GARDNEWS

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Looking both ways

Claes Isacson
Chief Executive Officer

2010 is the 10th anniversary of the launch of Gard Services – the creation of which was a transformational step for the group. Looking back across the years, there is no doubt that we have undertaken an exciting journey over the last decade, and that our position today provides compelling evidence that the experiment has proved a success.

The journey has had many achievements: the implementation of operational synergies, the creation of first-class risk management systems, a single underwriting organisation and the building of a fully-owned global network. No part of the organisation has remained untouched by the change, and change remains our constant companion.

Change is constant

Internally we have a number of initiatives under way where we are seeing how we can work more efficiently and effectively. Whether it is focusing on our quality systems or examining our claims processes, we are not complacent about the need to continually review – and possibly improve – the way that we work.

"No part of the organisation has remained untouched by the change, and change remains our constant companion."

From an external perspective we completed the incorporation of Gard Re, a captive that reinsures Gard P&I and Gard M&E, in Bermuda on 22nd February. This final part of the jigsaw reinforces the fact that, while our operational hub remains firmly centred in Norway, our centre of gravity for governance is now in Bermuda.

Facing political challenges

Our increased involvement with the International Group has meant that there is an active team – led by Sara Burgess – supporting me in my role as Chairman. One of the most public issues on the International Group's agenda is the pending legislation in the United States in which sanctions could be imposed against both domestic and foreign entities "underwriting or otherwise providing insurance or reinsurance" for "any activity that could contribute to the enhancement of Iran's ability to import refined petroleum resources".

The effect would be to prohibit insurance cover for any vessel(s), regardless of country of flag/registry/beneficial ownership, trading refined products into Iran. Sanctions can be imposed against individuals and companies, as well as officers or directors of companies involved in prohibited activities.

In anticipation of possibly widespread problems arising from this legislation, we felt it necessary to amend the Rules of the Associations in order to broaden the current termination of cover provisions. The overriding objective of this is to protect the Clubs from being caught by the proposed sanctions, if and when they come into force. The consequences of being subject to the sanctions may be serious and may affect the quality and efficiency of the services we are offering our Members.

Delivering results

We will be announcing our headline results at the end of April, after the Board meeting. The performance across all areas of the business has been very strong, with a combined ratio for the group below 100 per cent.

The recent P&I renewal went according to expectations in terms of premiums and tonnage. Close to 99 per cent of the mutual tonnage renewed – showing a strong commitment from our existing Members – in addition to which there was a net growth of 1.3 million mutual GT.

"The performance across all areas of the business has been very strong, with a combined ratio for the group below 100 per cent."

In its first year of operation, the new underwriting organisation worked together well through the process. There are of course lessons we have learnt, but we are confident that the benefits of an increased focus by customer segment or geography will be apparent to both Members and clients in the coming years.

These are all positive developments for Gard, but our efforts for the coming months and years are firmly focused on the future and meeting the many challenges – big and small – which will undoubtedly affect us all. Many will be beyond our scope or area of influence, but we will continue to focus on improving our services, and ensuring we have the structural foundations in place to allow us to offer long-term support. ■

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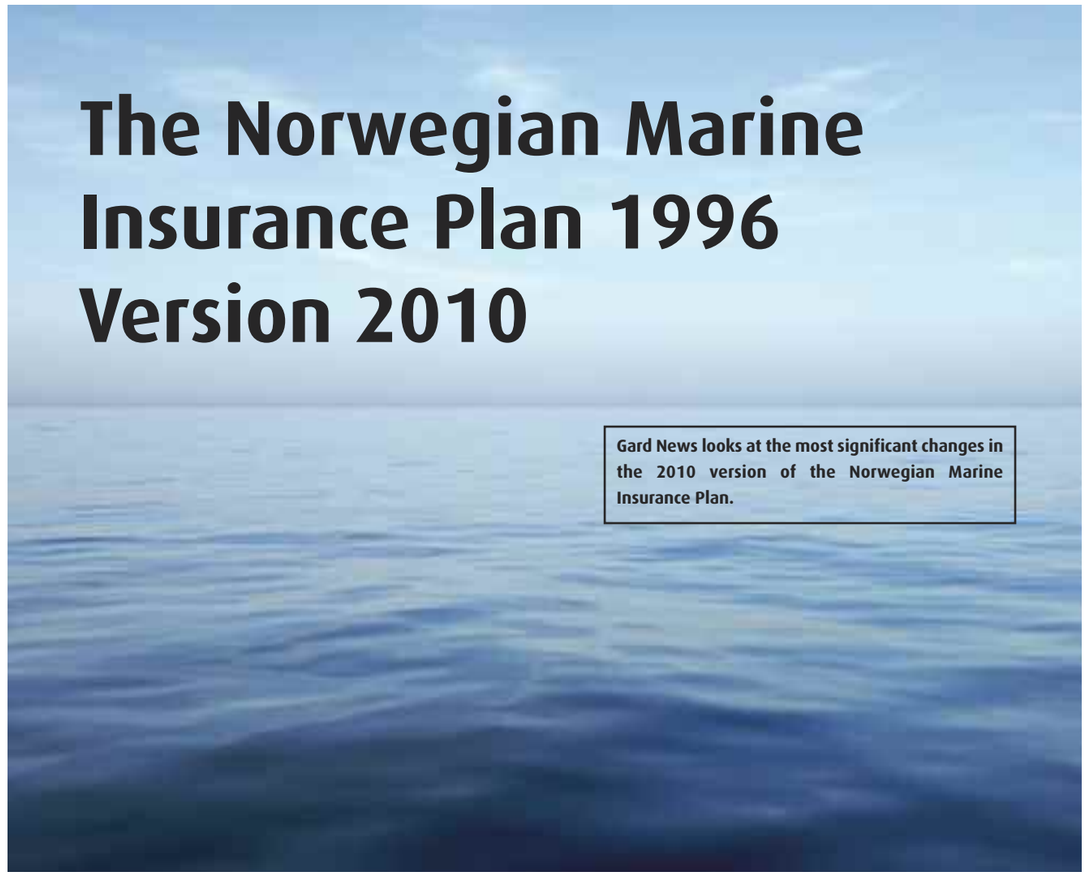
The Norwegian Marine Insurance Plan 1996 Version 2010



Gard News looks at the most significant changes in the 2010 version of the Norwegian Marine Insurance Plan.

The Nordic Association of Marine Insurers (CEFOR) has published the 2010 version of the Norwegian Marine Insurance Plan (the Plan).[1] This is the sixth update of the Plan since 1996. Previous versions were issued in 1997, 1999, 2002, 2003 and 2007. It is intended that the Plan should be updated every three years so the next version is due in 2013.

Clarification of the scope of paragraph 2-9 (war risks)

The 2010 version of paragraph 2-9 (a), (c) and (d) is set out below, with changes in italics:

"2-9 Perils covered by an insurance against war perils

An insurance against war perils covers:

(a) war or war-like conditions, *including civil war* or the use of arms or other implements of war in the course of military exercises in peacetime or in guarding against infringements of neutrality,

...

(c) riots, sabotage, acts of terrorism *or other social, religious or politically motivated use of violence or threats of the use of violence, strikes or lockouts,*

(d) piracy and mutiny, ..."

Paragraph 2-9 lists the perils defined as war perils. Paragraph 2-9 (a) starts naming a classic war peril: "war or war-like conditions". In the 2010 version, "civil war" has been added. This has been done for the avoidance of any doubt. The general view has always been that the term "war-like conditions" is sufficiently broad to include civil war. Civil war is specifically named in other war conditions and since the Plan is also used by many non-Norwegian owners it was thought advisable to mention civil war specifically.

"Civil war is specifically named in other war conditions and since the Plan is also used by many non-Norwegian owners it was thought advisable to mention civil war specifically."

In paragraph 2-9 (c), the words "other social, religious or politically motivated use of violence or threat of the use of violence" have been included to highlight the general principle underlying the cover for riots, sabotage and acts of terrorism. "Strikes and lockouts" have been moved to the end of the paragraph to make clear that the requirement for violence to be socially, religiously or politically motivated does not apply to strikes and lockouts. A further motivation for the change was the occurrence of armed attacks on vessels in inland waterways or close to shore where it has been unclear whether the attackers were acting purely for private gain or on behalf of a local political movement, or were motivated by a social or religious grievance. It may not be obvious whether these actions fall within the general terms "war" or "war-like conditions" or within the more specific terms "terrorism", "sabotage" or "piracy". The 2010 inclusion of "other social, religious or politically motivated use of violence or threat of the use of violence" may avoid doubt about these matters.

[1] This can be viewed on the CEFOR website (www.cefor.no) where it is also possible to order a hard copy as well as a PDF version of the Commentary.

Piracy

"Piracy" and "mutiny" are listed among the war perils in paragraph 2-9 (d). The Plan does not contain a definition of "piracy". The Commentary, however, provides detailed guidance. Significant changes have been made in the 2010 Commentary, although the text of the Plan itself remains unchanged.

Prior to the 2010 version, "piracy" was defined in the Commentary as "illegal use of force by private individuals in open sea against a ship with crew, passengers and cargo". "Open sea" was understood to mean outside the jurisdiction of the coastal state and in any event outside the territorial limit of 12 nautical miles. In view of the increase in illegal use of force in these areas, it was agreed that war risk insurers should assume cover for piracy closer to land than the previous limit of "territorial waters" or the high seas. The Commentary explains where and how the new limit is drawn.

In short, the new limit is drawn at the port limits, i.e., "piracy" if an attack takes place outside port limits and "robbery" if within port limits. If the port limits are not defined, the limit must be decided on a discretionary basis, depending on whether the use of force is in the nature of a war peril or a civil peril.

"An attack on a vessel is to be regarded as an act of piracy when the vessel is under way and the attack takes place outside port limits."

As regards merchant vessels, an attack on a vessel is to be regarded as an act of piracy when the following two conditions are met: the vessel is under way (i.e., not stationary) and the attack takes place outside port limits. However, an attack on a ship that is temporarily anchored outside the port limits also constitutes piracy if it is temporarily stationary during the process of dynamic positioning or is loading from or discharging to a loading buoy outside the port area. As regards ships designed for stationary operation, piracy will include attacks on the ship while it is operating in the field regardless of whether the field is located in "open sea" or the high seas.

The rationale behind drawing the line between piracy and robbery at the port limits is that the port authorities are normally able to provide assistance in respect of attacks taking place within port limits. In an attack outside the port limits it would be more difficult for the port authorities to intervene.

Piracy – The relationship between cover under Chapter 15 of the Plan and P&I

The rules of all P&I Clubs in the International Group contain the same standard war risks exclusion based on the Institute Hull Clauses. As is well known, under the Institute Hull Clauses piracy is treated as a marine peril, not a war risk, and as a result piracy is not excluded from P&I cover under the standard war risks exclusion. It is necessary, therefore, to ensure that, irrespective of the hull and machinery conditions used, the war cover provided fits in with that provided by the P&I Club. Not only must one ensure that there are no gaps in cover, but one must also limit overlap of cover as far as possible. If overlapping is unavoidable, then ideally it should be clear which insurance takes precedence, so that one avoids the need to apply the rules governing double insurance.

Under the Plan piracy is treated as a war risk. Chapter 15 of the Plan deals with war risks and paragraph 15-20 states that the Plan covers P&I liabilities and expenses which have been caused by a war peril. Since piracy is treated as a war risk, as a starting point the cover provided for P&I risks in Chapter 15 in respect of piracy overlaps with that provided by the P&I Clubs. Furthermore, there is a small risk that a peril that falls within the P&I war exclusion might fall outside the definition of war perils in paragraph 2-9 of the Plan, thus creating a potential gap in cover. In order to make certain that there is complete alignment between the cover under Chapter 15 and standard P&I cover, two important changes have been introduced to paragraphs 15-20 and 15-22:

1. Paragraph 15-20 now makes clear that the Chapter 15 war cover includes P&I liabilities arising either from a war peril as defined in paragraph 2-9 or from a peril that has been excluded from P&I cover by the war exclusion contained in Appendix IV of the Pooling Agreement of the International Group of P&I Clubs, which is incorporated into the rules of all International Group P&I Clubs. This ensures that no gaps in cover can arise.

2. Paragraph 15-22 states that the cover provided by Chapter 15 for P&I liabilities arising from war risks shall not be subsidiary to P&I cover taken out with a P&I Club that is a party to the Pooling Agreement of the International Group of P&I Clubs.

This means that liabilities and/or expenses that are recoverable under both the ship's P&I insurance and paragraph 15-20 of the Plan will be covered by the Chapter 15 war risks insurer. The war risk insurance will always be seen as the main insurance. This is in line with current practice in piracy cases, but the legal foundation for this practice is now quite clear. Note that all P&I Clubs rules contain a provision stating that P&I cover is subsidiary to cover provided by other insurances, so that there is alignment also on the P&I side.

"Since piracy is treated as a war risk, as a starting point the cover provided for P&I risks in Chapter 15 in respect of piracy overlaps with that provided by the P&I Clubs."

Coral reef damage – P&I v. hull and machinery insurance

The 2010 version of the Plan has introduced a significant change with regard to hull and machinery cover for damage to the environment. Paragraph 13-1(f) of the new version of the Plan now states that liability for damage to coral reefs and other environmental damage is expressly excluded from cover.

A survey of other hull and machinery policy conditions available in different markets indicates that, as a rule, the responsibility for coverage of damage to coral reefs will not lie with the hull and machinery underwriters, but rather will rest with the P&I underwriter in question. This is either due to the wording of the policy conditions or, if nominally within the ambit of such conditions, these are normally written out of the offered policy by

specific exception by the insurance broker, although this is not always the case.

As a practical matter for vessels insured under the Norwegian Plan, by default this liability will now be covered by P&I underwriters, and related claims will be handled by them. This is a significant change, and places an additional burden on the P&I Clubs with regard to physical damage to coral reefs. This is not to say that P&I underwriters were not previously involved where coral reef damage occurred, since ships causing oil pollution incidents could also harm coral reefs, and in certain jurisdictions such damage would fall within natural resource damage claims by governmental resource trustees.

The cost of assessment and repair of coral reef damage is quite high, even when the physical contact in question causes little damage to the ship itself. It seems natural therefore that all environmental damage to coral reefs should be handled by the insurer who has most experience and expertise.

Read more about damage to coral reefs in Gard News:

– "P&I incident – Damage to coral reef" in Gard News issue No. 157.
– "Mitigating claims for damage to coral reefs from vessel groundings, salvage and wreck removal in the US" in Gard News issue No. 182.
– "Legal implications of coral reef damage in the United States" in Gard News issue No. 183.

