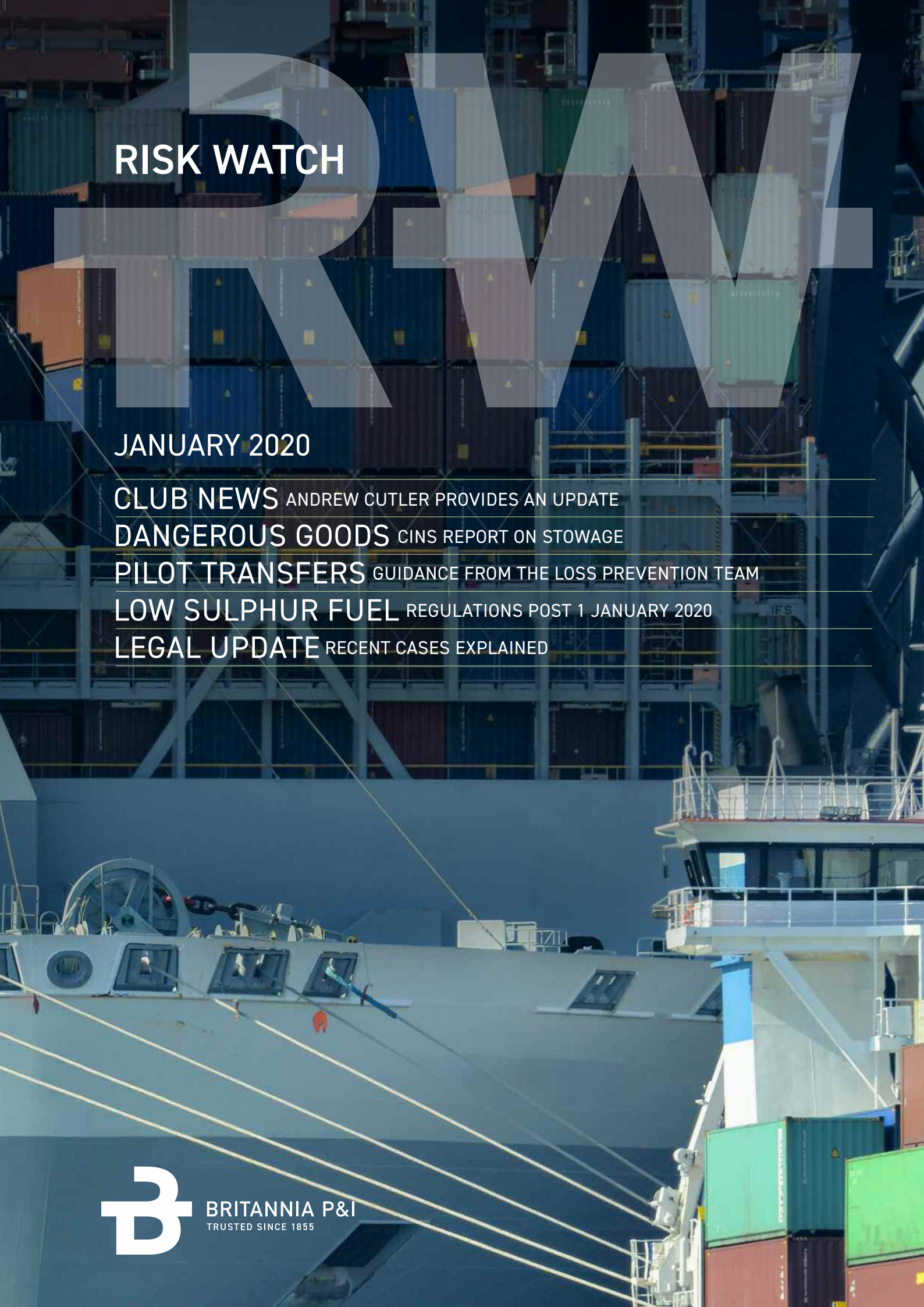

RISK WATCH

RW

JANUARY 2020

CLUB NEWS ANDREW CUTLER PROVIDES AN UPDATE

DANGEROUS GOODS CINS REPORT ON STOWAGE

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BRITANNIA P&I
TRUSTED SINCE 1855

ANOTHER BUSY YEAR FOR BRITANNIA

AS EVER, OUR FOCUS IS ON THE MEMBERSHIP, AND OUR GOAL OF BEING **THE FINEST PROVIDER OF P&I AND FD&D INSURANCE.**

The elephant in the room remains Brexit. Within the UK, Brexit remains a source of embarrassment: I make no comment on the competing merits of the UK's vote in June 2016 to leave the EU. What is troubling is the uncertainty for the past three years following that vote. For Britannia, we continue to plan for the worst whilst hoping for the best. That planning has seen us establish Britannia Europe, a Luxembourg based 'sister' mutual P&I Club. When (or if) the UK leaves the EU and Britannia loses the right to 'passport' (that is, Britannia, as with all UK insurers, then loses the right to provide insurance to our Members' EU flagged ships) Britannia Europe will step in. For Members, practically they will see no change – with their continuing to benefit from the same high service levels and financial strength of the Britannia group.

