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NEWS

Britannia 

The Britannia Steam Ship
Insurance Association Limited



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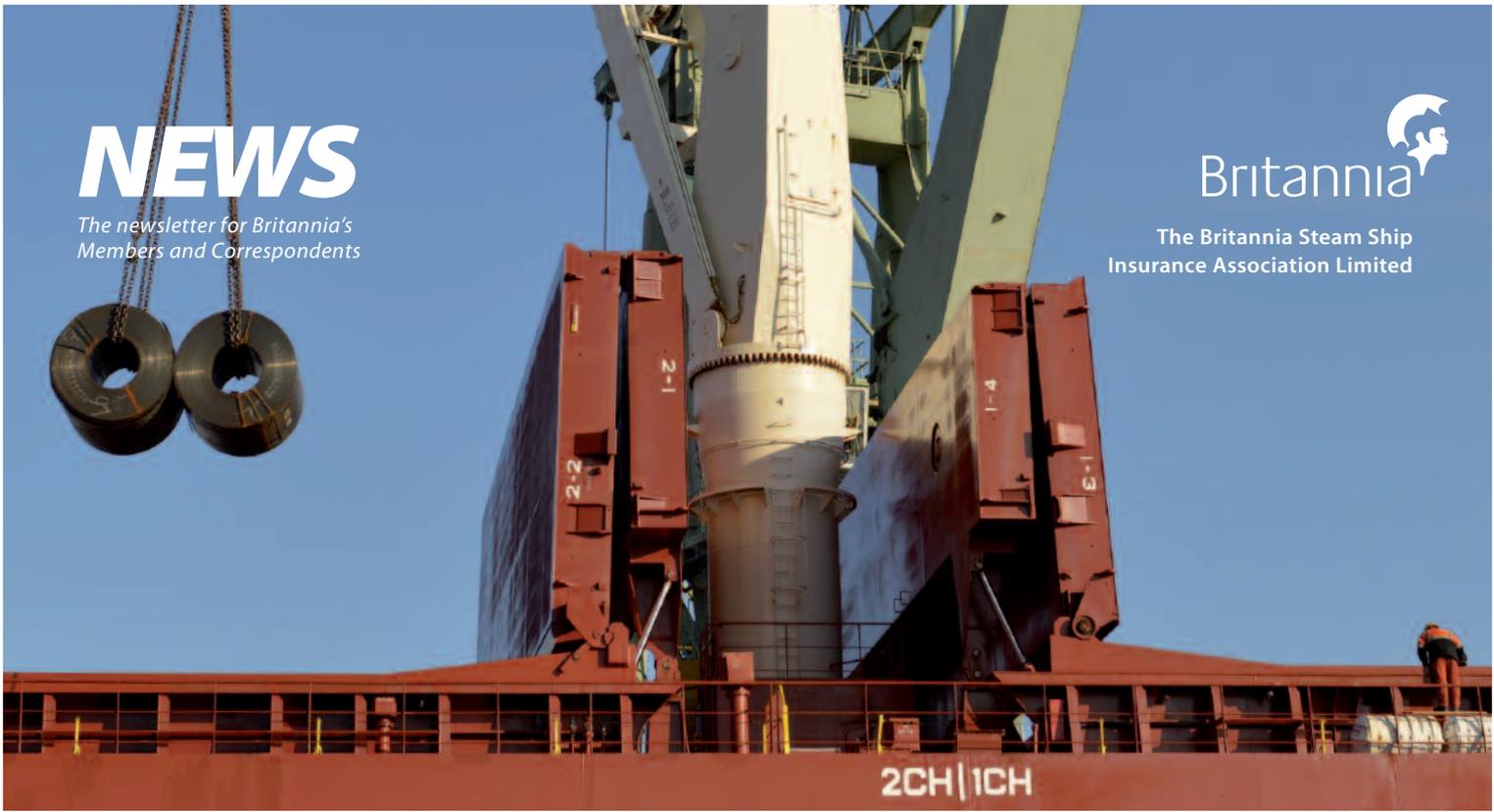


NEWS

The newsletter for Britannia's
Members and Correspondents



The Britannia Steam Ship
Insurance Association Limited



Letter from the Chairman

Welcome to the latest edition of *Britannia News*. We have had a long hot summer in the UK but sadly this has not been reflected in freight rates in the shipping market, which continue to bump along at depressed rates. The effects of this can be seen in issues over maintenance and quality of manning – those of us with grey (or little) hair have seen this all before and can reflect on the lessons of history that seem to continue to be unlearned.

Claims on the Association continue at historically high levels which indicates another of the periodic 'step changes' in claim levels, with a new plateau being reached. The number of claims remains broadly constant, but the value of each has shown a marked increase in the last three years.

Pool claims also continue to be a concern – there has been plenty of press coverage on the cost and difficulty of the *COSTA CONCORDIA* wreck removal (currently the ship has been lifted to an upright position, but there is a long way to go before she is refloated and transported to the breakers), but other recent high profile

incidents such as the *RENA* and the *MOL COMFORT* are examples of the potential for heavy claims. Inevitably these affect the reinsurance rates on the IG's programme as the market adjusts to such losses.

Work continues in the International Group to analyse large claims to see what lessons can be learned to control these – you will see further details about this in this edition.

The scourge of piracy continues to blight our industry. The efforts of naval forces, and the adherence by more ships to the BMP guidelines, has resulted in a welcome reduction in attacks off East Africa.

Letter from the Chairman (continued)

Sadly attacks off West Africa have become more common and these are of a very different nature, usually involving a higher degree of violence. It really is intolerable that seafarers have to face these type of attacks in the 21st century. Britannia offers what support it can to its Members involved in such incidents, but action by the international community is required to stamp this out.

The global financial recovery continues to offer hope for a return to robust global growth – a prerequisite for an improvement in shipping markets. Britannia has had a good return on investments over the past few years and this has helped partially to offset the increased claims environment, but markets are volatile and it is unlikely that returns will continue at these levels.

We know that our Members value the financial strength and stability of Britannia and we continue to make decisions to ensure the long-term health of the Club.

Best regards



Nigel Palmer OBE Chairman



Committee news

Since the last edition of *Britannia News*, Messrs. D K-L Chao, A Lowry, P-O Lund and K Whang resigned as directors and Messrs. A Cieslinski and A J Cutler were welcomed as new directors of the Committee.

In October last year, the Committee meeting was held in the Bauer Hotel in Venice where

Committee members and their partners had to get to grips with the practical problems of navigating around a city only by boat or on foot. In January the meeting was held at the Association's offices at Regis House in London and in May the Committee travelled to Hong Kong where the Conrad Hotel hosted the meeting.

The meeting in October this year will take place in Amsterdam – another city full of canals. But while boats will still play a part in the Committee activities, there are plenty of other options for exploring the city without getting wet feet.



Club news



Grantley Berkeley

In November last year, Grantley Berkeley was elected chairman of the International Group following the retirement of Claes Isacson, formerly of Gard. Grantley was elected by managers from the 13 Group Clubs and will serve a three-year term in the position.

Grantley Berkeley has been with Tindall Riley since 1982. He is currently the chairman of Tindall Riley (Britannia) and has been a member of the Britannia Committee since 2006. The last Britannia representative to hold the position as chairman of the International Group was John Riley who held the post between 1994 and 1997. John Riley was at the helm when the first European anti-trust investigation was conducted and Grantley took over just as the latest EU investigation came to a close. This had taken up much time for the previous incumbent, but there are plenty of new challenges facing the Group during Grantley's chairmanship. One of the most important issues at the moment is how to deal with the rising cost of claims, and the International Group will be looking carefully at what can be done to control the cost of the largest claims, in particular, the cost of wreck removal. There is also the issue of the increasing cost of insurance and reinsurance at a time when Members are experiencing a prolonged recession in the shipping market. There is a strong feeling that it is important for the Clubs to work together, reaching consensus wherever possible, under the strong leadership of the International Group chairman.



Andrew Cutler

Following the retirement of Colin Johnston, Andrew Cutler was appointed Chief Executive of Tindall Riley (Britannia). Andrew initially qualified in 1990 as a barrister and in 1992 joined lawyers Holman Fenwick Willan. He spent his first two years in their London office qualifying as a solicitor and then went out to Hong Kong where he became a partner in 1999. In 2002 he moved to the Shanghai office and became partner in charge there before returning to the UK in 2006. After joining the Club, Andrew became director at the head of the Scandinavian claims department. He has a special interest in pollution matters, sanctions and maritime security, both within the Club and at International Group level.



Tony Gosden

Tony Gosden retired in June this year after 16 years with Tindall Riley. He joined the company in 1997 to work with John Riley, who was then the senior partner and Chairman of the International Group.

Tony had qualified as a chartered accountant with Peat Marwick Mitchell (later to become KPMG) and, after 5 years in London, transferred first to Brussels and then to Luxembourg, working principally with clients in the banking sector. Although Tony knew little about marine insurance when he joined Tindall Riley, he quickly got to grips with the intricacies of the sector. Indeed, his time in Brussels proved useful as the International Group was, at that time, grappling with the second EU anti-competition investigation and Tony worked closely with John Riley on that issue.

Tony's contribution to Britannia has been considerable, especially in the work of the Finance, Risk and Investment Sub-Committee, matters relating to corporate governance and Solvency II. He was also heavily involved in the work of the International Group, sitting on the Accounting Standards and Regulatory Affairs Sub-Committees, and chairing the Capital Adequacy Sub-Committee.



