RISK WATCH

RWF

OCTOBER 2021

BRITANNIA P&I
TRUSTED SINCE 1855

A MESSAGE FROM THE EDITOR

Here in the London office, things are returning to a more normal working pattern, with staff now back in the office for most of the week, meeting their colleagues face to face, sometimes for the first time since March 2020.

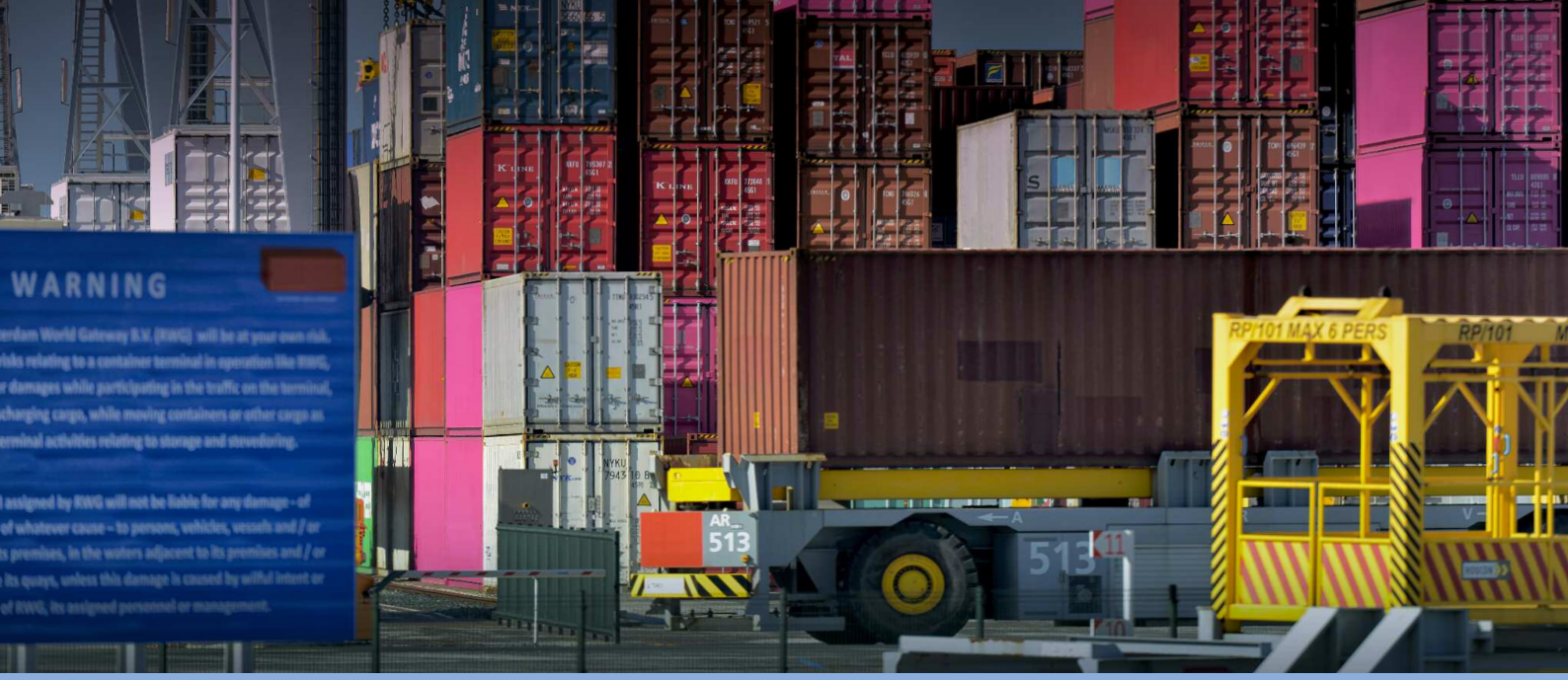
We have a wide range of articles in this edition of Risk Watch, including advice about loading and carrying various cargoes and a case study about a mooring operation which went wrong and led to fender damage. We also look at the role of the pilot in an article which follows on from a long-term study led by the International Group, collecting data on all incidents where a pilot was involved.

Our loss prevention team remains busy and the latest in our series of **BSafe** case studies deals with an engine room fire. The team has also published an in-depth investigation into electric vehicle fires and how to deal with them when they break out on board.

I hope you enjoy this latest edition of Risk Watch and, as always, we welcome any feedback that you might have.

CLAIRE MYATT
Editor

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: britanniacommunications@tindallriley.com



THE CLUB HAS RECENTLY SEEN AN INCREASED NUMBER OF ENQUIRIES ABOUT THE CARRIAGE OF CONTAINERS ON BULK CARRIERS. THIS IS BEING DRIVEN BY CURRENT FAVOURABLE FREIGHT RATES IN THE CONTAINER MARKET WHICH MAKE CARRYING CONTAINERS AN ATTRACTIVE PROSPECT FOR BULK CARRIER OPERATORS. TO MAKE SURE THAT A MEMBER DOES NOT PREJUDICE THEIR P&I COVER , THE CLUB'S UNDERWRITING DEPARTMENT SHOULD BE NOTIFIED AS SOON AS POSSIBLE AND CERTAINLY BEFORE A MEMBER ACCEPTS THE CARRIAGE OF SUCH CARGO. THE CLUB CAN ALSO GIVE ADVICE ON THE ISSUES TO CONSIDER AND OTHER POTENTIAL LIABILITIES THAT MIGHT FLOW FROM CARRYING CONTAINERS ON A BULK CARRIER.

LOADING CONTAINERS ON BULK CARRIERS

Jacob Damgaard
Associate Director,
Loss Prevention Singapore
jdamgaard@tindallriley.com

ALTHOUGH CONTAINERS CAN BE CARRIED PERFECTLY SAFELY ON A BULK CARRIER, A THOROUGH RISK ASSESSMENT MUST BE CARRIED OUT BEFORE ANY CONTAINERS ARE ACCEPTED AND THE SHIP'S CLASSIFICATION SOCIETY (CLASS) AND FLAG STATE SHOULD BE CONTACTED TO SEE IF ANY MODIFICATION OR ADDITIONAL EQUIPMENT IS REQUIRED.

