurrage. In all cases, for a demurrage claim to be valid, the Master is required to follow to the letter the charter party provisions governing how and when a NOR is to be given so that there is no argument later about whether and when time began to count. Many charter parties also impose specific, often very short time bars and other requirements for the presentation of demurrage claims, separate and apart from time bars for any other claims arising under the charter party. If those requirements are not strictly complied with, demurrage claims may be prejudiced or precluded altogether.

AET Inc. Ltd. v. Arcadia Petroleum Ltd., [2010] EWCA Civ 713 (the "EAGLE VALENCIA"), involved just such a situation. In that case, the vessel arrived at the load port anchorage and tendered NOR at 11:48 hrs on January 15th, but free pratique was not granted until 08:30 hrs the following morning – nearly 21 hours later. At 15:39 hrs on January 16th, the Master sent charterers an e-mail advising that, without prejudice to the earlier NOR, the vessel was ready to load. On January 19th, the vessel berthed and commenced loading.

The SHELLVOY 5 charter party provided that laytime would begin to run six hours after the vessel was ready to load and the Master had tendered a written NOR. Clause 22 provided further that:

> *If Owners fail to obtain Customs clearance; and/or free pratique...either within the six hours after Notice of Readiness originally tendered or when time would otherwise normally commence under this Charter, then the Original Notice of Readiness shall not be valid. A Notice of Readiness may only be tendered when Customs clearance and/or free pratique has been granted....The presentation of the notice of readiness and the commencement of laytime shall not be invalid where the authorities do not grant free pratique...at the anchorage or other place but clear the vessel when she berths.*

In the Commercial Court, Mr. Justice Walker held that the original NOR was not invalid if free pratique was granted before the vessel berthed, so Owners' demurrage claim succeeded based on that original NOR.

The Court of Appeal overturned the decision below, concluding that the charter party required free pratique to have been granted *either* at the time the NOR was given or within six hours thereafter. If it was not, then the January 15th NOR was invalid and laytime would not commence. Because free pratique was only granted some 21 hours after that NOR was given, the NOR was invalid and time did not begin to run.

However, the Master's January 16th e-mail advising that the vessel was ready to load **was** a valid NOR because free pratique had by then been granted. The Court of Appeal made clear that a NOR need not take any particular form unless the charter party requires a specific form – so long as it is in writing and advises that the vessel is ready to load, it is valid. As a result, laytime began to run once the Master sent his e-mail.

...BUT USE THE KITCHEN-SINK APPROACH WHEN PRESENTING THE CLAIM!

The Owners' victory was a hollow one, however, because the Court of Appeal went on to conclude that the demurrage claim was time-barred, based on a charter party provision requiring Owners to first notify Charterers of the demurrage claim within 60 days of completion of discharge, and to provide Charterers with "full and correct" documentation of the claim within 90 days. Failure to timely satisfy both the notice and documentation requirements would extinguish the claim.

Owners submitted their documented claim within 30 days of completion of discharge, but based solely on the original January 15th NOR. They did not include the Master's January 16th e-mail until more than 90 days after the completion of discharge. Charterers argued that because the original NOR was invalid, and because the Owners submitted the valid NOR out of time, the claim was not "fully and correctly" documented and was thus time-barred. Owners were left with the unsatisfactory argument that the claim had been timely submitted and

documented, and that it required a simple amendment based on a revised demurrage calculation, since Charterers were already in possession of the Master's January 16th NOR.

The Court of Appeal took a hard line on this issue and found the Owners' claim to be time-barred. An essential element of any demurrage claim, the Court observed, is the NOR; if the only NOR submitted with the claim is invalid, then the claim is by definition not "fully and correctly documented" as required by this particular charter party.

The lesson to be learned is that, in case of any doubt as to the validity of the NOR, the Master should give further NORs until the vessel is berthed and cargo operations have actually begun. Procedurally, moreover, where the charter party specifies how and when a demurrage claim must be presented to be enforceable, Owners should be sure to include each and every NOR tendered by the Master, as well as any other communications from the vessel indicating readiness to load, even if Owners question the relevance of such communications.

CAVEAT EMPTOR

Prior to the recent recession, parties contracting for the construction of new vessels likely gave little thought to the specific language of refund guarantees, since in more robust economic times the buyers – the intended beneficiaries – were unlikely to call for repayment under those guarantees. After all, when a contract is unlikely to be enforced, it is small wonder that the parties pay little attention to the contract language. But as market conditions have deteriorated in the past two to three years, and since the insolvency of shipyards is a real possibility, issuing banks and buyers alike have started to realize that these guarantees deserve closer scrutiny and more precise language so that the parties' respective rights and obligations are clearly defined. This is particularly true in situations where so much money is potentially at stake.

In the recent case of *Kookmin Bank v. Rainy Sky and others*, [2010] EWCA Civ 582, the bank issued six bonds to guarantee the refund of advance payments as security for the obligations of its shipyard customer under six separate, yet materially identical, shipbuilding contracts. Each contract required the buyer to pay the contract price in periodic installments at prescribed stages of the construction process. The contracts also entitled the buyer to a refund of any installments paid if the yard should become insolvent prior to delivery of each ship.

The language of the bonds was slightly different. Paragraph 2 entitled the buyer, in specific circumstances including rejection of the vessel, to repayment of any installments on the purchase price. In paragraph 3, the bank guaranteed payment of "all such sums due to [the

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buyer] under the contract." The yard's insolvency was not expressly mentioned as an event triggering the bank's obligation to pay out on the bonds.

