Issue number 46 December 2014

NEWS

Britannia

The Britannia Steam Ship Insurance Association Limited

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Letter from the Chairman

As the claims review explains, 2014 has started well with claims levels lower than they were at the same point in the previous two years. This is largely because of a smaller number of high value claims, so a note of caution must be expressed – a lot can happen in the remaining northern winter months.

Nevertheless, when the Committee met in Singapore earlier this month the possibility of a more benign claims environment was one of the reasons behind its decision to increase the 2015/16 advance call rate by just 2.5%. Strong investment returns of almost 5% across the portfolio in the year ending 20 February 2014, combined with the Association's strengthening capital position, were other important considerations. They further contributed to the Committee's decision to reduce the 2014/15 deferred call by 5% down to 40%.

The Committee also noted the positive results in Class 6 (FD&D), where claims have reduced considerably since the post-crash highs of 2008/09 and 2009/10, and the reserves have now been rebuilt. Accordingly, the Committee decided that yet again there should be no general increase in the 2015/16 advance call. This is the fourth year out of the last five that there has been no general increase. In addition, the deferred call for Members with mutual entries was reduced to 30%.

A more detailed analysis of the recent call decisions and an update on the Association's financial position is given in the article on page two.

We were pleased to receive an 'A' rating from Standard & Poor's (S&P) in September. This was the Association's first interactive rating, enhanced by a 'stable' outlook assessment. S&P said that their assessment reflected their expectation that 'Britannia will manage its capital adequacy consistent with [a] 'AAA' benchmark and will maintain a strong competitive position'.

S&P commented on the heavy claims years in 2012/13 and 2013/14 – but noted that adverse loss ratios were partly the result of waiving deferred calls, premium discounts and the Association's conservative reserving policy. Members will recall that Britannia waived US$12.8m of deferred calls in 2012 and US$2.8m of deferred calls in 2014 – in addition to a premium discount amounting to US$10.3m.

Members will be aware that there has been discussion about 'diversification' among P&I clubs and in the press. Some clubs have taken the view that by establishing ancillary products, such as a Lloyd's syndicate, they can provide Members with additional services and deliver a healthy return from the profits. They compare such returns to the returns produced on standard market investments such as equities and bonds. This may seem to be a perfectly reasonable approach; indeed, if the venture is profitable, the scheme will work to the benefit of the entire membership. However, the risks of diversification are arguably greater than those found in 'standard' investment portfolios. Further, the scheme becomes more problematic where the ancillary product provides fixed premium P&I to quite large ships.

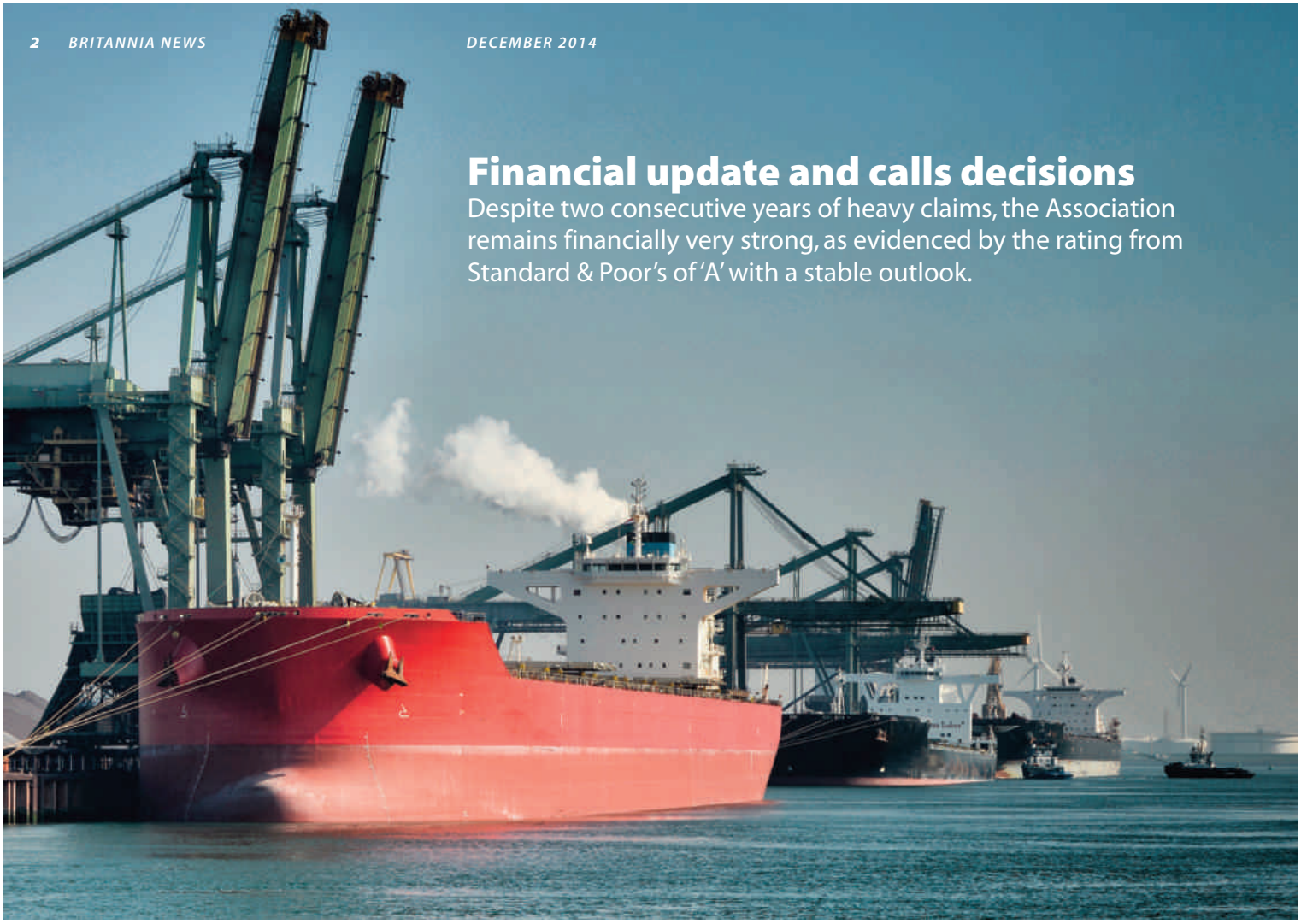
Britannia is firmly committed to mutuality and believes strongly in the International Group (IG) providing the highest possible limits to a broad range of shipowners. Full mutual cover is not appropriate for every shipowner; for example, some small shipowners trading domestically do not need the levels of cover that an IG club can offer.

However, establishing facilities offering fixed premium P&I cover to tonnage better-suited to membership of an IG club could potentially undermine a system that has served shipowners very well over many years.

The issue of whether Britannia should cover the additional Maritime Labour Convention (MLC) risk relating to back wages for abandoned crew was also considered by the Committee. This matter is also referred to in the claims review article. The boards of all IG clubs will be asked to consider whether they were willing to cover the risk and provide the relevant financial security; and, if so, whether the risk should be poolable with other clubs. It is likely that there will be a variety of views, although it is hoped that a clear consensus can be achieved.

The Association continues to enjoy a strong financial position. Through the Managers we endeavour to provide the highest levels of service in all areas. While uncertainty in the markets persists, with political turmoil in numerous countries, Britannia is working hard to maintain its position and doing everything it can to support its loyal membership.

Nigel Palmer OBE Chairman



Financial update and calls decisions

Despite two consecutive years of heavy claims, the Association remains financially very strong, as evidenced by the rating from Standard & Poor's of 'A' with a stable outlook.

In both of the last two years, ending on 20 February 2013 and 2014, the Association experienced extremely high levels of P&I claims. The 2013 policy year set a new record, but 2014 then beat it, and by some margin.

One of the main drivers of the higher level of claims overall was an unusually high number of large claims (those expected to cost the Association more than US$1m). As at today's date, 26 such large claims have been reported for 2012/13 and 33 for 2013/14. High value claims are more volatile and unpredictable in nature and occurrence but, invariably, they have a disproportionate impact on the Association and its overall claims experience in any given year. In contrast, it is encouraging that over recent years claims of US$1m or less (attritional claims) have reduced both in number and aggregate value. This is a positive development, although in part it is due to some Members agreeing higher deductibles.

In the first six months of the current year, which will end on 20 February 2015, attritional claims have continued to decline and, reassuringly, only seven large claims have been reported to date. It is hoped that this is a return to a more typical level of claims seen in prior years. Total claims within the Association's retention after the six month stage were at their lowest level for four years. Over the same period, claims in older policy years developed very positively; in other words, the actual outcome of many claims has proved to be lower than expected. This has allowed releases of surplus claims reserves from those years. The positive claims development and releases of surplus provisions are normal features of the Association's operations and reflect the Association's prudent approach to claims reserving.

Investments performed strongly in the year ending 20 February 2014, returning US$48m or almost 5% across the portfolio. The main contributor was equities, to which the Association has maintained a significant exposure. These returned more than 21% over the year. In the first six months of the 2014/15 policy year, investment returns have been more volatile, but the return at 20 August remained at a healthy 5% (on an annualised basis), with equities continuing to contribute strongly to the overall result.

The improvements to claims in prior years and a positive investment return have resulted in a strengthening of the Association's capital position since 20 February 2014. In addition, Boudicca's funds have also increased, the result of strong investment returns from its portfolio and the fact that, as Britannia's claims have improved, the reinsurance recoveries that Boudicca had been expecting to pay have also fallen. Overall, the Association's capital position (which includes the benefit of surplus funds in Boudicca) projected forward to 20 February 2015 shows a modest headroom over the economic capital benchmark.

