

CIRCULAR REF: 2009/005

**CIRCULATED TO ALL MEMBERS, BROKERS AND DIRECTORS
ATTENTION INSURANCE DEPARTMENT**

**18 FEBRUARY 2009
SHP**

**FD&D COVER FOR MOA RISKS, "WRIT SEARCH FACILITY" AND MARITIME LIEN INSURANCE FOR SECOND-HAND SHIPS
2009/2010 POLICY YEAR**

The purpose of this Circular is once again to draw Members' attention to the "Writ Search Facility" which the Managers of the Association have arranged on Members' behalf, as well as to advise Members of the availability of "Maritime Lien Insurance for Second-Hand Ships" for the 2009/2010 policy year.

The "Writ Search Facility" has been designed to reduce the risk of Members buying vessels which turn out to be subject to claims relating to the vessel's previous ownership. The "Maritime Lien Insurance for Second-Hand Ships" is intended to provide Members with some further protection against the financial losses which may flow from claims being made against second-hand vessels purchased by Members. Members should note that the insurance cover is provided under a Lloyd's insurance policy which the Managers of the Association have arranged on Members' behalf acting purely "as agents only". Accordingly, the Association shall be under no liability whatsoever in relation to any claims which may be made against the Maritime Lien Insurance Policy.

Before going on to explain in more detail how these products may benefit Members, it is perhaps helpful to recap on the types of claims that can be made against vessels relating to their previous ownership. Broadly speaking such claims fall into two categories:

1. Maritime Liens
2. Statutory Rights of Action in rem
1. MARITIME LIENS

A maritime lien is a claim which entitles the Claimant to arrest the ship in connection with which the claim arises, which right of arrest survives a sale other than a judicial sale, despite the fact that the buyer has bought the vessel in good faith and without notice of the claim. Under English law only a small number of claims have been granted "maritime lien" status, the most important of which are as follows:

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1. Damage done by a vessel
2. Salvage
3. Wages of masters and seamen
4. Masters disbursements

Unfortunately for the buyers of second-hand vessels, there are other jurisdictions which grant many other claims "maritime lien" status which greatly increases the risk that a vessel may be subjected to some such claim. For example, in the United States of America, the Federal Maritime Lien Act provides that any person furnishing "necessaries" in the United States to a vessel shall have a maritime lien on that vessel. "Necessaries" has been interpreted by the US Courts very widely to include repair services, supplies (including bunker supplies), towage, the use of dry-dock facilities, pilotage, stevedoring services and even P&I insurance premiums!

Furthermore, the US Court of Appeals 9th Circuit has recently upheld the claim of a foreign supplier of bunkers to a foreign ship in a foreign port to a maritime lien in respect of that supply on the basis of incorporation in the Supply Contract of a lien clause and a US Choice of Law clause. This extension of US jurisdiction in this manner has also recently influenced the Canadian Federal Court of Appeal to uphold the claim by non-US bunker suppliers to the protection afforded by maritime lien status in respect of non-US supplies of bunkers by virtue of a US Choice of Law provision in their Supply Contracts.

In addition to the categories of claims which, under English law, have been granted "maritime lien" status, the International Convention on Maritime Liens and Mortgages 1993 extends the categories of claims granted "maritime lien" status to include claims in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel as well as claims for port, canal and other waterway dues and pilotage dues amongst others. This Convention has been ratified by a number of countries including China, Denmark, Finland, Germany, Guinea, Morocco, Nigeria, Norway, Paraguay, Peru, Russian Federation, Spain, Sweden, Tunisia and the Ukraine.

As a matter of English law, the question of whether or not a claim against a vessel has "maritime lien" status will be determined according to the law of the forum. The law of the flag state of the vessel may however be applied in other countries, which may (as has been seen in the recent Canadian Federal Court of Appeals case referred to above) apply the laws of the Choice of Law clause in the contract.

2. STATUTORY RIGHTS OF ACTION IN REM

Even in England where the category of claims attracting "maritime lien" status is small, all maritime claims listed in the 1952 Arrest Convention may be enforced in rem by arresting the vessel. Such claims cause a particular problem for Members purchasing vessels because providing a writ has been issued prior to a change of ownership, the writ may be served and the vessel arrested perfectly validly even after a change of ownership. The same applies to a number of other jurisdictions such as Australia, Canada, Hong Kong, New Zealand, Singapore and arguably South Africa. The risk of a vessel being arrested pursuant to a writ issued in rem against the vessel prior to a sale can however be significantly diminished by carrying out a search of the Admiralty Registry in London as well as in these other important maritime jurisdictions.