As a minimum, the risk assessment should cover the following areas:

STABILITY CALCULATIONS – The loading of containers on a bulk carrier may result in a larger metacentric height (GM) especially when containers are loaded on deck and thereby affect the motion and potential stress on the hull and cargo securing equipment. The vessel's stability should be calculated prior to departure on the basis of the loading plan received. The approved onboard loading software may need to be updated to accommodate the loading of containers and the calculation of lashing forces.

CARGO SECURING – If the onboard Cargo Securing Manual (CSM) does not specifically cover the carriage of containers or allow for them to be loaded, Members should consult the Classification Society in order to obtain approval and the CSM should be amended accordingly. This may also require additional lashing equipment to be provided, or for an alteration to the current onboard lashing arrangement to be made. In addition to the provisions of the ship-specific CSM with regard to the stowage and lashing of the proposed cargo, the applicable provisions and recommendations stated in the Cargo Stowage and Securing (CSS) Code Appendix 1 should also be taken into account.

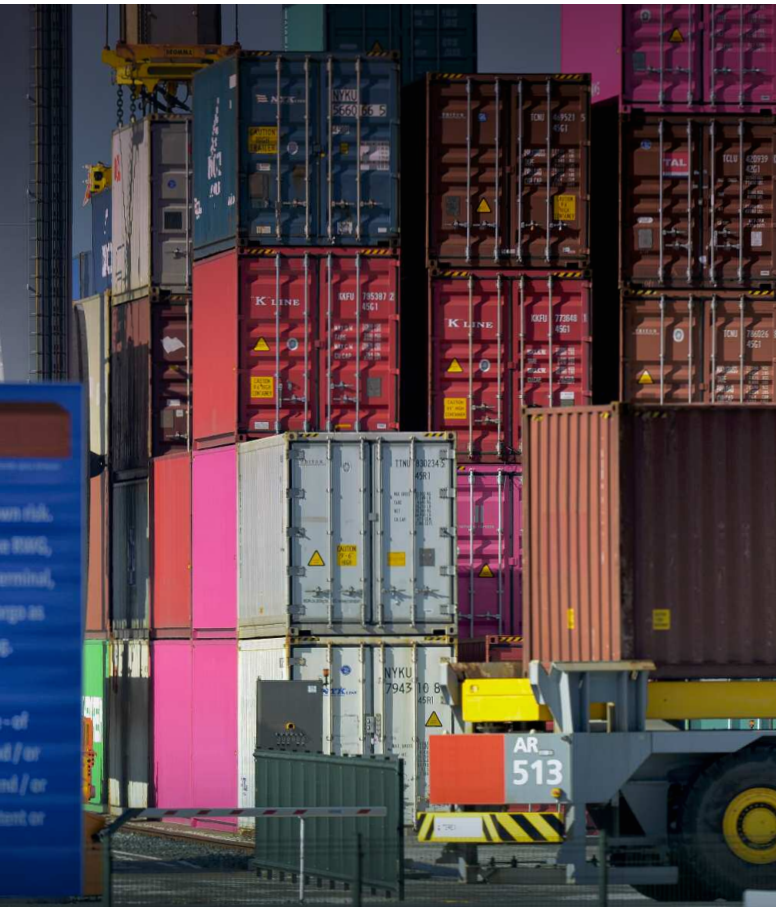
CARGO STOWAGE – As per the CSS Code Appendix 1, the containers should be stowed so as to permit safe access for the crew in the necessary operation of the ship. The stowage should also take into account any required checks of the cargo during the voyage and potential emergency scenarios. In addition, for stowage of containers on deck, the International Maritime Organisation's bridge visibility requirements should be taken into account.

'ULTIMATELY THE DECISION TO CARRY CONTAINERS ON A BULK CARRIER RESTS WITH THE INDIVIDUAL MEMBER WHO WILL NEED TO ENSURE THAT THE SHIP IS IN A SEAWORTHY STATE BEFORE DEPARTURE BY COMPLYING WITH ALL STATUTORY AND CLASS REGULATIONS.'

HATCH COVER/TANK TOP STRENGTH – The hatch covers on a bulk carrier will not normally be designed to accommodate containers. The hatch cover manufacturers should be consulted to determine what impact the loading of containers may have on the hatch covers and whether any modifications will be required. Furthermore, it will need to be verified that the container stack weights do not exceed the maximum permitted weight load on the tank top. These considerations should take into account the adequate distribution of the point load.

CARRIAGE OF DANGEROUS GOODS (DG) – DG cargo in containers should be carried in accordance with the IMDG code. The ship's Document of Compliance for the Carriage of Dangerous Goods may need to be amended by Class or Flag State to accommodate the carriage of DG cargo in containers.

FIRE FIGHTING EQUIPMENT (FFE) – Additional FFE may need to be installed or placed on board. This may include lances to penetrate and flood containers in the case of fire and the installation of a fixed under-deck firefighting system if the ship is to carry DG cargo. The onboard fire plans should be updated accordingly and may require additional approval by the Classification Society or Flag State.



SAFETY MANAGEMENT SYSTEM (SMS) – Member's SMS should contain adequate procedures ensuring the safe carriage of containers on bulk carriers. If Member's International Safety Management System (ISM) has been audited by Class or Flag State on the basis of only operating bulk carriers and listed as such on Member's ISM Document of Compliance (DOC), this may require amendment. The issuing body should be consulted for further guidance. The Company's risk assessment library and work safety procedures, such as the Job Hazard Assessment, may also require a structured review based on the changed management approach adopted by the company.

CARGO GEAR – In cases where a ship's cranes are to be used to load/discharge the containers, this should be taken into account in the preparation of the lifting plan. The crane operators should have the necessary experience required. Also the crane manufacturer may need to be consulted to ensure the cranes and the associated lifting equipment can accommodate containers.