The financial strength of the Association has recently been confirmed by Standard & Poor's (S&P), which in September 2014 published the Association's first interactive credit rating. This rates the Association as 'A', which is 'strong', and gives the Association a stable outlook. In previous years, S&P rated the Association on a 'public information' basis, but the interactive rating gives a more robust assessment.

Against the encouraging background of recent claims and the Association's continued financial strength (confirmed by S&P), on 21 October the Committee of Britannia met in Singapore to decide on the terms of the 2015/16 renewal and the appropriate actions to take in relation to the deferred calls in prior years.

The Committee approved an inflationary 2.5% general rate increase for P&I advance calls, with the deferred call remaining at 45%. The level of the deferred call reflects the Committee's cautious assessment of the claims environment faced by Members,

but it also gives financial flexibility, which means that in the event of a more benign claims year, part of the deferred call might not need to be collected.

In respect of minimum deductibles, the Committee decided that for 2015/16 there would be no change.

For prior policy years, the Committee decided that:

- the 2011/12 policy year would be closed with no further calls;
- the 45% deferred call for the 2013/14 policy year be approved in full, with 25% to be collected immediately and the remaining 20% in October 2015; and
- Members should now budget for a deferred call of only 40% for the 2014/15 policy year, rather than the full 45% deferred call previously advised.

Turning to Class 6 (FD&D), this class has seen much improved fortunes since the 'twin peaks' in claims in 2008/09 and 2009/10 resulted in the aggregate policy year balance of this Class being negative. To address this problem, since the 2010/11 renewal, the Association's calls strategy has been to call sufficient premium to rebuild Class 6 reserves. That rebuilding has now been achieved and, in addition, claims have returned to levels more consistent with those seen in pre-recessionary policy years.

The Committee therefore agreed to revert to the previous calls strategy, which was to call only the amounts necessary to balance the policy year. Accordingly, the Committee decided that there should again be no general increase in the 2015/16 FD&D advance call. This is the fourth year out of the last five that there has been no general increase. In addition, the deferred call for Members with mutual entries would be reduced to 30%.

In further recognition of the overall improvement in the Class 6 reserves, the Committee also decided to call only half of the 50% deferred call for 2013/14, with the balance waived, and that Members should budget for a deferred call of 30% in respect of the 2014/15 policy year, which had previously been set at 50%.

In conclusion, despite two consecutive years of heavy claims, the Association remains financially very strong, as evidenced by the rating from S&P of 'A' with a stable outlook.

That solid financial footing enables the Association to take a positive view of the future. Members entered for Class 3 will again benefit from a low general increase going into the 2015/16 renewal, together with a waiver of part of the budgeted deferred call for 2014/15. Class 6 has also performed very strongly and again Class 6 Members will reap the benefits at renewal.

The ability of the Association to use its financial strength to benefit a loyal membership is one of the key benefits of the mutual P&I system and one that the Association fully embraces.

Committee news

Since the last edition of *Britannia News*, Messrs. B Chiu, U Kranich, S-H Lee and B K Mandal have resigned as directors of the Committee and Miss Irene Lan and Messrs. A Firmin, S-D Lee, L Martel, B Nielsen, S Paek and J Warwick have been welcomed onto the Committee.

Committee meetings have been held over the last 12 months in Amsterdam, Bermuda and Singapore, as well as at the Association's office in London.

As usual at the October meeting, the Committee looked at the Association's finances, discussed the policy year review and made decisions about the call recommendations, both for the open policy years and for the amount of the general increase for the 2015/16 policy year. Full details of these decisions are found elsewhere in the magazine.

Claims review

The 2014/15 policy year has started well. After seven months, the total cost of retained claims is significantly lower than at the same point in the last two policy years. This is largely due to the very low number of 'high value' claims reported to the Association – that is, claims with an estimate in excess of US$1m. At the time of writing, only seven such notifications have been received, compared to 17 and 15 at the same point in the previous two policy years.

Loss prevention must continue to be at the forefront of all Members' minds, with a particular emphasis on training and auditing, especially with regard to bridge team management. The Association will continue to give Members every possible support.

In previous claims reviews, we have explained how high value claims, although small in number, can have a considerable effect on the total cost of claims. For example, in the 2013/14 policy year, the total number of high value notifications (33) represents just 0.6% of the number of notified claims (5,887); but in terms of total estimated cost of claims they represent over 50%. Furthermore, by their nature, high value claims are random in occurrence and therefore difficult to predict. This means that the results to date are encouraging, but nothing more. So, while it is to be hoped that the number and cost of high value claims have returned to the lower levels seen in the years prior to 2012, that remains to be seen.

One factor that might indicate a real improvement in claims levels is the number of attritional claims reported in the first seven months of 2014/15 – that is, claims at or below US$1m. Not only have claims at this level reduced in number (by over 18%) but they have also reduced in estimated total cost (by over 24%). This means that the current average value of an attritional claim is about US$13,400, compared to over US$14,500 at the same point last year and almost US$15,000 in the year before that.

There are a number of factors that need to be considered when trying to identify patterns or trends in claims, so these figures merit examination in greater detail.

High value claims (above US$1m)

The three largest high value claims involved a collision (leading to loss of life and oil pollution), damage to a shore crane and an oil spill during loading from an offshore buoy. Only the collision claim has an estimate exceeding the Club's retention (currently US$9m) and this has been notified to the Pool.

Analysis of high value and Pool claims in previous years has shown that the root causes of many collision, grounding and property damage claims can be closely linked to the competence and experience of bridge teams. Fortunately, there is now a general acceptance within the industry that far more emphasis needs to be placed on training and owners should undertake more frequent navigational audits.

The Association's loss prevention team can also play a part. Over the last few months, they have organised technical seminars in Imabari, Taipei and Tokyo and are holding further seminars in Manila and Mumbai. They continue to conduct in-depth root cause analysis of every high value claim in excess of US$1m. The findings are then shared with the whole membership through the regular publications *Risk Watch* and *Health Watch*.

Risk Watch has recently included articles on the importance of a proper lookout, a case study on a collision in restricted visibility and will be continuing the series of posters to remind bridge watchkeeping officers of the requirements of COLREGs. The recent technical seminars have included a review of damage to property claims, using case studies to show what can go wrong due to complacency and poor communication, while highlighting best practice and ways to mitigate risk.

In addition, further workshops have concentrated on how to generate and maintain an effective safety culture on board. This is an ambitious goal, but essential if accidents are to be avoided. All crew members should be aware of the risks they face and understand how these risks can best be reduced. The workshops therefore focused on many of the daily operations that can be seen as merely routine. Specific topics have included the use of correct personal protective equipment, maintenance of safety/life-saving equipment and entry into enclosed spaces.

In the October 2013 edition of *Britannia News* we reported on the work being undertaken by the International Group (IG) reviewing the most expensive casualties involving wreck removal and, where relevant, SCOPIC expenditure. The most significant driver of cost was identified as the unreasonable and disproportionate orders being issued by authorities overseeing the removal operation. The IG has therefore been in contact with international shipping organisations, national and supranational authorities to raise awareness of how clubs respond to casualties. The IG has also tried to explain the need for proportionality in the response orders that are issued. To give these meetings a focal point, a Memorandum of Understanding (MOU) has been drafted by the IG, which is designed to promote an effective response to casualties and to encourage preparedness. The MOU encourages parties to participate in each other's training sessions and workshops, thus enabling both sides to establish which national/local authorities will be involved.

The MOU further envisages that, immediately following a casualty, the parties will quickly identify the individuals handling the case and that all relevant technical information will be exchanged at an early stage. The requirement that a club should keep relevant authorities advised of the proposed response to an incident is important because it helps to engender confidence that appropriate action is being taken.

Claims review (continued)

In May 2014, the South African Maritime Safety Authority became the first national safety agency to enter into the MOU with the IG. Meetings with representatives from the UK, Australia, New Zealand, Singapore, Malaysia, Canada and the US have taken place and it is hoped that more national safety agencies will follow South Africa's example. The IG will participate at Sea Asia Week in Singapore in April 2015 as this will provide the opportunity to engage with numerous Asian national safety agencies.

The IG's Large Casualty Working Group (LCWG) continues to gather data on recent major casualties involving salvage and wreck removal. This process will allow the LCWG to monitor the effectiveness of the contractual arrangements and to identify whether any problems are continuing to arise when salvage is no longer relevant and a club wishes to terminate SCOPIC. The level of intervention adopted by the authorities will again be of significant interest.

The LCWG was formed in 2012, as estimates for the *COSTA CONCORDIA* and *RENA* cases deteriorated significantly. As readers will have seen in the press, the *COSTA CONCORDIA* was successfully parbuckled and, following a period of winter lay-up, refloated with the assistance of external buoyancy sponsors. In July, the wreck was towed to the Italian port of Genoa for final dismantling. With the wreck removed from the grounding site, attention has now shifted to the remedial action considered necessary to clear the site of debris. This work will be put out to tender. Unfortunately, a high level of interference continues with the refusal of the authorities to permit the wreck to be exported and their insistence on dismantling in Italy, notwithstanding the technical viability of cheaper foreign alternatives.

The *RENA* also continues to be problematic with a highly-publicised Resource Consent application being filed with the Bay of Plenty Regional Council. This seeks permission to leave what remains of the wreck in situ at Otaiti Reef. While this politically-charged application is considered, work continues to monitor the shoreline of the Bay of Plenty and remove debris from the vicinity of the wreck when flotsam is discovered.

International Conventions continue to play a vital role in capping the costs of high value and Pool claims and next year there are two important developments.