Jo Rodgers

Tony Gosden's role as Chief Financial Officer of Tindall Riley (Britannia) has passed to Jo Rodgers. Jo qualified as a chartered accountant in 1991 and worked at both KPMG and Deloitte before joining Tindall Riley in 2005 as director of financial reporting. Jo worked closely with Tony over the past eight years and is well-placed to carry on the tradition of sound financial management of the Association.

Taiwan claims seminar

In June this year, Britannia organised a claims seminar for its Taiwanese Members at the Far Eastern Plaza Hotel in Taipei. The seminar was organised with the help of Chiang Marine Services, Britannia's exclusive Correspondents in Taiwan and attracted over 100 representatives. Members' staff were joined by representatives from various government agencies and Taiwanese law firms.

The aim of the seminar was to provide Members with examples of some of the most difficult, complex and unusual claims that Britannia has handled recently. Fortunately, most of Britannia's Members have never encountered problems involving piracy or cargo liquefaction, but few are immune to the risk. Members' staff therefore need to understand the issues and know how to react should a crisis occur. Many organisations, including the Club, have produced Circulars and Bulletins to keep Members advised of developments in such problem areas. This seminar provided real-life examples and suggested ways of handling and, where possible, resolving those problems.

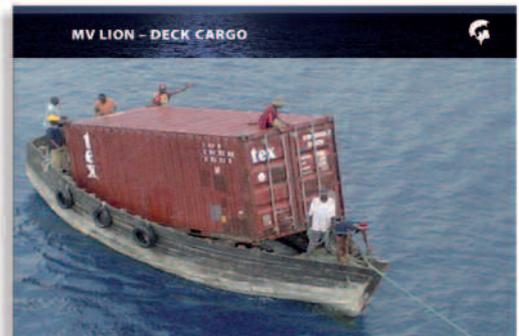
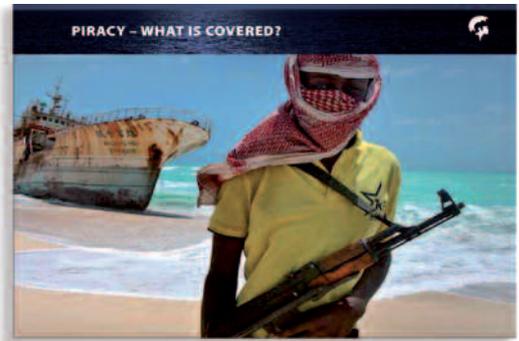
The format chosen to provide a practical example was an imaginary voyage of the fictitious ship *MV LION*. The 'voyage from hell' scenario incorporated a variety of incidents, problems and disputes all loosely based on actual events. As the 'voyage' progressed and the problems arose, one by one the various Club representatives would step in and discuss how to respond.

This involved claims handlers specialising in P&I, Personal Injury and FD&D. An underwriter was also on hand to discuss and explain the various additional covers that might be necessary following events.

The presentations were candid in revealing certain circumstances where the Club representatives struggled to find a solution – either because of difficult political circumstances or because some elements of the claim were not within P&I cover, such as loss of hire or operational expenses.

It was clear from the feedback received that this 'warts and all' approach provided much food for thought and there was, at times, a lively debate over some of the issues raised. There is no doubt that everyone benefited from the seminar, though we can only hope that none of Britannia's Members experience in one voyage what the imaginary ship experienced in the course of the seminar!

Below: risk management technical seminar which took place in Manila in June 2013.



Risk management – an update on the technical seminar programme



The recent IMO symposium on the future of ship safety made a number of recommendations to the Maritime Safety Committee, including ways of encouraging a safety culture beyond simply enforcing compliance with the various regulations. It also recommended a review of the existing safety regulatory framework to ensure that it meets future challenges, including the use of new technologies and the continued importance of the human element.

The programme of technical seminars continues with regular presentations in India, the Philippines and Taiwan in addition to visits to other areas where Members source their crew. Safety culture and the human element are themes running throughout the presentations, which strive to improve the standard of crew competence and training. The case studies shown in the presentations are based on the Managers' experience of handling claims, and this enables us to raise awareness of safety issues based on what can go wrong and communicate this information to those at the sharp end. Learning from mistakes is a powerful message and our aim is to get the seafarers to participate at the seminars. Every crew member has a part to play, whatever their individual experience, and each person can readily spot defects on board the ship.

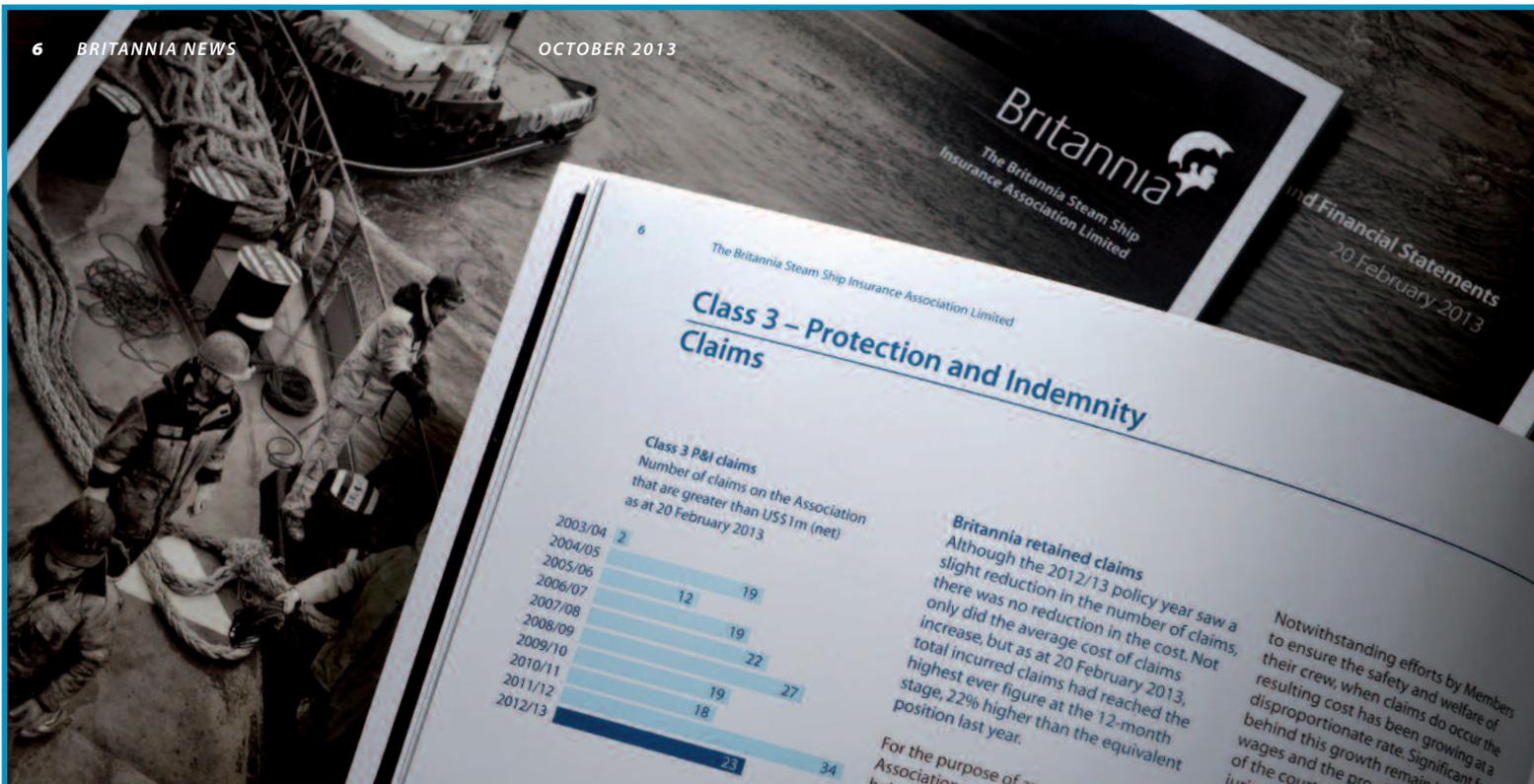
The condition survey programme allows the managers to review the quality of the entered tonnage and seek to ensure the maintenance of standards. It also enables the risk managers to spot trends and provide help and support to the membership to help Members avoid potential claims and also unwanted attention from Port State Control inspectors. Trends associated with lapses in shipboard planned maintenance routines were debated at these seminars, with best

practice recommendations and guidelines discussed with the seafarers. In addition there was a detailed review of various aspects of cargo handling and stowage combined with a discussion on the recommended best practices relevant to different types of cargo. Both presentations provided an opportunity to encourage delegates to reflect on their own safety culture and actively record and report any defects as they go about their daily routines, with an aim to continuously improve the Safety Management System (SMS) and ensure maintenance and cargo issues are raised at safety briefings and risk assessments.