PERSONAL PROTECTIVE EQUIPMENT (PPE) – Crew activities associated with the carriage of containers may require a review of the PPE required. Among other factors, due consideration should also be given to safe access, working at height and the handling of lashing equipment.

TRAINING – Any additional training for the crew on the special provisions associated with carrying containers should be identified. This may include:

- The correct application and checking of lashing equipment and providing the necessary cargo care during a voyage
- Use of the IMDG code if DG cargo is to be carried
- Stability and loading/lashing force calculations
- Emergency response provision, including correct firefighting techniques
- Vessel manoeuvring characteristics due to the increased wind affected area if containers are carried on deck, and heavy weather precautions to prevent loss of containers
- Any specific procedures added to Member's SMS in order to accommodate the carriage of containers should include hatch cover securing arrangements (i.e. cleats and wedges) for the crew involved in this operation

In view of the fact that containers may not normally be carried on board a bulk carrier, Members could consider appointing a surveyor to assist with loading and verifying the lashing.

For further advice and assistance, please contact the Club.

FOCUS ON FIRES

BRITANNIA LOSS PREVENTION INSIGHT
ELECTRIC VEHICLE FIRES
AN OVERVIEW FOR THE MARITIME SECTOR

FOLLOWING A FIRE ON BOARD A SHIP BELONGING TO THE JAPANESE SHIPOWNER NIPPON YUSEN KAISHA (NYK), THE CLUB WORKED TOGETHER WITH THE JAPANESE MARITIME DISASTER PREVENTION CENTRE TO CARRY OUT A STUDY TO INVESTIGATE THE FIGHTING OF ELECTRIC VEHICLE (EV) FIRES ON BOARD SHIPS.

As part of this project, full scale EV fire testing was conducted on a Nissan Leaf. The testing has shown that when an EV battery pack is subjected to a thermal runaway failure induced by an applied flame, the resulting fire can spread beneath the vehicle within ten minutes to the plastic trim at the wheel arches and other locations which subsequently burn readily, increasing the likelihood of fire propagation to an adjacent vehicle within 15 minutes of the onset of the thermal runaway.

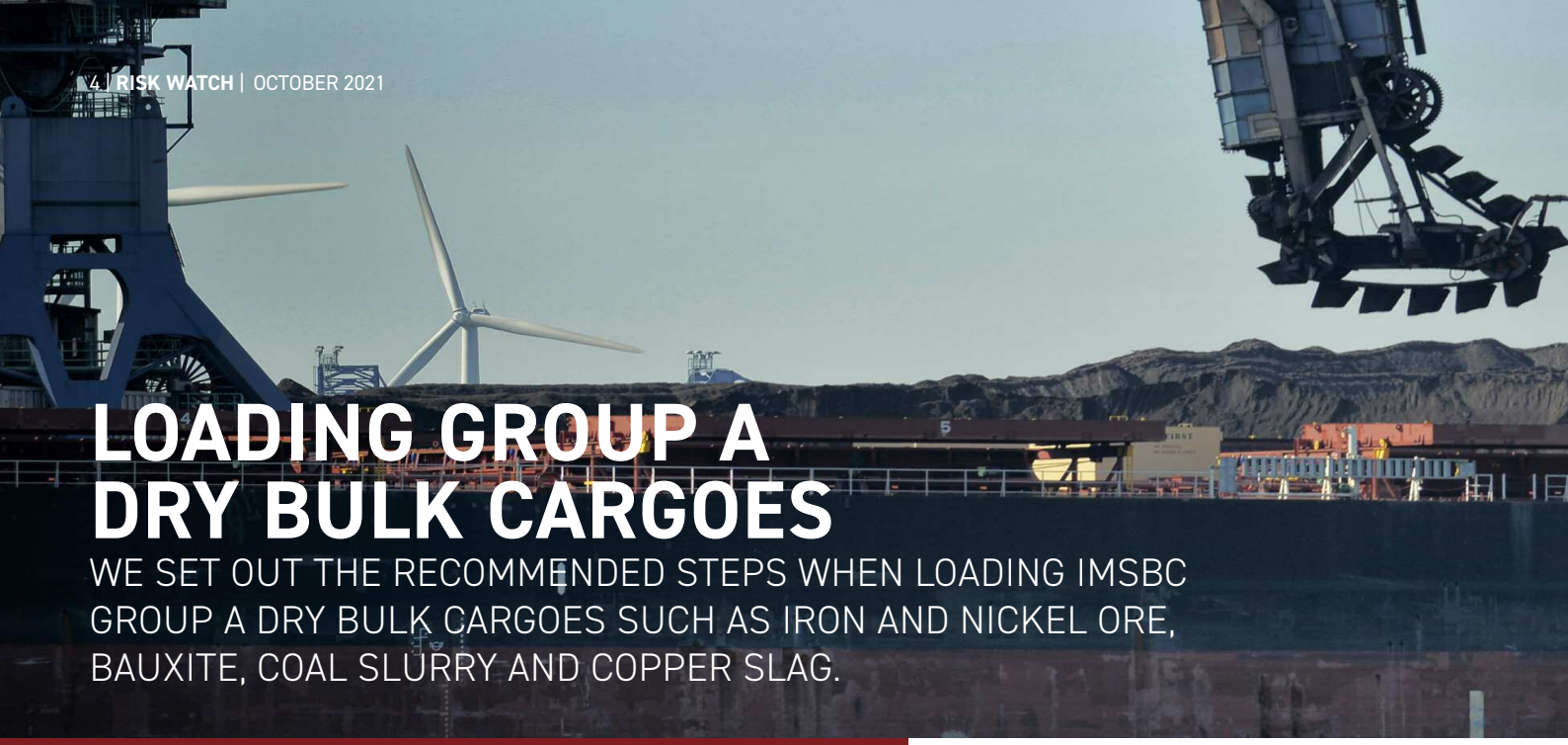
The full report, written by Dr Darren Holling, a partner at J H Burgoyne, is available on the Britannia website.

ow.ly/AIpt30rVzTR

BSAFE CASE STUDY – ENGINE ROOM FIRE

This recent **BSafe** case study deals with an engine room fire. The brief facts are that *FERNANDA*, a 2,576GT Ro-Ro ship built in 1982, was nearing the end of its voyage when a fire broke out in the engine room. Despite an early decision to deploy the ship's fixed halon firefighting system, the fire could not be extinguished, and the crew had to be evacuated by helicopter. No crew members were injured. However, the fire was not finally extinguished until eight days later and the ship was eventually declared a constructive total loss. The complete case study, which comprises a summary, reflective learning form, presentation and a full commentary, is now available on the Britannia website.

ow.ly/OP5m30rVElp



LOADING GROUP A DRY BULK CARGOES

WE SET OUT THE RECOMMENDED STEPS WHEN LOADING IMSBC GROUP A DRY BULK CARGOES SUCH AS IRON AND NICKEL ORE, BAUXITE, COAL SLURRY AND COPPER SLAG.