After the buyer paid the first installments, the shipyard became insolvent and the buyers sought repayment of over US $46.6M under the bonds. The bank insisted that it was entitled to review "evidence" of the underlying dispute between the buyer-beneficiary and the yard, whereas the buyers argued that absent fraud, the bonds were payable on demand without any explanation beyond notice as expressly provided in the bonds themselves. The parties also disagreed as to whether the language "all such sums due to [the buyer] under the contract" included situations like the shipyard's insolvency.

In summary proceedings in the High Court of Justice, Mr. Justice Simon agreed with the buyers, holding that the bonds were to be considered demand guarantees. In his view, all that was required to trigger the bank's obligation to pay was a statement by the buyer specifying the nature of the yard's failure to fulfill its obligations under the shipbuilding contract. Essential to his ruling was his determination that the words "such sums" under paragraph 3 of the guarantees included the pre-delivery installments; in the judge's estimation, the bank's contrary interpretation yielded the "surprising and uncommercial" result that the buyers would be unable to demand payment under the bond in the event of the yard's insolvency ... perhaps the eventuality most likely to require security for the buyer.

The Court of Appeal upheld the bank's appeal and overturned the decision below with respect to the interpretation of "all such sums due...under the contract." All of the judges agreed that this language was susceptible of both parties' interpretations, but the majority concluded that the bank's reading was closer to the natural meaning of the contract language. Lord Justice Patten observed:

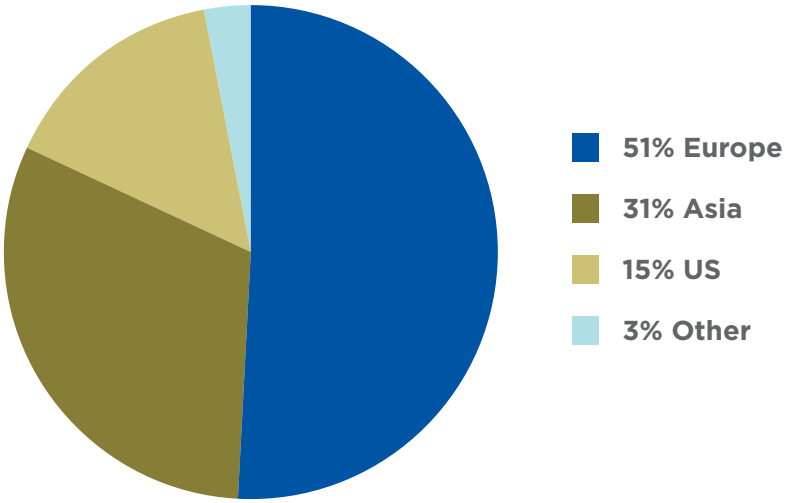
> *Unless the most natural meaning of the words produces a result which is so extreme as to suggest that it was unintended, the Court has no alternative but to give effect to its terms. To do otherwise would be to risk imposing obligations on one or other party which they were never willing to assume and in circumstances which amount to no more than guesswork on the part of the Court.*

On this basis, Patten LJ agreed with the bank's interpretation, concluding that the bonds did not require repayment in the event of the builder's insolvency. The fact that cover for just such an eventuality may have been desirable from the buyer's perspective was an insufficient basis upon which to depart from the natural and obvious construction of the bond language. Given the extent of the buyer's loss, it is likely that an appeal is in the works.

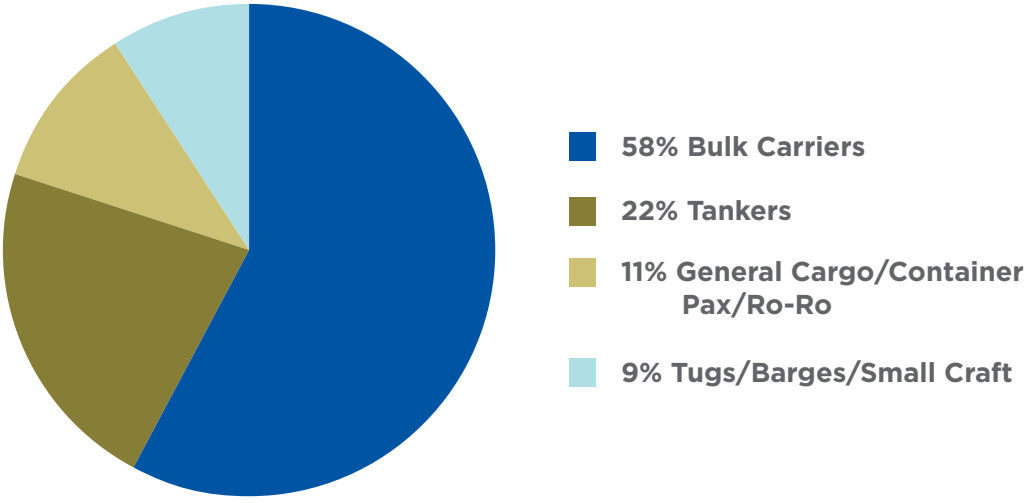
The moral? Whatever terms might be agreed, parties are encouraged to be as clear and precise as possible when designing contracts, particularly when such large sums of money might be at stake.

ALL CLASS GT BREAKDOWN

GT BREAKDOWN BY REGION



GT BREAKDOWN BY VESSEL GROUP



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