The trends from the condition survey programme and claims analysis feed through to the root cause analysis work undertaken by the risk managers. The seminars provide an opportunity to disseminate some of the lessons learned from such analysis. Unfortunately, the analysis of a number of collision claims handled by the Club shows that the infringement of one or more of the International Regulations for Preventing Collisions at Sea (COLREGs) is the single most common cause of collisions. A workshop was conducted during the seminars using the examples of cases where there had been a lack of understanding of the COLREGs by the officer of the watch and a failure to apply

them properly. The case studies, illustrating areas of navigation, were familiar to many in the room and the audience participation was lively. The sessions were evenly matched in terms of comments from the floor and the speakers. Particular emphasis was placed on discussing possible human failings in the various scenarios and highlighting ways the bridge team could anticipate human errors by situational awareness and team work. The presentations also explored safeguards, including the use of navigation audits and reviewing the quality and relevance of bridge resource training. Above all, despite the advances in electronic assistance for mariners on the bridge, everyone agreed that the officer of the watch and the bridge team should maintain situational awareness at all times and must remember to look out of the window.

The seminar programme reinforces the message that the best safeguard against accidents is a genuine safety culture throughout the organisation with awareness and constant vigilance by everyone in the company. The presentations and the ensuing discussions highlight ideas and ways each individual participant can positively contribute within their own organisation to continuously improve the safety culture, both on board and ashore.



Claims review

The claims review published in the most recent *Annual Report and Financial Statements* noted that, by 20 February 2013, total incurred claims on the Association had reached the highest level ever recorded. It also noted the considerable increase in the average value of both cargo and crew claims – categories of claim which together represent approximately 57% of the Association's total retained claims expenditure.

After just 5 months of the 2013/14 policy year, it is clear that claims levels have remained stubbornly high. While the total cost of all claims is only slightly lower than at the same point last year, in part this can be attributed to the effect of a number of Members having opted for higher deductibles at the last renewal. Indeed, when the figures are adjusted for this change, the actual total cost of all claims has increased slightly.

It must be remembered, of course, that the 5-month point is still very early in a year's development. 2008 produced a 5-month total claims cost that was just over 10% higher than the 5-month figure in 2012 – but at the 12-month point was 22% lower. It is therefore difficult, if not impossible, to predict with absolute certainty how any year will develop based on the 5-month figure. The main reason for this difficulty is the extreme volatility in large claims – that is, claims that cost, or are estimated to cost, more than US\$1 million. By number, they

represent a tiny percentage of total claims on the Association, but they often have a significant impact on the total cost.

Currently, the 2013/14 policy year has 13 'large' claims out of a total of 2,133 notified thus far. In other words, these claims account for just 0.6% of all claims, by number. By value, however, they currently account for almost exactly 50% of the total cost. So, ultimately, it will be the number and level of these high value claims that will determine the total claims result for the year.

Of these 13 large claims, 8 are estimated to cost between US\$1 and 2 million and 3 fall in the US\$2–4 million range. Unusually, these contain a high proportion of cargo claims – rather than the bias towards collision, grounding, property damage and pollution that has been seen in previous years. Of the 13 notifications, 9 involve alleged damage to cargo. This lends weight to the belief that the value of cargo claims is increasing significantly.

So, what is the picture at the attritional level – that is, claims below US\$1 million?

In the *Annual Report*, it was noted that the number of cargo claims had fallen, and this seems again to be the case in the first 5 months of this policy year. However, yet again, the overall cost of cargo claims appears to be on the increase. Indeed, if one remodels the figures to take account of the increased deductibles already referred to, the increase in cost is dramatic – around 40% by value. This increase will need to be studied and, as 'harder' figures appear over the year, the possible causes identified. We will advise Members about our findings.

On a more positive note, both the number and cost of attritional crew claims have reduced in the first 5 months (compared to the similar position in 2012). It will need more time before it can be seen whether the cost of crew claims has peaked. If it has and the number of claims continues to fall, this will be a very positive development.

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The Britannia Steam Ship Insurance Association Limited

Class 3 – Protection and Indemnity Claims

Class 3 P&I claims
Number of claims on the Association that are greater than US\$1m (net) as at 20 February 2013

2003/04	2	19
2004/05		19
2005/06	12	19
2006/07		22
2007/08		27
2008/09	19	
2009/10	18	
2010/11		23
2011/12		34
2012/13	23	

Britannia retained claims
Although the 2012/13 policy year saw a slight reduction in the number of claims, there was no reduction in the cost. Not only did the average cost of claims increase, but as at 20 February 2013, total incurred claims had reached the highest ever figure at the 12-month stage, 22% higher than the equivalent position last year.

For the purpose of an Association...

Notwithstanding efforts by Members to ensure the safety and welfare of their crew, when claims do occur the resulting cost has been growing at a disproportionate rate. Significant behind this growth remain wages and the pro... of the court...

... the Association believes that a continual and increased focus on risk management – a focus that works in practice and not just on paper – remains the way forward.

The Association has put a considerable amount of effort into tackling crew matters in its risk management programme – through seminars and its publication, *Health Watch*. It would be heartening to think that this might now be having a positive effect.

It is also far too early to consider the possible effect of Pool claims on the policy year. To date, the Club has notified the Pool of one claim that is likely to exceed the new Club retention of US\$9 million.

As Members will be aware from reports in the media, the impact of certain Pool claims (from all Clubs) on previous years has been significant. In particular, the dramatic deterioration in the estimates for the *COSTA CONCORDIA* and *RENA* claims during the 2012 policy year resulted in the International Group establishing a large casualty working group to review the 20 most expensive casualties involving wreck removal and, where appropriate, SCOPIC expenditure.

The purpose of the review was to identify key common features driving cost and also to identify areas of operational planning where improvements could be made. A questionnaire was created and key data provided by the relevant Clubs for review by the working group. Six factors were identified which individually, or when combined, were believed to increase costs significantly.

While, of course, a matter of pure fortuity, the location of the casualty was found to be of significance – both in terms of its proximity to heavy-lift and portable salvage equipment and also due to the weather conditions likely to be prevailing during any casualty response.

In general, the working group found that appropriate and effective contractual arrangements were put in place to deal with casualties and that wreck removal operations followed a thorough tendering process. A clear preference on the part of Clubs to contract on a 'fixed price' or 'staged payment' basis was identified and attributed to a natural desire to ensure a fair allocation of

risk between the contractor and the Club concerned. The working group endorsed this approach. On occasion, however, it was noted that contractors were only willing to work on the basis of 'daily rate' contracts. The working group recommended that the 2010 BIMCO wreck removal contract forms should be utilised whenever possible and that better use should be made of additional bonus/penalty provisions, in order to improve risk-sharing where unforeseen delays arose.

On the whole, the Club's responses indicated a high degree of satisfaction with the performance of both the contractors' personnel and the on-site Special Casualty Representatives (SCRs). The working group also identified growing environmental concerns approaching almost zero tolerance. This frequently resulted in the need to remove bunkers and other potential pollutants, often without any formal cost/benefit appraisal. Similarly the removal, recovery, storage and destruction of containerised and other problematic cargo was seen as an area where, in certain circumstances, substantial increased exposure to cost was likely to be seen.

The most significant driver of cost was identified as being unreasonable or disproportionate orders being issued by authorities overseeing removal operations. This has perhaps been most starkly demonstrated by the *COSTA CONCORDIA* case and the well-publicised involvement by the local authorities in the removal methodology.

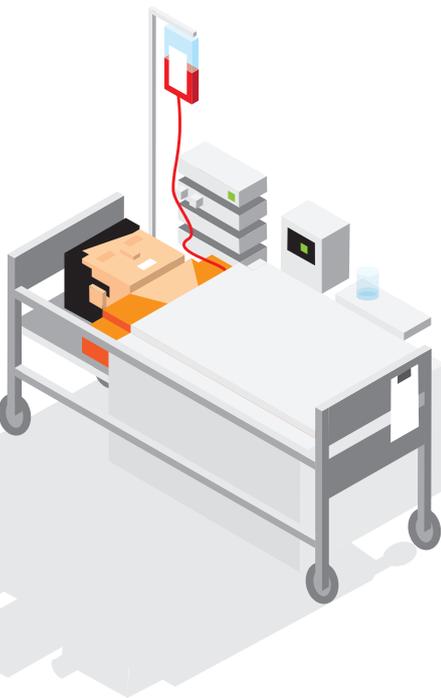
Concerns were also raised by the working group at the apparent interference by a number of authorities in the attempted termination of SCOPIC. The working group views SCOPIC as a private funding agreement, which should not be of consequence or concern to authorities who are, instead, charged with ensuring that removal operations are properly conducted. The working group stressed that the funding of SCOPIC operations is a strictly private matter between the Club concerned and the contractors employed.

As a result of the review undertaken by the working group, the International Group will be reaching out to international shipping organisations, as well as national and supranational authorities, to ensure that the Group's concerns are fully articulated and understood. Furthermore, the Group will try to ensure that key contacts are made within these organisations to enable the smooth handling of future major casualties. Further work is also planned to help identify the main reasons why authorities so often feel the need to interfere in funding arrangements.

In short, our ongoing analysis indicates that there are different drivers operating on different types of claim and different levels of claim. However, not surprisingly, the drivers behind high value claims and Pool claims are closely linked. While there is little optimism for the future, the Association believes that a continual and increased focus on risk management – a focus that works in practice and not just on paper – remains the way forward. There is little evidence to show that the claims environment will grow any less hostile for shipowners in the foreseeable future.

Crew claims in China

In previous issues of *Britannia News*, we have referred to evidence of a growing 'compensation culture', particularly in the Philippines. This has had the effect of increasing both the average and overall cost of crew claims. Recent changes in the method of calculating damages for personal injury claims in China signals that the cost of claims involving Chinese seafarers is also set to increase.