MEMBERS WHO OPERATE DRY BULK CARRIERS WILL BE AWARE OF THE DANGERS OF CARRYING GROUP A CARGOES THAT MAY LIQUEFY AND THE NEED FOR SHIPPERS TO PROVIDE DOCUMENTATION PRIOR TO LOADING CONFIRMING EACH CARGO'S:

1 **flow moisture point (FMP)**
2 **transportable moisture limit (TML) and**
3 **actual moisture content.**

Stephen Hunter
Fleet Manager,
Claims London

Members' objective should always be to stop any cargo that is too wet from coming on board in the first place. Apart from the obvious dangers to the ship and crew of carrying cargoes with excessive moisture content, delays to the ship can occur while trying to resolve a situation in which excessively wet cargo has been loaded and the shipper may be reluctant, and even lack the equipment and facilities, to take cargo off the ship.

When loading Group A cargoes, it will be helpful for Members to have the following points in mind:

• **Ensure that the cargo is loaded in accordance with the applicable IMSBC schedule and that, before commencement of loading, the certification supplied by the shipper conforms with IMSBC code requirements.** This means FMP/TML tests should be performed within 6 months of loading and a valid moisture test showing actual moisture below the TML is done in the seven days before loading is commenced. If the cargo has been subject to significant rain or snow in the seven days before loading, such that the characteristics of the cargo may have changed, Members should be wary that the actual moisture figure might not be representative of the actual cargo condition. In such a situation it may be prudent to conduct further moisture tests.

• **Make sure that the crew and any attending surveyor have a safe space in order to perform can tests.** This means having a proper observation and communication system in place to ensure that grabs are not a danger to personnel who may need access to the cargo.

• **Crew should be involved with and participate in can testing. They should be familiar with and trained in how to carry out can tests.**

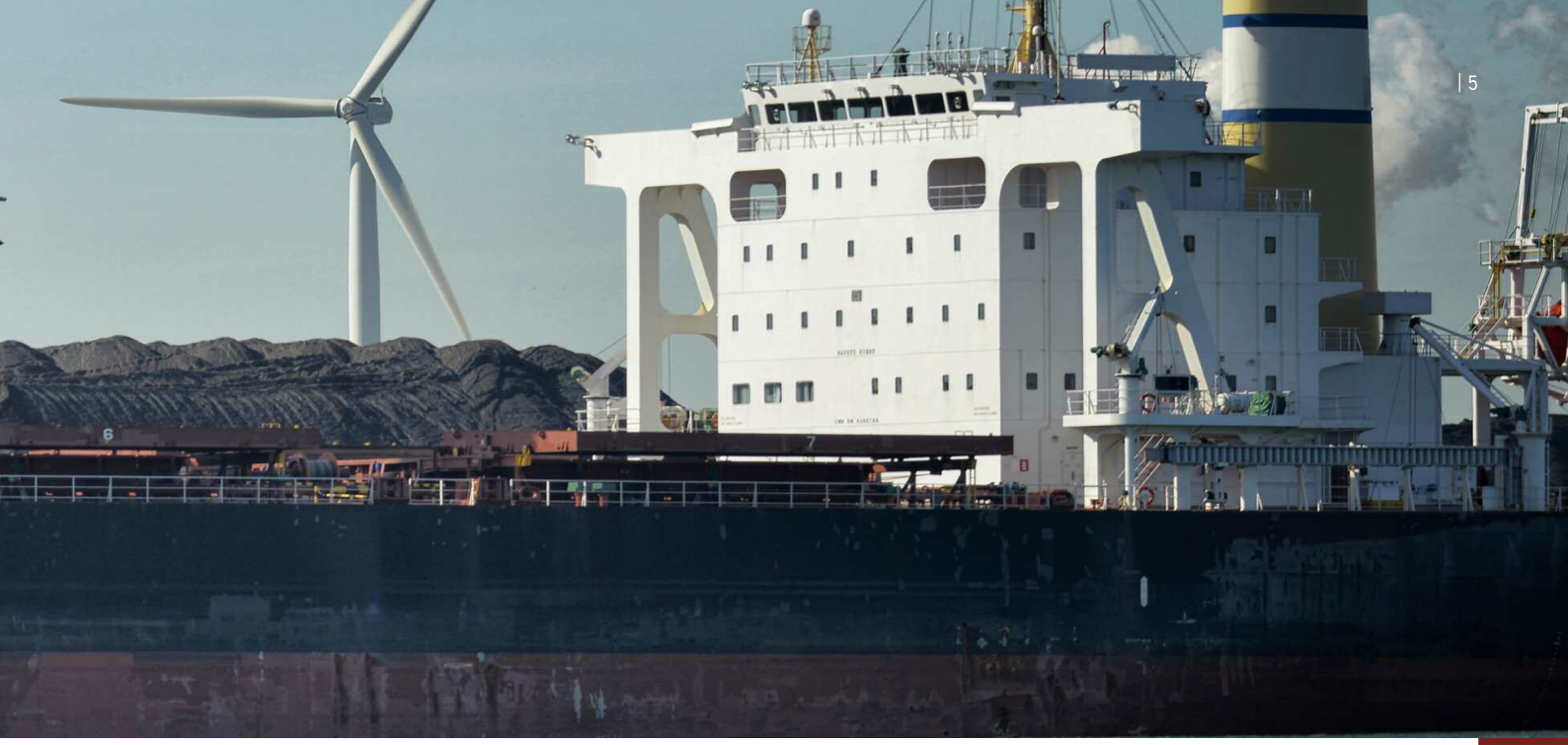
• **Make sure that can tests are performed on representative cargo brought alongside the ship in trucks or barges.** This means not taking samples only from the top layer of cargo, which might be drier than wetter cargo underneath.