That financial strength was re-affirmed by S&P, who in August 2019 confirmed Britannia's A (stable rating), with AAA capital and exceptional liquidity. This enabled the Board to declare a further USD15m capital distribution to its mutual P&I Members with tonnage on risk as at 15 October 2019. This brought the total capital distributions during 2019 to USD25m (and USD85m since May 2017). In addition, Britannia announced its move away from declaring a General Increase: for 2020/21 renewals Members' premium will be rated according to their individual risk and record. The view is that this is a more sophisticated approach. At the same time, from 2020/21 we will move away from Advance and Deferred Calls, with Members' premium being termed Estimated Total Calls and collected in three equal instalments. This will ease any administrative burden on Members as well as providing them with improved credit terms. The renewal circular issued to Members has more details.

Within Britannia there has been a change of the Board's Chair, with Tony Firmin succeeding Nigel Palmer OBE. To add to the article opposite, with more details on that change, I wish Nigel a long and happy retirement as well as thanking him for his exemplary service to Britannia over many years.

As mentioned, Britannia aims to provide the highest level of service. To benchmark this, in 2019 we carried out a second Members' survey. The results are being compiled and we aim to publish a circular to Members soon. In the meantime, over 55% of our membership took part in the survey: which is a great achievement and for which I thank Members. As a mutual, we value feedback on what we do well and what we can do better.

One area where we continue to do better is investment in our offices: with a focus during 2019 on expanding our claims handling, underwriting and loss prevention capacity in our regional hubs. This investment will also see B Denmark (established in June 2018) being welcomed into the Managers' fold in 2020, with it being rebranded TR(B) Denmark in due course. We have also strengthened our ties with our exclusive correspondents in South Korea, Spain and Taiwan, for whose support I remain grateful.

Last, I thank all Members for your continuing trust in Britannia, your Club.

ANDREW CUTLER CEO BRITANNIA

We hope you enjoy this copy of Risk Watch. We will be looking for ways to maintain and increase the usefulness, relevance and general interest of the articles. If you have any ideas or comments please send them to: publications@tindallriley.com

A NEW CHAIRMAN FOR THE BRITANNIA BOARD

October saw a changing of the guard within Britannia's Board, with Tony Firmin taking on the position of Chairman. Tony's maritime career started when he joined Hapag-Lloyd in 1995, initially as Finance Director of Hapag-Lloyd America Inc., responsible for the USA, Canada and Latin America. His career with the transnational container shipping line culminated with his election in July 2014 to its Executive Board, serving as Chief Operating Officer until his retirement on 30 June 2019. Within Britannia, Tony had been Britannia's Deputy Chair since 2016.

Inevitably, a new Chair meant saying farewell, with Nigel Palmer OBE retiring from that role at the Britannia Board Meeting in Rome on 15 October. The meeting was held in the baroque Palazzo Colonna, home of the Italian Shipowners' Association (Confitarma). We are grateful to Confitarma for hosting the meeting – which ensured a suitably grand venue for Nigel to say his farewell to the Board.

Nigel started his career as a cadet with BP Tanker Co., where he rose to the rank of Master before taking on various corporate roles within BP prior to retiring in 2004. He then became a director on the Britannia Board before becoming chairman in May 2008.

Marking the change, Mr Palmer said: 'It has been my immense pleasure to have helped steer the world's oldest P&I club over the past decade, where we have faced numerous challenges within the maritime industry on behalf of our Members'. Paying tribute to Mr Firmin, he added: 'Tony brings his considerable maritime and financial experience that will help guide Britannia in the coming years as it continues its recent programme of regional expansion and tonnage growth whilst maintaining its financial strength.'

INTERNATIONAL MARITIME RESCUE FEDERATION

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INTERNATIONAL MARITIME RESCUE FEDERATION (IMRF)

WE ARE VERY PLEASED TO ANNOUNCE THAT BRITANNIA IS NOW AN ASSOCIATE MEMBER OF IMRF. THIS AN INTERNATIONAL NON-GOVERNMENTAL ORGANISATION (NGO) WORKING TO DEVELOP AND IMPROVE MARITIME SEARCH AND RESCUE (SAR) CAPACITY WORLDWIDE.

Their mission is to bring together voluntary and governmental SAR organisations from around the world to share their lifesaving ideas, technologies and experiences and to freely cooperate with one another to achieve their common humanitarian aims. The IMRF also has an important advocacy role, providing an international voice for its members, and has consultative status with the International Maritime Organization (IMO) – the only SAR NGO to have this.