There are two main elements: first, the ever-increasing levels of contractual compensation written into standard collective bargaining agreements and, secondly, the apparent shortage of competent seafarers that is tempting some owners to engage seafarers even though they are not sufficiently fit. Unfortunately, the combination of these two elements has made it very attractive for many seafarers who are not fully fit to recover compensation for permanent disability, rather than returning to sea.

During the boom years of shipping, when the number of new ships being delivered was outstripping the availability of suitably trained crews to man them, people looked increasingly to China to fill the gap. Indeed, some commentators predicted that China would eventually overtake the Philippines and India as the primary source of seafarers. Although the number of Chinese seafarers has not reached that level, there are signs that more shipowners are indeed turning to this market.

Although it cannot be said that the level of crew claims in China has increased to the extent of other countries, there are indications that the value of crew claims in China is increasing, particularly following a recent change in the law relating to the calculation of damages in personal injury claims.

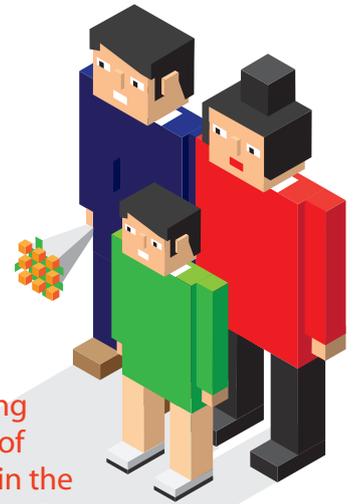
Until relatively recently, foreign owners were afforded some protection by limitations imposed by the Chinese Supreme Court's 1992 Specific Provisions on compensation for loss of life and personal injury at sea involving foreign interests (the 1992 provisions).

Amongst other things, the 1992 provisions contained a limitation for personal injury claims of RMB800,000 per claimant (at today's rate of exchange, about US\$130,600).

The Supreme Court has now stipulated that personal injury claims shall be subject to the Maritime Code of the PRC and, where claims do not fall within the scope of the Code, the Court's interpretation of the application of the law for personal injury (known for convenience as the 2003 Judicial Interpretation) will apply. The 2003 Judicial Interpretation came into force on 1 May 2004 and applies to claims in tort and also claims based on employment.

The most important point to note is that the 2003 judicial interpretation does not provide any cap on the amount of compensation that is recoverable. On the contrary, it extends the scope of personal injury claims to include the following heads of claim:

- 1) Medical expenses including treatment fees, nursing costs, transportation and accommodation.
- 2) Loss of income.
- 3) In case of disability, necessary living expenses incurred due to disability and loss of income, including disability compensation, necessary rehabilitation and nursing costs.
- 4) In case of death, funeral costs, living costs of persons who were dependent on the deceased, death compensation.
- 5) Compensation to the family for mental trauma.



From this, it will be appreciated that, where there is any suggestion of the injury or death being caused by the negligence of the shipowner, it will rarely be possible to limit compensation to the contractual limit. Our experience is that, even in cases where there is no apparent tortious liability, it is still very difficult to limit compensation to that provided by the contract.

Despite the fact that the 2003 Judicial Interpretation remains silent on capping personal injury claims for the moment, there may not be a significant uplift when quantifying compensation for damages for personal injury or death. This is because the calculation of loss of income and/or living expenses is not based on the actual income of the seafarer during his service on board the vessel at the time of the incident; rather, at the moment, it is calculated for a period of 20 years on the per capita disposable income published by the government for the province where the Court seizes the case. For example, in 2012, the average disposable income in Shanghai was RMB40,188 per annum or about US\$6,540 (this is the highest in all Chinese cities). Furthermore, if a deceased seafarer is aged 60 or more, the death compensation calculation will be reduced by one year for each additional year over 60.

Another factor driving the increase in costs is the need for foreign shipowners, employing Chinese nationals and wishing to trade

internationally, to adopt collective bargaining agreements (CBAs) with terms that have been approved by the International Transport Workers' Federation (ITF) and employers. The most notable of these is the International Bargaining Forum (IBF) CBA. In the event of death, the 2013 IBF CBA provides for a payment of US\$93,154, plus \$18,631 for each dependent child under the age of 21 (up to a maximum of four children). For disability, the maximum compensation is US\$155,257 – almost 20% higher than the amounts provided in the 1992 Specific Provisions.

Furthermore, Chinese law requires that seafarers are deployed through licensed manning agents and the deployment will be pursuant to a contract of employment, which is subject to Chinese labour law. While those contracts may incorporate the terms of the shipowner's CBA, often they do not. This inconsistency can and does lead to disputes in the event that the seafarer considers he is entitled to disability compensation, or his next of kin to compensation for his untimely death.

There is also scope for the seaman to bring a claim for compensation against the manning agent, as well as the shipowner. Provisions

introduced by the Chinese Ministry of Transport require that manning agents, engaged in the employment of crew for deployment of foreign flagged vessels, purchase personal accident insurance for seamen assigned overseas. Regrettably, the provisions do not specify the amount of insurance that is required. Therefore, some agents may only arrange insurance with minimal levels of cover in order to comply with the provisions.

The Chinese economy has grown exponentially over the last 10 years. This has had the inevitable effect of increasing both the cost and the standard of living, especially for those living in the cities. That limitation amount has been under attack for some time as being outdated and out of step with inflation. As noted above, limitation has effectively now been abolished and will no longer apply to the calculation of compensation for personal injury claims, except in cases of a marine casualty in which the owner has the ability to limit liability.





Cover for specialist operations and towage

One of the fundamental features of mutual insurance is that all the participants in a mutual scheme should face similar risks. If one participant is performing activities that are very different from the activities of the other participants, it is unlikely that the risks will be similar.

In the context of P&I insurance, risks arising from the performance of so-called 'specialist operations' are considered to be different from the risks that arise from conventional shipping activities. For this reason, all IG Clubs have specific rules excluding cover for liabilities arising from specialist operations – exclusions that are mirrored in the IG Pooling Agreement.

In Britannia's case, the relevant rule is Rule 21(8). This Rule provides that there shall be no recovery from the Club in respect of any claim relating to liabilities, costs and expenses of an Entered Ship which is:

'Used for specialist operations including but not limited to dredging, blasting, pile-driving, well stimulation, cable or pipe-laying, construction, installation or maintenance work, core sampling, depositing of spoil, professional oil spill response or professional oil spill response training or tank cleaning where the claim arises out of or is incurred during those operations.'

PROVIDED ALWAYS THAT:

(i) special cover may be agreed between the Member and the Managers under Rule 7.

(ii) to the extent that the Member has cover in accordance with these Rules the exclusion in Rule 21(8) shall not apply to the liabilities, costs and expenses incurred by a Member in respect of:

(a) loss of life, injury or illness of crew and other personnel on board the Entered Ship;

(b) the wreck removal of the Entered Ship;

(c) oil pollution emanating from the Entered Ship or the threat thereof.

The following features of Rule 21(8) should be noted:

1. The list of excluded specialist operations is not exhaustive.
2. Cover is only excluded if the claim arises out of or is incurred during the performance of the specialist operation.
3. Not all P&I cover is excluded under Rule 21(8). If Members' terms of entry provide P&I cover for the risks referred to in paragraphs (a), (b) and (c) of proviso (ii), the Member will have cover for those risks even if they are performing specialist operations otherwise excluded by Rule 21(8).
4. Pursuant to Rule 7, special cover may be agreed which reinstates cover excluded under Rule 21(8).

We now look at some of these features in more detail.

What is a specialist operation?

Many specialist operations reflect activities carried out by vessels working in the offshore industry. Rule 21(8) gives examples of some of the better known types of specialist operation and is not intended to be exhaustive. This is mainly because the offshore industry is constantly developing new technologies and the vessel's activities have to be evaluated according to the particular circumstances of each case. Some examples of common activities that may be considered to be specialist operations in certain circumstances are as follows:

• Diving and ROV (remotely operated vehicle) operations:

The test of whether this is a specialist operation depends upon how the Member's vessel is being used. If the Member is carrying out the diving/ROV operations from the vessel using its own personnel and equipment, this would be considered a specialist operation. If, however, the Member's vessel is simply chartered out as a platform from which the operations take place, leaving the engagement of divers and the operation of the ROV to others (with the Member having no contractual obligation or liability for the divers/ROV), this would not be a specialist operation.



• Well intervention/drilling operations performed by supply vessels:

Well intervention/drilling operations are frequently carried out by ordinary supply vessels and crane barges and are considered to be specialist operations. This is because it is not the type of vessel or craft used for the operation that is relevant but the nature of the operation itself. Activities associated with drilling such as stimulation and capping off are also considered to be specialist operations.

• Windmill installation:

Liabilities arising from the operation of windmill installation vessels are covered in the usual way subject to the specialist operations exclusion. However, work undertaken by a vessel in actually installing the windmill is considered to be an excluded specialist operation.

• Anchor handling:

Anchor handling operations that assist in the navigation of another property, for example another ship or a rig, are not considered to be specialist operations. Similarly, picking up a mooring line of, for example, a rig in a developed field and then repositioning the anchor is not a specialist operation. On the other hand, installing anchor wires and/or anchors in, for example, a field prior to arrival of an FSPO is an excluded specialist operation.

When does the specialist operations exclusion apply?

