

Maritime Risk International

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P&I, claims management and loss prevention

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Regulations looming

Cruise & employment in focus

- Role of maritime law researched
- Training remains key
- New cargo risks emerge

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IN BRIEF

Poor stowage risks

North P&I club has seen an increase in claims from poor stowage and securing of break bulk cargoes, particularly on ships from China. Such cargoes – typically of bags and timber as well as construction components and plant – can put people, cargo and vessels at risk if they start shifting at sea. North's head of loss prevention Tony Baker said "Poor loading practices of break bulk cargoes are particularly prevalent in Chinese ports and have led to cargo shifting and stows collapsing during voyages. This in turn has resulted in damage to vessels and cargo and to cargo being lost overboard, resulting in substantial claims." Problems include over-stowing incompatible cargoes and the improper or insufficient use of lashings, dunnage and shoring.

Lifeboat hook concern

Lifeboat hooks can be "lethal" and their design is out of date and unsuitable to meet modern demands, according to serving seafarers whose views have been gathered by InterManager. Following a series of incidents and fatalities involving lifeboat hooks, InterManager has gathered comments from seafarers of various ranks in an online discussion forum. Crew members believed hook designs have not kept pace with developments in the global shipping industry.

Welcome for new code

Marine insurance intermediary Seacurus has welcomed Lloyd's decision to amend its risk codes to include a new class covering seafarer abandonment (SA). Lloyd's provides guidance to underwriters on the classification of business into various categories using a risk coding scheme, providing a common base for classification and description of risk. Thomas Brown, managing director of Seacurus, said "This new class of insurance is very welcome and very timely. SA is classed as financial guarantee insurance, so any Lloyd's syndicate wanting to write it will need approval from the Lloyd's performance directorate to do so."

Seven dead in Genoa accident

Business has resumed at the port of Genoa, just days after a container ship crashed into the port's control tower, killing at least seven people with many more injured and two still unaccounted for. Inchcape Shipping Services has advised commercial and passenger traffic has resumed at the Port of Genoa, Italy, following the tragic *Jolly Nero* accident on 7 May. Commercial traffic resumed on the afternoon of 9 May as planned, with ferry and cruise traffic beforehand.

The control tower was a major landmark in the port area of this seafaring city. The accident occurred when a shift change was taking place in the control tower and about 13 people were thought to be inside. The *Jolly Nero* was reported to be manoeuvring out of the port in the dark but with the help of tugboats in calm conditions, on its way to Naples.

The captain of the *Jolly Nero* is being investigated by prosecutors with a view to possible manslaughter charges after the accident in which the port of Genoa's control tower was knocked down. Officials, though, have said that some sort of mechanical failure was most likely to blame for what happened. The vessel has been impounded and its "black box" seized by investigators, according to Italy's Ansa news agency.

The cause of the crash was not immediately clear, but Italian Transport Minister Maurizio Lupi said there could have been a problem with the ship's engines or with the tugboat cables. The head of the Genoa Port Authority, Luigi Merlo, reportedly said "It's very difficult to explain how this could have happened because the ship should not have been where it was."

Genoa is Italy's busiest port. Mayor Marco Doria said there was an average of 14 accidents a year, but that the incident late on Tuesday was unprecedented. The *Jolly Nero* is almost 240m long and has a gross tonnage of nearly 40,600 tonnes. It is owned by the Italian firm Ignazio Messina & Co. **MRI**

Concern at casualty reporting failures

Ship owners and seafarers' unions have joined forces to express concern at flag states' failure to submit maritime casualty reports as required under international Conventions.

The International Chamber of Shipping (ICS), which represents 80% of the world merchant fleet, and the International Transport Workers' Federation (ITF), which represents seafarers' unions worldwide, have made a joint submission to the International Maritime Organization (IMO) commenting on the apparent failure of some flag states to submit maritime casualty reports to IMO. This is a requirement under several international maritime Conventions, including the Safety of Life at Sea Convention (SOLAS).

ICS and ITF hope that governments will give consideration to the issue at the next meeting of the IMO Maritime Safety Committee in June. In accordance with SOLAS regulation 1/21, maritime administrations undertake to conduct investigations into any casualty occurring to ships under their flag and to supply IMO with pertinent information concerning the findings of such investigations.

In accordance with other Guidelines adopted by IMO, this is meant to include incidents defined as being a "very serious marine casualty" involving the total loss of the ship, a death, or severe damage to the environment.

"The lack of investigation and accident reports hinders the development of appropriate measures by IMO to address the cause of serious incidents in which seafarers may have lost their lives," said ITF acting general secretary, Stephen Cotton.

"It also frustrates efforts by ship operators to learn from the reports and to amend or develop new procedures, or implement other measures to prevent or mitigate similar future incidents," said ICS secretary general, Peter Hinchliffe.

ICS and ITF have suggested the IMO might give further consideration to what constitutes "a very serious marine casualty" and the extent to which flag states should retain the latitude which they currently enjoy when determining whether the results of any investigation should be submitted to IMO. **MRI**

IN BRIEF

Rapid growth for KPI

The international KPI Project, started by InterManager but now an industry-led initiative, is going from strength to strength. 120 companies have registered and KPI data is being uploaded from more than 1,600 vessels into the web-based KPI environment system. To date more than 5,000 sets of data have been submitted for each category, enabling meaningful analysis to provide industry rankings for each measurement. Captain Kuba Szymanski, InterManager secretary general, said "This is the fastest growing IT shipping project ever. Within 16 months from launching it we have 1,600 vessels already taking part. This is unprecedented. With this speed of growth we are on target to reach 2,000 by the end of this year."

New Myanmar deal

Classification society ClassNK has signed an agreement with the government of Myanmar granting ClassNK authorisation to carry out statutory surveys on its behalf. Myanmar is one of the fastest growing economies in South East Asia and has recently seen many Japanese businesses including major shipowners expanding into the Myanmar market. As one of the world's main producers of seafarers, Myanmar has become an increasingly important region in the global maritime industry.

Strike warning

The Strike Club said its results reflect growing labour unrest, although tonnage and reserves have been boosted as more companies opt for insurance against delays. It said the early months of 2013 have been marked by extremely damaging labour strike action in several countries which has punished ship owners and charterers even though they are innocent parties. Some of the worst trouble spots in recent weeks have been in South America, particularly Chile where a three-week strike crippled the country's key ports, blocking exports of copper, fruit and wood products. Chile's business leaders estimated the country lost more than US\$200m a day due to the conflict.

Fear of criminalisation grows

Seafarers' suggestions on how to improve their situation when facing criminal charges were presented at the landmark 100th session of the Legal Committee of the International Maritime Organization (IMO) recently. The suggestions, from a eight-language survey conducted by Seafarers' Rights International (SRI) during a 12-month period to February 2012, focus as much on fears of their own human rights being violated as on a lack of due process in the criminal process. A total of 3,480 questionnaires were submitted by seafarers from 68 different nationalities.

According to the seafarers, there is a frequent lack of due process for seafarers who face criminal charges. Seafarers are complaining of unfair treatment, intimidation and a lack of legal representation and interpretation services. Almost half of the seafarers said they would be reluctant to co-operate fully with casualty inquiries and accident investigators because of concerns they could be implicated in a crime; because they do not trust the authorities; and because they are concerned it would have a prejudicial affect on their employment. The findings strongly suggest the rights of seafarers, as enshrined in the Guidelines on Fair Treatment of Seafarers in the event of a Maritime Accident, adopted by the IMO and the International Labour Organization (ILO), are often be subject to violation: itself causing widespread concern among seafarers.

As many as 85.04% of seafarers surveyed said they are concerned about facing criminal charges. The main reasons were that seafarers feel they are scapegoats. Also seafarers feel there are numerous regulations which make them more vulnerable to being criminalised. Seafarers want more information on the risks in relation to criminal charges as well as their rights if they are defendants, complainants or witnesses. When facing charges, they want good and free legal representation; a fair process and fair treatment; a greater network of support from all the various stakeholders in the maritime industry; and more uniform laws and procedures given the wide range of different crimes to which they are exposed. "The message from seafarers is loud and clear," said Deirdre Fitzpatrick, executive director of SRI: "Seafarers are saying that their rights are theoretical and illusory; they need them to be practical and effective." The Committee agreed the issue should remain on its agenda and be discussed again in 2014. *MRI*

Call for a unified "Asian voice"

Singapore will continue its drive to be a leading international maritime centre and will work even more closely with countries and shipping associations in the region to realise its goal of creating a unified "Asian voice" in the shipping industry. This was the message given by Singapore Shipping Association (SSA) president Patrick Phoon at the start of Singapore Maritime Week. "World shipping is moving east, that is clear, so it is important for the SSA to work more closely with other organisations in Asia to ensure the Asian message is heard internationally. The industry is going through difficult times but we must all ensure that shipping is fit and strong when the crisis ends," Phoon said.

The need for a unified "Asian Voice" was never more important than in shipping regulation, he stressed, where it was essential the views of Asian ship owners were heard loud and clear on issues such as piracy and armed robbery as well as greenhouse gas emissions. Shipping's image in Asia and internationally is also crucial which is why the SSA values its work with the Singapore Maritime Foundation (SMF), Asian Shipowners' Forum (ASF), the Federation of ASEAN Shipowners' Associations (FASA), the Association of Asian Class Societies (ACS) and ASEAN Ports Associations (APA).

The SSA chairs the ASF Safe Navigation and Environment Committee and leads very active discussions on safety, security and environmental issues to safeguard ship owners' interests while at the same time ensuring safe navigation of ships and the protection of the marine and atmospheric environments. Key to Singapore's continued growth as an international maritime centre is the close co-operation between the SSA and the Maritime and Port Authority of Singapore (MPA). "We will continue to work in tandem with the MPA with whom we have excellent relations, in our joint efforts to promote Singapore as a leading maritime centre," Phoon said. *MRI*

IN BRIEF

Pilot launched

Protection Vessels International Ltd (PVI) and Lloyd's Register Quality Assurance (LRQA) have announced an agreement for PVI to take part in the ISO 28000/28007 pilot scheme. The pilot is due to commence in the next few weeks and will include an initial assessment of the PVI ISO28000 and ISO28007 PAS management systems. The companies agreed the importance of promoting the correct route to certification; through the ISO28000 "Security Management Systems for the Supply Chain" base standard together with requirements of ISO PAS 28007 which should be conducted by a certification body accredited by UKAS.