Ella Hagell (Britannia Divisional Director, People Risks) attended the IMRF awards lunch which took place during London Shipping Week on HQS Wellington. This year there was a special award for 'Women in SAR', given to an individual who is an inspiration, role model and support for other women and girls. This is part of the wider support that the IMRF is providing for the IMO's 'Empowering Women and Girls' focus for 2019. The award was won by Isobel Tugwell, a young crew member at the RNLI Shoreham Lifeboat Station in the UK.

We encourage readers to go to the IMRF website to learn more about the important work they do in all areas of SAR and to support their various initiatives.
www.international-maritime-rescue.org

CINS PUBLISHES

SAFETY CONSIDERATIONS FOR THE STOWAGE OF DANGEROUS GOODS ON CONTAINER SHIPS

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IN RECENT YEARS THERE HAVE BEEN SEVERAL MAJOR CARGO FIRES ON CONTAINER SHIPS ATTRIBUTABLE TO THE CARRIAGE OF DANGEROUS GOODS (DG), INCLUDING SOME CASES WHERE THE DG WERE INCORRECTLY DECLARED. THE RESULTING LOSSES HAVE BEEN SIGNIFICANT, BOTH IN TERMS OF LOSS OF PROPERTY AND LOSS OF LIFE.

In order to address on-board dangerous goods stowage considerations, CINS (Cargo Incident Notification System) has published 'Safety Considerations for Ship Operators Related to Risk-Based Stowage of Dangerous Goods on Containerships' (Safety Considerations). Developed by CINS members, classification societies, the International Group of P&I Clubs and other stakeholders, the Safety Considerations look at a number of issues to bear in mind when developing a risk-based dangerous goods stowage strategy. These Safety Considerations are intended to complement the existing measures being taken by ship operators, cargo carriers and port terminals and enhance the mandatory requirements of IMDG, SOLAS and other regulations.

THE SAFETY CONSIDERATIONS PROVIDE GUIDANCE ON HOW TO IMPLEMENT A RISK-BASED STOWAGE STRATEGY. THE OVERALL GOAL IS TO CARRY DANGEROUS GOODS SAFELY AND IS DIVIDED INTO SIX SUB-GOALS AS FOLLOWS:

- PROTECT LIVES
- RETAIN MAIN PROPULSION
- RETAIN STRUCTURAL INTEGRITY
- FACILITATE FIRE PREVENTION
- FACILITATE FIRE-FIGHTING
- FACILITATE SECURITY

For each sub-goal the Safety Considerations list the functional requirements that need to be fulfilled in order to achieve the sub-goals and also looks at how this can be done using a risk-based stowage strategy. The Safety Considerations have been developed so they can be applied to all sizes of container ships.

These Safety Considerations are for guidance and are not mandatory but Members are encouraged to consider them when planning the stowage of dangerous goods on container ships to increase the safety of their crew, the ship and the environment.

The full publication is available on the Britannia website:
https://britanniapandi.com/cins-publishes-risk-based-dg-stowage-safety-considerations/

If you have any questions or would like further advice on the safe carriage of containers and dangerous goods, then please feel free to contact the Britannia Loss Prevention team:
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PILOT BOARDING RISKS

THE RISKS ASSOCIATED WITH THE SAFE TRANSFER OF PILOTS AT SEA ARE UNFORTUNATELY NOT A NEW MATTER, REFLECTED BY THE MANY TRAGIC ACCIDENTS OVER THE YEARS INVESTIGATED BY ORGANISATIONS SUCH AS THE AUSTRALIAN TRANSPORT SAFETY BUREAU (ATSB): http://ow.ly/jdLF30q0XdJ

Sadly, such accidents likely represent only a small proportion of the hazardous scenarios faced by pilots. Marine Notice 03/2019, recently issued by the Australian Maritime Safety Authority (AMSA): http://ow.ly/FN0O30q0Xie refers to six incidents since November 2017 where man ropes parted or the securing point failed; it also notes that AMSA regularly receive reports of non-compliant pilot transfer arrangements. Likewise, the UK's Maritime Confidential Hazardous Incident Report Programme (CHIRP), which Britannia sponsors, frequently feeds back on confidential reports received regarding the adequacy of boarding arrangements: http://ow.ly/Ofid30q1cbz

The AMSA notice provides a useful recap to shipowners, operators, crew, and other stakeholders, of their obligations to provide a safe means of boarding for pilots. SOLAS Chapter V, Regulation 23 stipulates the mandatory requirements[1] for pilot transfer arrangements, noting that these are minimum standards. In Australia, Marine Order 21 (Safety and emergency arrangements) 2016 (MO21) implements SOLAS V/23 and shall be complied with.

It is important to ensure that a pilot ladder is certified by the manufacturer as complying with SOLAS V/23 or 'with an international standard acceptable to the Organization'; regulation 23.2.3 specifically referring to ISO 799:2004 'Ships and marine technology – pilot ladders' in this respect, noting that these standards are not identical. Other key considerations include:

• Appliances shall be kept clean and properly maintained and stowed, and shall be used solely for embarking and disembarking personnel.