As already mentioned, the exclusion in Rule 21(8) applies only to the operation and not the ship itself. In addition, a claim will only be excluded if it arises out of or is incurred during the performance of the specialist operation. So, for example, liabilities arising

from the activities of a dredging vessel will be covered in the normal way but subject to the specialist operations exclusion. Therefore, if a liability arises while a dredging vessel is steaming to or from the place where the dredging will be performed, that would not be considered a specialist operation and normal P&I cover would apply. However, liabilities arising from the dredging operation itself, e.g. damage caused to an underwater installation, will be excluded under the specialist operations exclusion.

Furthermore, even if the performance of the specialist operation has started, the exclusion will only apply if the claim arises out of the specialist nature of the operation. Therefore, if a vessel that was involved in installation work at an offshore site suffered an engine breakdown for reasons that were not connected with that work and, consequently, lost power, drifted and came into contact with a third party's property, liability for damage to that property would not be excluded because the claim did not arise out of the nature of the specialist operation. On the other hand, the exclusion would apply if a claim arose from the fact that the vessel had damaged a third party's property due to the way in which it performed the installation work.

Special cover for specialist operations and contract terms

Under Rule 7 the Managers may agree to insure ships on special terms regarding membership and contribution and, within the scope of the Rules, regarding the nature and extent of risks covered. It is, therefore, possible for Members to buy a reinstatement of cover for liabilities arising from the performance of specialist operations that

would otherwise be excluded under Rule 21(8). It should, however, be noted that such reinstatement of cover would not provide blanket cover for claims arising from the specialist operations. Any claim would still have to be covered under one of the Rules and all other normal cover exclusions would apply. For example, claims arising from imprudent trading would still be excluded despite cover being reinstated to cover specialist operations. Alternatively, if a Member's P&I cover excludes, for example, crew death and personal injury claims, such claims will still be excluded even if cover is reinstated to respond to claims that would otherwise be excluded under the specialist operations exclusion.

Ordinarily, most specialist operations, particularly in the offshore industry, will be performed pursuant to a written contract. Therefore it should be noted that, as with normal P&I cover, liabilities that the Member has accepted under a contract to carry out specialist operations will be excluded if they expose the Member to liabilities that it otherwise would not have in law or the liabilities are not apportioned on appropriate 'knock for knock' terms. Knock for knock terms are those under which each party has accepted similar responsibility for, and indemnifies the other party against, claims in respect of its own and/or its contractor's and/or their subcontractor's and/or other third party's property or personnel regardless of fault. If the Member wishes to be covered for such 'onerous' contracts, they will need to buy cover for liabilities arising from the specific contract as well as a reinstatement of cover for the otherwise excluded specialist operations.



When entering into an offshore contract, Members should always pay close attention to references in the liability and/or indemnity provisions to such items as 'property', the 'contract works' and the identity of the parties. Such terms should always be carefully defined in the contract. So, for example, 'property' may need to be defined by reference to the specific items that form part of the property of the project including those items on which, or in the vicinity of which, the Member is carrying out work. It should also be borne in mind that the other party to the contract may not own the property that the vessel is working on or that it is in close proximity to.

Any knock for knock provisions should include a term that both parties indemnify the other for claims arising in respect of damage to third party property regardless of fault. This is because claims could otherwise be brought by a third party against the Member and, in the absence of a specific indemnity clause, the Member may not be able to make a recovery from the other party to the contract.

Members should always ensure that they do not waive any rights of limitation in such contracts.

Towage by an entered ship

Towing is not ordinarily considered to be a specialist operation. However, there are particular considerations relating to towage contracts and, for this reason, towing is dealt with in a specific rule, namely Rule 19(14)(B). This Rule provides that cover will be provided for liabilities, costs, and expenses which a Member may incur arising out of the towage by their ship of any ship or object, provided that the ship is specially designed or converted for the purpose of towage and the towage contract has either been approved by the Managers or the Member has agreed to pay an additional premium if the contract is not approved. Acceptable forms of towage contract include those on UK, Netherlands and Scandinavian standard towage conditions and BIMCO's Towcon and Towhire forms.

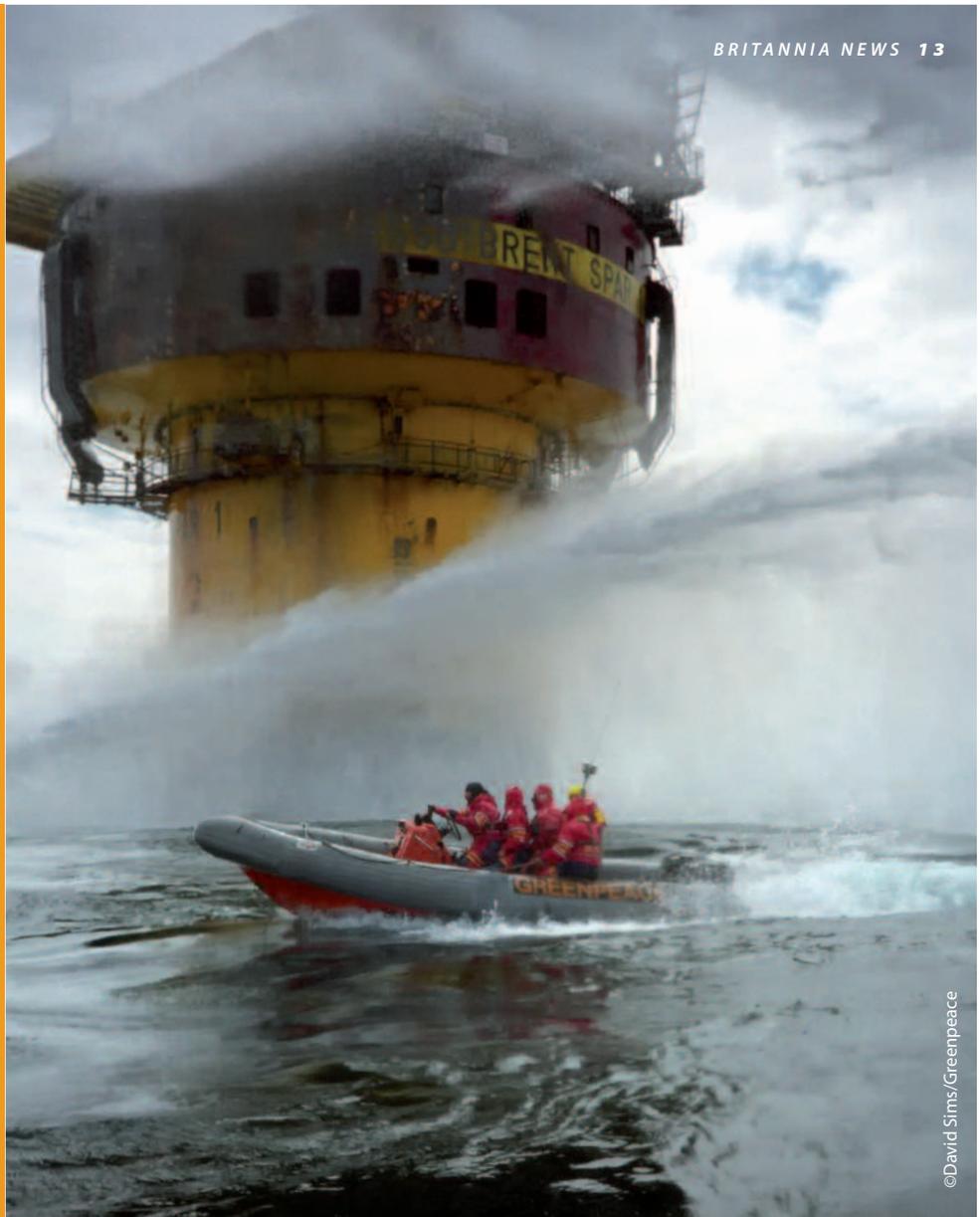
The towage contract should include a 'Himalaya' clause. This is a clause stating that the servant, agent or independent contractor (i.e. the tug owner, master etc.) employed by the contracting party (i.e. the owner of the tow) will be entitled to the protection and benefit of all the rights, limitations and defences available to the owner of the tow under the towage contract. The clause should also provide that the contracting party is contracting not only on its own behalf but as agent or trustee for the contractor.

Final comments

Whenever a question arises about the nature of an operation, or the suitability of a contract in the context of a specialist operation, it is essential that the Club is contacted and our advice sought. If an operation is deemed to be 'specialist' in nature, or the terms of any relevant contract are not considered to preserve an appropriate balance of liabilities between the parties, additional cover can be arranged.

Dumping convention

Pollution from ships usually occurs in one of two ways – either as the result of a marine accident (such as a collision or fire) or following operational discharges (such as unintentionally during bunkering). International conventions such as CLC and the Bunkers Convention have been introduced to deal with the consequences of both eventualities and the potential liabilities of those responsible. Occasionally, however, a casualty may require the intentional disposal of property at sea – in which case, different legal principles will apply.



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Members will be aware of the provisions of MARPOL (the International Convention for the Prevention of Pollution from Ships 1973, and subsequent protocols thereto), which includes regulations aimed at preventing and minimising pollution from ships – both accidental pollution and that from routine operations. Indeed, the Association has recently published a number of articles relating to the convention – in particular, the revised Annex V (dealing with garbage and cargo residue disposal).

On the other hand, the 1972 International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (commonly known as the London Dumping Convention (LDC)), and its 1996 Protocol, may be much less familiar. Whilst there are some similarities between the two conventions, they are actually designed to deal with two different aspects of pollution from ships: MARPOL deals primarily with pollution prevention and deliberate discharges as part of the normal operation of the ship (such as disposing of waste and garbage), whilst LDC deals with deliberate

dumping that is not incidental to the operation of the ship and, indeed, to dumping of the ship itself.