First, there is the introduction of the Wreck Removal Convention, which will enter into force on 14 April 2015. This will provide uniform rules and procedures to ensure the prompt and effective removal of wrecks within the exclusive economic zone (EEZ) (but outside the territorial sea) of the states party to the Convention. There is an option to extend the application of the Convention to the territorial sea but, so far, only three of the ten states that have ratified the Convention have done this. It is hoped that more states will ratify the Convention and extend it to their territorial seas. Most wrecks occur within territorial seas, so this would give the Convention much greater force. It is further hoped that the new Wreck Removal Convention may assist in bringing greater transparency, proportionality and certainty to this important area. Readers will find a detailed article outlining the principal provisions of the Convention in this edition of *Britannia News*.

The second development relates to new limits of liability under the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims (LLMC) that will come into force in June 2015. Under the amendments, the limit of liability for property claims for ships not exceeding 2,000 gt will increase to 1.51 million SDR's (Special Drawing Rights) (up from 1 million SDR's and equivalent to approximately US$2.24m at today's rate of exchange – an increase of approximately 50%).

For larger ships, the following additional amounts will be used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 gt, 604 SDR's (up from 400 SDR's).
- For each ton from 30,001 to 70,000 gt, 453 SDR's (up from 300 SDR's).
- For each ton in excess of 70,000 gt, 302 SDR's (up from 200 SDR's).

A separate set of increased limits has been adopted for loss of life and personal injury.

This increase reflects the 45% change in inflation between 1996 and 2010, rather than any perception that the limitation regime was not working as intended. While any increase may be unwelcome, it is hoped that by keeping the limitation amounts in line with inflation, states will not only continue to ratify the LLMC but, more importantly, will preserve and uphold the concept of limitation when a major casualty occurs. In view of the ever-increasing cost of casualties, it is vital that states fully integrate international conventions into their domestic legislation, thus ensuring that their national courts then uphold the shipowner's right to limit liability in accordance with the terms of the Convention.

Attritional claims (claims at or below US$1m)

These claims have gradually been reducing in number over the last few years and the total value has reduced this year after two very heavy years. What are the reasons?

The reduction in the number of claims has, in fact, resulted from the introduction of combined deductibles at the start of the 2014/15 policy year and the decision by a few Members taking higher deductibles. If the figures are adjusted to take account of these changes, we find that the numbers of claims are actually very similar to last year.

Over 70% of the Association's attritional claims continue to be either cargo claims or crew claims relating to illness or injury. While this is a similar percentage to 2013/14, the split has now reversed with crew claims representing 40% and cargo 32%. A review shows that the average cost of cargo claims has decreased, whereas the average cost of crew claims continues to increase. What are the factors behind this?

Cargo claims

Cargo claims at or below US$1m account for the largest reduction in value of attritional claims and have fallen considerably compared to the previous policy year. This year there has been a reduction of around 50% in both the number and value of cargo claims between US$250,000 and US$1m compared to this time last year. This has been a key factor in the overall reduction in value of cargo claims below US$1m. It must be remembered, however, that the number of claims at this level is relatively small; the figures are therefore likely to be more volatile.

The average value of cargo claims below US$250,000 has reduced from US$5,900 to US$4,000 (based on projected figures as at 20 August 2014). At this lower level, the impact of higher deductibles and the combined deductible has been significant. An additional factor has almost certainly been a general decrease in the value of goods: since the start of 2013, the IMF commodity index has decreased by around 4%.

Crew claims

With the increasing focus by Members and the Association on crew matters, it is pleasing to report that the number of crew claims has remained stable over the last four years. Unfortunately, the value of crew claims has continued to increase, with the average cost of crew claims below US$250,000 now around US$19,400 (based on projected figures as at 20 August 2014). This compares with about US$18,200 last year. This is a significant leap when one bears in mind that the average cost in the 2010/11 policy year was US$13,000.

Last year, around 37% of crew claims related to injury, while 61% involved illness. So far this year the split has been similar. The average cost for injury continues to be higher than for illness; this is mainly due to the higher compensation limits and more onerous terms found in many collective bargaining agreements.

The ever-present problems of rising wages and increasing compensation levels in collective bargaining agreements remain major factors in the ongoing increase in average costs. This is unlikely to change given the industry demand for better quality crew in numbers that exceed supply. The Association is continuing to analyse the underlying causes of crew claims and work closely with Members to disseminate the findings through its publications *Risk Watch* and *Health Watch* and through its active programme of loss prevention seminars. *Risk Watch* has included an article on hand injuries. These are the most common injuries suffered by crew members which are usually caused by poor working practices and complacency. *Health Watch* has recently included articles and a poster on the importance of wearing appropriate personal protective equipment, even while performing routine tasks.

There has also been a focus on lifestyle illnesses caused by poor diet or the wrong type of food. The most recent loss prevention seminars included a talk on the root cause analysis of non fatal illness and injury claims, using case studies to raise awareness of crew injury claims caused by poor work practices.

The continuing problem of claimant-friendly tribunals and courts is not helpful. Both the Managers and the International Group continue to make representations to government bodies and other key stakeholders in Manila to provide a more balanced process for the handling of seafarers' claims. The International Group has submitted a position paper to various interested parties, including the National Labour Relations Commission in the Philippines, highlighting industry concerns. Two of the main issues were the incorrect application of collective bargaining limits to illness claims and the attachment of funds after a decision in the labour court, despite the fact that there was still a right of further appeals.

In summary, early claims figures may indicate a reduction compared to the very high levels experienced in the previous two policy years. If so, that is indeed good news for both the Club and its Members. The underlying causes for claims remain broadly the same and there is no evidence to suggest that the claims environment will become any less hostile. Loss prevention must continue to be at the forefront of all Members' minds, with a particular emphasis on training and auditing, especially with regard to bridge team management. The Association will continue to give Members every possible support.

Loss prevention seminars: anchoring and mooring

Britannia's technical seminars have proved to be very popular with the membership. Using presentations and workshops, liberally sprinkled with real-life Britannia case studies, the seminars have provided a sound platform to engage with seafarers and superintendents and to share experiences and solutions.

In addition to navigation issues, the seminars have also focused on 'frequently conducted' tasks. Mooring and anchoring operations, for example, are routine operations for most ships, but if things go wrong there is the potential for serious consequences. For this reason, we decided to produce an article featuring some of the key points from a recent seminar.

Anchoring

The following examples of recent incidents will highlight some typical issues:

• A ship's anchor started dragging due to heavy weather; the anchor position was not adequately monitored and the fact that the ship was dragging its anchor was not noticed for several hours.

• A ship at anchor started to yaw between 30 to 60 degrees in moderate-to-heavy weather conditions. The anchorage was in an exposed location, with a rocky sea bed. After weighing anchor, the anchor flukes were found to be missing.

• A number of incidents where Members' ships either anchored too close to another ship or had another ship anchor in very close proximity. When the ships started to swing at anchor close quarters situations developed.

A root cause analysis (RCA) of some of these incidents has shown that navigators are often not maintaining an adequate anchor watch, leaving the bridge unmanned for long periods while at anchor, either due to complacency, lack of advice or lack of supervision. It is therefore worth reviewing a few fundamentals.

There are a number of reasons why a ship might want to anchor:

• Awaiting a berth, tide or pilot;

• Carrying out cargo work;

• Seeking shelter in case of cargo or ship damage;

• Providing respite for crew under the MLC hours of rest requirements;

• Entering lay-up.

In any of the above situations, an anchor plan should be prepared before the ship arrives at the anchorage. The anchor plan should include an assessment of all associated risks, including the following:

• The ship's anchor system design, performance and limitations;

• The characteristics of the designated anchorage (including the topography of the sea bed, location of pipelines and other hazards), expected weather, tidal conditions and range and also whether shelter is available from adverse weather (whether expected or not);

• The ship's draft, freeboard/windage, under keel clearance and propeller immersion;

• The depth of water, scope of cable and preferred swinging circle; and

• The notice period for readiness and availability of the engine.

It should always be remembered that the anchoring equipment required and fitted is the minimum considered necessary *'…for temporary mooring of a ship within a harbour or sheltered area'* (as per the International Classification Societies' (IACS) standards for mooring, anchoring and towing).

IACS also notes that:
'The equipment is therefore not designed to hold a ship off fully exposed coasts in rough weather or to stop a ship which is moving or drifting …The anchoring equipment presently required herewith is designed to hold a ship in good holding ground in conditions such as to avoid dragging of the anchor. In poor holding ground the holding power of the anchors will be significantly reduced.'

Reviews of incidents have shown that masters and navigation officers often fail to appreciate this fundamental point – apparently believing that their anchors can hold them in almost any conditions. As ship sizes have increased, their anchors have also increased in weight but not always in proportion with their size. A number of larger newer ships have consequently experienced a potential loss in the holding power of their anchors.

Analysis of a number of anchoring incidents has shown that windlasses and brakes are generally the weakest component in any anchor system. In almost all ships, windlasses tend to be modestly powered (e.g. on a standard 100,000 DWT cargo ship, the anchor will be able to apply a 'pull' of around 34 – 35 tonnes). In theory, windlass performance effectively restricts anchoring to depths of around 110m or less but this would also be dependent on prevailing weather conditions and the type of sea bed.

Anchor holding power test	Anchor type	Blue clay	Sand/shingle	Rock with layer of mud/sand
	Standard Stockless	3 to 4 x weight	3.5 x weight	1.8 x weight
	HHP (AC 14)	10 x weight	8 x weight	2.4 x weight

The UK Marine Accident Investigation Branch (MAIB) has investigated a number of anchoring incidents and noted that the ships often found it difficult to weigh their anchor cables in wind strengths over Beaufort Force 7.

The chain stopper (guillotine) is designed to be the strongest part of the anchoring equipment and should be engaged when a ship is anchored and brought up. IACS requirements for the chain stopper state:

'A chain stopper should withstand a pull of 80% of the breaking load of the anchor chain. The windlass with brakes engaged and cable lifters disengaged is to be able to withstand a pull of 45% of the breaking load of the chain.'