Software launch

Videotel has launched a training software programme, Videotel webFSA, a flag state administration training and record management system. It provides International Maritime Organisation (IMO) member states with assistance to meet the forthcoming IMO requirement for a global quality management system in the implementation and enforcement of member obligations and responsibilities. The programme is a highly secure web based solution built around cloud based technology, providing the detailed reporting needed to access a surveyor's records, results and performance – wherever in the world they are operating.

Gard results

Gard has announced its consolidated results for the year ending 20 February 2013. Reporting at a group level the key financial results are gross written premiums of US\$855m; a surplus after tax of \$99m; a combined ratio net of 101%; and free reserves on an estimated total call basis of \$926m. Claes Isacson, CEO of Gard, said "Our insurance operations performed well, despite some large losses in the first quarter of the year and highly competitive markets. This is a good result in difficult markets."

Warning not to relax on piracy

Two maritime security companies have warned ship owners and operators not to relax their guard despite the drop in piracy attacks. At a recent Counter Piracy Conference in Hamburg, Port 2 Port Maritime warned ship owners operating in the Gulf of Guinea of the dangers of using unlicensed private security companies to deter maritime crime and piracy.

Martin Broughton, senior operations manager for Port 2 Port Maritime, said "With the decrease in piracy activity on the East Coast of Africa and the Arabian Sea, the focus of attention has turned to the increasingly volatile West Coast of Africa and the Gulf of Guinea (GoG) region. In 2012 the GoG witnessed its worst year for acts of piracy and maritime criminal activity, and, if the current rate of incidents continue, 2013 will surpass all previous years."

He continued "The rise in maritime crime has resulted in a vast number of private maritime security companies (PMSC's) trying to ply their trade in this area without fully understanding the regulatory requirements and nuances of operating in such a diverse area. Shipping companies and charterers alike need to be aware of the pitfalls when using the services of PMSC's that are not fully licensed, which could ultimately lead to them being unable to operate and deliver their services."

For example, Port 2 Port Maritime has witnessed numerous cases of unlicensed and unregulated "off duty" Nigerian Armed Forces being used for protection services within Nigerian waters; something that would annul any indemnity they have in place for the GoG region.

Meanwhile PMSC Sea Marshals warned the threat to maritime trade from Somali pirates continues and ship operators should stay vigilant and adhere to best management practices (BMP). Latest security industry intelligence points to a likely upsurge in pirate attacks, particularly given recent releases of hijacked vessels and a reduction in attack success rates.

Thomas Jakobsson, chief of operations for Sea Marshals Ltd, said "Private maritime security companies are expecting the pirate attack groups to renew their activity in the coming months as they try to acquire more vessels. It is essential vessels maintain a high state of preparedness and our team leaders, trained in analysing intelligence and threat reports, are working hard to ensure this information is communicated to masters and crew before and during transits through the high risk area. Now is definitely not the time for complacency. Any lapse in security or failure to follow BMP4 just plays into the hands of the pirates and significantly increases the risk of attack or capture." *MRI*

IUMI support for Arctic declaration

The International Union of Marine Insurance (IUMI) has backed efforts to create a declaration of best practice for marine and energy operations in the Arctic. The declaration has been drawn up by a group of marine and energy experts in the Arctic region to create a voluntary set of standards. It will not be a binding legal document, saved for those circumstances where it may be incorporated into private contractual relations between parties.

The objective is to promote good examples in Arctic operations, preventing the risk of emergencies from ad-hoc operations set up without careful planning. The declaration is a proactive response to concerns that there is as yet no consensus among nations, which have territory within the region, on a single legislative standard for those operating in the Arctic.

The hope is the declaration will be signed by all involved parties like oil companies as well as the operators of ships, drilling rigs and other marine infrastructure. IUMI secretary general Lars Lange said "IUMI fully endorses the idea behind the declaration, with the objective to promote best practice on a reasonable basis and prevent the risk of emergencies. While not a natural signatory to the declaration, IUMI supports in principle the concept of this voluntary, non-binding document."

He added "IUMI fully support a mandatory Polar Code through the IMO; meanwhile we welcome this voluntary initiative for the industry to take a proactive approach when operating in the Arctic." *MRI*

Beazley

TWO NEW HIRES



Specialist insurer Beazley is strengthening its marine liability and cargo capabilities with two new hires.

Phil Sandle (above left), a member of the Lloyd's Market Association and current chairman of the Joint Liability Committee, has joined Beazley as head of marine liability. Phil has 20 years of Lloyd's underwriting experience, most recently as deputy divisional underwriter for marine & energy at Canopus. He also directly oversaw the marine property portfolio at Canopus. Previous to this, Phil worked at QBE and Hiscox.

Additionally, Stuart Spiers (above right) has joined Beazley as cargo underwriter. Stuart joins from Travelers and has 10 years experience in the market, previously having worked at Amlin and Catlin.

Clive Washbourn, head of Beazley's marine division, said "We are delighted to have Phil and Stuart join Beazley. Marine liability and cargo are important areas of focus for us and we plan to grow them further.

"Phil is one of the most able marine liability underwriters in the market and we are delighted to have someone of his calibre in the team. His expertise will be invaluable to our business and clients. Stuart is very well versed in the cargo market. His experience and knowledge in one of our key areas of business – the movement of crude oil and oil products – and an in-depth understanding of broker requirements will help us in building our business."

Clyde & Co

NEW PARTNERS

Clyde & Co has added seven lawyers to the partnership and six equity partners too senior equity partners effective from 1 May 2013.

These include several marine roles, including, in Asia Pacific, the promotion

of Andrew Rourke, marine & international trade, Shanghai; and Chris Metcalf, marine & international trade, Singapore to partners. In the UK, Charles Smith becomes a partner in the marine & international trade team in Guildford.

Among those promoted to senior equity partner are, in the UK, DR Lee and Ed Mills-Webb, both marine & international trade, London. As of 1 May 2013, Clyde & Co has 295 partners worldwide.

Senior partner elect James Burns said "These promotions reflect both the continuing growth of the firm throughout our global network as well as the considerable opportunities for career development at the firm. We would like to congratulate this group of excellent lawyers and wish them every success."

Hill Dickinson

INTERNATIONAL SHIPPING TEAM EXPANDS



Law firm Hill Dickinson has appointed Ian MacLean as a partner to its London office, where he will focus on his international client base of ship owners, ship

managers and their insurers.

This appointment provides the firm with five former mariners at partner level, with Ian joining the existing team of Mike Mallin, Tony Goldsmith, Phil Haddon and Andrew Gray. This team is further strengthened by another five ex-mariner assistants, two of whom are qualified solicitors.

Ian has extensive commercial experience as a former ship manager and ship owning company director. He remains close to the shipping community, serving as a director and general counsel of InterManager, the international trade association for ship managers.

ISS

NEW BULK COMMODITY ROLE

Maritime services provider Inchcape Shipping Services (ISS) has appointed Tim Cahill to a new role as vice president bulk commodity business development, to target future growth in cargo services.

Reporting directly to Claus Hyldeager, chief executive officer (CEO), Tim will develop ISS's strategy and delivery of cargo solutions, enhance port agency sales in the bulk sector and identify additional business opportunities. He will be based in Florida, North America.

Tim comes to the role with more than 30 years' experience in business development, operating at a global level in the bulk commodity sector and marine industries. He has extensive knowledge of commodity origination, transportation management and quality control and has recently worked closely with coal and cement companies to evaluate supply chain and export/import alternative multimodal transportation strategies.

He was the founder and former CEO of Coal Export Services International (CESI), now a subsidiary of ISS, which offers a wide range of consulting and field services to coal and petroleum coke producers across the globe.

Wikborg Rein

NEW PARTNERS IN LONDON AND SINGAPORE



Law firm Wikborg Rein has appointed two new partners to its shipping and offshore team.

Birgitte Karlsen (above left) becomes a partner in the firm's London office, which she joined in 2011 after two years working as in-house counsel for offshore oil and gas technology specialist Aker Solutions in Norway. Prior to that, Birgitte had worked in the Oslo and Singapore offices of Wikborg Rein as a senior associate.

Meanwhile, Siri Wennevik (above right) has joined the Singapore office of Wikborg Rein. Siri is a well-known and highly experienced transactional lawyer within the shipping and offshore sectors. She has participated for both borrowers and lenders in a number of transactions for Norwegian and international clients.

Heading **the risk list**

Syria and Yemen are currently in the severe risk bank, the highest on the Exclusive Analysis risk scale, behind the key piracy hotspots of Somalia and Nigeria. **John Cochrane** looks at the current maritime risks to see why they are in the red



Syria

There is a high risk small vessels approaching Syrian territorial waters will be suspected of weapons smuggling and will be fired at by the Syrian Coast Guard without warning. In January 2012, Syrian forces fired at a Lebanese fishing boat, killing one fisherman and detaining two others for several weeks. In April 2012, Syria claimed it had intercepted a vessel smuggling arms to Latakia. Syria's marine defences were significantly enhanced by the acquisition of 72 Yakhont medium range anti-ship missiles from Russia in December 2011.

There would be a severe risk to both military and civilian vessels off Syria's coast if Turkey establishes a buffer zone in Syrian territory along the border with Hatay Province. Turkey is the only regional actor with the military capability to intervene in Syria, but it is only likely to do so if faced with an unmanageable influx of Syrian refugees or with the prospect of a de facto Kurdish autonomous region in north-eastern Syria. Even then, Turkey would be unlikely to intervene without at least NATO backing. An indicator of imminent Turkish intervention would be direct requests to do so from the Arab League or most Arab countries, along with backing from the Syrian Opposition Coalition and NATO. However, we assess this is unlikely in the three-month outlook.