The purpose of this article, therefore, is to focus on the provisions of the LDC, providing an overview of the LDC and the 1996 Protocol, before discussing its application with reference to a recent case dealt with by the Association.

Basic provisions of the London Dumping Convention 1972

The LDC came into force in 1975 and was one of the first international conventions aimed at protecting the marine environment from human activities and, in particular, from pollution caused by the dumping of waste at sea. At the time of writing, the LDC has been ratified by 87 states.

In general, the LDC operates by obliging contracting states to take steps to prevent pollution by giving effect to various controls set out in the convention. Waste is categorised into a Black List, a Grey List and a final category for all other types of waste.

Where the LDC terms apply, generally Black List waste must not be dumped, Grey List waste may be dumped if a contracting state grants a special permit and all other waste may be dumped providing a general permit is obtained from the contracting state.

The criteria governing the issue of special and general permits is set out in the LDC terms. These include:

- the characteristics and composition of the waste;
- the characteristics of the proposed site;
- the method of dumping;
- general considerations, such as the possible effects on amenities, marine life and other users of the sea; and
- the practical availability of alternative land-based disposal.

The LDC applies to the dumping of 'waste and other matter that is liable to create



hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea’.

Dumping only includes the deliberate disposal of waste or other matter, and must specifically take place from ‘vessels, aircraft, platforms or other man-made structures’. The LDC also applies to the deliberate disposal of vessels, aircraft, platforms or other man-made structures themselves.

The LDC applies to any vessel or aircraft, in any marine waters other than internal waters of a state and to any material or substance of any kind. The substance, therefore, is less relevant than the activity. If a substance is being deliberately disposed of at sea, it could be within the scope of the LDC.

The 1996 Protocol to the London Dumping Convention

In 1996, a Protocol to the LDC was agreed in order to bring the convention more in line with modern views on pollution and dumping. The 1996 Protocol entered into force on 24 March 2006 and is currently in force in 42 states.

Under the Protocol, all dumping is prohibited, except for certain wastes on the so-called ‘reverse list’ – which may be acceptable. The reverse list is restricted to only seven items, which include ‘vessels and platforms’, ‘inert, inorganic geological material’, ‘organic material of natural origin’, and ‘bulky items primarily comprising iron, steel, concrete and similarly un-harmful materials’.

If a material is on the reverse list, further general provisions apply, as follows:

i. Materials capable of creating floating debris or otherwise polluting the marine environment are to be removed to the maximum extent possible;

ii. Materials dumped must pose no serious obstacle to fishing or navigation;

iii. Materials dumped must contain nothing more than *de minimis* levels of radioactivity.

Any dumping requires a permit from the relevant contracting state. When considering applications for permits, contracting states must take into account a number of provisions which are set out in Annex 2 to the Protocol. Every effort must be made to avoid dumping in favour of environmentally preferable alternatives.

If a material qualifies to be considered for dumping, then the Protocol requires a further assessment of the waste to reduce any potential requirement for dumping. Detailed criteria are contained in Annex 2 of the Protocol and require:

- a waste prevention audit;
- consideration of alternative waste management options;
- consideration of the chemical, physical and biological properties of the material;
- compliance with an ‘action list’ imposed by the contracting state to evaluate particular substances;
- consideration of dump site selection;
- monitoring to ensure that permit conditions are met (in particular, relating to the environment and human health); and
- compliance with stipulations of the permit itself.

It is also worth noting a requirement in the Protocol that contracting states take steps to prevent pollution arising from incineration at sea. (Incineration is defined in the Protocol.)

Accident, force majeure and emergency

The LDC and the Protocol both provide for similar circumstances where their terms will not apply:

(i) Any entirely accidental disposal of material.

Dumping is defined in both conventions as being a ‘deliberate’ disposal.

(ii) Force majeure events, due to either (a) stress of weather or (b) where there is a danger to human life or a real threat to vessels, platforms, etc. Furthermore, the provisions of the LDC and its Protocol will not apply ‘if dumping appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur’. Dumping in such situations must be reported forthwith to the contracting state.

(iii) A permit may be issued by a contracting state if there is an emergency posing an unacceptable threat to human health, safety or the marine environment and there is no other feasible solution. Granting a permit requires consultation with all countries that are likely to be affected.

When considering the three exceptions above, it would seem that the important factors to take into account should be the time available (to consider the possible options) and the level of control that can be exercised by the dumping party. For example, in (i), it would seem that there must be neither time nor any possibility of controlling the disposal if it is to be considered ‘accidental’ rather than ‘deliberate’. For (ii), it would seem that there should be a degree of control to enable consideration of available options, but insufficient time to consult contracting states. Finally, for (iii) this would seem to require that some control can be exercised to permit sufficient time for both consultation and application for a permit.



Application of the LDC and 1996 Protocol in practice

If the dumping of any material is arranged in advance and under permit, the application of either the LDC or 1996 Protocol should be a relatively straightforward matter (in legal terms).

In this context, however, it is important that there is a clear distinction from dumping of waste or material under MARPOL. The LDC convention specifically excludes the dumping of waste that is 'incidental to, or derived from the normal operations of vessels... and their equipment' (i.e. dumping/disposal covered under MARPOL). So, for example, if a cargo becomes distressed and needs to be dumped at sea, this is not incidental to a vessel's operation and would be within the scope of the LDC. If, however, a ship discharges an oily mixture of the kind produced by the operation of the ship, this would fall under MARPOL.

It is in the circumstances of maritime casualties that some interesting questions arise. In purely accidental cases, where cargo is lost without any control of the vessel, the terms of the conventions will not apply (see exception (i) referred to above). Likewise if, for example, a ship becomes a CTL and no salvage assistance is given such that she sinks with her cargo, this should not be 'deliberate' dumping. The same would be true if salvage assistance was provided, but the salvor was unable to prevent the vessel from sinking with, or without, her cargo.

A recent case handled by the Association also provides an interesting example of the issues arising under the convention. A bulk carrier with a cargo of grain dragged her anchor and beached just outside a port in Chile. Chile is a 1996 Protocol state. Over time, the ship's condition deteriorated and she was declared a CTL. The ship had significant bunkers on board, meaning there was a risk of pollution. There was no facility to scrap the ship nearby.

Salvors and experts advised that refloating might be possible but her condition was likely to be so poor that she could not be towed any distance. In other words, there was a serious risk of her sinking and becoming a hazard to navigation.

In consultation with the authorities, Members made arrangements for the ship to be refloated and subsequently dumped in accordance with the 1996 Protocol terms, providing the cargo, loose equipment, bunkers and other polluting substances were successfully removed to the greatest extent possible.

It was perhaps helpful that the waters off the port fell away to a great depth relatively quickly. Within only a few kilometres of the coast, the vessel could be dumped in deep water, such that it could be certain she would present no future hazard to navigation. The permit specifically stated that the dumping had to be carried out within a short time period to minimise the risk of her sinking. The permit allowed just sufficient time to assess the vessel's condition and remove any remaining loose equipment (including that of salvors which remained on board after refloating).

The case of the *BRENT SPAR* incident in 1995 is also worth considering, as it illustrates the difference between the LDC and the 1996 Protocol (indeed, the Protocol was specifically introduced to remedy this problem). The *BRENT SPAR* was a decommissioned oil platform whose owners had obtained permission to dispose of the platform at sea under the terms of the LDC, due to a lack of other practical alternative means of disposal. Ultimately, the decision to dump at sea had to be abandoned due to a public outcry following a campaign by Greenpeace, which argued that the platform should be disposed of onshore. It was shown to be possible to dispose of the platform ashore, and the platform was eventually towed to Norway

where, after cleaning, it was used as the foundation for a quayside extension. Under the 1996 Protocol it would therefore be impossible to obtain a permit for disposal at sea where a practical shore-based alternative existed.

Another case involving the Association was the well-reported incident of the *NEW CARISSA*, which grounded off the Oregon coast in 1999 (notably after the 1996 Protocol was created, but before it came into force). The *NEW CARISSA* was in ballast, but had significant bunkers on board, a proportion of which had been spilled and had caused pollution damage. The vessel initially failed to refloat and, after the authorities attempted to burn the bunkers using explosives, the vessel broke in two (though not as a result of the use of explosives). Another attempt was made to burn oil in the forward half of the ship, which was partially successful, but some bunker oil remained in the larger bow section of the ship. The decision was therefore made to tow the bow section out to sea and sink it in deep water. The expectation was that the low temperature at the great depth would make the bunker oil congeal, preventing or minimising further leakage, which would create less pollution damage than any other available option and dumping was, therefore, permitted under LDC.

The 1996 Protocol is now in force in contracting states and is much more restrictive than LDC in cases where there are alternative methods of disposal and there is some control over ship and/or cargo. However, it is still possible that a contracting state may permit dumping of a ship and fuel or polluting cargo in the event that such action is deemed likely to reduce the impact of coastal pollution that would result if the dumping was not permitted.



Letter from Lamorte Burns, Britannia's Correspondent in the US

The maritime industry is changing rapidly with new regulations and requirements being placed on shipowners, charterers and underwriters all the time. For better or worse, the US has been at the forefront of new security, shipping and environmental regulations over the past few years, particularly those relating to cargo discharge, port/vessel security, oil spills, carbon emissions and ballast water treatment.