In one case involving the Association and one of its Members, the Member purchased a vessel in relation to which a writ had been issued prior to the sale but not served until some time after the sale for a claim of approximately US\$250,000. As no "Writ Search" had been carried out at the Registry in Singapore where the writ had been issued, this was not discovered until the vessel was arrested.

3. "WRIT SEARCHES" (IN REM CLAIM FORM SEARCHES)

As explained above, in relation to statutory rights of action in rem it is possible in Australia, Canada, England, Hong Kong, New Zealand, Singapore and South Africa to check prior to purchasing a ship whether any writs have been issued which have yet to be served on the ship. In order to assist Members in identifying such claims, the Association has entered into arrangements with the following law firms whereby Members of the Association wanting to

purchase FD&D cover for disputes arising under sale and purchase contracts will be entitled to have a search of the Admiralty Registry concerned carried out free of charge:-

Australia and New Zealand - Norton White Canada -

Borden Ladner Gervais

England, Hong Kong and Singapore - Ince and Co South

Africa - Garlicke and Bousfield

The Writ Searches will take place after an application for entry of a vessel in the FD&D Class of the Association has been accepted by the Managers, not more than one week prior to the intended delivery date of the vessel.

Ideally, Members wishing to gain maximum value from this "Writ Search Facility" will give the Association as much notice as possible prior to delivery of the vessel (possibly even prior to concluding the MOA) in order to enable a proper search of each Registry to be carried out. Should any writs be discovered, Members will then have a proper opportunity to negotiate with the sellers to ensure that these claims are adequately secured by the sellers to the satisfaction of the Claimants. Clearly, had a "Writ Search" been effected in the claim referred to in (2) above, then there can be little doubt but that the Members would not have been faced with the subsequent arrest of the vessel and the financial losses which flowed therefrom. As this "Writ Search" facility is being provided free of charge to Members buying MOA risks FD&D cover, the law firms listed above have kindly agreed to carry out a single search of each Registry, not more than one week prior to the intended delivery of the vessel. Whilst of course there is a risk that a writ may be issued in the Registry after the search has been carried out, Members will appreciate that it is impossible to eliminate all risks. Upon receipt of an application for entry of a vessel in the FD&D Class being accepted by the Members, the Managers of the Association will send Members a brief letter setting out the terms on which the "Writ Search" is being carried out as set out in the draft attached to this Circular.

The Managers of the Association hope that Members will take full advantage of this facility, thereby reducing the risk of suffering unforeseen financial losses as a result of claims being made against vessels purchased by them relating to vessels' prior ownership. Since this facility was introduced in 1999, a number of Members have been assisted in identifying claims which, when brought to the attention of the sellers concerned, were sorted out. As most vessels are owned by single purpose companies whose sole asset is the vessel, once the vessel has been sold and the sale proceeds distributed, it is usually extremely difficult getting the sellers to honour their usual obligation under the MOA to indemnify the buyers in respect of such claims. It is no surprise therefore that some Members view the "Writ Search Facility" as an integral part of their management of uninsured risks when buying second-hand ships.

4. MARITIME LIEN INSURANCE FOR SECOND-HAND SHIPS

Unfortunately, however, there are many jurisdictions other than those referred to in paragraph 3 above which grant various categories of claims "maritime lien" status and where it is not possible to discover the existence of such claims before a vessel has been arrested. In order to assist Members in insuring against the risk of claims being made against a vessel relating to its previous ownership, the Managers of the Association have arranged a Lloyd's Insurance Open Policy to which declarations can be made. Members wanting to purchase FD&D cover for disputes arising under sale and purchase contracts are thereby enabled also to cover the risk of liabilities being incurred by them in relation to claims being made against vessels relating to their previous ownership. Such claims brought against Members' vessels will of course continue to be handled by the Association's FD&D Department in the usual manner. To the extent, however, that financial losses are incurred by Members arising directly from a "maritime lien" type claim being made, such losses will be covered by the Maritime Lien Insurance for Second-Hand Ships up to a limit of US\$1.0 million per vessel, subject to a deductible of US\$5,000 at a premium for the 2009/2010 policy year of US\$7,500 per vessel. Alternatively, Members wishing only to purchase cover up to a limit of US\$500,000 any one vessel can pay a reduced premium of US\$4,500 per vessel declared. As will be seen from the terms of the policy attached, the cover purchased will continue for 12 months from the date of the declaration.