Syria has two container terminals, located at Latakia and Tartous, and an oil terminal located at Banyas. Fighting is likely to intensify in these three main coastal cities from mid-2013 onwards, as government forces concentrate on the coast and adjoining mountains, where large minorities of Alawis and Christians live. By this time, the insurgents will probably have acquired greater quantities of heavy weapons from defected or defeated government forces. Ports and the Baniyas oil refinery are likely to be targeted by insurgents, raising the risk of collateral damage and looting of warehouses.

In the unlikely event of Syria intervening in an Israel-Hizbullah war, Israel would probably attempt to impose a naval blockade on Syria. Israel would probably also launch airstrikes and naval attacks against Syria's marine infrastructure, as many weapons

shipments from Iran to Hizbullah transit through Syria's ports. Israeli and US naval forces operating in the Mediterranean and Red Sea would, however, be more likely to seize suspected arms shipments to militant groups before they reached Syrian waters. Syria lacks the naval capability to prevent seizures of arms shipments so far from its coastline.

Yemen

In February 2010, Said al-Shihri, the now-deceased deputy leader of al-Qaeda in the Arabian Peninsula (AQAP), appealed to the Somali al-Shabab militant group to co-ordinate operations with AQAP on either side of the Bab al-Mandab Strait, through which 25,000 vessels travel annually. His appeal followed an earlier statement, calling on Yemenis to attack "the Crusader campaign and their allies" by targeting "fleets on the water and land of the Arabian Peninsula". These statements are probably more indicative of aspiration than of definite plans for attack.

Nevertheless, there is an elevated risk of boat-borne IED attacks against shipping off the coast of Yemen. In August 2011, the Yemeni Navy claimed to have sunk a small boat they suspected was laden with explosives as it approached a warship off Abyan. Two weeks earlier, AQAP had taken over a fishing harbour at Shaqra in Abyan province, which seems to have been the launch point for the attack. There is a strong precedent for marine terrorism in Yemen and the large amount of unregistered traffic in the Gulf of Aden places shipping at particular risk. In October 2000, the *USS Cole* was hit by a boat-borne IED just outside the port of Aden. In October 2002, the French oil tanker *Limburg* was similarly attacked in the Gulf of Aden. Both attacks were organised by Yemeni jihadist networks, some of which later merged with AQAP. Increased US UAV strikes against AQAP raise the risk of retaliation using boat-borne IEDs. Additionally, boat-borne IED attacks launched from Yemen on oil tankers are a credible Iranian response option in the increasingly likely event of an Israeli or US strike on its nuclear sites.

The number of pirate attacks off the coast of Yemen has dropped significantly in the last year and improved security measures mean that few succeed. Nevertheless, piracy in the area is likely to continue. The risk of piracy originating from Yemeni ports is low, as there are currently no militant groups with the intent or capability to take and hold deep water ports, needed to hold captured ships. Any attempt to capture the port of Aden would be met with significant resistance from army units, tribes and southern movement militias. AQAP has shown no intent to hijack ships for ransom and is more likely to rely on boat-borne IED attacks to pursue its political agenda. **MRI**



John Cochrane

John Cochrane QBE is an independent risk adviser at Exclusive Analysis



L-R: Nadia Balta – Greenwich Maritime Institut, Professor Lars Goran Malmberg – University of Gothenburg, Audrey Kravets – Leuphana University, Knut Fournier – University of Leiden, Eric Kravets – Kravets & Kravets gbr

The future of **maritime law** and **policy research**

Professor Jason Chuah, of The City Law School, City University London, reports from the Postgraduate Researchers in Maritime Law and Policy Conference, held at the City Law School, City University London

Shipping law practitioners and industry professionals invariably lead very busy professional lives and it is no surprise that research in maritime law and policy does not always feature very high on their agenda. What is not ignored though is the appreciation and recognition that the maritime sector is an important but constantly evolving economic field deserving of high level cutting edge research.

Research carried out by commercial consultants is frequently of the highest quality, however it is not always seen as impartial and neutral. On the other hand, academic research is not always seen as “practical”. For the researcher too, maritime law and policy is a minefield because of the level of expertise one first has to acquire and develop before being able to carry out effective studies. There is much to learn prior to any realistically useful research being conducted – from the industry specialist terminology to quirky commercial practices. Moreover, as regards academic research, the researcher is often working on their own in small faculty units, which does not lend itself to the sharing of ideas and expertise.

The Postgraduate Researchers in Maritime Law and Policy Conference, held at the City Law School, City University London was conceived to challenge this status quo. It aims to help promote the visibility of research in maritime law and policy and to provide a supportive forum for maritime researchers to come together and exchange views. The conference was organised by the London Universities Maritime Law and Policy Research

Group (LUMLPG) to bring together doctoral and post-doctoral researchers to present their research findings to an informed audience. The LUMLPG was established as a collaborative network of London academic institutions with research interests in maritime law and policy, to discuss, disseminate and develop research in maritime law and policy. LUMLPG members are drawn from a wide range of academic and research institutions, professional groups, commercial organisations and individuals sharing a common interest in maritime law and policy.

Rotterdam Rules

The recurrent theme in the different papers presented was largely about how maritime law and policy needs to respond to change. The maritime industries have seen enormous adjustment in recent times and stand poised for even more change in the near future. Several papers addressed the newly enacted Rotterdam Rules – the so-called maritime-plus international convention to regulate the transportation of cargo by sea. The new convention will come into force once it has received 20 ratifications and it does look like that is still some distance off. Carlo Corcione, from The City Law School, considered whether and to what extent a third party involved in the shipping contracts (such as a freight forwarder, a terminal operator or a stevedore) might be protected under the new regime.

The new rules extend the scope of the law to inland operations and for inland transport operators this might well impact them. Sebastian Meyer, from Swansea University, talked

about how the new convention which tries to accommodate the flexible practice of delivering goods without asking to see the bill of lading, could very well result in more disputes concerning misdelivery and potential fraud. Another area of some concern relates to that of the carrier's liability for delay caused to the on-delivery of cargo. Selim Ciger, from Bristol University, spoke about deficiencies of the new convention in addressing this issue. The Convention states that delay occurs if the delivery is not made by the agreed date of delivery under the convention. Accordingly if there is no agreement on time of delivery then there can be no delay under the convention which ultimately means there would be no liability for delay. This approach would thus produce significant problems for the recovery of delay claims, considering an agreement on time of delivery is very rare, if not non-existent, in shipping context. Ioanna Magklasi, from Southampton University, spoke about so-called volume contracts which, the UN in its wisdom, have decided to exclude from the Rotterdam Rules. Her concern is with the seeming ease parties can avoid being subjected to these rules which were intended for the protection of small and medium sized cargo interests in the shipping contract. A paper by Lijun Chao, of Bangor University, argues that the Rotterdam Rules as a unifying convention is a step in the right direction.

Regulatory regimes

The maritime industry has also witnessed much regulatory change – new research in the field of environmental protection regulation to maritime safety regulation and anti-trust regulation is needful, especially when it is not always clear to the industry how these different regulatory regimes might overlap and thus cause policy confusion and increase compliance costs. Knut Fournier, of Leiden University, presented his research

on the recent enforcement of competition rules (concerning mergers, state aid and antitrust largely) against companies in the maritime transport sector. He argues that, despite the Commission's goal to phase-out sector-specific rules (ie there should be no distinction between different economic sectors for the purposes of the application of competition law), the high level of antitrust activity in the sector could justify that some rules remain in place.

Tabetha Kurtz-Shefford, of Swansea University, took up a matter which has been under-researched – the Offshore Oil Pollution Liability Agreement. Events in recent years, especially the Montara and Macondo incidents, have highlighted concerns about the effectiveness of compensation mechanisms for victims and claimants of oil pollution damage caused by offshore facilities. This presentation concentrated on the Offshore Oil Pollution Liability Agreement (better known as OPOL), which is the only international regime designed specifically for offshore oil facility pollution liability. Covering most of the North Sea, OPOL is a contractual document which was originally created as an interim measure while a regional convention was under negotiation, but it has since become a permanent solution. However, there are a number of deficiencies including its limited scope of application.

A highly relevant legal issue in maritime affairs is what constitutes a "ship" – this concept or conception of a ship has important bearings on maritime and marine law. Many conventions or maritime rules apply to "ships" but what is a ship is not as clear as bygone days given the numerous objects being put out at sea for various purposes. Flotsam, jetsam, lagan, derelicts, oil rigs, artificial islands etc. are subject to different applicable laws depending on whether they qualify as "ships".

Dmitrios Arvanitis, of The City Law School, has researched





this question, especially in the context of off shore installations. He contends that as there is no uniform definition of “ship”, these installations must be said to possess merely an ad hoc status under the specific provisions of major international conventions.

Protection of people

There was also much emphasis at the conference on the protection of people who are associated with shipping. There were papers exploring the need for gender awareness in fishing to abandonment of the seafarer and cruise ship issues for the passenger. We have seen in recent times a surge in cruising holidays in Europe and a corresponding increase in passenger disputes involving accidents, food safety, delays and customer service.

Audrey and Eric Kravets, from Leuphana University, Germany, discussed the problem of passengers finding the appropriate place to bring a claim, given the existence of forum selection clauses in their holiday contracts. In addition, they clarified whether the European consumer protection regulations on standard terms and conditions would grant cruise passengers additional rights. They examined the standard terms and conditions of three major cruise operators – Carnival, Royal Caribbean and MSC Cruises.

Claims for compensation are sometimes frustrated by the corporate structures adopted by the cruise line. For example, a cruise ship might be managed and owned by various corporate entities protected by the veil of incorporation making it difficult for the passenger to know whom to sue. A paper by Esther

Copote, from Greenwich Maritime Institute, outlined how pivotal women are in helping preserve the traditions and values of fishing communities generally but demonstrates that in Europe where there is no a functional network of women in fisheries that is capable of influencing and actively contributing to the EU Common Fisheries Policy. There was also some discussion around protection of the seafarers; one about the problem of seafarers who are abandoned by their employers (by Julia Lessa, of City University London) and another, more generally, about China’s reception of the Maritime Labour Convention (from Pengfei Zhang, of Greenwich Maritime Institute).