General average and salvage – Paragraph 4-8

In the 2010 version of the Plan, paragraph 4-8 has been amended to clarify that the insurer is liable for salvage awards on the same basis as for general average. Salvage awards are generally apportioned over the values of the salved property (e.g., ship, cargo, bunkers) which apply at the time the salvage operation is completed and the ship re-delivered. Until the York/Antwerp Rules of 2004 came into effect, the salvage award was always recoverable in general average. Therefore, the salvage award was re-apportioned between the various interests based on their values at the end of the maritime adventure.

In 2004, a new version of the York Antwerp Rules (YAR 2004) was introduced. Shipowners have generally been reluctant to adopt these new rules, but still there have been a number of general average cases to which the YAR 2004 has been applied. One of the features of YAR 2004 is that salvage payments shall generally "lie where they fall" and thus are

"As a practical matter for vessels insured under the Norwegian Plan, by default liability for coral reef damage will now be covered by P&I underwriters, and related claims will be handled by them."

not re-apportioned in general average. The amendment to paragraph 4-8 clarifies that the insurer will still respond to the contribution apportioned on the interest insured, i.e., the ship under a normal hull and machinery policy, regardless of whether or not the salvage is re-apportioned in general average.

Another relatively minor amendment introduced in the cover for general average makes clear that the insurer is not liable for any interest allowed in general average beyond the due date for the claim under the policy.[2]

Further, paragraph 4-8 contains a so-called General Average Absorption Clause,[3] whereby the insurer agrees to cover general average in full, up to a specific pre-determined limit, including expenses and sacrifices for which contributions from other parties to the marine adventure could have been claimed. The Commentary now makes it clear that the insurer is liable for interest as well as claims handling and adjustment charges in addition to the amount agreed in the policy.

Duty of disclosure – Paragraph 3-1

Recently, some unusual shipbuilding contracts have been seen in the market, pursuant to which the shipyard can not be held liable for damage that is covered under a hull and machinery policy in force after delivery of the ship. The parties involved in the revision of the Plan agreed that such waiver of rights by the shipowner is of importance to insurers when they consider the risk in order to decide on premium and conditions. It is, therefore, now stated in the Commentary that the person entering the insurance contract has a duty to inform the insurer about such unusual contracts. Any breach will be considered under the general rules dealing with breach of duty of disclosure (paragraphs 3-2 to 3-6).

Loss of hire in connection with transfer of ownership – Paragraph 16-15

If a transfer of ownership of the vessel has to be postponed due to repairs covered by the Loss of Hire insurance, the claim is limited to an interest compensation for the delay, in case this is lower than the daily insured amount. As to calculation of the deductible period, under previous versions of the Plan it has been held that in case the daily interest is lower than the daily insured amount, such lower daily compensation shall be converted into a period of full loss of hire, along the principles of partial loss of hire ("slow-steaming") dealt with in paragraph 16-4. Consequently, a deductible stipulated at a given number of days could take far longer to be exhausted, depending on how the daily interest allowance compared to the daily insured amount. The 2010 version of the Plan makes clear that the deductible period shall be calculated in consecutive days even if the loss of interest differs from the sum insured per day.

Loss of Hire for fishing vessels – Paragraph 17-56 to 17-61

The ordinary provisions for Loss of Hire insurance under Chapter 16 have proved unsuitable for fishing vessels, largely because it is difficult to calculate the loss of income based on the "time lost" only. These difficulties arise to a large extent from authorities' control of fishing, e.g., seasonal (time) limitations for fishing, limitations for certain fish species, vessel quotas or overall seasonal quotas. Following increased demand for Loss of Hire insurance for fishing vessels, a complete new section has been introduced to that effect in Chapter 17.

The Nordic connection

Finally, a very important and wide-ranging change refers to the greater involvement of

[2] This issue can become relevant as YAR 1994 and 2004 provide for interest allowance three months beyond the date of the general average adjustment, and in case the insurer pays its proportion of general average before the three months have elapsed, the insurer can deduct interest accordingly.
[3] See article "General average absorption clauses under the Norwegian Marine Insurance Plan" in Gard News issue No. 161.

References to a "Norwegian" adjuster have been replaced with references to a "Nordic" adjuster.

other Nordic countries in procedures set up in the Plan.

The Plan has always recognised the important role that is played by Norwegian average adjusters as impartial experts and as a first step in the resolution of disputes between the insurer and the assured. The opinion of an adjuster is not binding but in practice it is accepted in the vast majority of cases. Where referral to an adjuster is allowed by the Plan, the adjuster is chosen by the assured and the related costs are covered by the insurer. Paragraph 5-5 allowed either party to require any disagreement concerning the adjustment issued by the insurer to be submitted to a Norwegian adjuster before being brought before a court. Referral to a Norwegian adjuster was also allowed in two other cases, namely in paragraph 2-3 in connection with a demand by either party for a revision of the insurable value and in paragraph 12-10 in connection with disagreement in respect of surveys between the representatives of the insurer and the assured. In all these cases the reference to a "Norwegian" adjuster has been replaced with a reference to a "Nordic" adjuster.

The reason for this change is a movement among Nordic insurers and shipowners towards unification of standard insurance conditions and the Plan is the most obvious

"A very important and wide-ranging change refers to the greater involvement of other Nordic countries in procedures set up in the Plan."

baseline from which to work. As a first step the Norwegian Ship Owners Association co-ordinated the participation of representatives from the Danish and Swedish shipowners asssociations as observers in the permanent Plan Revision Committee. On the insurers' side, the Nordic perspective was already in place, as CEFOR now represents all the Nordic countries. Representatives from Sweden, Denmark and Finland participate in CEFOR's internal Plan processes and CEFOR's representatives on the Plan Revision Committee include a representative from Sweden.

The expansion of the Plan revision process to include representatives from the other Nordic countries has been a success and it is very probable that it will continue in the future.

Further reading

Other clarifications, including practical examples, have been introduced in the Commentary, without materially amending the Plan. A complete list of changes in the text and Commentary can be found at www.cefor.no and in the preface of the 2010 version of the Plan. Changes are also highlighted in the hard copy of the Plan as well as in the complete Plan text and Commentary available at www.norwegianplan.no. ■

Dangerous heaving lines

Is the art of properly throwing a heaving line being lost?

A recognised seaman's skill

In order to bring a hawser from a ship to a jetty, a heaving line is thrown from the ship to the linesmen ashore, who will pull in the hawser and make fast on a puller. When using tug boats, heaving lines are also thrown from the ship, to be picked up by the tug's crew and fastened to a messenger line. The messenger line is then hauled on board the ship and thereafter follows the towing wire of the tug, which is hauled on board the ship by the winch and made fast.

Being able to throw a heaving line properly, to reach the vicinity of the receiver, has been a recognised seaman's skill from the days of sailing ships. To add weight and body to the end of the heaving line, the tradition was to either use a heaving line knot or a so-called monkey fist, the latter still being the most popular method in use. An experienced seaman will still be proud of knowing how to make a monkey fist out of rope and of being good at throwing the heaving lines. In the old days it was the job of deck boys to coil up the lines, while the able bodied seamen would do the throwing, an indication of status on board.

Dangerous weights

The Belgian tug boat company URS, operating more than 30 tugs from their head office in Antwerp, for the servicing of ships on the Belgian coast and in and out of the busy Belgian and Dutch ports on the river Scheldt, has drawn Gard's attention to the growing practice of adding dangerous weights to heaving lines. It is recognised that a monkey fist just made up of rope is a bit on the light side if the skills of the thrower are inadequate, so seamen have always been tempted to dip it in lead-based paint or even to put a steel nut or other heavy object inside it. But it has also always been known among seamen that such practices are not appreciated by people on the receiving end of the heaving line.

When a port worker or a crew member on a tug boat receives a dangerous heaving line, he is likely to get angry enough to cut off the monkey fist or whatever heavy weight being used as an attachment. Such trophies

A heaving line with a monkey fist made of ropes only.

collected by URS employees and a collection of items on display in the office of the Antwerp Port Authorities show that they look more like medieval weapons or tools employed to frighten off pirates than something used for the passing of lines from a ship: heavy steel shackles, balls of lead, various steel spare parts, sections of solid rubber, bolts and nuts, to mention but a few.

Monkey fists are normally made up of three turns of rope, and when fists of five and even six turns are found, they are likely to have a heavy object inside. Cutting open such monkey fists, steel nuts, balls of lead or steel, golf balls and even billiard balls have been found. The monkey fist record in Antwerp is 1,070 grams. Someone threw a weight of more than a kilo from the forecastle of a large ship, to pass a heaving line to a person on the small deck of the tugboat far below! As vessels are growing in size, the heights that heaving lines are thrown from make weighted heaving lines more and more dangerous to the receivers.

Lack of regulations

There are not many regulations to be found on how to restrict weights of heaving lines, but at least the "Code for Safe Working Practices for Merchant Seamen" issued by the UK Maritime and Coastguard Agency, is very clear on this subject in section 25.3.2:
"Vessels heaving lines should be constructed with a monkey's fist at one end. To prevent personal injury, the fist should not contain any added weighting material."

"When a port worker or a crew member on a tug boat receives a dangerous heaving line, he is likely to get angry enough to cut off the monkey fist or whatever heavy weight being used as an attachment."

As for the Port of Antwerp, Article 19.8 of the Municipal Police Regulations places clear responsibility on the master of a ship if dangerous heaving lines are being used. A free translation from Dutch reads:
"The use of heaving lines the end of which is weighted in such a way that the action of throwing the line constitutes a hazard and/or cause damage and/or injury is prohibited".
This has created a legal basis for the imposition of fines, and the Antwerp Port Authorities have made use of it when incidents involving dangerous heaving lines have happened. The four most serious cases have resulted in 66 man-days off work due to injuries and there are also cases of damage to cars and other equipment. One person received a weighted monkey fist in his face

Cutting open a very heavy monkey fist.

The lead ball from inside the monkey fist.

A heavy steel bushing on a heaving line.

A solid piece of rubber gasket, with four steel bolts embedded to gain weight.

A ball of lead was used as a weight on this heaving line – a frightening experience for those on the receiving end.

One monkey fist was found to contain a lead ball weighing 810 grams.

A steel bar used as a weight, covered by a piece of reinforced hose.

and was lucky to get just a broken nose. The kinetic energy from such a weight thrown from high above could be sufficient to kill a man or make him permanently disabled if hit in the head. If such a hit should result in death, that could also lead to criminal prosecution for manslaughter against the persons found responsible.

Accidents

Luckily, many near accidents have caused more fright than injury, but over the years Gard has recorded several accidents with heaving lines. In one case a pedestrian on a pavement was hit in the shoulder while looking at a passenger vessel docking in a Swedish port. The heaving line went too far. As it can not be expected that pedestrians wear hard hats if they look at ships, there has to be some common sense on the part of the people on board, both when making heaving lines and when throwing them.

"One person received a weighted monkey fist in his face and was lucky to get just a broken nose."

Naturally, the linesman ashore or on board a tug has some responsibility for his own safety. A hard hat should be worn and he should be alert and as far as possible keep out of the "line of fire". But his job is to catch the line, and the risk of accident is increased if he is on a slippery surface, in the dark or blinded by floodlights – and hard hats have their limits.

"There has to be some common sense on the part of the people on board, both when making heaving lines and when throwing them."

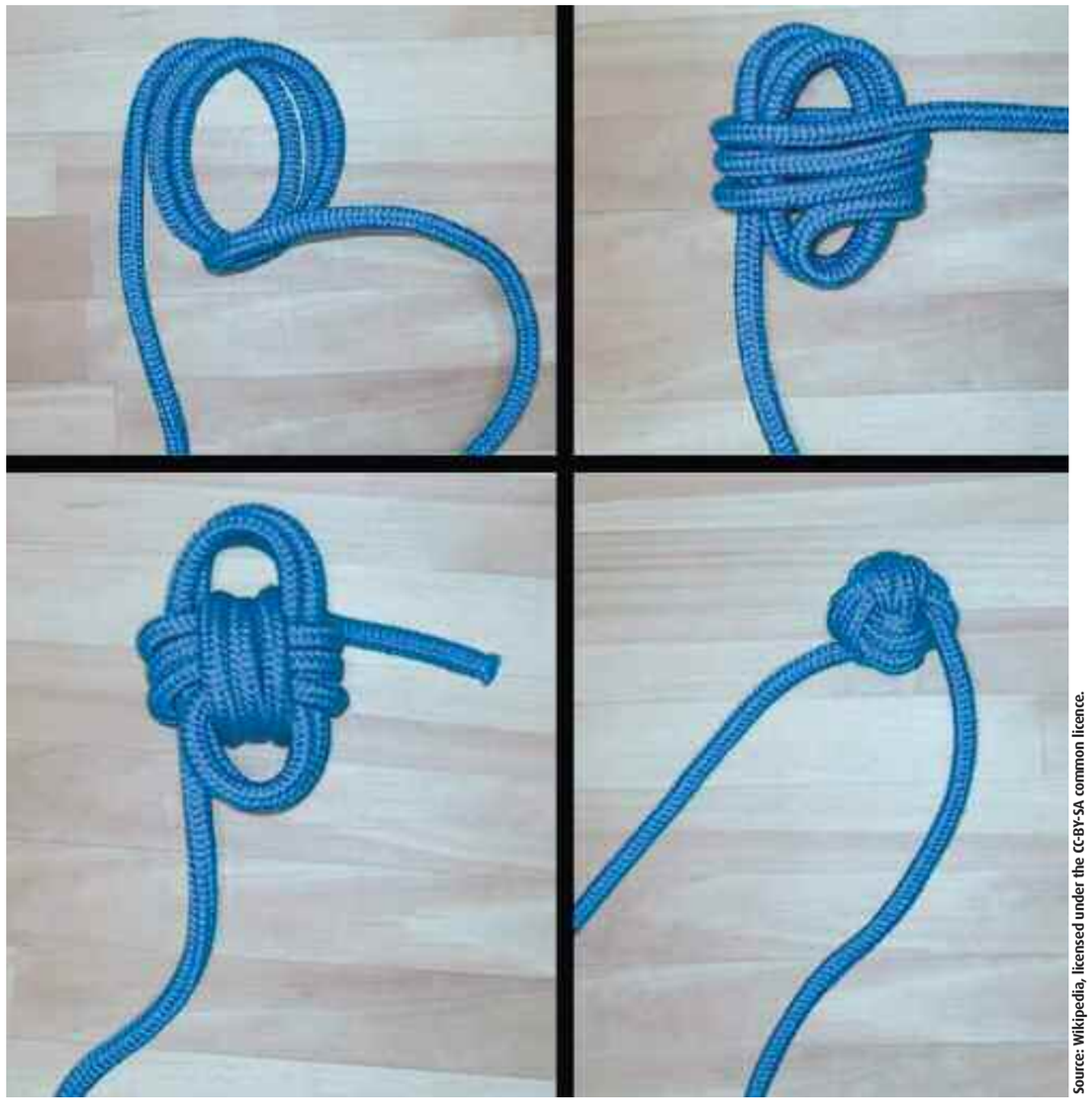
Seamen should also know that if excessively weighted heaving lines are not cut off by the receivers on a jetty, they will be returned in the same manner and can then cause injuries to people on board.