• The equipment shall always be checked by the responsible officer before being rigged and used in order to ensure that it is fit for purpose, in good condition and correctly secured.

• The rigging of the pilot transfer arrangements and the embarkation of a pilot shall be supervised by a responsible officer with a means of communicating with the bridge.

• Personnel engaged in rigging and operating any mechanical equipment shall be instructed in the safe procedures to be adopted with special consideration to be given to the risks when working over the side; the equipment shall be tested prior to use.

• Any modifications to a pilot transfer arrangement need to be approved by Class and/or Flag State, as applicable, to ensure continued compliance with SOLAS and/or relevant regulations.

AMSA also point out that procedures for the regular inspections of the pilot transfer equipment, and its storage when not in use, should be established and followed as required by paragraph 10.1 of Part A of the International Safety Management Code (ISM).

A useful summary of the key considerations is also provided in the Industry Guidance document on Pilot Transfer Arrangements: http://ow.ly/dye230q0Xl0 issued by the International Chamber of Shipping (ICS) and International Maritime Pilots' Association (IMPA). This includes a copy of IMO/IMPA's Pilot Boarding Arrangements poster:[2] http://ow.ly/blEB30q0Xnx, and which depicts the pilot boarding arrangements required by SOLAS V/23. The AMSA notice concludes with two final key points:

• Members operating ships in Australia should note that AMSA port State control inspectors will pay particular attention to the material state of all pilot transfer equipment, including the implementation of the relevant IMO circulars and resolutions, as well as MO21 and ISO 799:2004.

• Compliance with the standards does not in itself always assure safety. The master or deck officer of a ship providing a pilot ladder should assess whether supplementary measures, such as lifejackets, harnesses, lifelines and lifebuoys should also be put in place to assure the safety of personnel transferring onto their ship.

[1] The relevant IMO standards are also provided by IMO Resolution A.1045(27) 'Pilot transfer arrangements', as amended by IMO Resolution A.1108(29) 'Amendments to the Recommendations on Pilot Transfer Arrangements' (Resolution A.1045(27)).

[2] Also issued as part of IMO Circular MSC.1/Circ.1428.

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LOW SULPHUR REGULATIONS AFTER 1 JANUARY 2020

THE NEW IMO GLOBAL LOW SULPHUR REQUIREMENTS CAME INTO FORCE ON 1 JANUARY 2020 UNDER THE MARPOL CONVENTION. HOWEVER, THERE ARE SOME PLACES WHERE SEPARATE LOCAL LEGISLATION WITH STRICTER REQUIREMENTS WILL ALSO BE IN FORCE. IT IS IMPORTANT THAT MEMBERS ARE AWARE OF THE REGULATIONS IN THESE AREAS. THIS ARTICLE GIVES A SIMPLE OVERVIEW OF THESE KNOWN AREAS BUT PLEASE REMEMBER THAT THE SITUATION CAN FREQUENTLY CHANGE.

MARPOL EMISSION CONTROLLED AREAS (ECAs)

THERE ARE CURRENTLY FOUR ECAs COVERING THE BALTIC SEA, THE NORTH SEA, NORTH AMERICA AND THE UNITED STATES CARIBBEAN SEA AREAS.

FROM 1 JANUARY 2015 SHIPS HAVE BEEN REQUIRED TO USE FUEL WITH A 0.1% SULPHUR CONTENT LIMIT WHILE OPERATING IN THESE ECAs UNLESS USING ALTERNATIVE FUELS E.G. LNG OR AN EXHAUST GAS CLEANING SYSTEM (EGCS) SUCH AS A SCRUBBER SYSTEM. THIS REQUIREMENT DOES NOT CHANGE AFTER 1 JANUARY 2020. ALSO, THE MEDITERRANEAN SEA AND JAPAN HAVE BEEN MENTIONED AS POSSIBLE ECAs IN THE FUTURE.

EU AND TURKEY
EU sulphur emissions from ships are regulated by Directive (EU) 2016/802 'Sulphur Directive'.

Since 1 January 2010 this has required ships of all flags berthed in EU ports to use fuels with a 0.1% sulphur content limit, the fuel changeovers to be commenced as soon as possible after berthing and back again as close to departure as possible. Ships at berth for less than two hours are exempt as are ships that are changing entirely to a shoreside electricity supply. ('Berthed' is defined as ships which are securely moored or anchored in an EU port while they are loading, unloading or hotelling, including the time spent when not engaged in cargo operations - Directive (EU) 2016/802).

Similar rules are applicable for all ships arriving at Turkish ports as well as ships sailing on the Turkish inland waterways. Ships transiting the Turkish straits, the Bosphorus, the Dardanelles and the Marmara Sea are not subject to these regulations. That said, if the ship is at anchor for more than 2 hours, it is advisable to consider switching over to low sulphur fuel.