“Flotsam, jetsam, lagan, derelicts, oil rigs, artificial islands etc. are subject to different applicable laws depending on whether they qualify as ‘ships’”

Why does maritime law and policy research matter?

Carefully carried out maritime law research is vital to not only to the maritime sector but also to global legal development. Maritime law research is often cross cutting. Although the emphasis is on the maritime sector or industry, the legal rules, norms and policy considerations also have implications for other economic and social activities. For instance, a study about the efficacy of antitrust regulation on shipping (an easy target for antitrust regulators) will not provide answers to the maritime industry players but also to undertakings and operators in other commercial fields.

So too is an exercise in looking at rules intended to harmonise international shipping (such as the Rotterdam Rules). Other international efforts abound in attempting to “unify” commercial and financial laws. Hence, the question as to whether, to what extent and how harmonisation of laws in the global commercial village should take place can be answered by research into the Rotterdam Rules.

The City Law School and the London Universities Maritime Law and Policy Research Group clearly see maritime law and policy research as essential and the commitment is to continue to hold such conferences to foster even better research and to disseminate research to those who are interested. There is also a role for maritime professionals – researchers regularly find it extremely challenging to gather relevant data and information. Speaking as a professor to the profession, I would urge the profession to share their wisdom and information with student researchers. As regards dissemination, there is also a clear and moral role for specialist industry magazines and periodicals such as *Maritime Risk International* to help publicise and disseminate the research of the highest quality undertaken by passionate and conscientious research students. [MRI](#)

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Changing **the rules**

The 2002 Passenger ship liability and compensation treaty is set to enter into force in 2014, as outlined by the International Maritime Organisation



The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002, which substantially raises the limits of liability for the death of, or personal injury to, a passenger on a ship, is set to enter into force on 23 April 2014, after the required 10 ratifications were reached on 23 April 2013, with the ratification of the 2002 Athens Protocol by Belgium.

The 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, (PAL), revises and updates the 1974 Convention, which established a regime of liability for damage suffered by passengers carried on a seagoing vessel. As a precondition for joining, parties to the 2002 Protocol are required to denounce the 1974 treaty and its earlier Protocols. The Athens Convention declares a carrier liable for damage suffered by a passenger resulting from death, personal injury or damage to luggage if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier. Such fault or neglect is presumed, unless the contrary is proved.

Carriers can limit their liability unless they acted with intent to cause such damage, or recklessly and with knowledge that such damage would probably result. For the death of, or personal injury to, a passenger, this limit of liability was set at 46,666 Special Drawing Rights (SDR) per carriage in the 1974 convention.

The 2002 Protocol substantially raises those limits to 250,000 SDR per passenger on each distinct occasion unless the carrier proves that the incident 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 the intent to cause the incident by a third party.

“The Athens Convention declares a carrier liable for damage suffered by a passenger resulting from death, personal injury or damage to luggage if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier”

If the loss exceeds this limit, the carrier is further liable – up to a limit of 400,000 SDR per passenger on each distinct occasion – unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

As far as loss of, or damage to, luggage is concerned, the



www.imo.org

IMO seeks public input on administrative burdens

Meanwhile 7 May 2013 marked the start of a six-month consultation period in which the International Maritime Organization (IMO) will seek widespread input on the administrative burdens that may result from compliance with IMO instruments.

The intention is to gather data from a broad spectrum of stakeholders from which recommendations on how to alleviate administrative burdens can be developed. The Organization recognises that some administrative requirements contained in IMO instruments may have become unnecessary, disproportionate or even obsolete and is committed to reducing their impact. This, says IMO, would not only be beneficial in its own right, it would also help to release resources that could then be channelled towards the Organization's overall goals of improving safety and security in shipping and reducing its negative impact on the environment.

The consultation process is being carried out through a dedicated website, which is accessible from the IMO website (<http://www.imo.org/OurWork/rab>). It offers practical information and guidance to participants in the consultation and includes a questionnaire to be filled in and submitted electronically.

The consultation is open to everyone, including the general public. Particular target groups are all maritime stakeholders, including:

- companies and owners;
- governments, in their capacity as party to conventions, flag, port or coastal state;
- manufacturers and equipment suppliers;
- maritime administrations;
- masters and ships' crew;
- port authorities;
- recognised organizations;
- shipbuilders and ship repairers; and
- shippers.

IMO secretary-general Koji Sekimizu (pictured above) said "There has long been a feeling in the industry that there is too much wasted paperwork. This is the start of our efforts to tackle that problem. I would urge as many people as possible to take part in this consultation, as only with a strong set of data can we meaningfully identify where changes may be necessary."

The consultation process will end on 31 October 2013. After it has been completed, a steering group established by the IMO Council will analyse the responses to identify those administrative requirements that are perceived as burdens, and will make recommendations to the Council as to how any such burdens should be addressed.

carrier's limit of liability varies, depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle and/or luggage carried in or on it, or in respect of other luggage.

- The liability of the carrier for the loss of or damage to cabin luggage is limited to 2,250 SDR per passenger, per carriage.
- Liability of the carrier for the loss of or damage to vehicles including all luggage carried in or on the vehicle is limited to 12,700 SDR per vehicle, per carriage.
- Liability of the carrier for the loss of or damage to other luggage is limited to 3,375 SDR per passenger, per carriage.

The carrier and the passenger may agree that the liability of the carrier shall be subject to a deductible not exceeding 330 SDR in the case of damage to a vehicle and not exceeding 149 SDR per passenger in the case of loss of or damage to other luggage, such sum to be deducted from the loss or damage.

The 2002 Athens Convention also introduces compulsory insurance, as well as mechanisms to assist passengers in obtaining compensation, based on well-accepted principles applied in existing liability and compensation regimes dealing with environmental pollution. These include replacing the fault-based liability system with a strict liability system for shipping related incidents, backed by the requirement that the carrier take out compulsory insurance to cover these potential claims.

"The 2002 Athens Convention also introduces compulsory insurance, as well as mechanisms to assist passengers in obtaining compensation"

Ships are to be issued with a certificate attesting that insurance or other financial security is in force and a model certificate is attached to the Protocol in an annex. The limits contained in the Protocol set a maximum limit, empowering – but not obliging – national courts to compensate for death, injury or damage up to these limits. The Protocol also includes an "opt-out" clause, enabling state parties to retain or introduce higher limits of liability (or unlimited liability) in the case of carriers who are subject to the jurisdiction of their courts.

Amendment of limits

The 2002 Protocol introduces a tacit acceptance procedure for raising the limits of liability, whereby a proposal to amend the limits would be circulated on the request of at least one-half of the parties to the Protocol, and adopted by a two-thirds majority of the states parties. Amendments would then enter into force within 36 months unless no fewer than one quarter of the states parties at the time of the adoption informed that they did not accept the amendment.

Ratifications

The 2002 PAL Protocol has now been ratified by 10 states: Albania, Belgium, Belize, Denmark, Latvia, Netherlands, Palau, Saint Kitts and Nevis, Serbia and Syrian Arab Republic. It has been also ratified by the European Union. The 1974 convention has been ratified by 35 states. *MRI*

Foster **the people**

Nazery Khalid, of the Maritime Institute of Malaysia, discusses the introduction of the Maritime Labour Convention 2006, which comes into force on 20 August this year

‘Rough seas make good seafarers’

A recent major development in the development of modern-day seafarers’ welfare is the adoption of Maritime Labour Convention 2006 (MLC). The convention was introduced by the International Labour Organisation (ILO) to provide comprehensive rights and protection for seafarers to provide decent working conditions to them and safeguard economic interests of shipowners.

MLC was ratified by at least 30 member states of ILO with a cumulative share of 33% of the total global merchant ship capacity (measured in gross registered tonnage or GRT). This milestone was attained on 20 August 2012 and, as of February 2013, 39 states with 68% of global shipping tonnage had ratified the Convention which will be implemented on 20 August 2013.

MLC is introduced under the ambit of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 which provides the legal framework for all activities at sea and spells out the obligations and responsibilities of flag states. It consolidates and updates around 70 international labour standards in the shipping sector and maritime industry which have been adopted across the years. These standards cover the minimum age for seafarers, working conditions, welfare and wellbeing of seafarers working onboard the vessels flying the flags of those states. They will be gradually phased out as ILO member states which have ratified MLC ratify the convention, during a transitional period when some of the parallel conventions will be in force.

In introducing the MLC, ILO is fulfilling its responsibility as the specialised agency of the United Nations tasked to promote decent working conditions for laborers worldwide. It protects the rights of seafarers by setting minimum standards for their basic rights, freedom to form unions and associations, collective bargaining, abolishment of forced labour and other standards related to employment.

Through its role as the main representative of its member governments, ILO works with other organisations related to labour rights and welfare. They include the International Transport Workers Federation (ITF), which represents trade unions or seafarers, and the International Shipping Federation (ISF), which is the principal representation of ship owners worldwide.

In developing MLC, ILO assessed several conventions related to shipping and employment onboard ships. They include the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), the International Convention for the Safety of Life at Sea 1974 (SOLAS) and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW). MLC is meant to be the “fourth pillar” of maritime regulatory regime for the shipping sector, along with other International Maritime Organization (IMO) conventions.

MLC is made of articles, regulations and codes which



Photo: Nazery Khalid

The iconic International Seafarers Memorial, a bronze statue by British sculptor Michael Sandle, gracing the IMO headquarters overlooking River Thames in London. The seemingly long and reflective gaze etched on his face seems to symbolize a plea for better protection of the welfare and wellbeing of seafarers.

together establish the basic rights, principles and obligations of nations ratifying the convention and the particulars of implementing the regulations. The regulations and codes cover five major areas, namely :

- Minimum requirements for seafarers to work onboard a vessel;
- Conditions of employment as a seafarer;
- Accommodation, recreational facilities and food;
- Health and medical care, welfare and social security; and
- Compliance and enforcement.