Techniques

It is not always an easy task to get a line from a ship to a tug or a jetty, especially in strong winds. Being good at throwing a heaving line is a seaman's skill, and that is not a skill picked up there and then. Practice makes perfect, so seamen should be challenged to exercise with heaving lines and not just to fix a steel shackle to the monkey fist when the wind is blowing in the wrong direction. First of all it is important to have a rope that will fly well through the air. In the old days it would always be a rope of natural fibres and one trick was to wet the rope before throwing it. Coiling the rope properly and how the coils are divided and held in the left and the right hand are very important. When the rope is thrown, it is with a powerful swing by a straight arm. Those good at throwing a line in the old days could develop special personal techniques, like throwing a heaving line with both arms. The main throw by the straight, right arm will be followed by the coils in the left, also thrown from the right side, diagonally across the body. In some navies this is still practised.

"Practice makes perfect, so seamen should be challenged to exercise with heaving lines and not just to fix a steel shackle to the monkey fist when the wind is blowing in the wrong direction."

Linesmen on tug boats will prefer ship heaving lines to be of a coloured and floating material, being easy to see and less likely to end up in propellers. Small diameter rope of



Monkey fist: how to.

Source: Wikipedia, licensed under the CC-BY-SA common licence.

8-10 mm thickness is preferred, not heavier material that may cause injuries. As the tug will usually follow behind the bow-wave of the ship, lines should not be thrown from the extreme forward end of the forecastle, but rather from the shoulder of the ship, not to hit the wheelhouse, but the aft deck of the tug boat. Monkey fists should be of rope only, never weighted and preferably not even dipped in paint, as that makes them very hard. An alternative to the monkey fist could be a ring or ball of soft rubber like those used for lifelines, or a small leader or canvas bag, partly filled with a small amount of sand. Such a bag should be oversized for its content, to reduce the impact if it hits a person.

Conclusion

Masters are advised to check all heaving lines on board and remove all heavy monkey fists and dangerous attachments. It is important to understand the dangers involved in throwing an object at a receiver on a lower level and the risk of being prosecuted or fined for causing injury to other people and equipment. And last but not least, crew members should be proud of the traditional seaman's skill of being good at throwing a heaving line. Practice makes perfect. ■

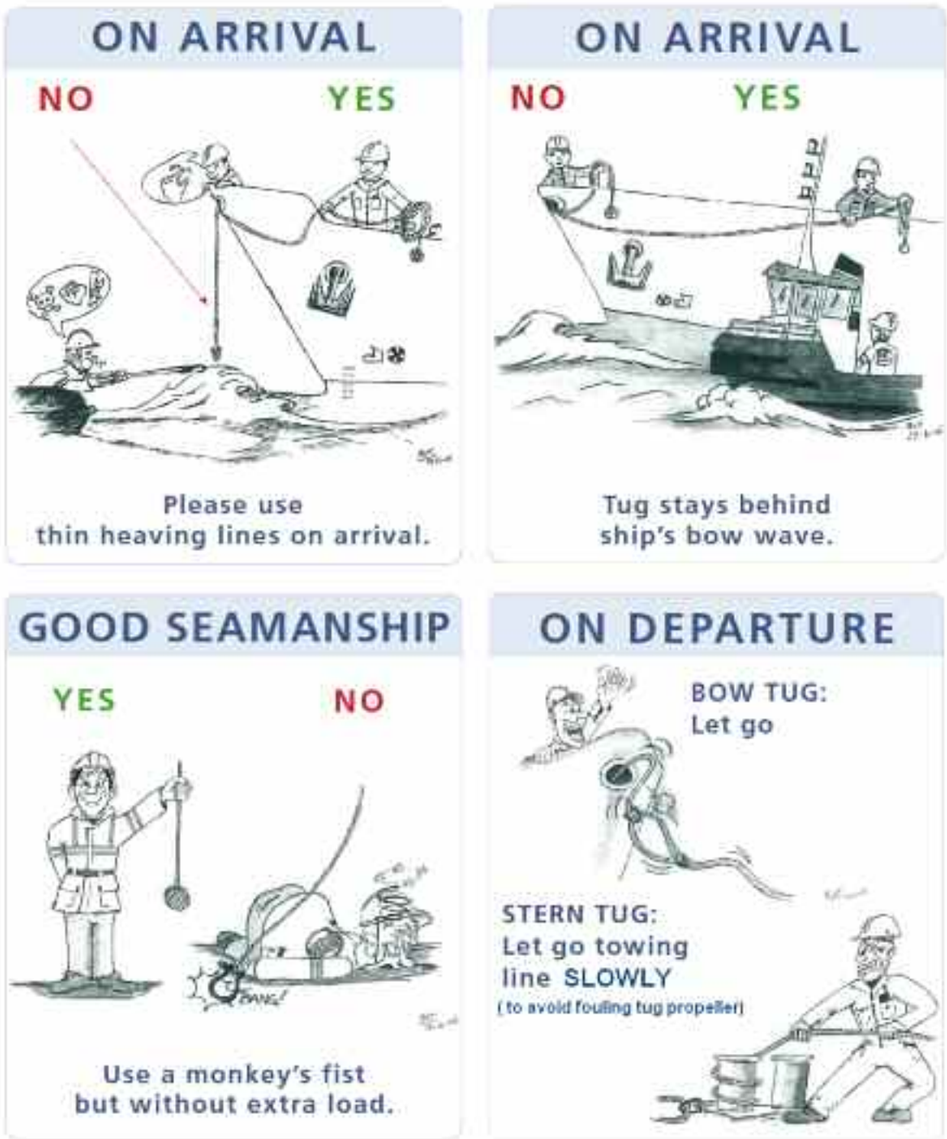


Illustration courtesy of URS nv.

Work safely with tugs.

BIMCO piracy clauses update

BIMCO amends the piracy clause for time charterers and publishes two new voyage charter clauses.

The article "Piracy charter party clauses – Risk shifting or risk sharing?", which appeared in Gard News issue No. 195, reported the publication of the BIMCO piracy clause for time charters. This article considers amendments to the BIMCO time charter clause and introduces two new BIMCO voyage charter clauses.

BIMCO time charter clause

Gard News pointed out previously that the BIMCO time charter clause was particularly "owner-friendly", in part because it provided for an open-ended obligation for charterers to pay hire while the vessel was detained by pirates. Apparently Gard News was not alone in this assessment. BIMCO recognised that "the reaction to the Clause from the industry was that it was perceived as being slanted in favour of the owners. The perception stemmed from the express provision in the Clause that if the vessel were to be detained by pirates then it remained on hire throughout the period of detention".[1]

BIMCO addressed charterers' concerns by introducing an amended version of the clause, in which the period that the vessel remains on hire is capped at 90 days. This is a positive step toward making the clause more balanced between the interests of charterer and owner.[2]

BIMCO voyage charter clauses

BIMCO also published two clauses for voyage charterparties. One is for consecutive voyages and contracts of affreightment (COAs) and the other is for single voyages.

The clause for consecutive voyages and COAs is designed for long-term agreements rather than spot fixtures. Like the time charter clause, the owner is entitled to take an alternative route if he reasonably believes the intended route is unsafe due to piracy in the area. In the event the vessel uses an alternative route the clause provides a formula to adjust the freight. If the decision is to proceed then the owner is entitled to take preventive measures and additional costs including insurance premiums[3] are to be shared by the parties. In the event the vessel is seized and detained by pirates, the charterer is liable for one half of the demurrage for the period of detention.

"In the event the vessel is seized and detained by pirates, the charterer is liable for one half of the demurrage for the period of detention."

The BIMCO clause for single voyage charter provides:

"If, after the date of the fixture, and in the reasonable judgment of the master and/or the owners, any port, place, area or zone, or any waterway or canal on any part of the route which is normally and customarily used on a voyage of the nature contracted for becomes dangerous, or the level of danger increases to the vessel, her cargo, crew or to the persons on board the vessel due to any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure, the owners shall be entitled to take a reasonable alternative route."

The key difference between the single voyage charter clause and the others is that owners are not entitled to choose an alternative route if the piracy risk existed at the time of the fixture. This reflects the short time horizon for spot fixtures and the information as to risk equally available to both parties to the fixture. Owners are, however, entitled to alter the route if the situation has changed and danger increased after the fixture. However, the costs of using the alternative route are for the owner.

Both voyage charter clauses provide that the clause "shall be incorporated" in the bills of lading issued pursuant to the charterparty and if not incorporated the owner is provided with an indemnity from the charterer for claims arising from the failure to do so.[4]

Broad scope

All three clauses include wording broadening their scope to include "violent robbery" within the definition of piracy. This addition is meant to address the attacks for example in Nigerian waters and ports.

While all charter terms are subject to negotiation, the BIMCO clauses provide clarity and an important starting point with respect to the allocation of risks and costs between owner and charterer when the customary routing takes the vessel through pirate-infested waters. ■

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[1] BIMCO Special Circular No. 2, November 2009.
[2] The full text of the three clauses can be downloaded from the BIMCO website at www.bimco.org.
[3] According to the BIMCO explanatory notes, the reference to insurance does not include Kidnap and Ransom insurance. See BIMCO Special Circular No. 2, November 2009.
[4] "The Charterers shall indemnify the Owners against all consequences or liabilities that may arise from the Master signing bills of lading as presented to the extent that the terms of such bills of lading impose or result in the imposition of more onerous liability upon the Owners than those assumed by the Owners under this Clause."

Why registration with MSCHOA is vital in the war on piracy

Maritime Security Centre Horn of Africa (MSCHOA), run by the EU Naval Force (EUNAVFOR), helps protect merchant shipping in the region by providing information that assists in preventing pirate attacks and disrupting the activities of pirate groups. Yet not all vessels choose to register with the centre, despite the support that MSCHOA can provide. In an interview to Gard News, Commander John Harbour, spokesman for EUNAVFOR, points out the benefits of registering with MSCHOA and employing best management practices to protect from piracy.

Best management practices

For all ship owners, operators and crews, the battle against piracy should actually start before their vessels enter the danger zones of the Gulf of Aden and the Somali Basin/Indian Ocean. Incredible as it may seem, some vessels are still not taking the most basic measures to help protect themselves from hijackers. Despite a number of attacks from pirates, even in the EU-warship-patrolled Gulf of Aden, certain fundamental best management practices (BMPs) are still being ignored by some operators.

As reported in the article "Piracy – Best Management Practices for shipowners and operators are revised", published in Gard News issue No. 196, BMPs to deter piracy in the Gulf of Aden and off the coast of Somalia were adopted in March 2009 by various international industry representatives and approved by IMO. These BMPs draw attention to one of the most crucial things that can help in case a pirate attack should occur: the registration of a vessel with MSCHOA.

Registering with MSCHOA

MSCHOA aims to provide a service to mariners in the Gulf of Aden, the Somali Basin and off the Horn of Africa. This service involves providing protection to shipping from the threat of pirate attacks. However, in order to do this effectively, MSCHOA needs to know what vessels are operating in the piracy hot spots. This can be done simply by registering vessels with MSCHOA at its website, www.mschoa.org. The site also allows for the updating of a ship's position and enables MSCHOA and UK Maritime Trade Operations (UKMTO) Dubai to send up-to-date information to a vessel to help avoid or reduce the risk of pirate attacks.

Commander John Harbour, spokesman for EUNAVFOR, points out that if you do register and employ BMPs, "clearly you are going to be better off", citing as one advantage the extra advice that can be provided by MSCHOA, particularly on the subject of BMPs. But as to why some vessels are not registering with MSCHOA, he says there is "no one clear answer".

According to Commander Harbour, off-the-record information indicates some operators are clearly uncomfortable with registering their vessels: "It is unclear who actually makes the decision as to whether or not to register. I believe that some are unsure about giving information out that could be

"Anecdotal evidence suggests that the majority of vessels that have been hijacked by Somali pirates were not registered with MSCHOA."

prejudicial to company policy and may affect their profitability. But the fact is that over 75 per cent do register and therefore we do our utmost to encourage the rest to do so as well".

Anecdotal evidence suggests that the majority of vessels that have been hijacked by Somali pirates were not registered with MSCHOA. The conclusion to be drawn would seem to be obvious.

A French naval vessel, part of the EUNAVFOR, arrests 19 pirates after coming to the rescue of a Panamanian ship.

In order for vessels to make the most of the protection and advice that MSCHOA can give, details such as cargo, speed, crew numbers, freeboard size and a number of other factors

"The excellent information regarding BMPs has been significantly enhanced by two resources recently introduced by MSCHOA/EUNAVFOR."

are required so that a comprehensive assessment of a particular ship's vulnerability can be made. This is done by feeding all the information into a matrix.

Commander Harbour explains: "Once they get into the area it is useful to know what cargo they have and what type of vessel. We do a vulnerability assessment on them and, if they are particularly vulnerable, we may give them a personal escort. If they are reasonably vulnerable, then we recommend that they go with the group transit. But the thing about registering of course is that it does give them excellent information on Best Management Practices.

We often find that the ships and companies that register clearly have a very firm security policy. More often than not they are taking the threat seriously and have put into place hardened measures. If they have not put hardened measures in place prior to registering, then normally they are very interested in putting them in place after registering and getting all the advice they receive from MSCHOA".

Anti-piracy chart and anti-piracy briefing package

The excellent information regarding BMPs has been significantly enhanced by two resources recently introduced by MSCHOA/EUNAVFOR: an anti-piracy chart and an anti-piracy briefing package for masters. The piracy chart is a map of the Red Sea, Gulf of Aden and the Arabian Sea. It shows the Gulf of Aden's internationally recommended transit corridor (IRTC), with advice for vessels on how they

"Pirates are becoming more desperate and are moving into the Indian Ocean and developing new tactics with a view to attacking ships out there."

should safely join it, as well as an overview of BMPs and what to do in case pirates are spotted. The advice on the chart is listed under headings, including "Identified suspect vessels in vicinity", "Attack in progress", "Pirates on board" and "Vessel hijacked".

According to Commander Harbour, "[the chart] is basically the one document on the bridge that has all the security advice that a ship really needs to take".

The masters' briefing package, given to vessels with a speed of less than 15 knots and a freeboard of less than seven metres, which are perceived to be more vulnerable, consists of a checklist booklet, a DVD on BMPs and a folder entitled "How to survive a piracy attack". It is handed out by the staff of the Suez Canal authority as ships pass through the canal.