CALIFORNIA
Although part of the North American ECA zone, the state of California has additional local requirements as set out in the California Ocean Going Vessel Fuel Regulation (COGVFR) issued by the Californian Air Resource Board (CARB). These apply when ships are within 24 nautical miles of the Californian coastline and, in contrast to the ECA regulations, prohibit the use of residual fuels and thereby also EGCS like scrubbers. Only distillate fuels (e.g. MGO or MDO) with 0.1% sulphur content limit are allowed when operating in Californian waters.

Furthermore, California also has its 'At Berth Ocean Going Vessels Regulations'. These apply to Members who operate either container or refrigerated cargo ships that visit the same Californian port 25 times or more in a calendar year (5 times or more for passenger ships). The regulation requires Members to reduce their fleet's on board power generation by 80%, calculated from the fleet's baseline power generation, during 80% of their port stays in California from 1 January 2020.

CHINA
Since China introduced their own local ECA zones in September 2015 there have been several changes to both its requirements and geographic application. In November 2018 a new Coastal ECA was introduced which includes all sea areas and ports within China's territorial sea including the province of Hainan and two inland ECAs being parts of the Yangtze and the Xi Jiang River. Ships must currently use fuel with a 0.5% sulphur content limit when entering into the ECA.

However, stricter requirements have also been set out:
• From 1 January 2020, ships must use low sulphur content fuel not exceeding 0.1% when entering the Inland Water ECAs.
• From 1 January 2022, ships must use low sulphur content fuel not exceeding 0.1% when entering the Hainan Costal ECA.
Authorities are also considering implementing a 0.1% sulphur cap in the Coastal ECA from 1 January 2025.

So far, alternative means such as ECGS have been accepted. However, the use of open scrubbers has been banned in certain parts of the Costal ECAs. For more advice on this see the Britannia webpage: **https://britanniapandi.com/china-ban-on-open-loop-scrubbers**

HONG KONG AND TAIWAN
Both Hong Kong and Taiwan already require a 0.5% low sulphur fuel content limit to be in place by 1 January 2020. For Hong Kong, the implementation of a 0.1% limit has been discussed, but not yet made official. Furthermore, if using ECGS, this will need prior approval by the competent Hong Kong authority. Members are recommended to contact their local representatives for further advice.

CONCLUSION
The MARPOL 2020 low sulphur requirements will almost certainly not be the last emission regulation coming into force. There will probably be additional ECAs with stricter emission requirements designated either internationally through the IMO or by local legislation. Experience has shown that new regulations or changes to existing legislation in some places can happen with very little notice. It is therefore very important that Members always show due diligence and liaise closely with their local representative in order to obtain latest advice and in plenty of time before their ship enters a port state's territorial waters.

If you would like any further advice or assistance, please contact the Loss Prevention team.
LossPrevention@tindallriley.com

CLAIMS AND LEGAL

FORUM NON CONVENIENS

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BRIGHT SHIPPING LTD V CHANGHONG GROUP (HK) LTD – COURT OF APPEAL [2019] HKCA 1062
THE CF CRYSTAL AND THE SANCHI

FOLLOWING A COLLISION IN P.R. CHINA'S EXCLUSIVE ECONOMIC ZONE (EEZ), WHICH RESULTED IN ONE OF THE WORST OIL SPILLS IN RECENT YEARS, THE DEFENDANT FAILED IN ITS ARGUMENT THAT HONG KONG WAS NOT AN APPROPRIATE FORUM FOR RESOLVING THE DISPUTE BETWEEN THE TWO OWNERS.

On 6 January 2018 a collision occurred between a Panamanian-flagged tanker, the *SANCHI*, and a bulker, the *CF CRYSTAL*, flagged in Hong Kong. The collision's location was about 125 miles off the Chinese coast, which was in international waters but within P.R. China's EEZ.

At the time of the incident, the *SANCHI* was carrying a cargo of 136,000mt of natural gas condensate and there was an immediate explosion and fire. After burning and drifting for over a week, the *SANCHI* sank on 14 January 2018. Sadly, none of her crew survived. As a result of the incident bunkers and cargo were spilled, some of which made landfall in P.R. China and Japan.