These standards are meant to be easily understood and applied worldwide, befitting the transboundary and global nature of shipping. They can also be easily updated and enforced in a uniform manner.

With the coming into force of MLC, ship owners have to maintain and comply with the requirements of the Convention. They are obligated to have onboard their ships a copy of MLC and the ships are issued with a Maritime Labour Certificate and a Declaration of Maritime Labour Compliance (DMLC). The Certificate represents compliance by shipowners with MLC and is proof seafarers working onboard their ships comply with national requirements. The DMLC is a form that has to be filled out by the competent authority of the flag state and the ship owners. Without the Certificate and the DMLC, ship owners will be subjected to stringent inspection by the port state control. The ship owners are required to incorporate the above areas of the MLC into their labour management system. Compliance with the requirements of MLC is assessed by way of inspecting the employment conditions onboard the ship.

Muscles on vessels

The coming into force of MLC marks a high point in the provision of social protection for seafarers whose nature of profession subjects them to working under laws of different countries, on top of the challenging and stressful working conditions. IMO recognises the importance and contribution of the world’s

seafarers – estimated to number around 1.2m – to facilitate world trade and various economic activities such as offshore oil and gas exploration and production, marine tourism and passenger transportation. Without their sacrifices and efforts, world trade, of which 95% is carried through seaborne means, and other maritime-related activities could not take place.

A mark of this recognition is the designation by IMO in 2010 of 25 June every year as the Day of Seafarer. Observed worldwide, this day marks an acknowledgment of the immense role played by this unique workforce whose working conditions are tougher and more dangerous than found in most other professions. Growing world trade volumes that bring increasing demand for shipping services has seen the rise in the demand for new seafarers. They have been increasingly exposed a range of risks and threats at sea including piracy, terrorism and natural disasters. There have also been cases of criminalisation of seafarers in the wake of accidents involving their vessels. These underscore the challenging circumstances faced by seafarers every time they go to work and take to the seas.

“The fulfillment and requirements of MLC lead to a highly motivated, well-trained and happy onboard personnel”

All these factors shine the spotlight brightly on the welfare and wellbeing of this one-of-a-kind category of workers. The introduction of MLC requires seafarers are accorded occupational health and safety protection and work, live and train onboard their vessels in a safe, secure and hygienic environment. They have to work under harsh – and sometimes unacceptable conditions – onboard ships flying the flags of countries that do not exercise effective jurisdictions and control over them and lack international standards. With MLC in place, a modicum of global standards can be imposed to ensure seafarers can work in good conditions.

Business and common sense

MLC not only makes common sense in terms of protecting the wellbeing and welfare of seafarers but also makes business sense to ship owners. The fulfillment and requirements of MLC lead to a highly motivated, well-trained and happy onboard personnel. This in turn can lead to a safe and well-managed ship, which in turn requires less maintenance and dry docking time which can be costly and can incur opportunity loss for its owner. It is also important to note there are many ship owners who pay serious and keen attention on and spend considerable amount to provide safe, secure, comfortable and healthy working conditions for seafarers. Without such standards imposed on all ship owners, those which provide decent working conditions onboard their vessels will be at a disadvantage to those who do not.

It should be noted that MLC and many ILO instruments provide flexibility for its member states to apply them in a way to accommodate unique and diverse national circumstances and gradually improving the protection of workers. The exercising of such flexibility by member states usually entails consultation with workers and unions/associations concerned. This ensures

the interests of all parties are taken into account and international standards and obligations are adhered to and respected, with a view to continuously improve the lot of the workers. In the context of an international endeavour like seafaring, such consultation leads to mutual respect, understanding and agreements that serve the interests of both seafarers and ship owners. This is at the core of MLC which is described as “firm on rights but flexible on implementation”. While there is no compromising the safety, security and health of seafarers, it has to be acknowledged that not all shipping companies and flag states, especially from developing countries which lack resources, have high standards in seafarers’ protection and rights. They need to be given the time to enable their national laws to attain the levels of working conditions and occupational safety and health of large shipping companies and developed member states.

Flag states are also expected to ensure that their national laws and regulations implementing the standards of MLC are also adhered to on small vessels not included in the Convention’s certification system. To be sure, it is not going to be all smooth sailing for MLC to be implemented, as is the common case for an international convention of such scope and magnitude. Some critics say there has not been enough time for consultation between governments which have ratified the convention and shipowners and seafarers associations.

They maintain there are several restrictions that need to be overcome to meet MLC’s provisions, including the lack of resources on the part of the ship owners to invest, install and enhance onboard equipment and features of their vessels; adjust salary scale, allowance and insurance; and provide recreational activities to their crew. Fulfilling these requirements at a time when the shipping sector is still reeling from the global recession can be a big ask for ship owners.

Adjusting national laws to MLC can also be time-consuming not only owing to the legislative process but also, in the case of developing countries, the lack of expertise in fields such as occupational safety, labour law and sociology to address issues such as employment and working conditions and social obligations in aligning local laws to MLC. Only time will tell if MLC will attain its objectives and will be enforced smoothly. However, there is no denying the impacts that this groundbreaking convention will have on seafarers and the ship owners. There is little not to like about an international instrument that establishes global standards in this important profession and ensure good working environment for seafarers and protects their security, health and safety. Happy seafarers contribute to good handling of ships which serves not only the business interests of the ship owners but also global trade and economic growth. *MRI*



Nazery Khalid

Nazery Khalid is a senior fellow of the Maritime Institute of Malaysia

Safety by 'all available means'

Andrew Oldland QC and Lara Moore, at Michelmores LLP, remind the industry that money spent on training is money well spent

The International Regulations for Preventing Collisions at Sea 1972 (COLREGS) require vessels to use “all available means” to avoid collisions: COLREG 7(a) – “Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist”.

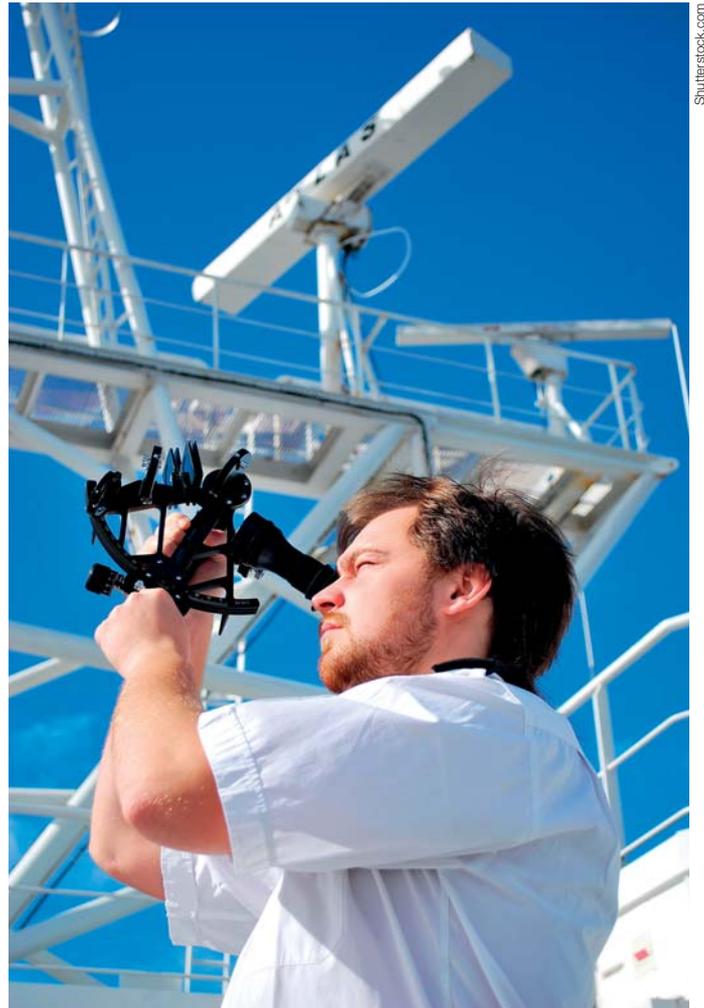
“All available means” clearly includes the technological devices installed on vessels designed to aid navigation and/or plot the position, speed and direction of potential collision risks. Technological advances to such devices should bring with them improvements in safety. For example the successful trials of the automatic eLORAN navigation system by the General Lighthouse Authorities (GLA) on behalf of ACCSEAS (Accessibility for Shipping, Efficient Advantages and Sustainability: an EU marine navigation development project based in the North Sea) in March this year means there is now an automatic back-up navigation system available to provide an accurate positioning, navigation and timing (PNT) system for vessels in the event of GPS loss or failure.

GPS signal is vulnerable to interference from natural events such as space weather and to GPS “jamming” either accidental (GPS jammers being left on in lorries during transportation on a ship) or deliberate (ie a terrorist threat). eLORAN uses longwave landbased radio signals rather than satellite navigation and so is not affected by GPS jammers. The automatic switch over to eLORAN following GPS failure enables the safe operation and navigation of the ship to be maintained.

According to Martin Bransby, research & radionavigation manager at the GLA, “the more dependent we become on electronic systems, the more resilient they must be. Otherwise, we face a scenario where technology is actually reducing safety rather than enhancing it”. With an over-reliance on GPS systems the potential increases in marine navigational safety provided by the eLORAN system, once fully operational, are obvious.

However, even in the absence of failure or malfunction an electronic system can serve to reduce safety if basic health and safety principles are not followed. Over adherence to following the course set by the navigation system without continually monitoring changes in circumstances and complying with the COLREGS can lead to accidents. The Marine Accident Investigation Branch (MAIB) is responsible for carrying out the UK’s accident investigation responsibilities pursuant to the IMO Code and Directive 2009/18/EC (and other associated legislation). A brief review of one of the case studies in the MAIB’s report “Lessons from Marine Accident Reports 1/2013” serves to highlight this point:

“While electronic charts and GPS feeds to radars are



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valuable aids to navigation, an unwelcome side effect is that the modern watchkeeper can often seem obsessed with sticking to ‘the red line’ (his track) – sometimes at the cost of complying with the COLREGS.”