• **Be aware that can tests, as well as 'grasp tests' and 'drop tests', whilst giving a helpful and recommendable assessment of the condition of the cargo, are not scientifically exact.** Cargo that is marginally unsafe might still appear to pass these basic tests, so Members should be cautious about any borderline results.

• **As cargo is dropped in the hold it receives an additional shock as it lands.** This shock is a possible trigger point for moisture separation if not previously indicated by the can test. Therefore, the crew should monitor loading and visually assess the condition of the cargo as it is being loaded to ensure that it looks dry. Again, adequate communication and safety systems should be in place while the crew observe loading from over the hold coamings.

• **Be aware of the weather forecast and the risk of precipitation, so as to be able to close hatch covers before it rains.**

• **In case of any doubts, always contact the Club or its local correspondents as soon as possible for assistance.**



The Club is always happy to appoint surveyors to assist Members in conducting pre-loading surveys, although these will be for Members' account unless a Club approved survey programme applies (e.g. for nickel ore loaded in Indonesia or the Philippines). Please give us as much advance notice as possible to appoint surveyors, bearing in mind that loading terminals are sometimes in remote locations.

With or without a surveyor in attendance, crews should always remain alert during loading. Our experience is that it is much better for everyone present to observe and ask questions, raising any doubts about the cargo as soon as possible. Junior crew members should be made to feel part of the team and feel able to raise any doubts or observations.

It should be remembered that a surveyor is in attendance to assist the crew but it is the Master that is responsible for any decisions to refuse to load, or to stop loading, if there is doubt about the cargo's condition. A surveyor enhances, but does not replace the need for, a well-trained crew familiar with the cargo they are carrying and the requirements of the IMSBC code.

In recent cases we have become aware of shippers and/or load terminals refusing to allow a surveyor to attend loadings for reasons of 'COVID precautions' which we often suspect is an excuse to try to keep surveyors away. It also places a greater burden on the crew to check cargo themselves.

If any Member would like a surveyor to attend and is being told by, for example, the charterers' appointed agent that it is impossible due to COVID regulations or any other reason, please contact the Club and we can check the situation with our correspondent.

Finally, if loading is via a conveyor and spout, which can be a very quick method of loading compared to loading by grabs, take care by trying to perform can testing at suitable intervals.

For further information and links to circulars and information on the Britannia website please see the following:

CARRIAGE OF NICKEL ORE FROM THE PHILIPPINES
ow.ly/Ik8n30rVDZ2

INDONESIA AND THE PHILIPPINES – SAFE CARRIAGE OF NICKEL ORE CARGOES
ow.ly/uHYj30rVDZ7

SIERRA LEONE – CARRIAGE OF IRON ORE FINES CARGOES – LIQUEFACTION RISK
ow.ly/7CfQ30rVDZp

LOADING OF IRON ORE FINES AT INDIAN PORTS – PROTECTIVE PRE-LOADING SURVEYS
ow.ly/XBEQ30rVDZr

LIQUEFACTION – CAUTION REMAINS THE WATCHWORD
ow.ly/6jqX30rVDZT

THE SINKING IN JUNE 2021 OF THE *MV X-PRESS PEARL* , OFF THE COAST OF SRI LANKA, HAS AGAIN BROUGHT MEDIA ATTENTION TO THE TRANSPORTATION BY SEA OF MICRO PLASTICS (KNOWN AS 'NURDLES') STOWED IN CONTAINERS. THE VESSEL IS REPORTED TO HAVE BEEN CARRYING 78 TONNES OF PLASTIC NURDLES IN CONTAINERS THAT WERE LOST OVERBOARD IN CONNECTION WITH THE INCIDENT.

PLASTIC NURDLES STOWAGE ADVICE

Stephen Hunter
Fleet Manager, Claims London
shunter@tindallriley.com

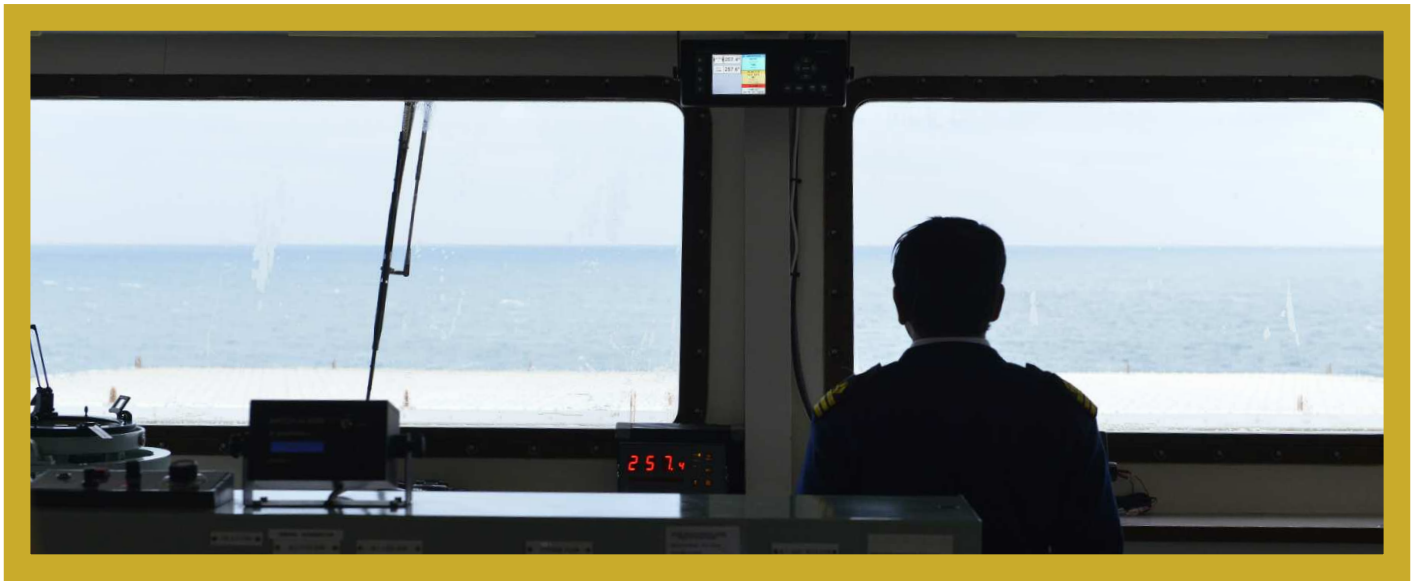
A nurdle is a very small pellet of plastic, usually only a few millimetres in diameter, which serves as raw material in the manufacture of larger plastic products. For the purposes of sea carriage, nurdles are usually packed in plastic bags which are then stowed inside a container. The loss overboard of a container in which nurdles have been stowed can result in millions (sometime billions) of microplastic pieces being spilt into the sea if the packaging splits and the nurdles leak out of the container. These tiny pieces of plastic are hard to clean up, sometimes polluting many miles of beaches or being dispersed over long distances on sea currents. The nurdles are so small in size that they can also be easily ingested by a large variety of fish and other wildlife, especially as they can appear similar to fish eggs.