A navigator's responsibility for safe navigation does not end when a ship is brought up at anchor and it is essential that an effective anchor watch is maintained for the duration. Failure to do so can lead to the anchor dragging, followed by the ship grounding, fouling submarine cables/ pipelines, or coming into contact with another ship or structure.

If a ship is in lay-up – or at anchor for a long period – it is essential that a risk assessment is carried out to decide how best the requirements for maintaining an effective anchor watch can be achieved.

In a busy anchorage, it is not uncommon to find ships anchoring or passing in close proximity to an anchored ship and an early warning about the potential dangers can be useful to minimise any risks. Similarly, monitoring strong tidal streams or changes in prevailing weather conditions will require a further risk assessment. Early and positive action should therefore be discussed, agreed and implemented, and this will only be possible if an effective anchor watch is being maintained.

There have been a number of claims recently that were the result of anchor loss or damage, particularly due to delays in weighing anchor in heavy weather. In an anchorage exposed to deteriorating weather conditions, a ship will usually remain safely anchored so long as there is sufficient scope on the anchor cable and the anchor is still set on the sea bed. Effective monitoring of the anchor position and verification of the ship's position within the swinging circle is essential to obtain an early indication of dragging.

Once the weather starts deteriorating, a risk assessment will invariably lead to one of two choices – to stay at anchor or to weigh anchor and head for open sea.

If the decision is taken to stay at anchor, considerations should include:

- Whether lowering more cable in the water will ensure that the anchor flukes remain engaged;

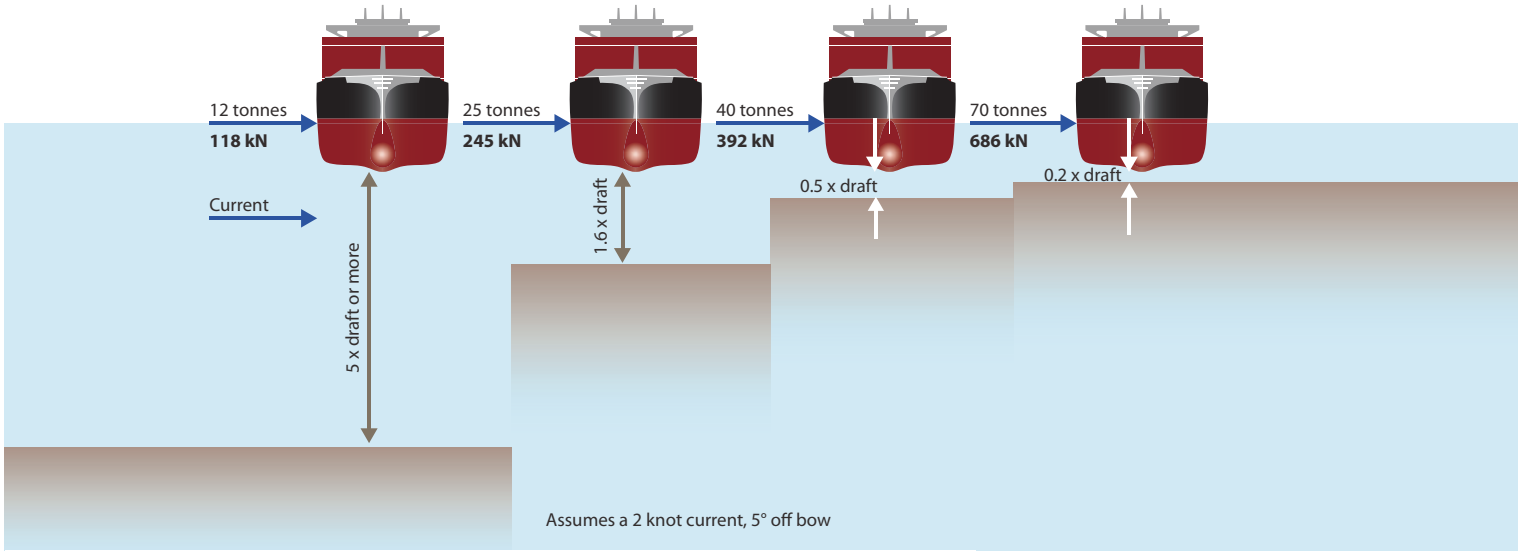
- Whether dropping a second anchor would assist;

- Whether the proximity of other ships at anchor and the availability of the requisite sea room might be an issue.

In the last scenario, the prevailing weather conditions, depth of water and scope of cable will all dictate whether it will be feasible and safe to weigh anchor. The safety of the crew on the forecastle must also be considered as well as the capacity and capability of the anchor windlass.

In either case, early and positive action is essential, as deferring a decision in deteriorating weather conditions will only reduce the options available. It is always preferable to take action when you can rather than when you have to.

It goes almost without saying that any decision to stay at anchor or sail should not be dictated by commercial considerations. Safety as well as practical and prudent seamanship must be paramount.



Under Keel Clearance (UKC) effect

Mooring

Mooring incidents analysed by the Association's loss prevention team have included a number of instances of mooring ropes parting, allowing the ship to drift off the berth. In some cases crew have been injured, usually because safe procedures were not followed. Leaving aside the question of why the mooring lines parted, it is important to consider the ancillary risks associated with mooring equipment. The consequences should always be borne in mind, as the following examples demonstrate:

- A crewman was caught in the bight of a rope as it came under tension, causing broken limbs and crushing injuries.

- Limbs have been caught in moving or rotating machinery.

- Injuries were sustained while a crewman was attempting to free mooring lines jammed on the mooring drum (while mooring operations were still in progress).

To avoid this type of incident, it is worth providing a reminder of current best practices:

- The effect of Under Keel Clearance (UKC) and the anticipated tidal stream at the berth should be taken into consideration when deciding the appropriate mooring arrangements.

- When mooring lines are under strain, all personnel should remain in positions of safety i.e. out of snap back zones.

- Slip and trip hazards should be identified and highlighted.

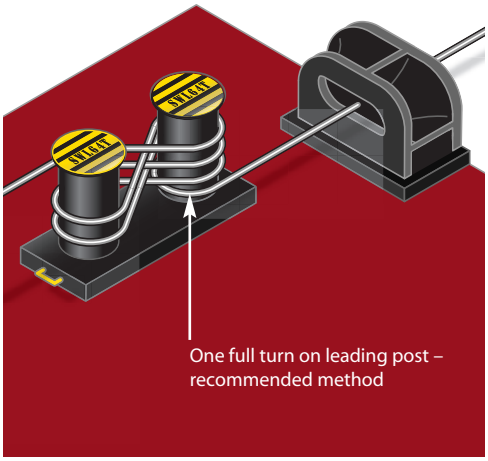
- Mooring lines should be secured on bitts rather than warping drums.

- If suitable leads cannot be provided for the ship's moorings, the master should take additional precautions, including shortening the notice period for the main engine to be available and making provisional arrangements for tugs particularly if adverse weather conditions are expected.

Given the number of claims relating to damage to fenders, taking a picture of the berth and fenders just prior to berthing and just after departing can help in defending such claims.

These presentations, focusing on anchoring and mooring, aim to highlight the key risks associated with such operations. They are supported by the loss prevention team's careful analysis of real-life cases. Lessons learned and best practice information are shared with the audience who are then encouraged to discuss the findings at safety meetings, incorporating the results in their own procedures and training programmes.

Snap back zones



Moorings secured on bitts

Freight, Demurrage & Defence review

Freight, Demurrage & Defence (FD&D) provides Members with cover for legal and associated costs in relation to a wide range of shipping disputes, mainly arising from owning or chartering ships. For this reason, the type, volume and cost of FD&D claims often reflect trends in the wider shipping market.

This was most vividly illustrated during the 2008/09 and 2009/10 policy years, when the banking crisis caused a dramatic collapse in charterparty hire rates. This, in turn, led to the widespread non-payment of hire and cancellation of charterparties, with the result that the number and value of FD&D claims reached record high levels. A number of factors combined to exacerbate the effect of the 2008 crash on FD&D costs.

Many charterers had undertaken charterparty commitments in 2007 and the first half of 2008, when hire rates were at their peak. This meant that, when hire was not paid or charterparties were cancelled, the losses suffered by innocent parties were considerable, often running into many millions of dollars.

Many of the companies that reneged on their charterparty commitments did not have sufficient cash or assets because their income was reliant on cargo shipments that had dried up due to the banking crisis.

The dry bulk market in particular was often characterised by long chains of sub-charterers. When one company in the charterparty chain failed, it had a domino effect, resulting in a series of sub-charterers failing to pay hire.

Until 2009 it was possible to attach a debtor's electronic fund transfers (EFTs) as they passed through the New York banking system using a procedure called Rule B. As almost all US dollar payments are made via New York banks, this was a relatively easy task and, sometimes, the only means by which a creditor could obtain security for its claim. It was widely used in the panic situation that prevailed in late 2008 and had a huge effect on the New York court system. At one stage, it is estimated that about one third of all proceedings in the New York courts involved the interception of EFTs.

Two court decisions in 2009 ended this state of affairs. First, it was held that a company that was registered with the New York Secretary of State could not be the subject of a Rule B attachment. This led to many non-US companies registering in New York in order to avoid their exposure to Rule B. Subsequently, and more importantly, the Second Circuit Court of Appeals held that EFTs could not be attached using the Rule B procedure. Since that decision, it has not been possible to intercept EFTs being processed through the New York banking system in order to obtain security.