Indian Ocean

However, reassuring as these initiatives undoubtedly are to a master and his crew, the presence of EUNAVFOR, NATO, CMF and independent warships in the Gulf of Aden has led to other tactics being deployed by pirates, particularly the use of mother ships which allow them to operate far out in the Indian Ocean. Although vessels using the Gulf of Aden's IRTC can expect help from a EUNAVFOR warship within around 15 minutes, the sheer size of the Indian Ocean means that such help is not so readily available for a vessel operating there that finds itself under attack.

Commander Harbour says: "What we have done is dramatically reduce the number of hijackings in the Gulf of Aden. That is the reason the pirates are becoming more desperate and are moving into the Indian Ocean and developing new tactics with a view to attacking ships out there. What do we do to combat that? Well, the primary remit of EUNAVFOR is to protect World Food Programme shipping. The second mandate is to protect vulnerable ships and the third is to deter and disrupt piracy. Deterrence of course

"Deterrence of course works very well in the Gulf of Aden because they see us around and they tend not to attack."

works very well in the Gulf of Aden because they see us around and they tend not to attack. When they do attack we are close enough to do something about it.

"The disruption element really comes into its own in the Indian Ocean. We have got 'eyes in the sky' in the form of intelligence gatherers. In particular, the one thing EUNAVFOR does have is access to maritime patrol aircraft. These give us good intelligence on pirate action groups that are operating way out in the Indian Ocean. Effectively, we have got time to send appropriate vessels down there before attacks take place, with a view to disrupting their activities. When we find them, if they have got pirate paraphernalia on board, we will seize their craft, their weapons, destroy any other craft they have and leave them enough food and water to get back to Somalia. This can disrupt a pirate group for up to four weeks. People might say, "Well, they will get back out there", but it is still four weeks that they are not operating.

"Vessels operating in the Indian Ocean should still be registered with MSCHOA. The thing to remember is that MSCHOA goes hand-in-hand with UKMTO. Once they are registered with the UKMTO we have got a system in the operations room which indicates exactly

"You join MSCHOA and get all the guidance, the charts and everything else that you need to help protect yourself against piracy."

where the ship is. If we know that there is pirate activity where that ship is operating and we have not disrupted them because we have only got maritime surveillance aircraft on them, we can actually guide masters and talk to them directly through MSCHOA and tell them to divert, change course or go around a particular area".

He adds: "Although we would like everyone to register for transiting the Gulf of Aden, our actual operating area is huge and goes well beyond the area of the Gulf of Aden. Registering really goes hand-in-hand with the UKMTO advice as well. In addition, you join MSCHOA and get all the guidance, the charts and everything else that you need to help protect yourself against piracy".

Pirates on the deck

To highlight the effectiveness of registering with MSCHOA, Commander Harbour points to the recent plight of the 25-strong crew of the M/V ARIELLA. In the early morning of 5th February, Somali pirates managed to get on board. The vessel was part of a group transit in the IRTC when it was attacked. The crew immediately sent out an alert. This was picked up by the Indian warship TABAR. It sent out a warning and a EUNAVFOR aircraft was soon on the scene, confirming the presence of pirates on the deck of the ARIELLA. The crew of the French EUNAVFOR aircraft made contact with the Danish NATO warship ABSALON. As the special forces from this vessel boarded the

"Following BMPs will give an owner and his vessel the benefit from the hard-won experience of other owners who have been through the danger areas."

ARIELLA, crew from the Russian navy ship NEUSTRASHIMYY observed a skiff trying to leave the area and detained the individuals they found.

Commander Harbour explains that although the crew had followed BMPs and had done everything they could, the pirates were very swift in getting on board. "Because they registered and were in a group transit, they were within 15 minutes of a helicopter flight path and there was a maritime patrol aircraft above them".

Conclusion

All owners and operators should properly and carefully prepare and plan for a transit of the Gulf of Aden or the Indian Ocean. The risk of being attacked and, worse, hijacked, may be statistically low, but nobody, either ashore or on board, is likely to forget the experience of being hijacked. The financial and commercial repercussions are also significant.

Two key points stand out. Firstly, following BMPs will give an owner and his vessel the benefit from the hard-won experience of other owners who have been through the danger areas and will provide that owner with a basis on which to plan and train for his vessel's transit. Secondly, registering with MSCHOA will ensure the vessel has access to information and assistance which could mean the difference between an uneventful passage and an attack or hijack.

For a practical account of a ship master's interaction with MSCHOA and UKMTO during transit of the Gulf of Aden see the article "From a master's desk – Transiting the Gulf of Aden" in Gard News issue No. 196. ■

Conditions for deployment of Filipino seafarers in the Gulf of Aden

Requirements are imposed by POEA for deployment of Filipino seafarers on board vessels transiting the Gulf of Aden.

In 2009 the Philippine Overseas Employment Administration (POEA) issued a Resolution declaring the Gulf of Aden a high-risk zone and providing that seafarers on board vessels passing through the area are entitled to receive double compensation and benefits.

Transit

A recent POEA Resolution has established conditions for the deployment of Filipino seafarers on board vessels transiting the Gulf of Aden. The following requirements have been introduced:

– That the vessel which the seafarer being processed will board, will strictly pass only within the designated Internationally Recommended Transit Corridor (IRTC);

– That the said passage will be registered with the Maritime Security Centre Horn of Africa (MSCHOA) and the United Kingdom Maritime Trade Organisation (UKMTO);

– That the vessel has a security plan in place and that the seafarer will be briefed about it.

Gulf of Aden: declared high risk zone by POEA.

Training

In addition, deployment of Filipino seafarers on board vessels transiting the Gulf of Aden shall be allowed only if shipowners, through manning agents, provide training to their crew on how to avoid, react, and cope with piracy and other related incidents. For processing of seafarers transiting the Gulf of Aden, POEA requires a certificate of compliance with a Pre-Departure Orientation Seminar, which includes shore-based training to improve knowledge and skills on how to carry out risk assessment, understanding piracy threats and current patterns, how to conduct the physical preparation of the vessel, conduct during transit to the high risk zone, actions on encountering pirates, as well as on-board exercises and drills on implementing anti-piracy strategy.

A tripartite summit to address piracy issues was held in Manila in January 2010 with government representatives (Department of Labor and Employment (DOLE), POEA), employers, seafarers' unions and international organisations. One of the resolutions adopted at the summit was that manning agencies shall provide, pursuant to the POEA guidelines and at no cost to the seafarers, an anti-piracy awareness training seminar for departing seafarers as of 1st February 2010.

"POEA requires a certificate of compliance with a Pre-Departure Orientation Seminar, which includes shore-based training as well as on-board exercises and drills on anti-piracy strategy."

In response to queries on the length of validity of the anti-piracy training and whether it needs to be repeated before each deployment, POEA has clarified that seafarers need to attend the orientation seminar only once. An official advisory on this point is to be issued by POEA shortly.

Reporting

Shipowners and managers, through their manning agencies, are required to submit a written report to DOLE and the Department of Foreign Affairs on any incident of piracy involving their enrolled vessels, immediately after occurrence of the incident. The report must contain a description of the incident, actions taken and lessons learned.

We thank Del Rosario Pandiphil Inc., Philippines, for providing information on which parts of this article are based. ■

Keeping the pirates at bay

Best Management Practices help to deter pirate attack in the Indian Ocean.

Pirate attacks continue to make headlines around the world. According to figures issued in January 2010 by the International Maritime Bureau's Piracy Reporting Centre (PRC), 406 reports of piracy and armed robbery were made world-wide in 2009. In 2008, 293 attacks were reported. But it is the number of violent attacks that makes for the most shocking statistics. In 2008, the PRC reported that 46 vessels were fired upon. In 2009 this figure almost trebled to 120.

The piracy hotspot remains off the coast of Somalia, with attacks still occurring in the Gulf of Aden, despite the presence of the EU Naval Force and other countries' warships patrolling those waters. Often Somali pirates use "mother ships", larger vessels that act as fuel and weapons carriers for the fast, small skiffs that are used to attack merchant vessels, no matter how big they are. The use of these mother ships allows pirates to go far out into the Indian Ocean where naval help is not so readily available for vessels under attack. So what can be done to effectively protect a crew, ship and cargo from a hijacking? Several Gard Members have found that following Best Management Practices (BMP)[1] to the letter is essential when it comes to deterring pirates.

Anti-piracy measures deployed on one of Gard's vessels have been recently put to the test. The vessel in question was far out in the Indian Ocean when several suspicious vessels, including a possible mother ship, were sighted. Their position in the water was such that it was obvious that the skiffs were attempting to get the vessel to alter its course, taking it towards Somalia.

Immediately the master pressed the pirate alarm and the crew swung into action, letting the skiffs know they had been sighted. He sent all the crew down to the engine room except for those on the bridge, put full speed on the engine and started evasive manoeuvres. The pirates followed for a while, then gave up their attempt.

The vessel had good speed, visible anti-piracy measures in place and a highly alert crew. There were large coils of razor wire generously fixed around the main and poop decks, as well as large boards warning that this wire was electrified. There were also several powerful fire hoses in operation. All accommodation doors were locked and safety rails were greased making them virtually impossible to climb. These factors, combined with the ship's high freeboard, made it a somewhat surprising target for an attempted attack.

Successful deterrence is clearly not just a matter of vessels being fitted with a host of anti-piracy measures; it is the training and support given to a master and his crew that really make the difference.

Putting anti-piracy measures into practice normally involves a host of strategies, both physical and logistical: as in the above example it may involve investing heavily in razor wire to be placed around vessels (a measure particularly important for ships with a low freeboard), night-vision equipment for lookouts, helmets and bullet-proof vests.

Sometimes specialised (unarmed) security teams, often consisting of ex-military personnel, are used to identify weak points in defences, strengthen and use them in case of a pirate attack. Specialist companies place security teams on board and help training personnel. They can also participate as lookouts and, in case of an attack, help keep the pirates off the vessel until help can arrive. At the end of voyages, masters' reports, together with pictures, describing and showing what has taken place on board, may be examined and the security teams may make amendments where needed to the anti-piracy measures.

Vigilance is the key weapon against piracy. When a suspicious vessel is sighted, a quick and highly visible reaction from the potential target vessel is vital. If the pirates know they have been spotted, that will often help deter them.

Appropriate speed (BMP indicate that pirates have difficulty boarding ships making way at more than 15 knots) combined with evasive manoeuvres can be valuable strategies, as a large ship's wake can cause huge problems for the tiny skiffs favoured by Somali gangs. Combine these factors with a ship that is visibly prepared to repel any unwanted callers, and pirates will know that they will have a tough time getting on board. In many cases, they will simply give up and retreat. Best Management Practices are vital now in the Indian Ocean, where ships can not expect the sort of help available in the Gulf of Aden. This is particularly true in relation to vessels with a low freeboard, which, in theory, are easy for pirates to board unless protective measures are in place.

Obviously, the widespread use of BMP strategies comes at a cost, particularly if dedicated security teams are used on board. But can firms afford not to take precautions when, apart from the well-being of crews, ships and cargoes are worth many millions of dollars, let alone the time and money spent in obtaining the release of a hijacked vessel?

It is important to ensure that a BMP list is not just left lying around the wheelhouse. It is vital that the master and crew are fully aware of and follow the measures contained in the guidelines and that they know how to respond when a situation arises. This readiness, together with the knowledge that they are being tracked via satellite, will make confidence grow.

With pirate attacks on the increase, it seems clear that all shipowners will need to display such readiness, planning and preparation. ■

[1] See article "Piracy – Best Management Practices for shipowners and operators are revised" in Gard News issue No. 196.

Illegal material on board ships in South Africa

By Michael Heads,
P&I Associates (Pty) Ltd, Durban, South Africa.

Possession of illegal material by seafarers may have consequences for shipowners.

Recent cases world-wide

In May 2009, five Filipino seafarers from two separate vessels were arrested and detained in Liverpool, England, following the discovery of pornographic material on personal laptops and mobile phones by Customs officers. In December 2008, Customs officers caught a Filipino seafarer with child pornographic material and it was reported that he was the second seafarer to have been caught that month in possession of such illegal material.

It has also been reported that in New Zealand, two seafarers were convicted in the North Shore District Court having been prosecuted by the Customs Service for the importation of objectionable material involving child pornography.

In South Africa, a seafarer has now also been arrested and successfully prosecuted for being in possession of illegal material involving child pornography.

South Africa

In terms of South African law, it is legal for the South Africa Police Services to carry out a search of any vessel within South Africa's territorial waters. In our experience, such searches are on the increase and now take place regularly on vessels shortly after they berth in a South African port.

Masters should be advised that in South Africa between 20-30 police officers will attend on board the vessel, and the master will be presented with a letter by the senior police officer setting out their rights and on which statutory legislation the South African Police Services can rely to carry out the search. The letter also states that the master or any seafarer on board a vessel who interferes with a police officer's execution of his duties will be arrested and prosecuted for such interference.

If the police feel that the vessel may have sailed from a port or country that is associated with illegal substances then they may also use dogs to assist in the search.

"The seafarer concerned was immediately arrested and charged with various criminal offences."

In this regard, a vessel has recently been detained by the South African Customs Services after 250 kg of cocaine were found on board. The shipowners were charged with breaching various statutory offences. Among other things, the Customs Services argued that the owners had breached the provisions of the International Ship and Port Facility Security (ISPS) Code, in that they had failed to adequately check what was being brought on board their vessel by the crew and other third parties.

Pornographic material

Recently, during the execution of one of the above searches, the South African Police Services found illegal material involving child pornography on board a vessel. The seafarer concerned was immediately arrested and charged with various criminal offences. The vessel, thankfully, sailed without being detained or the owners fined. The seafarer was clearly acting outside the scope of his employment and had to cover his own legal expenses, but the cost to the owners and the P&I Club could have been far greater had the seafarer been an officer and the need arisen to call for a replacement so as to comply with the vessel's safe manning certificate and watch-keeping requirements.

Could the vessel have been detained and the owner fined for having such illegal material on board their vessel? It is quite plausible that the South African Custom Services and/or the South African Police Services could use the argument raised in the drug case mentioned above and argue that the shipowner failed to enforce the provisions of the ISPS Code by allowing illegal material to be carried on board the vessel. The owner would be expected to demonstrate what measures had been implemented to prevent such events occurring, such as carrying out searches of cabins, checking mobile phones and laptops and also checks at the gangway to see what is being brought on to the vessel by crew and visitors, for example, surveyors, stevedores, and agents.

Recommendation

We will of course keep monitoring such cases, but in the meantime owners should be advised to continue with their efforts to remind seafarers that they should not be in possession of illegal material, whether in paper or electronic form on their mobile phones and laptops. Regular records should be kept of searches and checks at the gangway, in cabins or other spaces. These written reports would then be available for inspection by the authorities and would serve as evidence of the shipowners' efforts in terms of ISPS compliance. ■

Insurance implications of lay-up

Gard News has a look at issues affecting the insurance of laid-up vessels.