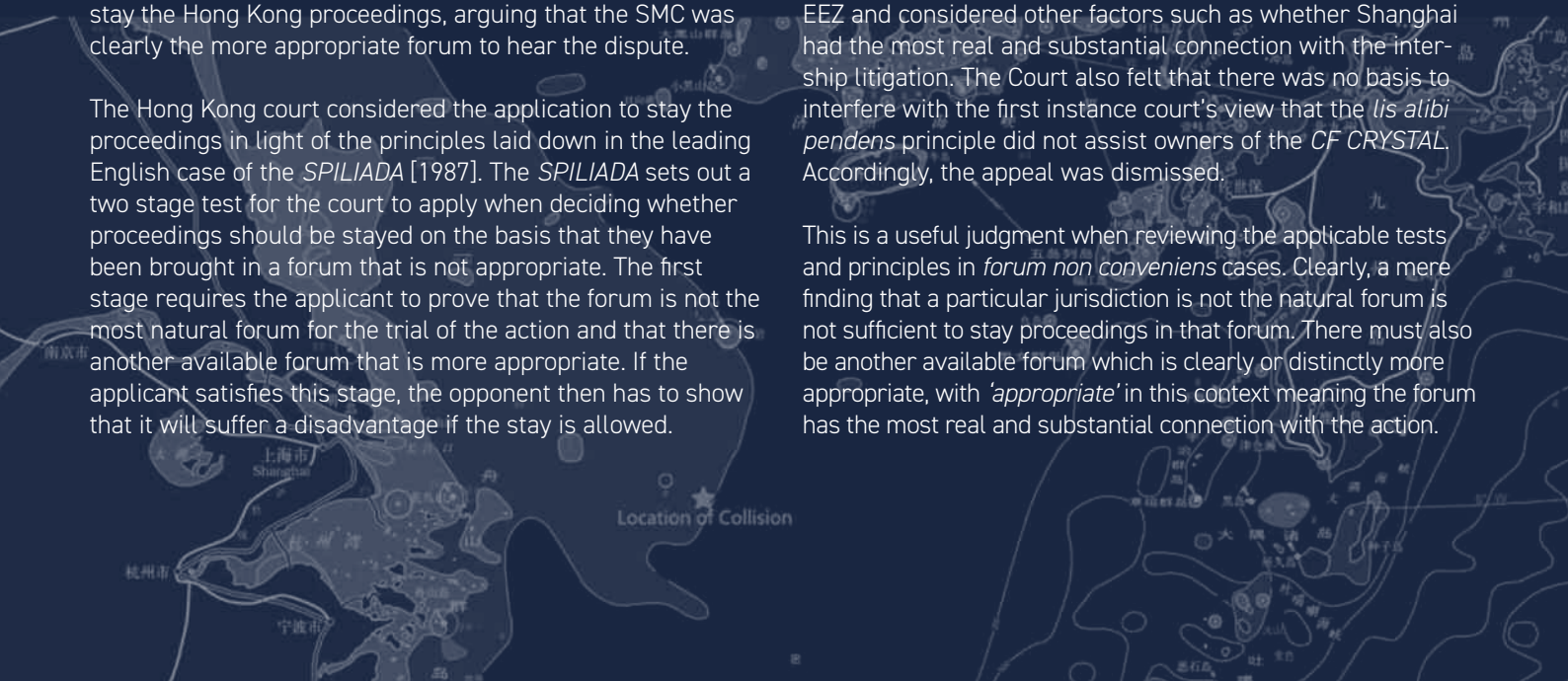
The collision led to a number of proceedings. Owners of the *CF CRYSTAL* commenced proceedings in the Shanghai Maritime Court (SMC) and established two limitation funds. Owners of the *SANCHI* did not submit to the SMC's jurisdiction but commenced proceedings in Hong Kong, presumably because Hong Kong applies a higher tonnage limitation than P.R. China. Owners of *CF CRYSTAL* sought to stay the Hong Kong proceedings, arguing that the SMC was clearly the more appropriate forum to hear the dispute.

The Hong Kong court considered the application to stay the proceedings in light of the principles laid down in the leading English case of the *SPILIADA* [1987]. The *SPILIADA* sets out a two stage test for the court to apply when deciding whether proceedings should be stayed on the basis that they have been brought in a forum that is not appropriate. The first stage requires the applicant to prove that the forum is not the most natural forum for the trial of the action and that there is another available forum that is more appropriate. If the applicant satisfies this stage, the opponent then has to show that it will suffer a disadvantage if the stay is allowed.

At first instance, the Hong Kong court held that the fact that the collision occurred in international waters did not prevent the court from concluding that the SMC was clearly more appropriate than Hong Kong as the forum for resolving inter-ship liabilities. However, the *CF CRYSTAL's* case rested heavily on the principle of *lis alibi pendens* ('dispute elsewhere pending') and the Court decided that the fact that proceedings had been commenced in another jurisdiction was not in itself a material factor when applying the first stage of the *SPILIADA* test. The Court, therefore, dismissed the *CF CRYSTAL's* application for a stay of the proceedings.

On appeal by owners of the *CF CRYSTAL*, the Hong Kong Court of Appeal accepted that Hong Kong was not the natural forum for the inter-ship litigation. However, they focused on the question of whether owners of the *CF CRYSTAL* had established that the SMC was clearly and distinctly more appropriate as a forum than Hong Kong. The Court of Appeal decided that the first instance court's approach to stage 1 of the *SPILIADA* test was correct, as it did not put too much emphasis on the place of collision being within P.R. China's EEZ and considered other factors such as whether Shanghai had the most real and substantial connection with the inter-ship litigation. The Court also felt that there was no basis to interfere with the first instance court's view that the *lis alibi pendens* principle did not assist owners of the *CF CRYSTAL*. Accordingly, the appeal was dismissed.