Although many sectors of the shipping market have remained depressed in the years since the 2008 crash, this has had the effect of reducing market volatility. As a result, most owners and charterers have been content to honour charterparties and there have been fewer disputes. In addition, the factors mentioned above, which contributed so much to FD&D claims experience in 2008 and 2009, are no longer present. The result has been that recent FD&D policy years have incurred much lower costs, with the vast majority of claims being of the type that traditionally dominated this class prior to 2008. These include disputes in relation to:

- Periods of off-hire and delay;
- Calculation of demurrage;
- Speed and bunker consumption;
- Quality of bunkers supplied to the ship;
- Small hull damage claims (i.e. those that fall within the hull and machinery deductible);
- Responsibility for additional costs arising during a charterparty such as the employment of security personnel (whether on board during a voyage or in port).

The Association dealt with a number of cases during 2013/14 that arose from more topical issues. The threat of pirate attacks, particularly in the Indian Ocean and Gulf of Guinea, has inevitably led to charterparty disputes.

Prompt notification of potential disputes can help to save significant costs and, wherever possible, preserve a working relationship.

In addition to arguments about which party should bear the cost of additional insurance and the employment of guards, the Association has handled disputes about delays in performing voyages while waiting to join a convoy. There have also been disputes about the routes taken by ships in order to minimise the risk of attack by pirates.

The imposition of trade sanctions in relation to countries such as Iran, Syria and (most recently) Crimea/Russia has also led to a number of disputes. Such disputes frequently relate to whether or not an owner or charterer is obliged to perform charterparty obligations that had been agreed before the relevant sanctions were introduced.

Generally speaking, the most expensive FD&D claims are those that cannot be settled amicably and are only resolved by an arbitration hearing or court trial. These cases often involve the most complex and/or disputed facts and often there are large sums of money are at stake. Arbitration hearings and trials are expensive because of the need to have lawyers (often both solicitors and barristers) and expert witnesses in attendance throughout. Also, in the case of arbitration hearings, each of the arbitrators must be paid for his attendance at the hearing and for writing the award.

Furthermore, in England and some other countries, the costs covered by FD&D are effectively doubled if the Member is unsuccessful and a costs award is made against them: FD&D also covers opponents' costs for which a Member may become liable. FD&D costs can also be significant in those cases that tend to be particularly document-heavy, such as new building disputes, disputes about ship repairs and maintenance under bare boat charters.

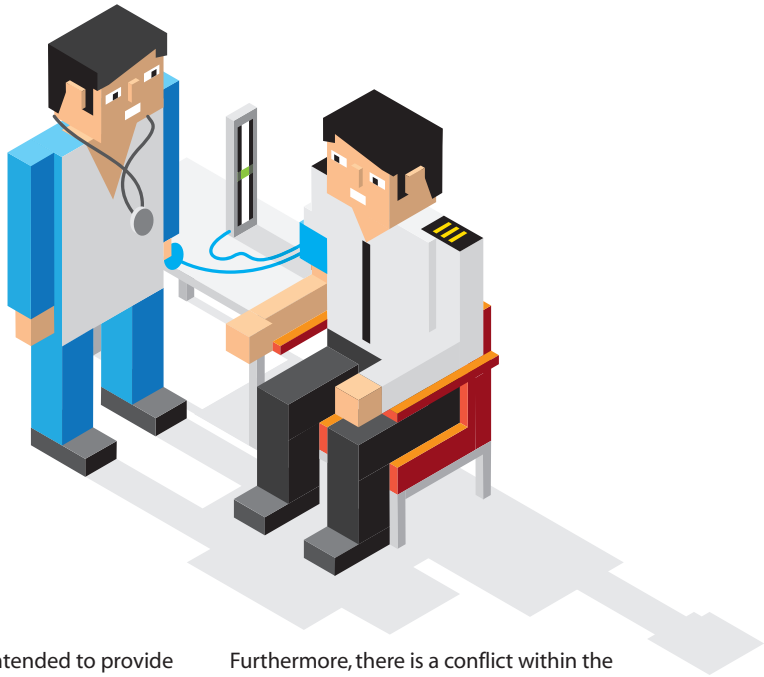
English law and London arbitration are the preferred choice of law and forum in the vast majority of charterparties seen by the Association. However, London remains a relatively expensive place in which to arbitrate. New York is rarely encountered as an arbitration forum although it seems to have made a small recovery recently. Lawyers' costs in New York maritime arbitrations are generally considered to be reasonable. Singapore has become a more popular choice of arbitration venue although it has, perhaps, not developed quite as quickly as some expected and, in the Association's experience, does not appear to have any significant cost advantage over London.

The last year has seen one very important decision of the English High Court which may have a significant effect on future FD&D disputes. In *The ASTRA (Kuwait Rocks Co. v. ANN Bulkcarriers Inc. [2013] EWHC 865),* the High Court held (albeit only obiter) that a charterer's obligation to make punctual payment of hire pursuant to Clause 5 of the NYPE 1946 form charterparty is a contractual condition, a breach of which entitles an owner to terminate the charter and claim damages for future loss of earnings. This contrasts with the previously widely held view that only a series of failures to pay hire would be sufficiently serious to entitle an owner to end the charter and claim for loss of future earnings. Although the High Court's comments are obiter, it is thought they may be considered persuasive by arbitrators and other High Court judges, raising the possibility that an owner may terminate a charter and claim damages for future loss of earnings following a failure by charterers to pay a single hire instalment on time. It certainly means that much more will be at stake if a charterer fails to pay hire, particularly when market conditions are volatile.

FD&D provides advice and cover for legal costs to Members who suddenly, and often unexpectedly, find themselves in conflict with parties with whom they are doing business. Prompt notification of potential disputes can help to save significant costs and, wherever possible, preserve a working relationship.

The MLC and medical standards

After a long period of gestation, the Maritime Labour Convention 2006 came into force on 20 August 2013. Described as a bill of rights for seafarers, it sets out the minimum standards for seafarers working on ships. One of those standards requires that the seafarer must have a medical fitness certificate to work at sea. But what does that mean in practice?



One of the first international conventions relating to the health of seafarers was the International Labour Organisation's (ILO) Medical Examination of Young Persons (Sea) Convention 1921. This was followed by the Medical Examination (Seafarers) Convention 1946. Both instruments were consolidated into the Maritime Labour Convention 2006 (MLC).

Regulation A1.2 of the MLC states that:

'Seafarers shall not work on a ship unless they are certified as medically fit to perform their duties.'

In 2013, the ILO published its Guidelines on the medical examinations of seafarers. These updated guidelines previously adopted in 1997, entitled the Guidelines for Conducting Pre-sea and Periodic Medical Fitness Examinations for Seafarers, and sought to harmonise medical standards, regardless of the nationality of the seafarer. The latest Guidelines acknowledge that the intention is 'to reduce the risks to other crew members and for the safe operation of the ship, as well as to safeguard [a seafarer's] personal health and safety'.

Under the heading 'Purpose and Scope of the Guidelines' there are three important statements:

1) These Guidelines are intended to provide maritime administrations with an internationally recognised set of criteria for use by competent authorities either directly or as the basis for framing national medical examination standards that will be compatible with international requirements.

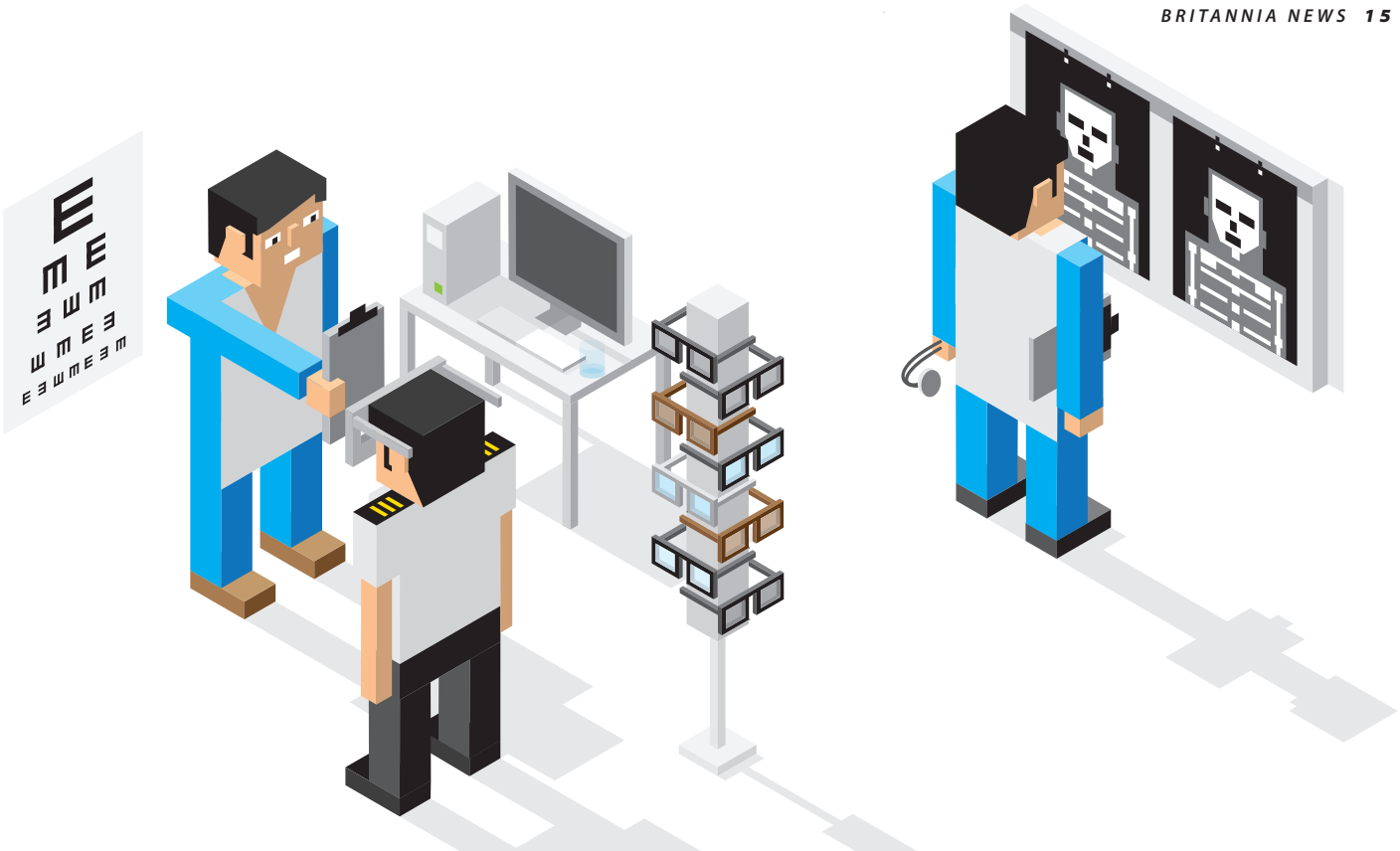
2) These Guidelines have been developed in order to reduce differences in the application of medical requirements and examination procedures and to ensure that medical certificates which are issued to seafarers are a valid indicator of their medical fitness for the duties they will perform. Ultimately, the aim of the Guidelines is to contribute to health and safety at sea.