Background

The lay-up of a ship is a serious decision for a shipowner to make. According to Clarkson Research Services, at the end of 2008 the world fleet consisted of more than 55,000 ships. The order book was about 9,500 ships, an increase of 15 per cent if demolition of existing ships or cancellation of newbuildings did not take place. With hindsight it became clear that even with the normal growth of trade experienced over the past years, there would not be sufficient cargo for all these ships, and with the additional financial downturn from mid-2008, the number of vessels with no cargo to carry became increasingly evident. The anchoring sites outside the main ports in the Far East started to be filled with vessels "waiting for orders" and the first notices for vessels going into lay-up and the request for lay-up returns started to come in.

"How many more ships are lying around idle, waiting for cargo or for other reasons, is not known, but during 2009 several thousand ships registered no movement for months."

During the spring of 2009 the estimated number of ships in lay-up was around 1,000. An exact number was never available, as shipowners were reluctant to confirm their ships were laid-up. Gard Marine & Energy had at the most close to 60 ships registered as laid-up, which coincided remarkably with its six per cent market share. How many more ships were lying around "idle", "waiting for cargo" or for other reasons, is not known, but during 2009 several thousand ships registered no movement for months.

Since mid-2009 the number of ships in lay-up has decreased slightly. This is partly due to a small increase in activity and volumes shipped, but mostly a result of optimisation of trading with slower speed and better planning. There has also been more demolition of ships than expected. More than 1,000 ships were sold for demolition during 2009, compared to about 400 in 2008. Speed reduction and demolition are probably the most important factors to bring back balance to the market.

Although there have also been cancellations of newbuilding contracts, their effect is difficult to assess, as it is unclear how many contracts were really cancelled and how many were postponed or sold to others.

Owner's decision

Once a shipowner has decided to lay up a vessel, several important decisions have to be made. The main one is the duration of the lay-up, which again will be critical for the decision on type of lay-up. If the owner has expectations that he will be able to re-employ the ship within the next six to nine months, then a hot lay-up will be appropriate, with minimum crew on board to keep the machinery and equipment in operational running condition. The main savings will be in respect of reduced crew and lube oil, but the reactivation costs will be limited and the ship can sail on short notice.

If the lay-up is planned for longer than a year the owner will probably opt for a cold lay-up, which will reduce the daily running costs to the actual lay-up fee and watch-keeping. However, significant preparation costs for lay-up must be incurred as well as reactivation costs, which in most cases will include dry-docking.

Another important decision is where to lay up the ship, and for obvious reasons shipowners will try to find a place close to the main shipping trading areas. Gard does not have local knowledge of all locations offered for lay-up, so shipowners should obtain approval from local authorities, with information on worst-case weather conditions, as well as approval of the mooring arrangements from the vessel's classification society.

The preservation and maintenance of the ship is subject to individual considerations, but as a general requirement Gard refers to recommendations from the various equipment manufacturers, which must be followed and adhered to.

Risks related to lay-up

Risks related to lay-up may refer to two phases: the lay-up itself and the reactivation, including the trading period immediately after breaking lay-up.

During lay-up the following risk scenarios may arise:

– Risk of being struck by another ship. Even if the laid-up ship is without blame, the possibility of the other ship limiting liability may result in significant unrecoverable costs.

– Risk of breaking moorings. Dragging of anchor is the most frequent cause of grounding, and having ships anchored close to the shoreline increases this risk. This is why Gard requires the mooring location and arrangements to be checked and approved for the worst-case weather conditions.

– Low security. Limited manning on board an anchored ship will make it more difficult to cope with emergency situations. Security watchmen for ships in cold lay-up will be even more restricted if situations occur because they are not familiar with the ship and will face problems finding their way around the ship or operating the equipment on board.

– Cumulative damage. A fire on board one ship can spread to other ships moored to each other (raft).

During reactivation or immediately after breaking lay-up the following may arise:

– Failures due to equipment deterioration in general. The atmosphere and especially the humidity may not have been monitored during lay-up, resulting in corrosion and deterioration.

– Failures due to corrosion inside piping systems and valves (hydraulic, pneumatic systems).

– Heavy machinery components sit statically in same position or are turned with insufficient lubrication film.

– Starting up problems with malfunctioning regulators and control equipment.

– Failures because components have not been cleaned or opened up after months without operation.

– Electronic equipment start-up failures after months with no power.

Effect on premium

As far as insurance is concerned, lay-up constitutes an alteration of risk, since the ship is taken out of the normal trade and operation it was designed and equipped for, so the shipowner (the assured), must inform his insurers that the ship is taken out of service. This initial notice will normally be followed by a request for a lay-up return of premium, as a properly laid-up vessel may represent a lower risk to insurers. Insurers will usually request additional information, as the full risk picture can only be obtained if there is total transparency between the parties.

"As far as insurance is concerned, lay-up constitutes an alteration of risk, since the ship is taken out of the normal trade and operation it was designed and equipped for."

If all requirements are in place, an insurer may offer to return a percentage of the agreed premium to the shipowner, but in the case of hull and machinery insurance the contract must not be on a Cancelling Return Only (CRO) basis (if it is, the premium of the contract period can only change if the ship is sold).

Requirements from class, flag state, port

There are no specific requirements from classification societies regarding lay-up site, manning, mooring, preservation, etc. The flag state will normally suspend all safety-related surveys and will specify mainly the number of crew on board in case of a hot lay-up. For cold lay-up the flag state will normally be even less involved, accepting a security watch only. Some port authorities where the vessel is anchored/moored may have requirements regarding the mooring and environmental

Risks related to lay-up may refer to two phrases: the lay-up itself and the reactivation.

issues, others have no rules or requirements at all.

The conclusion is that there are no common rules or regulations for a ship in lay-up, and the insurer must rely on the shipowner to ensure that the ship is properly laid up, preserved and reactivated.

Impact on P&I and hull and machinery insurance

The impact of a lay-up on the P&I cover is fairly straightforward, as the main risks related to cargo, crew and passengers are removed. The main P&I risks remaining will be possible pollution from leakages (fuel, lube, garbage, etc.) and in worst case a wreck removal if a ship should break moorings and end up on a beach. Gard's P&I Rules contain relevant provisions related to survey (Rule 9) and returns of premium (Rule 22).

"There are no common rules or regulations for a ship in lay-up, and the insurer must rely on the shipowner to ensure that the ship is properly laid up, preserved and reactivated."

The impact on the hull and machinery cover is more complex, as the risk profile changes. The Norwegian Marine Insurance Plan defines lay-up as an alteration of risk (§3-26) and requires that a lay-up plan is drawn up and submitted to the hull and machinery insurer for approval.

Gard's requirements for P&I and hull and machinery covers

Upon receipt of a notice of lay-up Gard will request the following:

– Confirmation from owners that the vessel's class will be maintained.

– The lay-up plan. Gard will not approve the lay-up plan as such, but will assess the plan and verify that the approvals required have been obtained.

The maintenance of class

It is a condition for P&I and hull and machinery insurances that the vessel maintains its classification (either "in operation" or "laid up"). A suspension of class for any reason will automatically lead to a loss of insurance, and the insurance will not be reinstated without written confirmation from the insurer.

The lay-up plan

The lay-up plan shall describe how the ship is laid-up and how it will be preserved and maintained during lay-up. The lay-up plan should also describe the reactivation procedures as foreseen, but obviously these must be modified according to the length of the lay-up.

Most classification societies and a number of marine consulting companies have issued guidelines and recommendations on lay-up of ships. Classification societies may in addition offer technical services such as lay-up surveys and issue lay-up declarations on how the ship is laid-up and preserved. These are additional services offered by most classification societies' consultancy services which the shipowners have to pay for. These surveys and declarations are highly recommended, as they usually cover in detail all of Gard's requirements for documentation of a lay-up for both hull and machinery and P&I covers.

Many shipowners prefer to use their own resources to plan the lay-up and prepare the lay-up plan according to their experience and in-depth knowledge of their ship. To assist shipowners, Gard has specified some minimum requirements that should be included in the lay-up plan. These requirements have been listed in Gard's Loss Prevention Circular No. 14-09 and are reproduced in the text box on page 23. They include three main requirements which shipowners have to comply with:

1. The lay-up site has to be described with special attention to the weather conditions and approved by the local authorities.
2. The mooring and anchoring arrangements must be approved by or through the vessel's classification society; a competent body may perform the calculations, but the approval should go through the classification society.
3. The shipowner should contact the manufacturers of the critical equipment on board and make sure the maintenance, preservation and reactivation is done according to their recommendations.

There are other requirements, such as prevention of and protection from fire and flooding, but the three main requirements above ensure that the ship is laid-up in a sufficiently safe area, the moorings are adequate for the site and expected weather conditions, and the vessel and its equipment are taken care of according to the manufacturers' recommendations.

If damage occurs during or after lay-up, the cause of damage will be carefully considered by a surveyor, and if requirements agreed between the shipowners and the insurers have not been followed, the insurance cover may be prejudiced.

Reactivation after lay-up

It is not during the lay-up itself that incidents leading to insurance claims usually happen, as risk is greatly reduced by the precautions required by the lay-up plan. The most problematic of the different processes involved in a lay-up, and the easiest to overlook or postpone with a view to cutting costs, is the reactivation. This process can take longer than preparing the ship for lay-up, and the resources necessary not only from the shore management and crew, but also from external service engineers and shipyards with dry-docks, will be demanding. These services can be in high demand during an economic recovery, which normally is the moment the shipowners want the ships back in service.

Extensive groundwork is also needed when selecting crew for reactivation. There is a great difference between starting up a vessel and getting it working and taking over a fully operational ship.

"Gard strongly recommends reactivation to be carried out with utmost care and in accordance with class and equipment manufacturers' recommendations."

Gard strongly recommends reactivation to be carried out with utmost care and in accordance with class and equipment manufacturers' recommendations. Not only should the machinery itself be carefully handled, but attention must be paid to the fuel and lube oil quality, including analysis if these have been stored on board during the lay-up.

When the ship is reactivated, any outstanding surveys must be performed by class together with the full check of the entire machinery installation. Depending on the duration of the lay-up, dry-docking, or at least a trial, must be performed. Normally a full Safety Management System survey must be carried out. The scope of the required surveys will depend to a certain degree on the preservation and maintenance carried out before and during the lay-up. It is therefore of great importance that these measures are documented during the lay-up: in case of an insurance claim, such documentation will be important to demonstrate that necessary precautions have been taken in accordance with manufacturers' recommendations.

Underwriters may include specific reactivation clauses as part of the cover during lay-up. The main requirement is again the involvement of class and manufacturers, but a separate "additional machinery deductible" may be introduced for a limited time after breaking lay-up to cover the additional risks. ■

Minimum requirements that should be included in a lay-up plan

1. Lay-up site

A description of the lay-up site must be provided with particular focus on the weather conditions. The lay-up site must also be approved by the local authorities. Lay-up in hurricane-affected and/or tropical areas must be the subject of particular considerations.

2. Mooring/anchoring arrangements

Description and maintenance routines of anchoring and mooring arrangements must be provided including distances to shore and to other ships. The arrangements should preferably be approved by the vessel's classification society or by a consultant appointed by them, but other competent bodies may also be used.

Information on sea bed, maximum wind forces and direction, shore and on-board bollards, anchors with systems is needed for calculation purposes. The anchor windlasses and mooring winches which are in use or under constant tension must be the subject of frequent testing and maintenance to ensure that they function properly at all times.

3. Class status

Gard generally requires that the class is changed into the status of "laid-up" to facilitate a return of premium. Annual and other mandatory surveys must be carried out in accordance with class rules. As for ships in normal trading it is a pre-requisite for cover that the class rules and regulations are followed at all times also during the lay-up, and any suspension of class will lead to termination of the insurance cover.

4. Minimum manning

The flag state's requirement as to minimum number of crew for the different lay-up situations must be maintained. If watchmen and routine maintenance as described in the lay-up plan are contracted out to third parties, these arrangements must also be described in the lay-up plan.

5. Power availability

The lay-up plan should also include the envisaged need for propulsion power and describe the availability of tug assistance in the lay-up area.

6. Protection against explosions and fire

All cargo tanks, pump rooms, cofferdams and cargo lines must, as a general rule, be kept gas-free during lay-up. Inerted tanks may be acceptable if approved by local authorities. Hot work is only permitted if a valid gas-free certificate is kept on board.

All fire alarm systems must be fully operational during lay-up. The ship's normal fire-fighting systems must be available and ready for use. If fixed fire-fighting systems (CO_2 tanks) are disconnected for any reason, substitute systems must be operational and approved by class.

7. Precautions against flooding

All sea overboard valves not in use must be closed. If seawater coolers/condensers, etc. are left open, the seawater connections must be blanked off.

The water level in the ballast tanks, pump room and bilges must be checked regularly and bilge alarm systems for all spaces must be maintained in normal operation. Temporary bilge alarm systems for cold lay-up conditions are acceptable. All watertight doors and manholes must be closed.

8. Maintenance of equipment

The lay-up plan must also include specific items in accordance with the manufacturers' recommendations as to the preservation, maintenance and operation of machinery and other equipment to prevent damage occurring as a result of the items not being in normal use. The plan should describe the preservation and maintenance of among others:

– Main engine with turbocharger, gear and shafting arrangement

– Auxiliary engines with generators

• Boilers

• Rotating equipment such as pumps, compressors, etc.

• Ship type specific equipment

• General requirements as to ambient temperature and humidity, use of heaters, dehumidifiers, preservation oil, etc.

9. Resuming of trading/breaking of lay-up

The extent of survey and testing when breaking lay-up will depend on the extent of maintenance and other preservative measures which had been undertaken during the lay-up and the reason for breaking lay-up (trading, dry-dock for re-commissioning, scrap). Gard's requirement is that class' requirements for re-commissioning are followed, and that the manufacturers' recommendations for preservation and maintenance have been followed during the lay-up and re-commissioning.

These guidelines are general and should not replace any requirements given by class, authorities or flag state.

Introducing Gard (North America)

Gard News presents the members of staff in Gard's New York office.

Back row from left: Donna Fehily, Edward C. Fleureton, Evanthia Coffee, Hugh A. Forde, Kathleen Irwin, Jack Scalia, Claudia Botero-Gotz, Cheryl Acker, Renuha Ragulan, Christine Thomas. Front row from left: Linda Brown, Sandra Gluck, Dina S. Gallaro, Judy Cangemi.

Located in the heart of New York City's financial district, Gard (North America) Inc. (Gard NA) acts as Gard's general correspondent for the United States, Canada and certain Caribbean islands. In addition, Gard NA is the primary claims handling office for many US, Canadian and Mexican-based members and clients.

Gard NA has a staff of 14, including eight Claims Executives and three Claims Assistants.