MAIB highlights the good practices which led to an incident/collision being avoided in the case in question:

1. Despite familiarity with the port and the pre-departure checks the ferry’s master held a comprehensive departure brief, and read the pre-departure checklist aloud to the bridge team.
2. Prior to leaving port the bridge team were aware of all relevant traffic and its position. Changes being plotted where relevant.
3. The master made it absolutely clear that anyone with concerns at any time should let him know.
4. When a container ship altered course, the possible close quarters situation was spotted early on by the second officer who did not hesitate to call the master back to the bridge.
5. The master returned to the bridge, took control and altered course. The second officer supported him by giving a good briefing, liaising with the engine room and suggesting the coastguard is informed of their intended actions.
6. The close quarters situation was dealt with without incident.

The MAIB conclude their review of this incident by stating: “One might consider that many of these observations are basic good practice, commonplace and are not worthy of mention. Unfortunately, all too often MAIB deals with cases where some or all of these practices are missing and have led

to accidents that could easily have been avoided. The ferry company had invested a lot of time and resources into bridge team management, including monitoring the effectiveness of training schemes by auditing bridge teams in action and unannounced reviews of VDRs across the fleet. This incident highlights the importance of such a commitment.”

“The more dependent we become on electronic systems, the more resilient they must be”

The case study highlights the importance of having in place good quality health and safety policies and procedures which are fully understood and implemented. It is important that regular checks are made to ensure that shortcuts are not allowed to creep in. An open atmosphere encouraging communication is key. Staff who are concerned about the reaction they will receive from their superiors are unlikely to highlight concerns in a timely matter, instead waiting until the situation becomes critical; which may be too late for preventative action to be taken. Technological advances such as eLORAN, even at their most reliable are an aid, not the answer, to safety on vessels. Safety starts and ends where it always did, with the master, the bridge team and crew.

Balance vital

However the balance between the use of technology and crew is vital if the COLREGS are to be complied with. A review of the accident report related to the grounding of the *Pirate Queen* (published on the Maritime Accident Casebook website) highlights the issues that may arise when there is overreliance on the crew and technological aids are not used correctly. Although the main cause of the vessel grounding was the failure of the leading lights at Roonagh Pier, Eire’s Marine Casualty Investigation Board stated in its conclusions:

“Further Investigation reveals serious weaknesses in the navigational procedures and practices on the company vessels. There appeared to be an overreliance on visual aids to navigation and neglect to practice and use the electronic aids on board. When one is very familiar with the waters and on regular passages it is very easy to become complacent.”

Again overfamiliarity and complacency appear to be contributing factors. The message is clear, do not take shortcuts. Crew should follow the policies and procedures put in place and companies must make regular checks on compliance. If an incident occurs policies and procedures, compliance and checks will be scrutinised by regulators such as the Maritime and Coastguard Agency (MCA) when deciding whether enforcement action needs to be taken.

COLREG 5 requires that “every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate”. Yet in many incidents no lookout was posted or the only person on the bridge at the time of the incident was asleep. MCA has long cited fatigue as a major (avoidable) cause of collisions/groundings. Of particular concern is the six hours on/six hours off watchkeeping regime in

place on some vessels. MAIB’s report into the 2008 grounding of the vessel *Antari* on the Northern Irish Coast states:

“As has been demonstrated in many previous incidents, such a routine on vessels engaged in near coastal trade poses a serious risk of cumulative fatigue”

The six hours on/six hours off regime is compliant with the requirements of the International Labour Organization’s Convention no. 180 and indeed the Maritime Labour Convention 2006 when it comes into force in 20 August 2013. Nonetheless MAIB and Australia’s Transport Safety Board (ASTB) (amongst others) consider the regime inadvisable. In its accident report into a fatality on the *Thor Gitta* in 2009 ASTB states:

“the effect that a six hours on/six hours off roster has on crew member’s level of fatigue has been considered in a number of studies ... It is reasonable to say that all these reports comment on the inability of this type of roster to effectively manage fatigue levels of those working the roster, and that other systems of roster (such as four hours on/eight hours off) should be considered ... the six hours on/six hours off [roster], while complying with the ILO 180 ... probably resulted in a cumulative level of fatigue in the crew.”

Further reforms are necessary to put in place sufficiently robust EU/international legislation to combat mariner fatigue. However such reforms remain controversial and are opposed by a number of flag states. In the meantime, whilst continuing to push for legislative reform, MCA will come down hard on vessels flouting the rules.

To comply with the COLREGS and avoid enforcement action by regulatory bodies such as MCA for breaches of relevant legislation, vessels should indeed use “all available means”. This includes vessels being equipped with up to date reliable technological devices, with failure-resistant back up devices in place. The relevant crew must be fully trained to use these devices and on the company’s policies and procedures. Such policies and procedures should not only be compliant with the legislation, but suitable in practice (including a regime that does not cause cumulative fatigue in crew members). Time and money invested in suitable technology, training and checking compliance (to prevent shortcuts being taken) is well invested and key to getting the balance between use of technology and crew correct. Perhaps most important is an engendering of an environment where crew feel able to raise concerns with the master at the first sign of a problem. Unfortunately a failure to follow these seemingly common sense principles will no doubt continue to lead to avoidable incidents. *MRI*



Andrew Oldland



Lara Moore

Andrew Oldland QC is a barrister and partner and Lara Moore is a solicitor at Michelmores LLP

Owners' rights to intercept freight confirmed

In October, the English Commercial Court decision in *The Bulk Chile* was reported, which held a ship owner is entitled to redirect the payment of freight due under bills of lading and separately rely on a charterparty lien on sub-freights. The Court of Appeal has now upheld that decision, as **Bob Deering** and **Chris Ward**, of Ince & Co, report

The UK Court of Appeal has recently upheld the English Commercial Court's decision in *Dry Bulk Handy Holding Inc and another v Fayette International Holdings and another (Bulk Chile)* [2013] EWCA Civ 184. The prevailing view remains that a lien on sub-freights is a form of security in the form of a charge which in certain jurisdictions may need to be registered to be effective where the time charterer becomes insolvent. It should be noted that such charges are registrable in the UK and that the rules governing the registration of charges changed on 6 April 2013.

The background

The vessel owned by DBHH was time chartered to KLC and sub-time-chartered to Fayette. Both time charters were on NYPE terms, clause 18 of which provided that "Owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter ...". Fayette voyage chartered the vessel to Metinvest. KLC failed to pay hire so DBHH sent a notice to Fayette and to Metinvest requiring them to pay direct to DBHH freight or hire due under "charters, bills of lading, or other contracts of carriage". Subsequently, bills of lading were issued for the cargo which stated "Freight payable as per [the voyage charter]" and "freight prepaid", although freight had not in fact been paid. The bills were owners' bills and the shippers were Metinvest. Metinvest paid freight to Fayette. DBHH accordingly brought both bill of lading claims and charterparty lien claims.

The Commercial Court decision

Mr Justice Andrew Smith held that DBHH were entitled to instruct Metinvest to pay the freight due under the bills of lading to DBHH. This right arose independently of DBHH's rights under clause 18 of the time charter and could be exercised at any time before the freight had been paid. Clause 18 gave DBHH security over "all sub-freights" due to KLC. This security took the form of an assignment by way of a charge. The KLC-Fayette charter contained the same clause and therefore gave KLC security over Fayette's right to receive freight under the voyage charter. Consequently, Fayette had given security over the voyage charter freight to KLC who had assigned that security to DBHH. As the notices were sent by DBHH before freight was paid, they constituted a valid demand for payment of the freight under the bills of lading. As KLC were in default, the notices

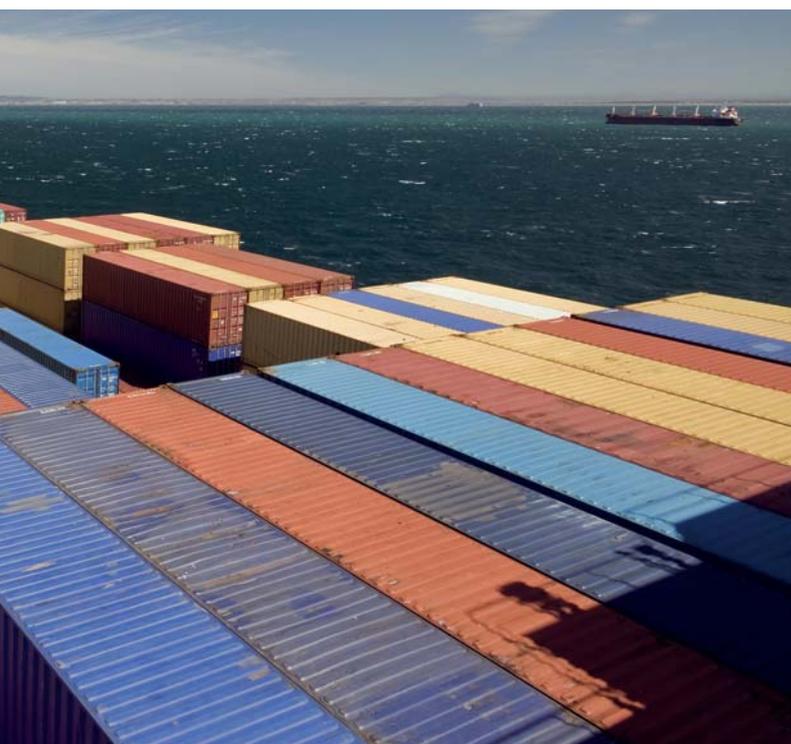


were also a valid exercise of the time charter lien over "all sub-freights" due to KLC. Metinvest were therefore obliged to pay freight to DBHH. Metinvest did not discharge this obligation by paying Fayette.