3) The aim of the medical examination is to ensure that the seafarer being examined is medically fit to perform his or her routine and emergency duties at sea and is not suffering from any medical condition likely to be aggravated by service at sea, to render them unfit for service or to endanger the health of other persons on board.

Regrettably, while the message conveyed by the Guidelines is laudable, there is a serious conflict with reality. The fact is that maritime employers are still struggling to employ and retain suitably experienced and qualified crew, because the demand exceeds the supply.

Furthermore, there is a conflict within the medical profession serving the seafaring community as to the merits of conducting an enhanced pre-employment medical examination (PEME) in the first place. At a recent international medical conference held in Norway, the view was expressed by a number of medical practitioners that it was an invasion of the rights of the seafarer to conduct tests that exceed the requirements of the ILO Guidelines. This sentiment is in direct contrast to the stated purpose of the Guidelines: 'to reduce the risks to other crew members and for the safe operation of the ship, as well as to safeguard their personal health and safety'.

A recent case handled by the Managers is a good example of this point. A 59 year old chief engineer was repatriated for medical reasons. He had consulted a doctor, complaining of stiff and painful right and left shoulders, accompanied by fever and headache. A review of his PEME report disclosed that he was described as 'morbidly obese'. He had hypertension, type II diabetes and eye problems. However, he answered 'yes' in response to the question: 'Do you feel healthy and fit to perform the duties of your designated position/occupation?' The shoulder problem was attributed to a degenerative back condition which, in turn, was linked to his obesity. Furthermore, he was diagnosed with cancer of the bowel.



Although cancer cannot usually be diagnosed in a routine PEME examination, it is possible that the cancer was a consequence of his other medical conditions. With the benefit of hindsight, it is clear that the man should not have been employed. However, because he was employed, his employer is now contractually obliged to cover the cost of treating the conditions that have been diagnosed since his repatriation. It is not clear whether the shipowner was aware of the contents of the PEME report and whether they had the opportunity to make an informed decision about whether or not to employ the chief engineer.

In another case, a master joined a tanker and only 11 days into his contract it was necessary for the ship to divert to secure urgent medical attention for him. Two months prior to joining the ship, the master had undergone a PEME and the certification issued by the medical clinic performing the examination answered 'no' to the question: 'Is the applicant suffering from any medical condition likely to be aggravated by service at sea or to render the seafarer unfit for such service or to endanger the health of other persons on board?' On hospitalisation at the overseas port, the master was diagnosed to have suffered an intracerebral haemorrhage (stroke). He was also noted to be suffering from hypertensive cardiovascular disease, diabetes mellitus, glaucoma and cataracts in both eyes. The master admitted that he was receiving treatment for the hypertension, diabetes and glaucoma.

Both hypertension and diabetes can be controlled by medication, but it is surprising that neither condition appears to have been disclosed at the PEME. If they were, no annotation was made on his fitness certificate, which was in a form that was fully compliant with the MLC medical standards guidelines. We do not know if the failure to discover the pre-existing illnesses was because they were controlled by drugs and therefore not diagnosed, or because of the poor quality of the PEME. The fact remains that the master was clearly not fit and could quite easily have died, but for the close proximity of the ship to a shore-based hospital, where he received urgent medical attention.

For some years now, P&I clubs have been advocating the importance of a fit and healthy crew. Britannia produces a quarterly publication called *Health Watch*, aimed specifically at the seafarer, highlighting medical conditions that are common among seafarers and encouraging a more healthy lifestyle. Other clubs operate PEME schemes aimed at identifying seafarers who are at risk, either because they are at risk of developing 'lifestyle' diseases or because they have already manifested the symptoms of illnesses such as hypertension or type II diabetes which, if left unchecked can lead to more serious, life-threatening medical conditions.

What we learn from the two cases above is that, ultimately, it is the responsibility of maritime employers (owners and their agents) to ensure that their medical standards are MLC compliant, and that their seafarers are fit and healthy. It must be remembered that, for many seafarers, the doctor performing the PEME may be their primary and only doctor. It is therefore important that the examination provides an overall and comprehensive picture of the health of the seafarer, particularly those at risk of developing serious illnesses.

The Wreck Removal Convention

A summary of the provisions of the Convention and a discussion of the potential impact of the Convention on shipowners.

We are grateful to Andrew Hawkins from MFB Solicitors in London for his assistance with the editing of this article.

Overview

The Nairobi International Convention on the Removal of Wrecks (the Convention) was adopted at an IMO Conference in Nairobi in May 2007. It will come into force on 14 April 2015 one year after Denmark became the tenth party state to ratify the Convention.

The Convention is designed to fill a gap in the existing legal framework by providing a set of uniform international rules and procedures to ensure prompt and effective removal of wrecks. Notably, it extends the rights of states to claim compensation for the costs of locating and marking wrecks, and of intervention to remove wrecks, outside territorial waters.

The Convention will permit a party state to:

- Remove a wreck that is a hazard to navigation or the marine environment;
- Place financial responsibility for the removal of certain hazardous wrecks on shipowners;
- Make insurance, or some other form of financial security, compulsory;
- Take direct action against insurers.

At the time of writing the following 11 states have ratified or acceded to the Convention: Bulgaria, Congo, Denmark, Germany, India, Iran, Malaysia, Morocco, Nigeria, Palau and United Kingdom.

Definitions

Convention area

The geographical area of application of the Convention is the Exclusive Economic Zone (EEZ) of a state, as set out in the United Nations Convention on the Law of the Sea (UNCLOS). If a state has not established an EEZ, then the Convention applies to an area beyond and adjacent to the territorial sea of that state, as determined by that state in accordance with UNCLOS and extending not more than 200 nautical miles from the coastal baselines of the state.

Ship

A 'ship' is given a wide definition and there is no minimum gross tonnage requirement. A 'ship' can be a seagoing vessel of any type and includes floating platforms, except when they are on location and engaged in the exploration, exploitation or production of seabed mineral resources.

Wreck

Following a maritime casualty, a 'wreck' includes:

- A sunken or stranded ship; or
- Any part of such a ship, including any object that is or has been on board such a ship; or
- Any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
- A ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

Hazard

A 'hazard' is defined as any condition or threat that either:

- Poses a danger or impediment to navigation; or
- May reasonably be expected to result in major harmful consequences to the maritime environment, or damage to the coastline or related interests of one or more states.

Affected state

An 'affected state' means the state in whose convention area (see above) the wreck is located.

Scope of application of the Convention

The territorial sea of the state is not subject to the terms of the Convention unless a state party specifically notifies the IMO that its territorial sea is to be included in the Convention. (The territorial sea normally extends 12 nautical miles from the state's coastal baseline.) A state party that has made such a notification may withdraw it at any time by means of a formal notification of withdrawal to the IMO and this will take effect six months after receipt by the IMO.

Of the 11 states that have ratified or acceded to the Convention, only Bulgaria, Denmark and the United Kingdom have currently extended its application to their territory and territorial sea. The other states will continue to apply their domestic legislation to the removal of wrecks within their territorial sea.

Exclusions

The Convention does not apply to measures taken under the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (Intervention Convention 1969), as amended, or the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended (Intervention Protocol 1973).

The Convention also does not apply to warships or other ships owned or operated by a state, and used only on Government non-commercial service, unless that state decides otherwise.

Rights and obligations of owners and affected states

Reporting wrecks

The Convention requires that the master and/or the operator of a ship immediately report to the affected state when that ship has been involved in a marine casualty resulting in a wreck.

The report must provide the name and the principal place of business of the registered owner together with all the relevant information necessary for the affected state to decide whether the wreck poses a hazard. This information must include:

- The precise location of the wreck;
- The type, size and construction of the wreck;
- The nature of the damage to, and the condition of, the wreck;
- The nature and quantity of the cargo, in particular any hazardous and noxious substances; and
- The amount and types of oil, including bunker oil and lubricating oil, on board.

The Convention provides a list of factors which the affected state must take into account when deciding whether a wreck poses a hazard. For example, the depth of the water in the area, tidal range and currents in the area, nature and quantity of the wreck's cargo, etc.

Locating and marking wrecks

If the affected state decides that the wreck poses a hazard, either to navigation or to the environment, then it must take all practical steps to locate and properly mark the wreck. The state must also warn mariners and all concerned states about the nature and location of the wreck as a matter of urgency.

Measures to facilitate the removal of wrecks

If a wreck has been declared a hazard then the registered owner of the ship is obliged to remove it. The registered owner may contract with any salvor or other person to remove the wreck. The affected state is entitled to:

- Lay down conditions for such removal before such removal commences; and

- Intervene during the removal operation, only to the extent necessary to ensure that the removal operation is carried out safely and makes sure that the marine environment is protected.