This is a useful judgment when reviewing the applicable tests and principles in *forum non conveniens* cases. Clearly, a mere finding that a particular jurisdiction is not the natural forum is not sufficient to stay proceedings in that forum. There must also be another available forum which is clearly or distinctly more appropriate, with *'appropriate'* in this context meaning the forum has the most real and substantial connection with the action.



BAREBOAT CHARTERERS' OBLIGATION TO KEEP THE SHIP APPROVED BY ITS CLASSIFICATION SOCIETY

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ARK SHIPPING CO LLC V SILVERBURN SHIPPING (IOM) LTD [2019] EWCA CIV 1161 – THE ARCTIC

IN THIS RECENT CASE THE ENGLISH COURT OF APPEAL DECIDED THAT A BAREBOAT CHARTERERS' OBLIGATION TO KEEP THE CHARTERED SHIP APPROVED BY ITS CLASSIFICATION SOCIETY FOR THE ENTIRE DURATION OF THE BAREBOAT CHARTER IS NOT A STRICT CONDITION OF A LONG TERM BAREBOAT CHARTERPARTY. THEREFORE, A TEMPORARY EXPIRY OF CLASS APPROVAL WILL NOT NECESSARILY ALLOW THE OWNERS TO WITHDRAW THE SHIP FROM THE BAREBOAT CHARTERPARTY UNLESS THE OWNERS CAN SHOW THAT THEY WERE ADVERSELY AFFECTED BECAUSE THE CLASS CERTIFICATE HAD EXPIRED.

The brief facts of the case are that in 2012 the owners of an offshore supply ship chartered it to charterers under a bareboat charterparty for a period of 15 years. The charterparty stated that *'Charterers shall maintain the Vessel…in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and they shall keep the Vessel with unexpired classification of the class and with other required certificates at all times. The Charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Vessel from service of the Charterers … The Charterers shall dry-dock the Vessel and clean and paint her underwater parts whenever the same may be necessary, but not less than once in every eighteen calendar months…'*

The ship was delivered under the charterparty in October 2012 and in early November 2017 the ship's class certificates were about to expire. The bareboat charterers arranged dry docking and the ship arrived at the dry dock port at the end of October 2017. However, the class certificates expired before the ship entered into the dry dock. Repair and maintenance work subsequently took place in the dry dock under supervision of the ship's classification society.

In early December 2017 owners withdrew the ship and terminated the bareboat charterparty on the basis that the ship's class certificates had expired. Charterers disagreed and refused to return the ship to owners.

Proceedings were commenced and the dispute eventually came before the Court of Appeal.

The court said that charterers were in breach of the terms of the bareboat charterparty by allowing the class certificates to expire. The Court felt that charterers should have either gone into dry dock earlier or arranged temporary certification while in dry dock in order to prevent the class certificates expiring.

Nevertheless, on the facts of the case, the court found that the expiry of class approval had not caused any adverse consequences for the owners. The court, therefore, decided that loss of class, at the very time the ship was undergoing repairs under class supervision, was not sufficiently serious to entitle owners to withdraw the ship from the bareboat charterparty, particularly as the bareboat charterparty did not specify a time limit within which to rectify any expiry of class certificates.

In summary, while the court thought that bareboat charterers had breached the charterparty by failing to arrange timely renewal of class certificates, this did not automatically entitle owners to withdraw the ship. In order to withdraw the ship, owners would need to show that legitimate adverse consequences had arisen as a result of the expiry of class approval. The court said that, in the context of a very long bareboat charterparty, a factually inconsequential breach of contract should not necessarily create disproportionate consequences for the long-term contractual relationship. The case is a good illustration of the English Court taking a pragmatic and not overly legalistic approach to a dispute

CONTRACTUAL EXCEPTION CLAUSES

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CLASSIC MARITIME INC V LIMBUNGAN MAKMUR SDN BHD AND ANOTHER – COURT OF APPEAL [2019] EWCA CIV 1102

IN THIS CASE, CONSIDERED RECENTLY BY THE ENGLISH HIGH COURT, A DISPUTE AROSE FROM CHARTERERS' FAILURE TO PROVIDE CARGO LIFTINGS FOR 5 SHIPMENTS UNDER A LONG TERM CONTRACT OF AFFREIGHTMENT ('COA'). CHARTERERS ARGUED THAT THEY HAD NO LIABILITY BECAUSE THE FAILURE TO PROVIDE THE CARGO WAS DUE TO A DAM BURST EVENT, WHICH THEY SAID ENTITLED THEM TO RELY ON THE FOLLOWING CLAUSE IN THE COA :

'EXCEPTIONS
Neither the Vessel, her Master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: ... accidents at the mine ...; or any other causes beyond the Owners', Charterers', Shippers' or Receivers' Control; always provided that any such events directly affect the performance of either party under this Charter Party. If any time is lost due to such events or causes such time shall not count as Laytime or demurrage (unless the Vessel is already on demurrage in which case only half time to count).' (our emphasis)

The court did not agree with charterers. While it was not disputed that the dam burst event constituted *'accidents at the mine'*, the court held that the clause could not apply on the facts. The language of the clause required charterers to show that if it was not for the dam burst, they could and would have performed the COA (the 'Causation Test'). Charterers failed to discharge this burden.