Claims handling capabilities and areas of specialised competence

Gard NA's claims executives have extensive maritime claims handling experience. Its staff includes four admiralty attorneys. Many years of claims handling and participation in industry groups have provided a significant base of knowledge concerning firms and individuals active in surveying and in the preparation, defence and prosecution of claims. This solid foundation permits efficient handling of claims and supervision of surveyors, consultants and of claims activities by correspondents and lawyers.

In the US legal environment, litigation management and oversight can result in significant savings for members and clients. Gard NA assists members and clients in the management of claims and any resulting litigation by engaging the most appropriate legal and technical expertise and by actively monitoring the progress of legal proceedings.

Claims executives at Gard NA handle a wide variety of matters, ranging from stowaways, personal injury and illness, dry and wet cargo claims, groundings, collisions/allisions, oil spills, general average and contractual disputes. Gard NA's claims handling expertise extends across Gard's business areas, including P&I, H&M and Defence.

Gard NA claims personnel have significant experience managing pollution and environmental claims. They are knowledgeable about and familiar with environmental consultants, spill claims and loss control specialist companies, media and press consultants, major OSROs and QIs, clean-up contractors and managers.

In handling personal injury and illness claims involving crew and non-crew (including longshoremen and harbour workers, passengers and independent contractors), Gard NA also arranges for the case management of more serious cases, which includes auditing of hospital and other medical invoices. This service has proven to be significant in terms of costs savings and achieving a positive overall outcome.

While much of their current work involves charterparty disputes, Gard NA's attorneys have extensive maritime experience and are regularly involved in assisting members and clients in negotiating and litigating all manner of maritime contracts. This includes preparing appropriate submissions for arbitrations and assisting members and clients in negotiating or analysing specific contractual provisions.

As part of its service, Gard NA regularly organises seminars for Gard members and clients concerning regulatory and claims-related issues. In addition, Gard NA personnel offer members and clients in-house training sessions tailored to specific issues.

Members of staff

Gard NA's President, Sandra Gluck, is a maritime attorney admitted to practise law in New York as well as Ontario, Canada. She supervises the handling of claims and oversees the day-to-day operation of the office. Previously, she was an associate and partner at a maritime law firm in New York. She is co-chair of the Arbitration and ADR Committee of the US Maritime Law Association and serves on the Board of Directors of the Norwegian-American Chamber of Commerce.

Senior Claims Executive John (Jack) Scalia has broad experience handling personal injury, illness, toxic tort, pollution and casualty claims. He is an active member of the US Maritime Law Association as Chair of the Marine, Torts & Casualties Committee, serves on the Board of Directors of the Marine and Insurance Claims Association, and is a former President of the Society of Maritime Personal Injury Consultants. His extensive experience in the shipping industry spans both insurance and operations, including responsibility for P&I insurance and claims for tanker operators as well as responsibility for marine and shore-based insurance, losses and safety programmes for an operator of container vessels.

"As part of its service, Gard NA regularly organises seminars for Gard members and clients concerning regulatory and claims-related issues."

Senior Lawyer Evanthia Coffee is a maritime attorney admitted to practise law in New York and New Jersey. She worked at a maritime law firm in New York for six years before moving to Norway, where she continued her maritime practice with a large Oslo-based firm. She joined Gard NA from her most recent post with the Court of Justice of the European Free Trade Association in Luxembourg. Handling both P&I and Defence matters, she regularly provides advice on charterparty disputes and cargo claims involving litigation or arbitration in New York. Evanthia is fluent in Norwegian and speaks some Greek.

Claims Executives

Before joining Gard NA, Cheryl Acker worked for many years for a tanker operator in various capacities, most recently as manager of corporate services. She is experienced in handling many different types of marine claims, including liquid cargo, pollution and personal injury/illness claims.

Claudia Botero-Gotz is a maritime attorney admitted to practise law in New York and New Jersey. She worked at several distinguished maritime law firms in New York before joining Gard NA. She is well-versed in maritime arbitration and litigation, having often appeared in both state and federal courts. She has practised in various areas, including cargo/property damage, personal injury and charterparty disputes. At Gard NA she handles both Defence and P&I matters. Claudia is fluent in Spanish.

Prior to joining Gard NA, Edward C. Fleureton, a graduate of the State University of New York Maritime College, worked in various capacities at sea and shore-side, including several years as a tanker-man with an oil major before joining a tanker owner as a claims adjuster. He handles cargo, personal injury, pollution, casualty and stowaway matters as well as claims involving toxic torts.

Hugh A. Forde is an experienced maritime attorney, having worked for seven years in the maritime practice group of a large New York law firm, followed by four years at the American Club, where he handled P&I and Defence claims. At Gard NA, he also handles both P&I and Defence claims.

Dina S. Gallaro handles cargo claims (with particular emphasis on steel and containerised cargo), stowaway matters, personal injury and crew illness claims. She is able to speak, read and write basic Italian.

Christine Thomas handles cargo claims (especially liner trade), stowaway matters, personal injury and crew illness and casualty/pollution claims.

Claims Assistants

Judy Cangemi assists Claims Executives in handling crew, personal injury and cargo claims.

Donna Fehily has worked in the shipping industry since 1981 and has experience co-ordinating claims involving asbestos, benzene and hearing loss. Donna handles asbestos claims and assists Claims Executives in handling crew, personal injury and cargo claims.

Renuha Ragulan currently assists Gard NA Defence Executives in the handling of Defence claims.

Support staff

Administrative Co-ordinator Linda Brown currently serves as administrative assistant to Sandra Gluck. She organises and co-ordinates Gard NA seminars and other Gard NA events, including member and correspondent luncheons.

Kathleen Irwin is Gard NA's Full Charge Book-keeper. Her responsibilities include book-keeping and accounting functions. ■

Carp(e) diem – Current issues on ballast water regulations in the US

Ballast water requirements in the US may be turning into a "crazy quilt" of possible practical and legal disparities, making compliance very difficult.

The subject of ballast water regulations, which aim to control or prevent the introduction of unwanted invasive species into ecosystems, has been a topic of concern for quite some time, not only in the US, but practically in the entire world. Proposals have been long discussed and controversial for many different groups: the shipping industry, environmentalists and government agencies.

Asian carps and zebra mussels

One area where recently the issue has been forced into focus is the Great Lakes region, between Canada and the US. This has occurred due to their land-locked nature, with both ocean-going and lake-bound trade and traffic, and various populated zones around the perimeter, using those bodies of water for commercial fishing and recreational purposes. The recent trigger for intense governmental interest in that region has been the issue of the possibility of invasion of the Great Lakes by the Asian carp, an invasive species that drives out native species from a lake almost in their entirety, resulting in a radical alteration of the native ecosystem, especially causing collapse of commercial and recreational fisheries. This carp species has already invaded portions of the Mississippi River and tributaries, and its detrimental effects have been observed and documented. The Asian carp was brought to the southern United States some 40 years ago to help keep retention ponds clean at fish farms and waste water treatment plants. Heavy floods in the 1990s allowed them to escape into the Mississippi, from where they have migrated to the Missouri and Illinois rivers and now threaten to make it into Lake Michigan. Officials at the US Fish and Wildlife Service (FWS) call the Asian carp "an aquatic vacuum cleaner because they filter important food resources out of the water and turn it into carp biomass".

But one may recall it was another invasive creature, the zebra mussel, which several years ago had spurred on the US Coast Guard (USCG) to issue a set of guidelines under a voluntary programme in 1998 for ballast water management. The rate of compliance under the programme was found by the USCG to be inadequate, so in 2004 they published a set of mandatory penalties for failure to submit ballast water management reports and for particular procedures for the Great Lakes and Hudson River areas. This set of rules required all vessels bound for the US to conduct mid-ocean ballast water exchange or retain their ballast water on board, or use some other approved method of treatment.[1] In 2005 the USCG issued a set of best management practices for vessels calling in the Great Lakes region.

Approved ballast water management system

In August 2009 the USCG announced a set of standards for ballast water management, having concluded that the prior regulations were not adequate to address the invasive species issue. These new proposed rules, written in conjunction with IMO standards for the subject established in 2004, include a ballast water discharge standard regarding the maximum number of organisms allowed to dwell in ballast water aboard ship, and a requirement to install and operate an approved ballast water management system (BWMS) in a second section of the rules, before discharging ballast water into US waters, with a gradual phase-in schedule and process envisioned over a period of several years.

However, while the first phase of the USCG rules are in accord with the IMO standards, the second phase would eventually result in a new level that would be 1,000 times stricter, allowing for only one organism per 100 cubic metre of ballast water. Public comments were solicited in the rulemaking process, to be sent to the USCG by 27th November 2009. The USCG is now evaluating those comments and a response with final rule-making should occur in the near future.

Individual state regulations

In the meantime, the individual states have proceeded with their own set of regulations, which they are permitted to do under federal law, and have come up with rather stringent proposals that have drawn intense criticism from the shipping industry, as impractical or impossible to meet. These proposals in many respects are much stricter than those within the USCG proposed regulations, which some states have said do not go far enough to ensure prevention of invasion of their waters by unwanted aquatic organisms.

Michigan was the first to issue its own guidelines, and these survived challenge in the federal courts. More recently, on 4th February 2010, a New York state appellate court upheld New York state regulations on ballast water exchange, despite legal opposition from the shipping and port terminal industries, stating that the federal Clean Water Act allows an individual state to add its own condition to a federal vessel discharge permit.

On the other hand, on 19th January 2010 the US Supreme Court denied a request by the states of Michigan, Wisconsin and other states to order a systematic shutdown of the locks and dams leading to and between the Great Lakes, in order to stop invasive species, most particularly the Asian carp (ironically, the discovery of DNA tracings of this species in Lake Michigan was announced on the same day). It was this decision by the US Supreme Court that precipitated a political crisis on this issue with the various states bordering the Great Lakes.

Not to be outdone, in October 2009 the State of California made effective its own set of performance standards for ballast water discharge that exceed the IMO standards, including a regulation mandating eventual installation of sampling ports in the ballast water system, permitting state inspectors to board vessels and draw ballast water samples, to then test and see if cleanliness standards are being met (these regulations only apply to vessels discharging ballast water in California; if kept aboard, then compliance is not an issue). The California performance standard, first announced by the State Lands Commission, is that by the year 2020 there will be zero detectable marine organisms in discharged ballast water.

Federal ballast water regulations

The federal ballast water regulations for ships are now contained in the Vessel General Permit framework, a relatively new programme administered by the US Environmental Protection Agency (EPA) that requires the use of "best practices" in the management of all effluents that can be emitted from a ship.[2] While the EPA adopts for the most part previous USCG regulations on ballast water controls, they do go further, concerning saltwater flushing programmes and use of onshore treatment for ballast water, unless the ship has on-board ballast water treatment systems approved by the USCG.

Unfortunately, one is now poised to face a situation where compliance with both federal and state rules will be required, with potentially conflicting judicial positions taken, presenting a "crazy quilt" pattern of possible practical and legal disparities, making compliance very difficult.

Proposed federal action plan for the Great Lakes

Further aggravating the complexities of the situation is the current Great Lakes Asian carp controversy, which is pitting various state and federal interests against each other. With the states stymied by the US Supreme Court in getting a judicial mandate for closure of the locks, dams and canals to prevent the potential spread of this fish, and the discovery of the DNA of that fish in Lake Michigan, not seen before, the political pressures for action increased dramatically (thus far, an actual fish specimen has not yet been located or caught there, but many scientists believe it is only a matter of time).

In reaction, the White House hastily arranged for an Asian carp "summit meeting", held on 8th February 2010 in Washington DC, to discuss proposals to try to block the Asian carp from gaining a permanent foothold in the Great Lakes. What makes this particularly tricky on a political level for the Obama Administration is that part of the proposal is to order a partial closing of the locks to the Great Lakes in the Chicago area, about which local politicians are loudly complaining as potentially ruinous to the trade and economy of that area – the area being of course the "home town" of President Obama.

On 21st February 2010 the administrator of EPA, Lisa Jackson, who attended the "summit", issued a proposed five-year action plan to improve the ecology of the Great Lakes in a variety of ways, not only regarding invasive species, but also about other types of pollutants and enhancing adjacent area wetlands. The plan earmarks USD 78.5 million in federal funds for the construction of electrified water barriers to try to deter the advance of the Asian carp, in addition to limited lock closures and other control measures.

What remains to be seen is whether the proposed federal action plan will placate the numerous interested parties on Great Lakes issues, particularly the commercial shipping interests that ply those lakes on a regular basis and the individual states that line the Great Lakes (not to mention Canada, which is watching these developments with keen interest). It does not address the apparent establishment of parallel, but independent, federal and state schemes on ballast water control, which will result in some areas of the US having extra regulatory standards to meet, beyond the federal mandates, so ships calling at several ports in various US states could face the daunting task of compliance with a number of different programmes on the same issue of ballast water treatment and handling.

New technology to the rescue

The good news is that regarding ballast water treatment equipment, at least six manufacturers have recently designed and produced equipment that they tout as enabling ships to comply with even the strictest regulatory regimes, and probably more such equipment will be developed in the near future. The additional question is one of price, with some reports indicating the retrofitting of such equipment to cost in excess of USD 400,000.

However, a caveat is that some of the regulations call for the use of a biocide substance to treat ballast water (Michigan, for example, calls for the use of hypochlorite or chlorine dioxide), which could be emitted outboard and itself pose a chemical pollution problem – solving one problem but creating another.

The absence of provisions in the various federal and state proposals regarding the establishment of any shore-based facilities where the ballast water could be pumped and treated shows that the approach seems to be to concentrate such efforts aboard the ship. In 2008 the State of Wisconsin Department of Natural Resources completed a feasibility study for establishing a treatment facility aboard a large tank barge, to be permanently moored at the Port of Milwaukee, and USD 6 million in funds were earmarked for a pilot plant. However, it would not appear that any further action has been taken on establishing such a facility.

Assuming that the technical, operational and effluent requirements can be met, then the remaining problem will be that of ensuring that appropriate reporting and record keeping are performed, so as not to run afoul of state and federal standards, which could still demand a significant effort on the part of vessel operators. ■

[1] See articles "More on unwanted aquatic organisms in ballast water – All ships are now potential polluters" in Gard News issue No. 155 and "Control and management of ballast water – Recent developments" in Gard News issue No. 173.

[2] For a detailed summary of this programme see the article "US Vessel General Permit – The case of the reluctant regulator" In Gard News issue No. 194.

New cargo reporting requirements in the US

Vessel operating ocean carriers are now required to submit two additional data elements to the US Customs and Border Protection for all containerised shipments to the US.