For example, New York State recently passed ballast water regulations that are generally considered to be the most stringent in North America. The regulations have also been a topic of considerable controversy since the technology necessary to comply with the regulations does not yet exist.

While the numerous regulations issued both by the federal and state governments are often confusing, they can include significant fines and penalties if not closely adhered to. One of the more troublesome aspects of US law is that each state can set their own oil spill and environmental regulations and apply them more stringently than the Federal Government, as has happened in New York. This is where the advice of an experienced Club Correspondent can prove invaluable.

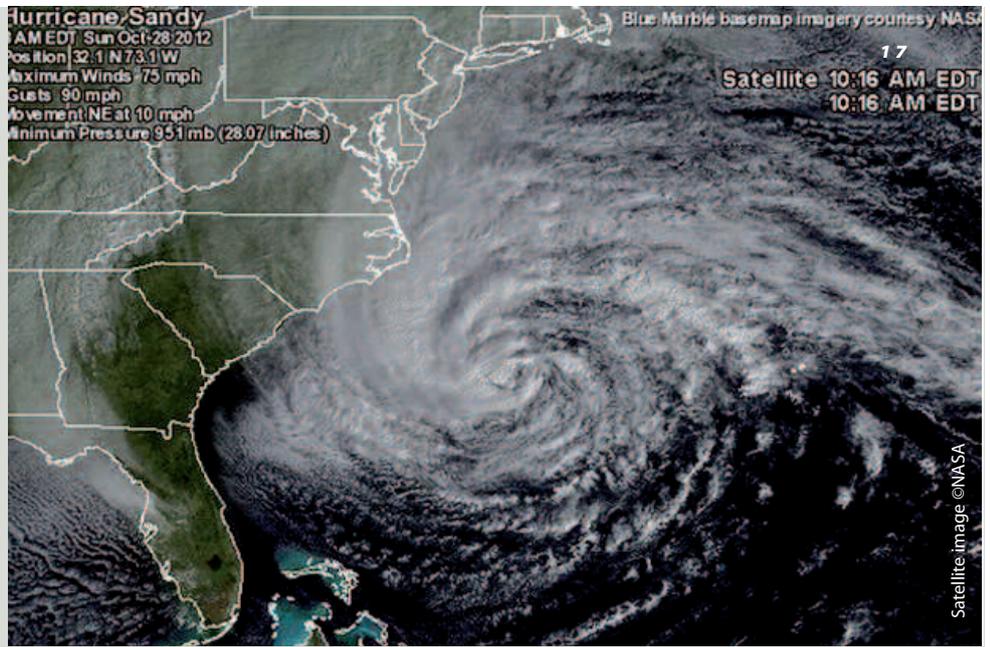
Lamorte Burns & Co., Inc. has been providing adjusting and counselling services to the maritime industry – and to the Britannia P&I Club – since our humble beginnings in 1938 as Monroe & Ard. Over the last 75 years, we have grown from a small firm with one office in downtown Manhattan into a company providing full maritime regulatory compliance, consulting and claims adjusting services from nine offices. Our offices are located at major ports around the US – New York, New Jersey, Port Everglades/Miami, New

Orleans, Houston, Long Beach, Oakland, Seattle and Portland. We have also expanded our focus to meet the changing needs of the industry, from P&I to hull & machinery claims as well as US Federal & State Workers Compensation Claims.

Lamorte Burns has assisted Britannia Members in a number of complex cases in the last few years. In one recent example, our Long Beach office negotiated with a university hospital to save the Club more than \$500,000 in medical charges after two seamen were severely injured falling into the cargo hold while performing ship cleaning without wearing harnesses.

In addition to the numerous legal and regulatory issues faced by shipowners in the US, there are also the natural disasters that require the assistance of local Correspondents. Hurricane Sandy was an historic storm that devastated huge areas of the north eastern coast of the US in October 2012. There were flooded and closed terminals in New York and New Jersey, ships were delayed entering and leaving ports and there was significant damage to cargo on board – particularly to containerised cargo carried on deck. In many cases, the ports, agents and local authorities were overwhelmed by the size and scope of the storm which meant that Members were

facing an emergency situation without the full assistance of their local agents, the ports, US Coast Guard, US Customs and local police. Lamorte Burns stepped in to assist where we could and provide Members with options and alternatives wherever possible, including working with other terminals on the East/Gulf coasts that could accommodate the traffic. Again, we were able to do this as a result of our disaster planning, which worked seamlessly. While many companies in the area were closed and/or cut off from communications, our staff was up and running, even when the Connecticut and New Jersey offices were closed for two days at the height of the storm. Our information technology (for all our offices) is secured off-site to prevent any catastrophic loss and can be remotely accessed by our staff, while at the same time our security protocols prevent any unauthorised use. The storm caused billions of dollars of damage to cargo and disrupted port operations for weeks. The economic effects of the storm are still being calculated and assessed almost a year later. According to the International Union of Marine Insurance (IUMI) the storm cost the global marine insurance market approximately US\$3 billion. When disaster strikes, the importance of good, local representatives and correspondents cannot be over-exaggerated.



- 1 Harold Halpin
- 2 Adam Isherwood (left) and Charles Johnson
- 3 Hal Halpin
- 4 Bob Hanson
- 5 Wendy Wang



Lamorte Burns prides itself on the quality of its staff around the US. In New York and on the east coast of the US, P&I matters are handled from their headquarters in Wilton, Connecticut. Harold Halpin, the President and CEO, has been working with Britannia and shipowners from around the world for many years. Charles Johnson and Adam Isherwood are also based in the Wilton office. Charles is a Vice President of Lamorte Burns and an attorney with 20 years of experience, both for the US Government and for private law firms. Adam, who joined Lamorte Burns in 2012, is a graduate of Massachusetts Maritime Academy and has shoreside operations experience. Hal Halpin, Executive Vice President of the company, grew up inside the organisation and started working full-time for the company in 1993. Hal is responsible for the day to day business operations.

On the west coast, P&I matters are handled mostly by Wendy Wang who is based in the Long Beach office. Wendy is a Vice President of the company and joined almost 30 years ago after completing a Masters degree from SUNY Maritime College at Fort Schuyler.



Lamorte Burns values the relationship that it has enjoyed with Britannia for the past 75 years and looks forward to working together for many years to come.



In the New Orleans office, David Genevay joined Lamorte Burns in 1999 having previously worked with Lykes Lines and then Stolt. Bob Hanson in the Houston office began his career with Liberty Mutual and has been with the company for more than 25 years. David and Bob both specialise in all aspects of P&I work such as cargo, personal injury, defence, pollution and collisions.



THE ASTRA: Is the obligation to pay hire on time under clause 5 of NYPE a condition?

Kuwait Rocks Co v. AMN Bulkcarriers Inc (*THE ASTRA*) [2013] EWHC 865 (Comm)

We are very grateful to James Shirley of Stone Chambers for a critical analysis of this important case.



Introduction

In the recent decision of *Kuwait Rocks Co v. AMN Bulkcarriers Inc (THE ASTRA)* [2013] EWHC 865 (Comm), Mr Justice Flaux held, in an arbitration appeal to the Commercial Court, that the obligation to pay hire on time in clause 5 of NYPE was a 'condition of the contract', any breach of which gives the shipowner a right to terminate the charter and claim damages for loss of future hire.

This article examines Flaux J's reasoning, considers whether it justifies his decision, and concludes that the market still awaits an authoritative resolution of this long-standing question. While *THE ASTRA* will no doubt improve the bargaining position of owners when times are tough, both owners and charterers alike should be cautious before using it as a basis for action until a higher court concurs with Flaux J.

Facts

The Appellant charterers hired the vessel from her disponent owners for a period of five years. The charterparty, on an amended NYPE 1946 form, was dated 6 October 2008, and from the outset the rate (US\$26,800 per day) was above market. Charterers soon attempted to negotiate the rate down, warned that they might have to declare bankruptcy if no reduction was forthcoming and ultimately defaulted.

There followed a period of distress which led to negotiations, the agreement of addenda designed to accommodate Charterers' situation, but finally to withdrawal and termination by Owners in August 2010 following service of an anti-technicality notice (required by rider clause 31 of this particular amended NYPE charterparty).

Approximately one month later, Owners mitigated their loss by concluding a substitute fixture for the balance of the charter period, but the rate under the substitute fixture was only US\$17,500 per day. With more than three years of the

original charter period remaining, Owners were facing a very substantial loss of hire.

Basic principles

When a shipowner terminates a time charter following a breach of contract by his charterer in circumstances where the charterparty gives him an express right to do so, he will also normally be entitled to whatever damages he has suffered as a result of his charterer's breach. However, it does not necessarily follow that he is entitled to recover damages compensating him for his loss of future hire following termination; the charterparty (and his right to hire) came to an end as a result of his decision to withdraw, not the charterer's breach.

In order to recover his loss of profit following termination, the shipowner must go further and show that the charterer either breached an important type of term, a 'condition', or that the charterer breached a less important type of term, an 'intermediate' or 'innominate' term, but in a serious, or 'repudiatory', manner. It is only if the shipowner exercises his right to terminate the charterparty in those circumstances that the law provides the shipowner with a right to claim damages for loss of future hire following withdrawal. Broadly speaking, that is because the common law will then regard the charterer's breach as having itself struck a life-threatening blow to the contract, entitling the owner to place financial responsibility for the end of the charterparty (i.e. his future loss of hire) on the charterer. There is no such remedy where the charterer has breached a term in the charterparty that is a mere 'warranty' or if his breach of an intermediate term is non-repudiatory.