The Court of Appeal decision

The Court of Appeal agreed with the judge's finding that DBHH were entitled to redirect the payment of freight due under the bills of lading. As the bills were owners' bills, they evidenced contracts between DBHH and Metinvest. It did not matter that the bills were issued pursuant to the Fayette-Metinvest voyage charter. DBHH and Metinvest were the only parties to the bill of lading contracts and DBHH were entitled to receive the freight due under them. The fact that the bills stated "Freight payable as per [the voyage charter]" identified that Fayette were nominated as agent to collect the freight on DBHH's behalf. DBHH were entitled as the carrier under the bills to notify Metinvest that this nomination was revoked and demand that Metinvest instead pay the freight to DBHH. Since Metinvest were themselves the shippers, it did not matter that the bills were marked "freight prepaid". This was not sufficient to show that Metinvest were not liable for freight which they knew had in fact not been paid.

The court held that a ship-owner who intercepted bill of lading freight would be required to account for any surplus which exceeds the hire due under the head charter. The court also observed that insolvency can give rise to complications. However, the court was quite clear in confirming that none of these complications should interfere with the ship owner's right to intercept the freight, not least since that right would most likely be needed in cases of insolvency. Unlike the charterparty lien on sub-freights, DBHH's right to intercept the bill of lading freight did not depend on whether KLC were in default. The possibility that ship owners might routinely intercept bill of lading freight did not concern the court because this was regarded as unlikely in practice. The Court also considered that a time



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New registration rules

The time limit for registering charges against a UK company is 21 days from the day after the charge is created. The prevailing view is that the time charter is the instrument which creates the charge and therefore the security created by the lien must be registered within 21 days after the charter date.

English law changed on 6 April 2013 when new rules were introduced dealing with the registration of charges. The new rules apply to all applications for registration even where the charge is created before 6 April 2013. The time limit for registration is still 21 days. However, the company creating the charge (ie the time charterer) is no longer obliged to register the charge. Instead, registration is voluntary and the onus is on the charge-holder (ie the ship owner) to ensure that the charge is registered.

Registration under the new rules is performed by sending to the registrar of companies a statement of particulars of the charge, together with a certified copy of the instrument creating the charge (ie the time charter) and the registration fee. A correctly registered lien on sub-freights will be valid against the time charterer's liquidator, administrator and creditors and may assist in establishing the priority of the ship owner over monies representing the sub-freight. The new rules apply whenever the time charterer is a corporation registered in the UK irrespective of where their assets are located. Overseas companies are not required to register charges over their assets under English law even when the assets are located in the UK. However, ship owners wishing to ensure that a lien on sub-hire or sub-freight is effective should verify whether similar requirements apply in other relevant jurisdictions.

charterer who was not in default may arguably be entitled to restrain a ship owner from demanding direct payment of the bill of lading freight on the grounds that the ship owner had agreed to delegate collection of freight to the charterer.

The notices issued by DBHH to Metinvest were sufficient to intercept the freight due under the bills. They were sent when the freight had not been paid and were explicit in warning Metinvest of the risk of being required to pay twice. It did not matter that the notices were sent before the bills were issued.

“The new rules apply whenever the time charterer is a corporation registered in the UK irrespective of where their assets are located”

Registration of charterparty liens on sub-freights

The Court of Appeal did not comment on Mr Justice Andrew Smith's finding that a charterparty lien on sub-freights is a form of security taking effect as an assignment by way of a charge. That finding appears to represent the settled view and is also consistent with the recent decision in *The Western Moscow* [2012] EWHC 1224 (Comm). The cases further indicate that where the time charterer is a company incorporated in the UK, a lien on sub-hire or sub-freight may need to be registered as a charge to be effective against the time charterer's liquidator, administrator and/or creditors. Where other claimants hold other forms of security over the charterer's assets, there may be questions as to the rights of the competing claimants to the monies representing the freight. A failure to register the lien may mean that it is void and the ship-owner will be treated as an unsecured creditor of the time charterer.

Comment

It is clear from the decision of the Court of Appeal in *The Bulk Chile* that a ship owner may redirect the payment of freight due under bills of lading where the bills are owners' bills and the sub-charterer is the shipper. Therefore, where the time charterer is in default and this remedy is available to the ship owner, it may have the advantage of simplicity over the more complicated requirements of exercising a valid lien on sub-freights.

What is less clear however is whether a ship owner may retain priority over freight which has been redirected under the bills in the face of claims from a liquidator, administrator, trustee in bankruptcy (in a Chapter 11 type situation) and/or competing creditor of the time charterer. As such, ship owners wishing to establish security over sub-freight and sub-hire should endeavour to ensure that a lien on sub-freights is incorporated throughout the charter chain and that the security granted by the lien is properly registered wherever this may be necessary. *MRI*



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An end on deductions?

Menelaus Kouzoupis and **Rory Butler**, of Holman Fenwick Willan, report on a case which found payment of hire is a condition and consider whether this is an end to a charterers ability to deduct from hire



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In the recent English High Court decision of Mr Justice Flaux in *Kuwait Rocks Co v AMN Bulkcarriers Inc (The MV Astra)* [2013] EWHC 865 (Comm) it was held that the obligation upon a charterer to make punctual payment of hire in clause 5 of the NYPE 1946 form charter, especially one containing an anti-technicality clause, is a contractual condition, a breach of which entitles an owner to terminate the charter and claim damages for future loss of earnings. Although the decision in the *Astra* is based on the NYPE 1946 form which is itself very common it has wider application to other charterparty forms.

Background

In October 2008 the *Astra* was fixed by the owner on a five year time charter on an amended NYPE 1946 form. Clause 5 of the charter required punctual and regular payment of hire 30 days in advance, breach of which would give the owner the option to withdraw the vessel and terminate the charter. An anti-technicality clause was incorporated at clause 31 requiring the owner to give the charterer two banking days to rectify any failure to make payment.

Owing to the charterer's financial difficulties there were several defaults in the payment of hire, culminating in the owner sending an anti-technicality notice to the charterer in August 2010. Following charterer's failure to pay, the owner both withdrew the vessel and claimed that the charterer was in repudiatory breach.

An arbitration was commenced by the owner who claimed prospective damages from the date of withdrawal to the earliest redelivery date under the charterparty. The tribunal did not accept that clause 5 was a condition, but did however find that the owner was entitled to his prospective damages on the basis that the charterer's conduct amounted to a repudiatory breach of the contract.

The charterer appealed and the owner also challenged the Tribunal's finding that clause 5 was not a condition. The charterer's appeal was dismissed by Mr Justice Flaux on separate grounds, however on the parties' request he proceeded to determine whether or not clause 5 was a condition of the charter.

The judgment

Mr Justice Flaux found that clause 5 of the NYPE (the obligation to pay hire) was a condition of the contract for a number of reasons, the most important of which can be summarised as follows:

1. Clause 5 treats a failure to make punctual payment of hire by the charterer as sufficiently serious as to entitle the owner to withdraw/terminate the contract. This was considered a strong indication that a failure to pay hire goes to the root of the contract and that the provision was a condition.
2. In mercantile contracts where there is a time provision, such as a term requiring payment to be made by a certain date, then time is generally considered to be of the essence and

is hence a condition. It should also be noted that the judge's decision was that failure to pay hire was a condition whether or not a charterparty contains an anti-technicality provision.

3. The importance of certainty in commercial transactions. In particular, the judge thought it preferable to avoid situations where the right to withdraw the vessel for non-payment of hire left an owner with no remedy in damages in a falling market, save in cases where the charterer's conduct could also be said to be repudiatory. This created uncertainty for the owner as to whether to withdraw the vessel or to soldier on with a recalcitrant charterer until such time as the owner was in a clear position to say that the charterer was in repudiatory breach. The charterer's "wait and see" approach to the question of when a repudiatory breach of the charterparty would occur was rejected.

It should be noted that the status of the clause 5 obligation to pay hire was not a ground of the appeal and Mr Justice Flaux's conclusions are obiter and are not therefore binding. However, until we have a clear and binding decision directly on point, Mr Justice Flaux's findings may be considered persuasive by Judges and arbitrators.

“The exact effect of the judgment will only become clear over time but it will no doubt lead parties to consider payment of hire issues in a new way”

Effects of clause 5 being a condition

If the case is correct and is followed, the decision in the *Astra* certainly puts owners in a stronger position from a legal perspective and arguably significantly increases an owner's options when faced with a defaulting charterer – especially in a falling market. It was previously widely believed that a non-payment of hire would allow an owner, where he had a contractual right of withdrawal, to withdraw the vessel from the service of the charterer and claim only any unpaid hire up to the date of that withdrawal. However, it was generally accepted that the payment of hire was not a condition of the contract and, as a result, in order for the owner to be entitled to damages for future losses he would need to establish that the charterer had repudiated the contract by evincing an intention no longer to be bound by the contract or to fulfil the contract in a manner that deprived the owner of substantially the whole benefit of the contract (ie a repudiatory breach).

In practice this was hard to evidence, which meant that it was notoriously difficult to state with any real certainty how many missed hire payments (or indeed deductions/short payments of hire) would allow the owner to successfully argue that the charterer was in repudiatory breach. This was particularly problematic in cases where an owner was faced with a defaulting charterer in a rapidly falling market because if the owner terminated the contract too soon he could forfeit a potentially substantial damages claim for future loss of income. Addressing this problem seems to have been a motivation behind the reasoning in the *Astra* decision.

Mr Justice Flaux's finding that the clause 5 obligation to pay hire is a contractual condition attempts to bring much needed

certainty in this area. The result of which reduces the risk to an owner if he wishes to terminate a charterparty for non payment of hire and allows him to crystallise a damages claim for future losses. However, an owner must still ensure that he terminates correctly (adhering to any contractual requirements such as anti-technicality clauses) to avoid being in repudiatory breach himself.