As of 26th January 2010, the US Customs and Border Protection (CBP) is enforcing new cargo reporting requirements for importers and vessel operating ocean carriers who are transporting cargo to the US. This rule is known as both the Importer Security Filing (ISF) and 10+2. 10+2 is shorthand for the number of advance data elements CBP is requiring be submitted. This article will concentrate on the "+2" aspect of the rule, as those two requirements apply to carriers.[1] However, it should be noted that carriers may, in certain instances, also be considered importers and required to file ISFs[2] for containerised cargo, bulk and break-bulk shipments including Ro-Ro shipments, and cruise vessels that are required to file cargo declarations.[3]

Under the new reporting requirements, vessel operating ocean carriers are required to electronically submit two additional data elements to the CBP for all containerised ocean vessel shipments loaded in TEUs, FEUs, reefers and ISO tanks inbound to the US: Vessel Stow Plan (VSP) and Container Status Messages (CSM). The purpose is to better assess and identify high-risk shipments to prevent terrorist weapons and materials from entering the US.

The following are exempt from the carrier's +2 reporting requirements: (1) bulk and break-bulk carriers including ro-ro carriers that are exclusively carrying bulk and break-bulk cargo and (2) carriers of goods (including containerised cargo) arriving by vessel into Canada or Mexico and afterwards trucked or railed into the US.

Vessel Stow Plan

A VSP (also known as BAPLIE, which stands for bay plan/stowage plan occupied and empty locations message) will be used to transmit information about the physical location of cargo, in particular dangerous goods and other high-risk containerised cargo, loaded aboard the vessel for the US. The CBP will use the VSP information to compare with the containers listed on the vessel's manifest in an effort to identify un-manifested containers. The carrier must transmit the VSP for vessels transporting containers no later than 48 hours after the carrier departs from the last foreign port. For voyages of less than 48 hours, the information must be transmitted prior to the vessel's arrival at the first port in the US. The VSP must be transmitted via Automated Manifest System (AMS), a secure file transfer protocol (sFTP), or e-mail. The VSP must include the following information:

With regard to the vessel:
- Vessel name (including IMO number)
- Vessel operator
- Voyage number

With regard to the container:
- Container operator
- Equipment number
- Equipment size and type
- Stow position
- Hazmat code (if applicable)
- Port of loading
- Port of discharge

According to the CBP, the vessel operating carrier, not the non-vessel operating carrier (NVOC), is responsible for filing the VSP. The carrier must submit accurate and timely plans for containerised cargo and submit new and accurate VSPs immediately upon discovering any inaccuracies. For bulk and break-bulk carriers shipping part container cargo, the CBP requires the carrier to submit a VSP for all the containerised cargo aboard the vessel.

Container Status Messages

CSM report container movement and changes in status (e.g., full or empty). If a carrier is currently creating or collecting CSM in an internal equipment tracking system, that carrier must submit CSM daily to CBP regarding certain events relating to all containers destined to arrive within the limits of a port in the US by vessel. Carriers are not required to create or collect any CSM data other than what the carrier already internally creates or collects. If a carrier does not have an internal tracking system, then the CBP does not require carriers to create or collect CSM information. The carrier must electronically transmit the information via a CBP-approved sFTP no later than 24 hours after messages are entered in the carrier's system. The following are events for which CSM are required:
- Booking confirmation
- Terminal gate inspection
- Container arrives at/departs from a facility or terminal port
- Loaded or discharged during transport (includes ship, barge, rail or truck movement)
- Vessel arrives at/departs from a port
- Intra-terminal movement
- Order from container loading or discharge
- Confirmation after completed loading or discharge
- Container being taken out of circulation for repairs

Carriers may transmit their "global" CSM, including CSM relating to containers that do not contain cargo which will enter the US and CSM relating to events other than those required. By doing this, a carrier authorises CBP to access and use that data. For each CSM submitted by the carrier, the following information must be included:
- Event code being reported, as defined in the American National Standards Institute (ANSI) X.12 or the United Nations rules for Electronic Data Interchange for Administration, Commerce and Transport (UN EDIFACT)
- Container number
- Date and time of the event being reported
- Status of the container (empty or full)
- Location where the event took place
- Vessel identification associated with the message if the container is associated with a specific vessel

As with the VSP, the CBP requires the vessel operating carrier, not the NVOC, to submit CSM.

Violations

The CBP will impose fines of at least USD 5,000 per violation with a maximum fine of USD 100,000. The fine level will depend on whether violations are in connection with international consignments with a final destination in the US, whether the goods are in transit through the US, or whether the advance information has not been submitted on time, is insufficient or incorrectly reported on the VSP or CSM.

Further information concerning the new requirements can be obtained from the CBP website at www.cbp.gov/xp/cgov/trade/cargo_security/carriers/security_filing/. ■

	Existing requirements	New requirements	
Requirements	Advance cargo information (i.e., Trade Act Requirements or 24 Hour Rule)	Vessel Stow Plan	Container Status Messages
Timing	24 hours prior to loading	48 hours after departure; prior to arrival for voyages of less than 48 hours	24 hours after the message is entered into carrier's equipment tracking system
Submission method	Vessel AMS	Vessel AMS, sFTP, or e-mail	sFTP
Elements	– Bill of lading number – Foreign port before vessel departs for US – Carrier SCAC – Carrier assigned voyage number – Date of arrival at first US port – Quantity – Unit of measure of quantity – First foreign place of receipt – Commodity description (or six digit HTSUS number) – Commodity weight – Shipper name and address – Consignee name and address or IS number – Vessel name – Vessel flag – Vessel IMO number – Foreign port of loading – Hazmat code – Container number – Seal number – Date of departure from foreign port – Time of departure from foreign port	With regard to the vessel: – Vessel name – Vessel IMO number – Vessel operator – Voyage number With regard to each container: – Container operator – Equipment number – Equipment size and type – Stow position – Hazmat code (if applicable) – Port of loading – Port of discharge	– Event code reported, as defined in ANSI X.12 or UN EDIFACT – Container number – Date and time of the event being reported – Status of the container (empty or full) – Location where the event took place – Vessel identification associated with the messages if the container is associated with a specific vessel

[1] Gard has recently issued Loss Prevention Circular No. 03-10, "US Customs regulations Importer Security Filings and Additional Carrier Requirements" on these reporting requirements. This article provides a more in-depth look at the specific requirements for carriers, while the circular is a more general overview of the Rule as it applies to both importers and carriers.

[2] See Federal Register, Vol. 73, No. 228. 25th November 2008. pp 71731-71733. For certain limited purposes, the carrier may be treated as an importer; for example, with respect to foreign cargo remaining on board (FROB)and be required to submit information concerning five of the 10 importer data elements to CBP prior to the cargo being laden aboard a vessel destined for the US. The five data elements that must be submitted are (1) booking company, (2) foreign port of discharge, (3) pace of delivery, (4) ship to name and address, and (5) commodity HTSUS number.

[3] Tankers are also exempt from filing ISFs, as they are considered outside the scope of the rule.

Stowaways – Help to reduce the risk

In order to play an active role in the prevention of stowaways, Gard will shortly publish a manual designed to be a practical point of reference and to assist masters in avoiding pitfalls and problems when it comes to stowaways. The manual, based on articles previously published in Gard News, will complement other Gard publications, such as the Guidance to Masters.

Stowaways seem to be an ever-present problem for the shipping industry, in particular to those trading on the coast of West Africa, in Central America, Colombia, Venezuela and to the Dominican Republic. In addition to vessels' trade patterns, this problem is also closely linked to vessel and/or cargo type, as well as to the security training and awareness of the crew. The lion's share of stowaways is found on board bulk, container and general cargo vessels. Car carriers are also over-represented compared to other vessel types.

A sign of human misery or pure opportunism?

By definition a stowaway is a person who secretly and illegally boards a vehicle, such as an aircraft, bus, ship or train, to travel without paying and without being detected. Needless to say, this is a risky business. Not only because a stowaway may spend days without food and drinking water, but also due to the location in which they sometimes choose to stow away: inside chain lockers, in the rudder trunk or maybe even just on the rudder. So why are they doing this? Is it a sign of utmost human misery, an adventurous mind or rather a result of plain financial opportunism?

The reasons are as diverse as the persons who stow away. Many do this to escape political or religious persecution; some flee from environmental disasters, some from social problems, whereas others do this only for economic reasons. The latter category may not even plan to leave their country on a permanent basis; they may simply wish to exploit any financial bonus related to stowing away, even if detected and repatriated: "pocket money".

Quite a few stowaways migrate to other countries before actually boarding the vessel. General stowaway movement patterns throughout Africa and the Middle East represent long-term trends in human movement, as they also tend to shift periodically due to the relocation of refugee camps, changing drug trafficking routes to continental Europe and weather conditions. Available connections to Europe as well as rumours of lax border controls can also be important factors behind high-risk stowaway zones. One good example of such migration is the people movement to South Africa. This is easily detectable in the profile of stowaways embarking in South African ports: the numbers are high and the variety of nationalities is huge. Put in a different way, on the top-ten list of ports of embarkation, three are South African (Durban, Richards Bay and Cape Town). However, South African nationals do not make it to the top-ten list of nationality of stowaways.

Sand in the machinery

Stowaways create considerable operational problems for a vessel's Master, crew and owners/operators. Having them on board is often a practical challenge and a security risk. Furthermore, it is a time-consuming problem and last but not least, it tends to be expensive.

It is obviously not only the Master and crew who get occupied with the stowaways: the shore-based operation gets involved, as do local authorities and the vessel's agent (sometimes a shipowner may have to appoint its own agent because the one appointed is acting on behalf of the charterer only). The claims handler at the P&I Club is contacted and he or she in turn engages the local P&I correspondent, maybe in several of the ports along the vessel's itinerary if it is still unclear where and when the stowaway will be granted permission to land. And there may be need for a doctor, security guards, translators and embassy personnel to assist with travel documents, perhaps one or more escorts to facilitate transport, etc.

If numbers tell the truth...

The costs involved in looking after and repatriating stowaways can be substantial; the repatriation of stowaways generally involves moving reluctant people across several continents and problems can easily occur. And problems rarely come and go free of charge. In 2002 the average cost to Gard of each stowaway case was in excess of USD 7,000. By 2008 this figure had increased significantly, to just above USD 18,000 (these numbers do not take into account the applicable deductibles paid by the Member, so the total costs are therefore even higher).

Informal figures (based on a questionnaire that all P&I Clubs within the International Group have completed and returned to the Group Secretariat) presented at the P&I Correspondents' conference in Amsterdam in 2009 indicate the same trend within the P&I Clubs of the International Group. In the 2007 policy year, the stowaway cost for all P&I Clubs put together, net of deductible, amounts to something in the region of USD 14.3 million. Estimating on basis of average deductibles on stowaway matters, the total costs that year may have been in the region of USD 20 million.

Before 2004 the number of reported stowaway cases was increasing steadily. However, it was expected that the number of stowaways would drop – and continue to be lower – with the implementation of the ISPS Code in 2004. And, indeed, for some time this was the trend. But figures are again on the rise, both in terms of frequency and cost.

A more sophisticated generation of stowaways?

Another trend is that the stowaways seem to be getting cleverer by the day. They come across as better prepared: they bring food and water and they select their hiding place with utmost care. It might seem that many do whatever it takes to stay hidden enough days to make diversion back to port of embarkation unfeasible.

It may not be a matter of "sophistication", but the stowaways also seem more conscious of the availability of "pocket money". At first sight, one can easily understand the humanitarian practice of owners giving stowaways some cash during the transport back to the port of embarkation, e.g., to pay for meals and drinks. Normal going rates have been in the region of USD 100–300. But it seems that this is no longer what "pocket money" means. Nowadays, when the question of "pocket money" is discussed, one

"Quite a few stowaways migrate to other countries before actually boarding the vessel."

is more and more amazed at the unreasonable amounts that are being requested by the stowaway(s). Rates seem to have gone up dramatically, being now close to USD 1,000. And why has this gone so far? It is certainly not because the price of food and drinks has, exploded. It is mainly because the stowaway makes threats to cause significant trouble at the airport by screaming, fighting, undressing etc., to such an extent that the airline may reject the passenger – hence repatriation arrangements are delayed and additional costs incurred, as the detention period is prolonged. On a cost-benefit analysis, many situations give the parties involved good reasons to give in to pressure.

An average USD 500 of "excess" pocket money paid to each stowaway (i.e., on top of what might be considered reasonable under the circumstances) would amount to a total of nearly USD 1 million in excess pocket money payments in 2007 alone (when roughly 1,950 stowaways were detected by IG Clubs). So in the long term the practice has become expensive to the industry as a whole.

Is there a market for more "search and bark" companies?

To minimise stowaway problems it is obviously better to prevent people getting on board a ship in the first place. The problem of stowaways is in fact a very simple security problem – it is one of access control.

One important preventive measure is to carry out a thorough search on board the ship prior to departure. There are many ways of doing this, but one of the more interesting but perhaps unconventional ways is by use of companies that offer "seek and bark" services, using trained dogs to detect hidden stowaways. Their modus operandi is to have two teams working together in the search; one commences its search from the bilge to the funnel and the aft part of the vessel, whereas the second team will commence searching in the forecastle, pump room and other storerooms. Holds are often searched by the entire team; cranes, the mast, the deck and lifeboats are double-checked. The accommodation area is checked and doors are locked/sealed afterwards. After the search, the Master receives a detailed checklist, and the job may also carry a guarantee. The guarantee offers the shipowner insurance cover for costs if stowaways are detected despite the search.

The method seems quite efficient, but its use is still limited – mainly due to lack of availability of service providers. Gard is aware of such service being offered only in South Africa. This may be a business opportunity in certain ports and countries where stowaways represent a significant problem for shipowners.

The Gard manual

Even though there is no illusion that the stowaway problem will be resolved overnight, by having constant focus on security training of their crew, a vigilant watch during calls in port and efficient search procedures in place prior to departure, shipowners can significantly reduce the risk of having stowaways on board their ships.

In order to assist masters in avoiding pitfalls and problems in this area, Gard is publishing a new manual, based on articles previously published in Gard News. Topics covered include risk assessment, preventive measures, what to do when stowaways are found on board, repatriation, P&I cover, IMO regulations on stowaways and ISPS Code. The manual is expected to be published in the spring of 2010.

The information in the new manual will supplement that available in other Gard publications, such as the Gard Guidance to Masters,[1] which provides a list of actions to be taken and evidence to be collected when a stowaway is discovered on board a vessel. A stowaway questionnaire in English, Spanish, French and Swahili can be accessed at www.gard.no. ■

[1] Available at www.gard.no.

EU law – Rome I – Law applicable to contractual obligations

Rome I has replaced the 1980 Rome Convention on the law applicable to contractual obligations.

Rome I

The 1980 EU Convention on the Law Applicable to Contractual Obligations (the Rome Convention) has been replaced by the Rome I Regulation (EU Regulation 593/2008, on the law applicable to contractual obligations) which came in to force in July 2008 and has been applicable in all EU member states, with the notable exception of Denmark, since 17th December 2009.