In general, unless the parties have expressly agreed otherwise, a term will be a condition if each and every breach of it should be treated as 'going to the root of the contract', and an intermediate term if non-serious breaches of it should not be considered to have that effect.

It will now be clear that the question raised in *THE ASTRA* is very important: if the shipowner's right of withdrawal is accompanied by a claim for damages for loss of future hire even in relation to minor breaches, it becomes a powerful weapon indeed. If, alternatively, he has no right to such damages until the charterer's breach is serious, one would expect the right of withdrawal to be used more cautiously, being a right that, in the absence of a repudiatory breach by the charterer, achieves release from the charterparty's obligations only at the expense of its future benefits.

Decision of the Tribunal

In order to recover their very significant loss of hire following early termination, Owners in *THE ASTRA* therefore had to establish either a breach of condition or a repudiatory breach of an intermediate term.

The Tribunal, despite being attracted to the proposition that the obligation to pay hire under clause 5 was a condition, concluded that English law was not to that effect. Owners nevertheless succeeded in their claim for damages for loss of future hire because the Tribunal was satisfied that, even if the obligation to pay hire on time was only an intermediate term, Charterers' breach, considered in light of the surrounding circumstances, amounted to a repudiation.

Decision of Flaux J

Charterers appealed the Tribunal's decision on the repudiation point. The condition point was raised by Owners as an alternative basis for upholding the Tribunal's award.

After a detailed examination of the case law, the judge gave four essential reasons for agreeing with Owners that there had been a breach of condition.

First, clause 5 provides a right of withdrawal whenever it is breached. This was a '*strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that the provision was a condition.*'



Second, time is normally considered of the essence in a commercial contract requiring something to be done by a certain time.

Third, certainty in commercial transactions is of considerable importance to businessmen: 'a 'wait and see' approach to breach of charterparty is inimical to certainty'.

Fourth, there was *obiter* judicial support in the authorities for the view that the obligation in question was a condition.

Notably, Flaux J rejected the view put forward in the leading textbook, *Time Charters*, 6th Ed, that the clause 5 obligation is an intermediate term, albeit one that has been given one characteristic of a condition, namely the right to terminate for any breach (see further comment below).

Each of the judge's reasons will be considered in turn.

1 Express right of withdrawal

While it is true that clause 5 provides for withdrawal on any breach by non-payment of hire, and therefore does not tie termination to any analysis of the seriousness of breach, it is submitted that Flaux J was too dismissive of the argument that clause 5 merely possesses one of the characteristics of a condition.

One of the main authorities on which Flaux J relied in saying that the right of withdrawal was a strong indication that any breach of the obligation to pay hire on time should be considered to go to the root of the contract was the judgment of Moore-Bick LJ in *Stocznia Gdanska v. Gearbulk Holdings* [2009] 1 Lloyd's Rep 461, but it is arguable that *Gearbulk* does not support such a view. In fact, Moore-Bick LJ's judgment might be thought to illustrate precisely why Flaux J ought *not* to have found in favour of Owners on the condition point.

Gearbulk was concerned with a shipbuilding contract that provided for various different remedies, responding to breaches of various

types. Relatively minor delay and inefficiency led to damages only, with serious delay or inefficiency required before the buyers had the right to terminate. The court had to decide whether, in addition to this right to terminate, the buyers had a right to damages for loss of bargain.

Although Moore-Bick LJ held that there was a right to such damages, an important factor in his decision was arguably that the right to terminate was only provided in respect of *serious* delay, the kind of delay that would perhaps have amounted to a repudiatory breach of an intermediate term in any event. By contrast, clause 5 of NYPE entitles termination on *any* failure to pay hire on time.

Flaux J recognised that Moore-Bick LJ did not endorse a blanket rule according to which all terms providing a right of termination for breach were conditions, but if that is right, then surely a prime candidate for the sort of clause that, despite providing for termination in case of breach, is not a condition, is a clause that provides that right of termination even in relation to non-serious breaches.

Flaux J's answer would presumably be that it is this very fact about clause 5 that suggests that the obligation in question is a condition, but it is suggested that, if anything, Moore-Bick LJ's judgment points to a different, more persuasive answer, namely that suggested by the authors of *Time Charters*.

2 Time of the essence

In support of his point that time is normally considered of the essence in a commercial contract requiring something to be done by a certain time, Flaux J's main reliance was on the decision of the House of Lords in *Bunge Corp v. Tradax Export SA* [1981] 1 WLR 711.

Although certain statements made by their Lordships in *Bunge* support Flaux J's very wide statement of the law on time clauses in commercial contracts (i.e. that time is normally considered of the essence in a

commercial contract), it is suggested that *Bunge* is better understood as supporting a narrower principle.

In *Bunge*, the court decided that the buyers' obligation to give a timely 15-day notice of probable readiness of a vessel under a GAFTA FOB contract was a condition. Since the giving of the notice was necessary before the sellers could nominate a load port, they might have faced difficulties if the obligation to serve the notice on time was merely an intermediate term: the buyers might in practice have been able to delay giving notice for so long that the sellers (never quite sure that they could safely terminate for repudiatory breach) no longer had time left to perform their own obligations once notice was actually given.

By contrast, payment of hire under a time charter is not necessarily a condition precedent to the shipowner's ability to perform his side of the bargain and it is suggested that it is actually far from clear that a court should '*normally*' regard terms providing for something to be done by a certain time to be conditions rather than intermediate terms or warranties. Indeed, there are a great many obligations in commercial or mercantile contracts that envisage something being done by a particular time but which are not conditions.

3 Commercial certainty

It is true that certainty is important to businessmen, but on its own that does not take us very far: the law often consists of a wrestling match between certainty and other values.

Whether the result in *THE ASTRA* reflected the correct balance may be doubted. As counsel for Charterers is reported by Flaux J to have argued in *THE ASTRA*:

'in a rising market the charterers will lose out through being deprived of the vessel, in a falling market the only situation in which the owners would wish to withdraw the vessel



would be if they were fed up with persistent late payment by the charterers, but that would amount to repudiatory breach, which would entitle the owners to claim damages. In those circumstances, there was no need to hold that clause 5 was a condition, breach of which would give rise to a right to claim damages independently of any repudiation.'

4 Support in the authorities

Some of the main authorities relied on by Flaux J have already been considered. However, it is worth recording that, as Flaux J acknowledged, the authorities also contain judicial *opposition* of various kinds to the proposition that the obligation to pay hire on time in clause 5 amounts to a condition. Most importantly, in *The Brimnes* [1972] 2 Lloyd's Rep 465, Brandon J decided that the obligation to pay hire on time in clause 5 was not a condition and Flaux J expressly recognised that he ought to follow Brandon J unless *The Brimnes* could be distinguished, or was wrongly decided.

The fact that there was no anti-technicality clause on the facts before Brandon J persuaded Flaux J to distinguish the earlier decision. In any case, it will by now be clear that Flaux J did indeed conclude that the condition point was wrongly decided in *The Brimnes*, taking the view that Brandon J's decision could not be reconciled with decisions of the House of Lords, and was based on a subsequently discredited decision of the Court of Appeal.

Those on both sides of the debate probably have to accept that there is uncertainty on the authorities. Although Brandon J's decision in *The Brimnes* is on point, it is hard to be too critical of Flaux J's view that it might not represent the current state of English law.

Anti-technicality clauses

While Flaux J hesitated before concluding that a failure to comply with the payment obligation in clause 5 would always amount to a breach of condition, the judge apparently had no such hesitation in relation to the position following service of a contractually-required anti-technicality notice: clause 31 combined with clause 5 to confer condition status on the obligation to pay hire in a timely fashion.

Arguably, the presence of the anti-technicality clause did improve Owners' case because it meant that the right to terminate was unavailable for minor breaches, i.e. those remedied within the grace period. It was therefore easier for Owners to argue that any breaches in respect of which the right to terminate was available would go to the root of the contract.

However, against that it might be said that clause 31 provided no answer to the, arguably crucial, question of whether the parties intended Owners to have a claim for damages for loss of future hire following termination. Perhaps clause 31 did no more and no less than to give Charterers a period of grace within which to avoid withdrawal. The argument that it also provided a period of grace within which to avoid liability for a claim for damages for loss of future hire might simply beg the question with which we started: was failure to pay on time a breach of condition?

Conclusion

Flaux J's decision in *THE ASTRA* is one of the most interesting and important charterparty decisions of recent years, and no doubt one of the most controversial.

This article has attempted to demonstrate that there is room to question the reasoning supporting the judge's conclusion on the condition point. Given that Flaux J's decision on that issue was also not essential to the result of the appeal, and in light of the earlier decision of Brandon J in *The Brimnes*, it is suggested that arbitrators might be persuaded not to follow *THE ASTRA* and that the point in issue remains in need of authoritative determination.

For essentially the same reasons, it is suggested that only a brave shipowner would rely on Flaux J's decision as a guarantee that damages for loss of future hire will be available following termination in the absence of a repudiatory breach. Until the point reaches appellate level, and possibly the Supreme Court, it is suggested that the issue of whether the obligation to pay hire on time under clause 5 of NYPE is a condition will remain as controversial as ever.

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