Apart from the separate issue of minimising the risk that any containers are lost overboard in the first place, in order to reduce the risk of nurdles pollution, we recommend that Members carrying containerised nurdle cargoes should, as far as possible stow all shipments of nurdles under deck only. If containers are lost overboard due, for example, to a container stack collapse, this underdeck stowage should help to minimise the risk of extensive plastic pollution from nurdles and the environmental damage, costs and bad publicity which can go with it.

PILOT ON BOARD – WHEN SHOULD YOU INTERVENE?

BRITANNIA'S LOSS PREVENTION TEAM EXAMINES THE ISSUES AND OFFERS ADVICE IN ITS LATEST REPORT

Slav Ostrowicki
Loss Prevention Manager, London
sostrowicki@tindallriley.com



THE SHIP PILOT, AS AN EXPERT IN SHIP HANDLING WITH LOCAL KNOWLEDGE, WILL ENGAGE IN A SHIP'S PASSAGE IN ITS MOST CRITICAL PHASES WHERE MARINE INCIDENTS ARE MOST LIKELY TO OCCUR, SUCH AS IN CONFINED WATERS OR IN POTENTIALLY DANGEROUS SITUATIONS. IF AN INCIDENT DOES OCCUR WHEN THE PILOT IS ON BOARD, THEN THE ROLE OF THE PILOT INEVITABLY COMES UNDER CLOSE SCRUTINY.

The need to understand shipowners' concerns and to look at the various issues relating to the role of pilots resulted in the recent publication: 'Report on P&I claims involving vessels under pilotage 1999-2019' by the International Group of P&I Clubs. Data presented in this report indicates that over the last 20 years a total of 1,046 incidents have occurred where pilot error either caused or contributed to the incident. The total cost of these incidents was more than USD1.82 billion. This translates to one incident per week with an average value of approximately USD1.7 million per incident. The findings of the IG Pilotage report indicate that sub-optimal Bridge Resource Management (BRM) remains the dominant underlying cause.

Britannia's own review of claims involving pilotage reveals the lack or ineffectiveness of master interventions as one of the key contributory factors, as demonstrated by the case studies within its reports. The report considers the role that this lack of effective intervention plays in pilotage-related incidents and explains what steps can be taken to reduce the risks involved.

The full report, together with the lessons learned, is available on the Britannia website.

ow.ly/rlcd30rVzTu

DAMAGE TO A FENDER MOORING STATION

Beatrice Cameli
Fleet Manager, London
bcameli@tindallriley.com

THE CLUB RECENTLY HANDLED A CASE WHERE A VEHICLE CARRIER CAUSED DAMAGE TO A PIER AS IT WAS ARRIVING IN PORT. WE SET OUT THE FACTS OF THE INCIDENT AND LOOK AT SOME KEY LEARNINGS WHICH CAN ASSIST MEMBERS IN PREVENTING SIMILAR INCIDENTS.

FACTS

The ship was arriving in port assisted by two tugs, and the pilot had embarked while the ship was passing the port lock.

As the ship was about 70 metres parallel to its mooring berth with the forward tug pushing at the port side, and the aft tug pulling, the wind had increased to Beaufort Force 5-9 with gusts from varying directions. This caused the ship to gradually drift to the other side of the berth despite the efforts of the assisting tugs and the use of the ship's bow thruster.

The ship made contact with the pier at the berth, causing substantial damage to the pier structure, which consisted of a concrete Ro-Ro platform on steel piles. The jetty required extensive repairs. In addition, several ships had to deviate to a nearby berth due to the loss of use of the jetty, thereby causing additional consequential expenses to the claimant.

The ship sustained minimal damage in the form of a dent in the hull plating, and was safely moored alongside after the incident.

REVIEW OF THE INCIDENT

Due to the minor damage to the ship, there is little information with regard to the events on its bridge and no detailed determination of causation. However, after conducting a review of the available information it is plausible that the following factors may have contributed to the incident:

MASTER-PILOT INFORMATION EXCHANGE (MPX) – The pilot boarded the ship while it was moored in the lock. The lock was opened and the ship cast off within eight minutes from the pilot boarding. This amount of time may have been insufficient for a comprehensive information exchange between the pilot and the master, which should have included the expected weather conditions and a contingency plan in case of a sudden change. However, there was no evidence available to confirm whether the sudden increase in wind speed was highlighted in the relevant weather forecasts.