As part of the EU's plans to lay down comprehensive choice of law rules for obligations in civil and commercial matters, Rome I is complemented by Rome II, the Regulation on the law applicable to non-contractual obligations, which has applied since 11th January 2009, providing for choice of law rules regarding non-contractual obligations, such as tort.

Right to choose

In many ways, Rome I reflects the provisions of the Rome Convention. Notably, Rome I maintains a party's right to choose the law that will apply to a contract where that choice is made expressly or can be clearly demonstrated from the terms of the contract.

One notable restriction is to be found in the second part of Article 5.2, which provides that in the case of a contract of carriage of passengers the parties may only choose to apply the law of the country where:

– the passenger has his habitual residence; or
– the carrier has his habitual residence; or
– the carrier has his place of central administration; or
– the place of departure is situated; or
– the place of destination is situated.

In the absence of choice

Article 4.1 lists eight specific contracts and makes express provision for determining which law governs those contracts where there is an absence of choice. The list includes for example contracts for the sale of goods, contracts for the provision of services, franchise and distribution contracts. These contracts are governed by the law of the country where the seller, service provider, franchisee or distributor, respectively, has his habitual residence.

Contracts other than the eight categories listed in 4.1 shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

"Rome I maintains a party's right to choose the law that will apply to a contract."

Article 5 deals specifically with contracts of carriage where the parties have not made an express choice. The law applicable in these cases shall be the law of the country of habitual residence of the carrier, provided the place of receipt or the place of delivery of the goods or the habitual place of residence of the consignor is also in that country. If this criteria can not be met, the applicable law will be that of the country of the place of delivery, as agreed by the parties.

Where the contract is one for the carriage of passengers and no express choice of law is made, the applicable law is that of the country where the passenger has his habitual residence, provided either the place of departure or destination is also in the same country. If these requirement are not met, the applicable law will be that of the country where the carrier has its habitual residence.

However, mopping up provisions in Articles 4 and 5 provide that where it is clear from all the circumstances that the contract is manifestly more closely connected with a country other than those provided by the articles, the law of that country shall apply.

Insurance contracts

Article 7 applies to insurance contracts and allows free choice of law for insurance contracts, other than life insurance. If an applicable law has not been chosen by the parties, then the contract of insurance will be governed by the law of the country where the insurer has its habitual residence. Yet again, there is a mopping up provision which reflects the provisions in Articles 4 and 5. It should, however, be noted that Article 7 does not apply to reinsurance contracts.

Habitual residence

Article 19 defines "habitual residence". Where the party is a natural person acting in the course of a business, the habitual residence shall be their principal place of business. Where the party is a corporate entity, the habitual residence shall be the place of the central administration.

Comment

It would appear that in the absence of an express choice of law provision in a contract a number of difficulties may arise under Rome I, especially by reason of the mopping up provisions, and, as such, it is important that the parties specify which law they wish to have as applicable to their contracts. Fortunately, the shipping community has been proactive in this particular area and, indeed, it is rare to find charterparties or bills of lading which do not contain an express provision relating to the law which should be applicable to the respective contract. These provisions should be upheld in most cases under Rome I. ■

Norway increases limitation amounts for wreck removal claims

Norway has significantly increased the limitation amounts applicable to wreck removal claims following maritime accidents.

During the last few years, Norway has experienced some maritime accidents that have increased the general public's awareness and put these incidents on the political agenda in Norway.

The most recent incidents include the groundings of the SERVER off Fedje in January 2007, the MIRABELLE in the Hardanger Fjord in January 2009, the CRETE CEMENT in the Oslo Fjord in November 2008 and the FULL CITY off Langesund in July 2009. The first and the last of these four accidents may result in clean-up costs in excess of the applicable limitation amounts for maritime accidents effective in Norway at the time of the incidents.

The Norwegian Parliament has recently adopted amendments to the Norwegian Maritime Code which significantly increase the limitation amounts applicable to wreck removal claims following maritime accidents in Norway. The amendments came into force on 1st January 2010.

1996 Protocol to 1976 Convention

Norway is a party to the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC 1996). However, Norway has reserved its right, in accordance with Article 7.1(a) of LLMC 1996, to exclude from limitation under the convention claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship and claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship.

Other states that have reserved similar rights under article 18.1 of the original 1976 Convention on Limitation of Liability for Maritime Claims include Australia, Belgium, France, Ireland, Japan, the Netherlands, the United Kingdom, Germany, Croatia and Bahamas.

New limitation amounts

The claims to which the amendments apply are the ones listed in §172a of the Norwegian Maritime Code, which are claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship and claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship, as well as measures taken and losses incurred in relation to efforts made to limit or prevent the claims mentioned above.

The limitation amounts for these claims in effect in Norway before 1st January 2010 were in excess of the amounts in LLMC 1996. The regime consisted of a baseline limitation in the amount of SDR 2 million, a first tier limitation for vessels with a gross tonnage between 1,001 and 10,000 GT at SDR 2,000 per ton, and finally a third tier limitation for vessels in excess of 10,000 GT at SDR 500 per ton.

The recent amendments to the Norwegian Maritime Code increased these limitation amounts for vessels with a gross tonnage of more than 2,000 GT by approximately 50 per cent and introduced a new tier in the relevant provision of the Code. The new regime provides for the following figures:

– The same baseline limitation amount of SDR 2 million applies.
– The first tier limitation applies to vessels with a gross tonnage between 1,001 and 2,000 GT, with a limitation of SDR 2,000 per ton.
– The newly introduced second tier applies to vessels with a gross tonnage from 2,001 to 10,000 GT, with a limitation of SDR 5,000 per ton.
– The final tier is applicable to vessels in excess of 10,000 GT and the applicable limitation is SDR 1,000 per ton.

"The new limitation amounts are three to four times higher than the limitation amounts set out in 1996 LLMC."

These amounts are three to four times higher than the limitation amounts set out in 1996 LLMC.

Rationale

The rationale behind the increased limits is to make sure that shipowners and their underwriters, as opposed to the state, pay for costs relating to the claims in question following a maritime accident. Nineteen maritime accidents which occurred in Norway before 2001 and five maritime accidents between 2001 and 2005 have been reviewed in order to determine the level of limitation amounts needed to achieve this. ■

Vetting of medical expenses yields major savings

Medical review and audit services save Gard members USD 1.3 million in 2009.

The article "United States – High medical costs can be reduced", which appeared in the last issue of Gard News, reported on tools used to control the escalating medical costs both in the US and many other countries.

One tool involves submitting medical expenses for review and audit by an independent medical auditor prior to payment of the expenses. Gard members who availed themselves of these medical review and audit services enjoyed savings in the 2009 calendar year of fifty per cent of the billed amounts. In real dollar terms members obtained gross savings of USD 1.3 million.

As can be seen from the above numbers, it is important that all medical expenses be reviewed prior to payment by the member or their agent. However, there is still a

"Gard members who availed themselves of these medical review and audit services enjoyed savings in the 2009 calendar year of fifty per cent of the billed amounts."

considerable number of medical expenses that for unknown reasons are not submitted for review and audit by the audit service. It is important to remember there is no risk involved in the auditing of US medical bills as these audits are performed on a "no cure, no pay" basis.[1]

Control of medical expenses

Medical review and audit services are available to members in most countries world-wide. These services, in addition to auditing hospital and doctors expenses, include review of drug charges and medical equipment fees. Once a medical service provider has been paid by the member or the agent, it is nearly impossible to reduce the charges later. It is equally difficult to dispute the medical necessity of a test once the test has been performed.

Medical review and audit should not be confused with medical case management, another tool used in the control of medical expenses. Medical case management involves the early intervention of a proactive medical practitioner[2] who is tasked with co-coordinating the care received by an individual while under the care of a doctor or in hospital treatment. The case manager is able to give advice which will assure quality care while staying alert to the potential for over-treatment or unnecessary treatment.

Effective use of resources

When used on a co-ordinated basis, medical case management and audit/review services can be a useful tool in obtaining the best available medical care on a cost-effective basis. In order to derive the maximum benefit from these tools, it is important to make prompt contact with the local correspondent or Gard office. If this contact can be made before landing the individual for medical care,

"In order to derive the maximum benefit from these tools, it is important to make prompt contact with the local correspondent or Gard office."

there may also be an opportunity to offer guidance in selecting the best treatment facility for the individual involved.

Prompt reporting, use of the best medical providers and thorough review and audit of all medical expenses will result in more effective use of resources for all members. Gard will be pleased to discuss the necessary steps to implement this course of action with individual members. ■

[1] Some audits in countries other than the US will involve a small flat charge fee.
[2] Usually a nurse-practitioner or physician's assistant.

Medicare delays implementation of some mandatory reporting requirements

Effective dates for recording data and reporting to CMS are postponed.

Postponement

An article which appeared in issue No.197 of Gard News[1] discussed changes in US law with respect to mandatory reporting and set asides requirements recently enacted by Medicare. These requirements established new duties for entities (now known as Responsible Reporting Entities, or RREs) making payments and/or settlements to individual claimants who are Medicare-eligible. New guidelines were published on 24th February 2010 by the Center for Medicare & Medicaid Services (CMS) which postpone the effective dates for recording data and reporting to CMS. These postponements have altered the dates published in the article in Gard News issue No. 197. The changes are highlighted below.[2]

"RREs are now required to report settlements and other payments to Medicare recipients which occur on or after 1st October 2010."

– The live test reporting date has been delayed until the first quarter of 2011. CMS had initially set a date for live reporting for the first quarter of 2010.
– RREs are now required to report settlements and other payments to Medicare recipients which occur on or after 1st October 2010. CMS had originally set a reporting date of 1st January 2010. This data must be retained and reported in the live test report mentioned above during the first quarter of 2011.
– RREs must report all ongoing responsibility for medical (which would apply to the obligation for continuing cure for seamen and worker's compensation cases) that exist as of 1st January 2010. Previously CMS required reporting as of 1st July 2009. This data must be retained and reported in the live test report mentioned above during the first quarter of 2011.

Non-US employers

To date there has not been a definitive answer from CMS regarding the necessity for non-US employers to register with CMS and comply with new reporting and set asides requirements. CMS has acknowledged the problem and is expected to issue guidance in the near future with respect to registration by foreign entities that do not have US federal tax identification numbers or US addresses.

Revised CMS manual

The updated CMS manual is available at www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3022210.pdf.

All Gard members are strongly advised to seek legal advice when engaged in any payments or settlements which would involve Medicare-eligible individuals. ■

[1] "Medicare reporting and set asides".
[2] See also Gard's Loss Prevention Circular No. 04-10, "Changes to Medicare reporting in the US".

Bunker Convention entry into force in Hong Kong

A corrigendum was sent together with the last issue of Gard News in respect of the note "Bunker Convention comes into force in Hong Kong", clarifying that although the article stated that the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention) had come into force in Hong Kong on 22nd January 2010, in the first week of February 2010 China had still not extended ratification of the Bunker Convention to Hong Kong, although it was expected that it would take place in January 2010.

It has now been confirmed by the IMO that, although ratification was only extended on 10th February 2010, the Bunker Convention took effect in Hong Kong on 22nd January 2010. ■

Loss Prevention and P&I Member Circulars, winter 2009-2010

The following Loss Prevention and P&I Member Circulars have been issued by Gard during the winter of 2009-2010:

Loss Prevention Circulars

– Loss Prevention Circular No. 01-10, January 2010: LOI, LOU and BLG – Confused?

– Loss Prevention Circular No. 02-10, February 2010: Counter Piracy – Following Best Management Practices (BMP).

– Loss Prevention Circular No. 03-10, February 2010: US Customs regulations – Importer Security Filings and Additional Carrier Requirements.

– Loss Prevention Circular No. 04-10, March 2010: Changes to Medicare reporting in the US.

– Loss Prevention Circular No. 05-10, March 2010: Paris MOU Port State Control – New inspection regime.

P&I Member Circulars

– P&I Member Circular No. 09-09, January 2010: Amendments to the Rules for 2010.

– P&I Member Circular No. 10-09, January 2010: Regulations of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships.

– P&I Member Circular No. 11-09, February 2010: Reinsurance Arrangements for the 2010 Policy Year; United States Oil Pollution Cover; Special War Risks P&I Cover.

– P&I Member Circular No. 01-10, February 2010: Iran sanctions – Notice of Rule changes.

– P&I Member Circular No. 02-10, February 2010: Regulations of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships.

– P&I Member Circular No. 03-10, March 2010: Carriage of Direct Reduced Iron (DRI) by Sea – Changes to the IMO Code of Safe Practice for Solid Bulk Cargo.

All Loss Prevention and P&I Member circulars are available from www.gard.no.

If you would like to receive Gard's Loss Prevention Circulars by e-mail, please contact Terje.paulsen@gard.no. ■

Staff news

Tadashi Sugimoto has joined Gard (Japan) K.K. as Managing Director. Tadashi previously worked for the Japan P&I Club as a manager in the Claims Department. Prior to that, he spent four years with a Japanese ship management company after having sailed for three years as a deck officer.

Michael Moon has joined Gard as Senior Lawyer in the Defence Department in Oslo. Prior to joining Gard, Michael was a partner at the law firm Bentleys Stokes and Lowless, London.

Adrian Hodgson has been appointed Senior Claims Executive in the London section of the Claims Department, P&I.

Stephen Mulcahy has been appointed Senior Underwriter in the Underwriting Department.

Kelly Turner has been appointed Claims Executive in the London section of the Claims Department, P&I.

Samira Hmam has been appointed Deputy Underwriter in the Underwriting Department.

Hideo Teramachi has been appointed Representative of Gard P&I Japan and Far East.

Anne Boye has been appointed Senior Claims Executive in Gard (Greece) Ltd.

Svein Ellingsen has been appointed Senior Claims Executive in Gard (Greece) Ltd.

Isabel Martin de Nieto McMath has been appointed Claims Executive in the Casualty, Environmental, Property & Liquid Cargo section of the Claims Department, P&I.

Tore Andre Svinøy, Lawyer, has been seconded to Gard (UK) Limited.

Helen Sandgren, Senior Lawyer, has relocated to Gard (UK) Limited.

Carla Bianco-Biagini has resigned from her position as Claims Executive at Gard (North America) Inc. We wish her all the best for the future.

Wai Yue Loh has resigned from his position as Claims Executive, Lawyer at Gard (HK) Ltd. We wish him all the best for the future.

Chris Moncrieff has resigned from his position as Claims Executive in the Claims Department, Energy. We wish him all the best for the future.

Sven-Henrik Svensen, Senior Vice President, a cherished colleague, an invaluable source of knowledge and experience and a great ambassador for Gard throughout his 32 years of service, retired from Gard on 28th February 2010. We thank Sven-Henrik for all his hard work and wish him a long and happy retirement. ■

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14th May 2010
25th June 2010

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13th May 2010
25th June 2010
26th June 2010

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16th June 2010
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