Uncertainty

Whilst the decision in the *Astra* aims to provide clarity in respect of a charterers' failure to pay hire, it arguably muddies the water in two respects.

Obiter

First, as the decision is obiter only, it creates a quandary for owners who, in the face of a payment default by charterers, must decide whether to terminate or not in the face of uncertainty as to how binding the decision in the *Astra* is. This could potentially lead to an owner who does not terminate in a prompt manner following a single missed payment being exposed to arguments that they have affirmed the contract.

Deductions from hire

Secondly, it is now arguable that a deduction from hire may expose a charterer to the risk that his action was a breach of a condition and therefore repudiatory. All may turn on whether or not the deduction was valid. If the owner terminates and the deduction is later found to be valid then the owner will himself be in repudiatory breach and liable in damages to the charterer. If the owner terminates and the deduction is later found to be invalid then the charterer will be liable in damages to the owner. Thus making deductions from hire is a game of high stakes if an owner decides to press the issue and far from clear cut. In the short term Mr Justice Flaux's attempts to bring some clarity, especially as the decision is obiter only, could even have the unintended effect of creating further uncertainty.

Conclusions

The exact effect of the judgment will only become clear over time but it will no doubt lead parties to consider payment of hire issues in a new way. It may lead charterers to seek amendments to their standard form charters aimed at revising provisions regarding payment of hire and changing the contractual regime to provide better protection when making deductions from hire. On the face of it, this judgment is of significant benefit to owners. However, whilst the decision is potentially ground-breaking, it remains to be seen whether it will be followed either at first instance level or in the appeal courts and further decisions on the point will be closely watched. *MRI*



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Guarantees: an update

Bethan Bradley and Tom Kelly, of Clyde & Co, consider the use of guarantees as the financial crisis stretches on



As the global financial crisis extends into its fifth year, the use of guarantees to back contractual obligations is increasingly commonplace to secure the performance of long term obligations or asset poor counterparties.

Not all guarantees are created equally. It is crucially important to understand the type of guarantee being offered and the asset worthiness of the guaranteeing party before accepting it. Failure to do so may result in the acceptance of a guarantee against which enforcement is hopeless.

On-demand?

An on-demand guarantee is perhaps the most straightforward of guarantees. Liability will usually be triggered by a written demand for payment, made in good faith. Once the demand is made, the guarantor is bound to pay.

In *Meritz Fire and Marine Insurance Co Ltd v Jan de Nul* [2011] 2 Lloyds Rep 379, the defendants had entered into ship-building contracts with Huen Woo Steel Co and Meritz issued advance payment guarantees to the defendants in respect of payments made by them. The Court of Appeal considered whether it was necessary to decide the merits of the underlying dispute before Meritz's obligations under advance payment guarantees were triggered. The answer was no. The court held that the guarantee given was similar to a bond and liability to pay was triggered by a demand made in good faith.

Some on-demand guarantees provide that if no proceedings are commenced within a set time, then the ability to trigger the obligation to pay will be the same as in *Meritz*. Accordingly, a party giving an on-demand guarantee which contains wording concerning the commencement of proceedings must, if it wishes to dispute the payment, commence proceedings within time otherwise the ability to challenge the obligation to pay will be lost.

In *Wuhan Guoyo Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2013] 1 Lloyds Rep 161, the Court of Appeal considered the wording of a payment guarantee issued on behalf of the buyers under a shipbuilding contract.

The document was called a "payment guarantee" and contained elements of both on-demand and performance guarantees. The guarantee was given in respect of the buyers' obligation to pay punctually. Clause 1 stated that it guaranteed "the due and punctual payment by the Buyer". Payment by the guarantor was required to be immediate "upon receipt ... of your first written demand". Clause 7 provided that the Banks' obligations were not affected by any dispute between buyer and seller.

The court considered whether the document was a standard guarantee (ie where liability depends on the buyers' liability to pay), or whether it was an "on demand" guarantee and could be called on irrespective of the position under the shipbuilding contract. It was held that the guarantee was an on-demand guarantee and therefore (as in *Meritz*) acted as a bond against which payment had to be made, bringing payment guarantees with this wording into line with the decision in *Meritz*.

Performance?

A performance guarantee promises that the contract will be performed. The guarantors' liability will only be triggered once a breach of the underlying obligations has been established and will only be to the extent of the liability of the original party to the contract. Under English law, in order to establish a binding guarantee, the formalities of the Statute of Frauds 1677 need to be met, in particular there must be a signed memorandum containing the guarantee and the person signing the guarantee must have the authority to sign on behalf of the guarantor.

The English courts have adopted a commercial approach to the formalities required under the Statute of Frauds, reflecting the recognition of fixing exchanges in charterparties and attempts by parent companies to deny the existence of a guarantee. In the recent cases of *Stellar Shipping v Hudson Shipping Lines* [2010] and *Golden Ocean v Salgoacar Mining* 2012, the English courts took a wide view of what a signed memorandum was for the purposes of the Statute of Frauds. In *Golden Ocean*, the Court considered the email exchanges which contained the guarantee and held that the correspondence was sufficient to amount to a signed memorandum.

Conclusion

When faced with an offer of a guarantee it is also vitally important to ensure that there is clarity about the type of guarantee being offered (is it on-demand or performance?) and to observe any deadlines contained within the guarantee. It is also important to ensure that the necessary formalities are observed, especially with regard to authority. *MRI*



Bethan Bradley



Tom Kelly

Bethan Bradley is a legal director and Tom Kelly is an associate at Clyde & Co

Dealing with **the unusual**

Ian Barr, of the London P&I Club, looks at two challenging cargoes as well as risks to divers

Iron ore fines from Guatemala

The shipment of iron ore fines from Guatemala is a relatively recent development, with the first shipment out of St Tomas de Castillo apparently occurring in October 2012. The limited experience so far suggests that the cargo may be brought to the quayside in uncovered trucks, but stored alongside under covers. It seems reasonable to expect there to be limited local experience of this cargo, which may adversely affect the reliability of any sampling process, and probably little in the way of infrastructure to ensure proper cargo assessment. Although laboratory analysis results are reportedly available in Guatemala within a couple of days, owners should err on the side of caution in assessing the safety of the cargo.

should be tested for a TML. This means it should be treated as a Group A cargo unless testing proves otherwise.

All Group A cargoes require shippers to provide an advance declaration of loading showing the moisture content and TML. It is understood that the IMO Dangerous Goods Sub-Committee is presently considering a new IMSBC Code entry dealing with the scale generated from iron- and steel-making processes, which it is anticipated will be entered as a Group A cargo. The IMO Maritime Safety Committee recognises that, even though it is normally carried in a dry condition with moisture content far below its TML, if a cargo could liquefy then it should be classified as a Group A cargo.

Diving accidents

From time to time, the club sees instances of divers encountering difficulties when employed to perform underwater inspections. This can give rise to personal injury claims, fines and police investigations into the sequence of events, with the risk of criminal consequences for individual crew members.

The divers employed will be working in a commercial environment which is inherently hazardous. This is compounded by possible operational activities on board a ship outside the control of the divers. Owners should exercise due diligence in ensuring that they contract with suitable companies with technically competent personnel, operating within the legal requirements of the port state. If owners have difficulty identifying an appropriate company, the club can assist by accessing the local knowledge of the correspondents.

Any diving in the vicinity of the hull should be carried out under the control of the ship's permit to work system. Before the permit is issued, any onboard operations or equipment that may be a hazard to the divers must be identified and the operation suspended and/or equipment locked out. Ideally, this should be a joint exercise undertaken with the divers, including the posting of warning signs.

The diving operations should be conducted to a prepared plan. The master may wish to review this so that he is familiar with action to be taken in the event of an emergency. Where accidents occur, they are often due to a crew member overlooking the fact that the dive is in progress and engaging in activities giving rise to a known risk, with the result that owners will be liable for any injury or loss of life. *MRI*



Dealing with mill scale

Mill scale is a byproduct of the steel milling industry and is composed of coarse or fine brittle flakes of iron oxide. Once regarded as waste, its potential for being refined has seen this material increasingly traded as a bulk cargo.

Mill scale tends to drain water easily, accumulating at the bottom of a stockpile to form a "wet base". However, to create a viable stockpile for sea carriage, mill scale will typically be accumulated from various sources and its particle size may be influenced by the manner in which the material is handled. As a result, individual stockpiles may not be homogenous and it is likely that no two consignments will share the same characteristics, even when originating from the same port or shipper.

The variable nature of the cargo emphasises the importance of obtaining fully representative samples for the determination of moisture content and transportable moisture limit (TML). Furthermore, it also means the TML will need to be determined anew for each shipment in accordance with IMSBC Code requirements.

As mill scale is not currently listed in the IMSBC Code, it should not be accepted for shipment unless accompanied by an authorisation from the load port competent authority that the cargo is suitable for sea carriage. However, as with iron ore fines, mill scale can exhibit characteristics of liquefaction, so



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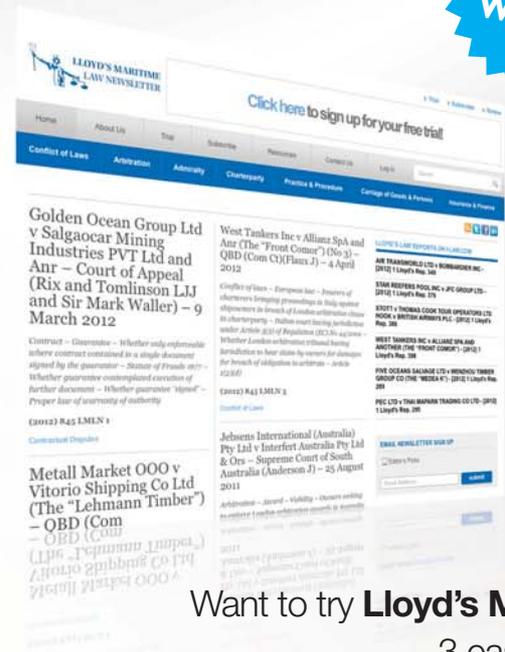
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