The affected state must:

- Set a reasonable deadline within which the registered owner must remove the wreck; and

- Inform the registered owner in writing of this deadline (if the registered owner does not remove the wreck within the deadline, the affected state may remove the wreck at the registered owner's expense); and

- Inform the registered owner in writing that it intends to intervene immediately in circumstances where the hazard becomes particularly severe.

The affected state may remove the wreck by the most practical and expeditious means available in circumstances where:

- The registered owner does not remove the wreck within the deadline set by it; or

- The registered owner cannot be contacted; or

- Immediate action is required and the state of the ship's registry and the registered owner is informed accordingly.

Measures taken by the affected state must be proportionate to the hazard and not go beyond what is reasonably necessary to remove the wreck. The measures must stop as soon as the wreck has been removed and must not interfere with the rights and interests of other states nor of any other person.

Defence and limitation of liability available to the owners

Defence

The registered owner must pay the costs of locating, marking and removing the wreck, unless the registered owner can prove that the maritime casualty that caused the wreck:

- Resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character; or

- Was wholly caused by an act or omission done with intent to cause damage by a third party; or

- Was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Limitation of liability

The registered owner may limit liability in accordance with any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) as amended by the 1996 Protocol. However, many states (including the United Kingdom) have exercised the reservation contained in the LLMC to exclude wreck removal claims when enacting the LLMC in their domestic legislation. Consequently, shipowners may find that they face unlimited liability for the cost of removing wrecks or that a separate wreck removal fund has to be set up, or that a higher limit applies. As this is a potentially complex area, any possible limitation will have to be carefully investigated on a case by case basis.

Exceptions to liability

Liabilities that would otherwise be in conflict with other IMO conventions, such as CLC, HNS, Nuclear Damage and Bunker Oil Pollution are excluded under the Convention.

Compulsory insurance or other financial security

In common with other international maritime conventions, for example the CLC and Bunker Convention, the Wreck Removal Convention imposes a compulsory insurance requirement.

From 14 April 2015, when the Convention comes into force, it will be compulsory for ships of 300 gt and above which fly the flag of party states, or are calling at ports or terminals in the party states, to have certificates showing sufficient insurance cover or other financial security for wreck removal in accordance with the Convention.

Compulsory insurance or other financial security, such as a guarantee of a bank or similar institution, has to be maintained for the purpose of covering the costs of locating, marking and removing a wreck within the Convention area, up to the limits provided by the LLMC Convention for the registered owner's liability.

All International Group P&I Clubs will be able to issue 'Blue Cards' to enable Members to obtain the Wreck Removal Convention Certificates.

A certificate of appropriate insurance or other financial security must be issued to a ship by the state where the ship is registered. Ships not registered in a party state may obtain certificates from any state party. A state party may authorise a recognised organisation or institution to issue such certificates on its behalf. The original certificate must be carried on board the ship.

Following the legal regime established in other liability and compensation conventions, this Convention provides a right of direct action against insurers (or persons providing financial security) for the registered owner's liability for any claim arising under the Convention. In these cases the defendant may invoke the defences that the registered owner would have been entitled to invoke, including limitation of liability under any applicable national or international regime. The defendant may also limit liability, even if the shipowner has lost the right to do so, to an amount equal to the amount of the insurance or other financial security required to be maintained under the Convention.

If a state party does not extend the scope of the Convention to its territory and territorial sea, it cannot rely on the compulsory insurance provisions under the Convention to bring direct action claims against the insurer if incidents occur in the territorial waters of that state.

Time limits

A claim for costs incurred in relation to a wreck will be time barred unless it is brought within three years of the date on which the wreck is determined by the Affected State (in accordance with the Convention) to constitute a hazard. In any event, an absolute time bar will extinguish claims not brought within six years from the date of the casualty.

Conclusion

The implementation of the Convention could potentially increase the financial burden of wreck removal incidents on the shipowning community as a result of the widened geographical application of strict liability, rights of direct action against insurers, and the broad definition of 'wreck'.

However, the strict liability imposed on the shipowner is tempered to some extent, since states may only lay down conditions concerning the manner of removal, or intervene, to the extent necessary to ensure that the wreck removal operation proceeds in a way that is consistent with considerations of safety and protection of the marine environment. It is also a requirement that measures taken by the affected state are proportionate to the hazard and do not go beyond what is reasonably necessary. The impact of the Convention may also be limited by virtue of the fact that many wrecks occur within territorial waters, where shipowners will already incur wreck removal liabilities under national law.

It remains to be seen how many states will ultimately adopt and extend the Convention to apply to their territorial waters, and therefore to what extent the Convention will have a significant harmonising effect on the numerous differing national law wreck removal regimes which are currently in existence.

Charterparties: safe port warranties revisited

We are grateful to Philip Stembridge of Stembridge Solicitors Limited for this article.

Introduction

In the recent case of *Gard Marine & Energy Ltd v China National Chartering Co Ltd (THE OCEAN VICTORY)* [2013] EWHC 2199 (Comm), the English High Court considered the extent of charterers' responsibilities under a safe port/berth warranty and what the test is for assessing whether or not a particular port or berth is safe. The Judge (Mr Justice Teare) decided that charterers were in breach of the safe port warranty in the charterparty on the basis that the port of Kashima, Japan was prospectively unsafe in circumstances where the ship was driven ashore and broke apart when attempting to leave the port in gale force winds with heavy seas.

This article examines the Judge's reasoning and considers whether the test of safety under English law has been expanded and if there has been any increase in a charterer's responsibilities under a safe port/berth warranty.

Facts

Since each unsafe berth/port dispute very much turns on the particular circumstances involved, it is necessary to set out the underlying facts in some detail.

The ship, a Capesize bulk carrier, was chartered on an amended NYPE form for a 5-7 month period 'via safe berth(s), safe port(s)'. The ship was ordered by charterers to call at Kashima, where she berthed within the Central Fairway at the Raw Materials Quay on 20 October 2006 and commenced discharge of a cargo of iron ore. The weather started to deteriorate, with a Force 8 north-easterly wind increasing recorded by early 23 October. The weather had worsened by early 24 October. By then the Central Fairway was exposed to Force 9 north/north-north-westerly winds gusting force 10 with prevailing swell from the north-east. In addition to the prevailing swell and wind generated waves, the berth was affected by 'long waves' which caused greater ranging or surging of the ship while alongside.

There was disputed evidence on whether the charterers' representative (a local and experienced mariner) instructed the master to leave the port on 24 October, or whether he only suggested the master should exercise his discretion in deciding whether to stay at the berth or seek shelter outside the port. The master understood that he was instructed to seek shelter (in the event, that was the Court's finding). Departure was delayed by the local pilots due to the difficulty of unberthing the ship and turning 180˚ in the strong wind. The wind and swell increased, the ship started to roll and range against the berth and some of the mooring lines chafed and parted. Two, and subsequently four, tugs attended the ship to assist. After an hour or so, the wind reduced to about force 8 and the pilot boarded for unberthing. Although the master preferred to stay, since the ship was relatively secure with the tug assistance, he understood that the pilot and port authority required the ship to leave for reasons of safety.

On leaving the Kashima Fairway, the ship was confronted with gale force winds and heavy seas, lost steerage (albeit with full use of her engines) and with her port side exposed to the gale, was set down onto the breakwater. The master attempted hard turns to port and then starboard but without success. The vessel went aground and broke apart. Luckily, the crew were able to abandon the ship so there was no loss of life.

Another Capesize ship *THE ELLIDA ACE* had been berthed close to *THE OCEAN VICTORY* and also suffered broken mooring lines. Having likewise received advice from the charterers' representative, she sought to leave Kashima on 24 October, got into difficulties and grounded.

The Hull insurers of *THE OCEAN VICTORY* ('the owners') pursued a claim of US$137.6m against the charterers for damages caused by charterers' breach of the safe port warranty in the charterparty.

Basic principle

This is easy to state, but not so straightforward to apply. The starting-point remains the definition of Sellers LJ in *The Eastern City* [1958] 2 Lloyd's Rep. 127 that *'a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship'.*

THE EASTERN CITY was particularly relevant since the case concerned a ship ordered on a winter voyage to Mogador, Morocco where weather conditions were unpredictable at that time of year. In circumstances where the ship was driven onto rocks after being forced to sail, the Court acknowledged that every navigable river, channel, port, harbour and berth has some element of danger (be it from tides, currents, swell or other forms) and that these risks can normally be overcome by proper navigation (by reference to use of lights, buoys, signals, warnings and other aids) and proper handling of a ship: *'…the case for the charterers is not, and on the evidence could not be, that there were no dangers attendant upon the use of Mogador for loading, but that they were such that the 'Eastern City' could and should have confronted them without the vessel being allowed to run on to the rocks, and that she could at all times have avoided the dangers and remained safe'.*

Unless the incident is the result of an abnormal occurrence (one which was unrelated to the prevailing characteristics of the port such as the once in a hundred years hurricane) a charterer usually only has to focus on whether the master could have avoided the incident by the exercise of good seamanship and navigation or whether the master's actions constituted a break in the chain of causation between the charterer's breach and the incident that caused the damage.

There is a significant amount of case law following the decision in *THE EASTERN CITY* which is too great a topic to comment upon here. This article will instead concentrate on the central discussion in *THE OCEAN VICTORY,* namely: was there a break in the chain of causation which caused the incident; or, put another way, was the true cause of the casualty intervening negligence on the part of the master?

The decision of Mr Justice Teare

The charterers denied liability, arguing that:

(i) A port was not unsafe because its systems failed to guard against every conceivable hazard;

(ii) No other ship had previously been trapped in such conditions in the Fairway; and, alternatively,

(iii) If the port was unsafe, the cause of the casualty was the master's mistaken belief that he had been ordered to leave the port and/or negligent navigation of the ship.