BERTHING MANOEUVRE CONTINUED DESPITE LOSING CONTROL – An increase in wind speed was noted within minutes of leaving the lock. When the ship was about 70 metres from its intended mooring position, there was a clear indication that the combined use of tugs and the bow thruster was insufficient to control the ship's position in worsening weather. No decision to delay or abort the manoeuvre was made.

LESSONS LEARNED

Although the exact circumstances of the incident from the bridge team's perspective have not been established, there are certain lessons which Members should take into account to assist in preventing similar incidents from occurring:

PREPARATION FOR MANOEUVRE – Prior to a berthing/unberthing manoeuvre, a specific risk assessment should be carried out. This assessment should include the potential for the prevailing weather to change unexpectedly, including consideration of the available forecasts and information on the prevailing conditions. It would assist in considering the appropriate mitigation, such as the need to use a certain number of tugs and the pull force required. This is particularly relevant to ships with a high windage area.

PROVIDING APPROPRIATE TIME FOR MPX – The master and the bridge team need to be provided with sufficient time to both absorb the information provided by the pilot and convey the necessary information to the pilot. This information should not only reflect the general characteristics of the ship, but also the outcome of the specific risk assessment of the manoeuvre. The mitigations and contingencies provided by the risk assessment may need to be revised based on the result of the MPX.

EFFECT OF WIND ON SHIP'S MANOEUVRABILITY – The bridge team's awareness of wind as the external factor influencing the ship's manoeuvrability is important. Enhanced detail of ship-specific manoeuvring information in wind (in addition to the relevant IMO recommendations) should be provided, allowing the bridge team to closely predict a ship's response while manoeuvring or drifting in wind.

SETTING THE THRESHOLD FOR ABORT DECISION – The master should plan for and understand the threshold at which a recovery from the potentially unsafe situation requires the manoeuvre to be delayed or aborted. Then the master should not hesitate to use their overriding authority to act as required.

MONITORING OF THE MANOEUVRE – The progress of the manoeuvre should be carefully monitored and communicated by the bridge team in order to react appropriately react to any deviation and to changes in the prevailing conditions. It is worth noting that an unexpected change of weather is a recurring causal factor in incidents under pilotage.

BRM AND MANOEUVRING TRAINING – Best practices in critical decision-making and interactions between members of the bridge team can be embedded through training and successful implementation of BRM procedures. It is also advisable that nautical assessments are carried out to monitor these practices and identify any additional training needs.

CLAIMS AND LEGAL

TO WHAT EXTENT CAN A SHIPOWNER RECEIVE BILL OF LADING FREIGHT INSTEAD OF THE CHARTERER?

The recent decision by the Commercial Court in Alpha Marine Corp v Minmetals Logistics Zhejiang Co. Ltd (*The MV Smart*) [2021] EWHC 1157 clarifies the extent of a shipowner's right to collect freight instead of the charterer.

THE *MV SMART* (THE "SHIP") WAS CHARTERED BY ALPHA MARINE CORP ("OWNERS") TO MINMETALS LOGISTICS ZHEJIANG CO LTD ("CHARTERERS") FOR A TIME CHARTER TRIP ON AN AMENDED NYPE FORM. CHARTERERS THEN VOYAGE CHARTERED THE SHIP TO GENERAL NICE RESOURCES (HONG KONG) LTD ("SUB-CHARTERERS"), WHO WERE ALSO THE LAWFUL HOLDERS OF THE BILLS OF LADING FOR CARGO LOADED AT RICHARDS BAY. THE BILLS OF LADING WERE ISSUED BY OWNERS.

After departing Richards Bay, the Ship ran aground and was lost. Charterers issued an invoice to Sub-Charterers for freight. However, prior to the date of payment under the freight invoice, Owners issued invoices to cargo interests for the freight that was due under the bills of lading, notifying Sub-Charterers that they had revoked Charterers' authority to receive freight and requesting that it be paid to them.

RELEVANT CONTRACTUAL TERMS

1) Clause 18 of the time charterparty provided that: "the Owners shall have a lien upon all cargoes and sub-hires and all sub-freights for any amounts due under this Charter..."

2) Under the voyage charter, freight was payable in full to Charterers on the vessel departing the load port and was deemed earned even if the Ship or cargo were lost.

3) The bills of lading issued by Owners stated that freight was payable "as per charterparty" (i.e. the voyage charter).

ARBITRATION AND APPEAL

The dispute between Owners and Charterers was referred to arbitration. The tribunal concluded that there was an implied term in the time charterparty that Owners would not seek to exercise their right to revoke Charterers' authority to receive freight unless hire or other sums were due under the charter. The tribunal found that Owners were responsible for the grounding, so no sums were due to them and they were, thus, not entitled to collect the freight.

Michaela Domijan-Arneri, Fleet Manager, London
marneri@tindallriley.com

Owners appealed to the High Court. The Court allowed the appeal, finding that Owners had no implied obligation to refrain from revoking Charterers' authority unless hire and/or other sums were due under the charterparty. The Court's reasoning was as follows:

1) Although a shipowner is entitled to demand freight from the holder of the bill of lading as consideration for the agreed carriage, freight is often payable under the terms of the charterparty to the charterer as agent of the shipowner. The shipowner can, however, revoke that order by giving notice to the shipper prior to payment being made without the need for the charterer to be in breach of the time charter.

2) The issue in this case was whether the terms of the time charterparty restricted the Owners' right to collect freight instead of the Charterers. As the charter in question contained no express provision to limit the Owners' right, the Court considered whether such a term could be implied. The Court decided that the term could not be implied because:

(i) the time charter was found to be commercially coherent without an implied term limiting the Owners' right to intervene in the collection of freight.

(ii) an unfettered right of a shipowner to collect freight neither interfered with a charterer's employment of the Ship nor deprived them of the Ship's earning capacity.

(iii) the fact that Charterers could formulate their suggested implied term in a range of alternative ways showed that the term was not necessary or obvious. All variations of the implied term suggested by Charterers in this case were thereby rejected by the judge.

In light of the Court's decision, it remains to be seen whether in future charterers will seek to include an express provision in the charterparty terms stating that a shipowner's right to receive freight may only be exercised when the charterer is in breach of charter.