Such clauses are common in COAs and other forms of charterparty so the court's reasoning is helpful in understanding how similar clauses may be interpreted.

Although the clause had similarities with a typical force majeure clause, the court decided that it was actually an exceptions clause. A force majeure clause is concerned with the effect of an event upon a contract - it operates to bring the contract to an end so that, thereafter, the parties have no obligations to perform. By comparison, exception clauses excuse a party from liability for a breach of the contract.

For the clause to apply, there must be *'loss or damage to, or failure to supply, load, discharge or deliver the cargo'* resulting from a cause/event listed in the clause (an 'Event'). This language exempts a party from responsibility for breach of an obligation. Furthermore, the clause refers to objects (i.e. *'cargo'*), and lists Events that can only apply in relation to a specific object (e.g. a collision that affects cargo on board the vessel). These factors pointed towards the clause being an exceptions clause.

Regardless of how the clause is characterized, its wording should be examined to determine its applicability, i.e. whether the Causation Test applies. The clause used words such as *'resulting from'* together with a requirement that the Events in question *'directly affect the performance of either party'*. This imports a causation requirement into the clause. This interpretation is strengthened by references elsewhere in the clause to *'any other causes'* and *'such events or causes'*, which suggest a more demanding causation requirement.

The final sentence dealing with *'time lost due to such events or causes'* must be construed in the light of the preceding part of the clause. Hence, this provision only applies if time is lost because the *'cargo'* is affected by a cause/event as described in the first part of the clause.

TIME LIMIT FOR CARGO MIS-DELIVERY CLAIMS

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DEEP SEA MARITIME LTD V MONJASA A/S [2018] – ALHANI

IN THE CASE OF THE *ALHANI* THE ENGLISH HIGH COURT CONSIDERED THE QUESTION OF WHETHER A CARRIER CAN RELY ON THE ONE-YEAR TIME BAR CONTAINED IN THE HAGUE RULES TO DEFEAT A CLAIM FOR WRONGFUL MIS-DELIVERY OF CARGO TO A THIRD PARTY WITHOUT PRESENTATION OF THE ORIGINAL BILL OF LADING.

Article III Rule 6 of the Hague Rules provides that *'In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered'*. In the *ALHANI* case the Hague Rules were incorporated into the bill of lading and the shipowners applied for a declaration that they had no liability for the shipper's claim for mis-delivery on the basis that it was time-barred.

The judge decided that the Hague Rules time bar did apply to mis-delivery claims, saying that the time bar was not limited only to claims in which it was alleged that the carrier was in breach of its obligations under the Rules. The judge reasoned that the words *'in any event'* and *'all liability'* appearing in Article III Rule 6 were wide and could clearly encompass a situation where goods were delivered to a person not entitled to take delivery of the same. The words should be given their natural meaning, which was unlimited in scope, otherwise, the finality that the time bar was intended to achieve would be undermined.

The judge said that the time limit applies to breaches of a shipowner's obligations that occur *'during the period of Hague Rules responsibility'* and have a *'sufficient nexus with identifiable goods carried or to be carried'*. It is yet to be decided by the English Court what the position would be if the cargo mis-delivery took place outside that period.

The court also considered the question of whether the requirement in the Hague Rules that suit be brought within one year after delivery of the goods would be satisfied if proceedings were commenced in the courts of one country, despite the fact that exclusive jurisdiction had been conferred on the courts of a different country. The judge held that, where proceedings were brought in breach of a contractual agreement to bring claims in another forum then, other than in exceptional circumstances, those proceedings would not be regarded as *'suit'* for the purposes of Article III Rule 6 and would, therefore, not protect the time bar.

This significant decision has clarified an issue that has been the subject of discussion for some time. It is thought that the result would also have been the same if the Hague-Visby Rules had been incorporated, as the language of the Hague-Visby time bar is even more unequivocal due to the words *'the carrier and the ship shall in any event be discharged from all liability whatsoever'*.

Shipowners should now bear in mind the possibility of relying on the protection of the Article III Rule 6 time limit when defending claims other than in what might be considered 'traditional' cargo claims made under bills of lading. On the other hand, Charterers will need to be aware of the issue so as to ensure the timely commencement of proceedings.

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