In arguing the above, the charterers sought to introduce a new test for determining safety in that the port had only to be *'reasonably safe'.* They argued that it would be unrealistic for a port to have in place a system to guard against every conceivable hazard. Since no ship had previously found itself in the same situation as *THE OCEAN VICTORY*, the port should not be criticised for failing to have a system in place to address such a possibility. The basis of the charterers' argument originated from comments made by Lord Denning MR in *Kodros Shipping Corporation v Empresa Cubana de Fletes (The EVIA) (No 2)* 1 Lloyd's Rep. 334 at page 338 when considering the characteristics of a 'safe port',

'To my mind it must be reasonably safe for the vessel to enter, to remain, and to depart without suffering damage so long as she is well and carefully handled. Reasonably safe, that is, in its geographical configuration on the coast or waterway and in the equipment and aids available for her movement and stay. In short, it must be safe in its set-up as a port.'

Mr Justice Teare was not impressed with this argument and, despite the lack of criticism of Lord Denning MR's comments in subsequent cases, considered the approach based on *THE EASTERN CITY* definition to be the standard, i.e. a port/berth must be safe in fact, not merely 'reasonably' safe. He then embarked on a relatively complex analysis of the evidence.

The consideration of the evidence was broken down into four questions, assessment of which was assisted by expert evidence from each party:

(i) When ordered to sail to Kashima, was there a risk the ship might have to leave the port on account of long waves and bad weather or because she could not safely remain?

(ii) Was there a real risk that long waves might occur at the same time as gale force conditions?

(iii) Did the safe departure of a Capesize bulk carrier in gale force conditions from the north together with swell require something more than 'good navigation and seamanship'?

(iv) Were there any systems in the port which prevented Capesize ships from being exposed to the risk of having to leave Kashima in a northerly gale?

The first two questions were answered in the affirmative.

On the third question, the evidence of the owners' expert was that ordinary seamanship and navigation could not alone have ensured a safe exit from Kashima and that *'Good luck was also required.'* This was accepted by the Court in that there was a risk or danger that a Capesize ship leaving Kashima in a northerly gale may be unable to maintain a course line in the narrow fairway and so be unable to leave in safety.

The fourth question was answered in the negative, it being noted that the only warning system considered appropriate was introduced after *THE OCEAN VICTORY* incident.

The charterers also tried to show that there had been a break in the chain of causation between the decision to leave Kashima and the incident. Apart from contesting whether the charterers' representative made any recommendation, the charterers pointed to:

(i) Pilot error in thinking it was safe to sail;

(ii) The master's failure to refuse to sail;

(iii) The master's failure to establish a disembarkation point for the pilot;

(iv) Various errors on the part of the master in the navigation by failing to use waypoints/parallel indexing; and

(v) Prolonged hard port/starboard on the helm caused the vessel's speed to drop leaving her beam to the weather.

In having found that the charterers' representative ordered the vessel to sail, Mr Justice Teare had no hesitation in finding that the first three items did not affect liability. Any pilot error reflected the absence of a port system for ensuring ships should sail or not; likewise the master's failure to refuse to sail in circumstances where he had taken local advice.

While the failure to use waypoints/parallel indexing was found to be negligent, this did not result in the master failing to appreciate the vessel's position in a relevant manner.

This left the hard port/starboard manoeuvres. The charterers submitted these were the direct cause of the casualty and it was not a case where the master's actions were taken in an 'agony of the moment' i.e. under extreme pressure.

Mr Justice Teare considered that if there was any negligence on the part of the master in steerage, this was due to the lack of safety of the port: *'The danger was not latent but, in circumstances where the local and experienced advice was to leave, the master had no real option to stay. The master's (assumed) negligence was chronologically the immediate cause of the casualty but that does not mean that it must inevitably be judged to be the real and effective cause of the casualty… This case was said not to be 'an agony of the moment' case but I think it was. The master, when deciding for how long to keep the hard port and hard starboard helm on, had a difficult decision to make for there were risks either way.'* (at paragraph 174).

In so finding, the decision was reached in favour of the owners.

Increase in charterers' responsibilities?

Although viewed as a pro-owner case, the decision in *THE OCEAN VICTORY* is not in itself surprising. It was accepted by the charterers that the conditions experienced at Kashima in October 2006 were *'at the upper end of what might be expected from a non-tropical system'.* With the benefit of hindsight, the master's decisions taken in the heat of the moment, under pressure in heavy weather conditions, were open to some criticism; but they were the product of the situation and did not amount to negligence sufficient to break the chain of causation.

The findings were very much in line with the decision in *Kristiansands Tankrederi A/S v Standard (Bahamas) Ltd (THE POLYGLORY)* [1977] 2 Lloyds' Rep. 353 to which reference was made by Mr Justice Teare. In *THE POLYGLORY*, the ship was under time charter and was ordered to Port La Nouvelle. While taking on ballast, the master and compulsory pilot decided to leave the berth due to increasing wind. In leaving, as the ship was still light, one of her anchors dragged, damaging an underwater pipeline. The owners settled the claim and sought an indemnity against the charterers as an unsafe port claim. The arbitrator held that although the pipeline was broken as a result of the pilot's negligence, this did not break the chain of causation between the order to proceed to the port and the damage. The decision was upheld by the High Court.

By contrast, in the case *London Arbitration 3/03* (where a ship grounded on leaving a berth in bad weather and the owners claimed that there was a 'lack of system' in ensuring timely sailing) the Tribunal found that the underlying and intervening cause was failure by the crew to coordinate releasing the stern line with heaving up of the starboard anchor combined with a failure to use the ship's engines quickly enough and with sufficient power.

While there has been no increase in a charterer's responsibilities in *THE OCEAN VICTORY*, if the more complex approach taken by Mr Justice Teare is adopted, there will perhaps be even greater focus on the evidence in future unsafe port/berth cases. Indeed, most of this lengthy case concerned a close analysis of the evidence. Such an approach in future cases could increase the prospects that in some cases a charterer will be able to identify substantive negligence of a master or pilot as an intervening cause, so escaping liability for an alleged breach of safe port/berth warranty. This underlines the importance of promptly gathering contemporaneous evidence as soon as practical after a potential unsafe port/berth incident has occurred.

A new office in Hong Kong

The Hong Kong branch of Britannia opened its doors in the Wan Chai district of the city in December last year.

The Britannia Steam Ship Insurance Association (HK) Limited ('Britannia HK') is the Association's latest overseas office, with responsibility for both the traditional Hong Kong correspondency work for all Members and also the claims role for Members based in Hong Kong which has, in the past, been managed from London. The office is headed up by David Harley, a Divisional Director of Tindall Riley (Britannia) Limited who has been seconded to Hong Kong from the London office.

Britannia HK has taken over the duties of Sureness Marine Services who were the exclusive correspondents in Hong Kong. Britannia's relationship with Sureness dates back more than 50 years, to 1963, when its forerunner was jointly listed as a port correspondent in Hong Kong. This relationship was cemented in 1990 when Sureness, under the leadership of Alister Inglis, was first appointed as Britannia's exclusive correspondent in Hong Kong. Over the years, the role of Sureness expanded; they were not only dealing with matters in and around Hong Kong itself, but were also assisting Members by liaising with port correspondents and lawyers in China. For example, in 2012 Sureness handled 70 'wet' cases (collisions, FFO, pollution) in mainland China and had developed a first class reputation for successful claims negotiation with Chinese interests.

Overall, Sureness were handling approximately 10% of the total number of claims for Britannia's Hong Kong Members.

Hong Kong has close links with mainland China and is designated as a Special Administrative Region of the People's Republic of China. As China has grown in importance in the world economy, with expansion of its ports and more of the country opening up to international trade, the role of Sureness also developed. In 2007 the first mainland Chinese Members were welcomed into the Association. Together with the existing and loyal Hong Kong membership, the decision was made to turn the successful Sureness correspondency into Britannia HK, providing a strong base in Hong Kong and affirming the importance of the entire region to Britannia.

In December 2013, the new Britannia HK office moved from the Sureness premises to new offices nearby. All the existing Sureness staff remain employed by Britannia HK and continue to play the same valuable role for the membership. In addition to handling the correspondency work for Britannia Members, the office also helps Members who require assistance in Hong Kong and liaises with correspondents in China. The Hong Kong office also handles both P&I and FD&D claims for Britannia Members based in Hong Kong and China.

David Harley joined Tindall Riley in 1998 and was formerly in charge of the Hong Kong, China and south east Asia claims team in London. As well as being in charge of the Britannia HK office, David also handles P&I and FD&D claims for the Hong Kong and Chinese Members. He is assisted in this area by Wing Wai. Wing, a graduate of Hong Kong University, joined Britannia HK in March 2014, having practised for a number of years as a solicitor in Hong Kong. In addition to being Hong Kong qualified, Wing is also admitted as a solicitor in England and Wales. Wing speaks English, Cantonese and Mandarin. More recently, Eske Munk joined Britannia HK on secondment from the London office.

The correspondency side of Britannia HK, previously handled by Sureness, is carried out mainly by Capt. CK Kai and Dr. Sanming Chen, assisted by David Cheung, HK Chiang, Connie Chang and Dicky Luk. Capt. Kai is an experienced mariner and worked as a marine surveyor before joining Sureness in 1994. Dr. Chen joined in March 2013 and previously worked for China P&I Club in Hong Kong. Both Capt. Kai and Dr. Chen regularly travel to Chinese ports in order to meet with the port correspondents and lawyers and to negotiate claims on behalf of Britannia Members. All the staff working on the correspondency side speak English, Cantonese and Mandarin.

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