IS TEXT OR CONTEXT KEY WHEN DETERMINING THE NATURE OF A GUARANTEE?

Pierre Merer, Fleet Manager, London
pmerer@tindallriley.com

WHETHER A GUARANTEE PROVIDED BY A PARENT COMPANY TO A SHIPYARD IS A DEMAND GUARANTEE OR A "SEE TO IT" GUARANTEE.

Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Limited [2021] EWCA CIV 1147

The English Court of Appeal has clarified the nature of an undertaking given by a parent company on behalf of its subsidiary to a shipyard under a shipbuilding contract. The shipyard (the "Builder") entered into a contract with the Buyer to build an offshore drillship for a total sum of USD200 million. In order to ensure payment of the last instalment of USD170 million, the Buyer's parent company (the "Guarantor") agreed to guarantee the payment. Due to alleged deficiencies in the vessel, the Buyer refused to pay the last instalment. The Builder, therefore, sought payment from the Guarantor.

The wording of the guarantee agreement led to a debate between the Builder and the Guarantor as to whether the Guarantor was allowed to withhold payment of the last instalment until the Buyer was found liable to pay the Builder in accordance with the dispute resolution clause in the shipbuilding contract, or whether the Guarantor had to pay immediately upon the Builder's demand for payment. In other words, was the Guarantor's undertaking a "see to it" guarantee where the liability of the Guarantor depends upon there first being a liability of the Buyer; or was it a "demand guarantee" where the Guarantor agreed to pay a sum on demand irrespective of whether the Buyer is under a liability to make the payment.

At first instance the High Court sided with the Guarantor and considered that its undertaking was a "see to it" guarantee. However, the Court of Appeal reversed this decision.

Focussing on the words used by the Builder and the Guarantor in the guarantee, the Court of Appeal highlighted that the guarantee:

- included the capitalised words "ABSOLUTELY and UNCONDITIONALLY" indicating that the obligations of the Guarantor were not conditional on the liability of the Buyer;

- stated that the Guarantor was stepping in "[as primary obligor] and not merely as the surety";

- contained the "hall mark of a demand guarantee", i.e. that the Guarantor's obligation to pay was triggered "upon receipt by us of your first written demand"; and

- required that the Guarantor pay "immediately" upon receipt of the first written demand.

The guarantee did contain two provisos allowing the Guarantor to withhold payment if arbitration between the Builder and the Buyer had commenced before receipt of the first demand. However, these two exceptions were limited to a specific scenario and were not enough to reverse the overall analysis that the Guarantor's undertaking was a demand guarantee.

In its conclusions, the Court of Appeal reiterated that a driving force when interpreting such agreements should be to promote "certainty as to the nature and legal consequences of [the commercial community's] instruments. [...] The primary focus must always remain on the words used by the parties in their context."

WHAT EVIDENCE CAN BE USED IN LIQUID BULK CARGO CLAIMS?

Gwen Vetuz, Associate Director, Hong Kong
gvetuz@tindallriley.com

THE CHINESE SUPREME COURT CONFIRMS THE POSITION ON EVIDENCE TO BE USED IN DETERMINING LIQUID BULK CARGO CLAIMS.

People's Insurance Company (Group) of China Limited Guangxi Branch v. Western Global Corp (2019), Min Zai No. 367

A dispute arose between the owners of the *MV KING GREGORY* and its charterers in relation to a shortage claim arising from the carriage to China of a cargo of crude degummed soybean oil.

Charterers and their subrogated insurers alleged that there was a cargo shortage of 77.456MT from the contracted amount of 9,876MT. Their figures were based on the shore tank weight measurements used for the China Inspection and Quarantine (CIQ) certificate issued by the Entry-Exit Inspection and Quarantine Bureau, Shanghai.

Owners maintained that the amount of cargo discharged was 9,866.12MT so the discrepancy was only 9.818MT (0.099%), which was well within the acceptable limits under the contract of carriage. Owners' figures were based on the draft weight measurements used for the ship's ullage report and dry certificate.

The main issue in dispute was which party's evidence should be used to determine the amount of the cargo shortage.

At first instance, the Shanghai Maritime Court found in favour of owners. The decision was appealed by charterers to the Higher People's Court of Shanghai, where it was upheld. Charterers/subrogated insurers then appealed to the Supreme People's Court of the People's Republic of China (Chinese Supreme Court), who confirmed that the correct approach in determining liquid bulk cargo claims is as follows:

1) A carrier's responsibility for the transportation of liquid bulk cargo starts from the moment the ship's manifold is connected to the flange of the shore pipeline at the port of loading and continues until the ship's manifold is connected to the flange of the shore pipeline at the port of discharge.

2) Shore tank weight measurements used in the CIQ and draft weight measurements used in a vessel's ullage report are equally reliable provided that they are measured in compliance with the applicable rules on measurement.

3) In the case of liquid bulk cargo, cargo weight should be calculated on the basis of the vessel's ullage report and not shore tank measurements unless it can be proved that the ullage report was defective for some reason, e.g. there was an inaccuracy in the tank calibration table or the measurements were not taken in compliance with the applicable rules.

4) This is on the basis that the measurements for the ullage report are taken during a carrier's period of responsibility for the cargo, whereas shore tank measurements are taken after the carrier's period of responsibility has ended and, therefore, cannot be evidence that any alleged shortage occurred during the carrier's period of responsibility.

Based on these grounds, the Chinese Supreme Court dismissed charterers'/subrogated insurers' appeal and ruled in favour of owners.

This decision is very welcome for shipowners carrying liquid bulk cargo and trading to Chinese ports as it clarifies what constitutes authoritative evidence in determining cargo shortage claims.

In light of the Chinese Supreme Court's decision, it is now clear that the vessel's reports regarding weight measurements should be used as primary evidence rather than any other measurements taken after the cargo has been discharged from the vessel, as long as the vessel's measurements have been accurately taken and recorded

britanniapandi.com
britanniacommunications@tindallriley.com