The Managers of the Association hope that this Maritime Lien Insurance Policy for Second-Hand Ships will continue to provide Members with a useful additional cover to protect them against unforeseen financial losses.

Members wishing to discuss any aspect of this Circular are welcome to contact the Association's Underwriting or FD&D Departments.

STEPHEN PURVIS

DIRECTOR - North Insurance Management Limited

As Managers on behalf of the North of England P&I Association Limited

To: THE MEMBER

Our Ref:

Your Ref:

Date:

Dear Sirs

FD&D COVER FOR MOA RISKS – WRIT SEARCH FACILITY

Pursuant to the Association's Circular dated 16 February 2009 and pursuant to the acceptance of your application for entry of the m/v [] in the FD&D Class of the Association from the date of the MOA, we confirm that [upon receipt of your notification to us of the estimated date of delivery] **(delete if not applicable)** we will forthwith request Ince & Co. London (together with their Hong Kong and Singapore offices and correspondents in Singapore), Garlicke & Bousfield, Durban (and their correspondents in Cape Town), Norton White in Australia (and their correspondents in New Zealand) and Borden Ladner Gervais (Canada) to effect *in rem* writ searches in relation to the above vessel on the terms set out in this letter. In the case of Ince's Singapore office, it will be necessary for them to use their locally qualified Singapore legal correspondents.

The responsibilities which the law firms mentioned above and the Association are willing to undertake are necessarily subject to certain practical constraints and we therefore draw your attention to the following limitation on the searches which will be carried out.

- (a) The search to be carried out by Messrs. Ince & Co's London office will be conducted only through the Admiralty Registry in London. It is theoretically possible for a prospective claimant to issue proceedings through a district registry. Such issue of proceedings will not be discovered by a search made through the Admiralty Registry in London.
- (b) The searches to be carried out by Garlicke & Bousfield, Durban and their legal correspondents in Cape Town will be conducted only by a perusal of the Admiralty Register Books of the Durban and Coast Local Division and the Cape of Good Hope Provincial Division of the High Court of South Africa. These two Divisions have jurisdiction over Durban, Richards Bay and Cape Town harbours, being the busiest harbours in South Africa. It is theoretically possible for a prospective claimant to issue proceedings through another division of the South African High Court. Such issue of proceedings will not be discovered by a search made through the Admiralty Register Books of the Durban and Coast Local Division and the Cape of Good Hope Provincial Division of the High Court of South Africa. Furthermore, it is common for the notation in the Register Books to record only abbreviated details of the parties and vessels for litigation. For that reason, it may be the vessel name does not appear in the Register, although a Writ has been issued in respect of her.

- (c) The searches to be carried out by Norton White in Australia will be carried out in the Federal Court of Australia (electronically), the Supreme Court of New South Wales, the Supreme Court of Victoria, the Supreme Court of the Northern Territory, the Supreme Court of Western Australia, the Supreme Court of Queensland, the Supreme Court of South Australia and the Supreme Court of the Australian Capital Territory. These are the main courts where actions are likely to have been commenced, but it is again possible that claims could have been issued in other courts.

As regards the searches to be carried out by Norton White's correspondents in New Zealand, these searches will be carried out electronically at the central registry and will cover the main registries where actions are likely to have been commenced (Auckland, Wellington, Christchurch, Tauranga and Dunedin) but again, it is possible that actions could have been commenced in different registries and so again, the searches are not exhaustive.

- (d) The searches to be carried out by Borden Ladner Gervais in Canada will be carried out in the Federal Court of Canada and the Supreme Court of British Columbia. As regards the latter jurisdiction, however, the writ search is limited to the British Columbia Supreme Court Registry offices of Vancouver and Prince Rupert and again, it is possible that proceedings could have been commenced elsewhere.
- (e) A number of the law firms, in accordance with their agreement with this Association, will conduct the searches for a period of three years prior to our request to them. It is theoretically possible (though in practice unlikely) that a writ or claim form may have been issued earlier than three years prior to the date of our request and could still be "alive" by virtue of repeated renewal, but we believe that it is reasonable to limit the search to a three year period.
- (f) The timing of the searches to be carried out by the law firms will be dictated by our information to them (based on what you have told us) as to the prospective timing of the closing. In view of the time differences and other logistics (including the need for Ince & Co. London to obtain formal permission from the Admiralty Registrar to make such a search), it is not practicable to carry out the searches immediately prior to closing. This creates the theoretical risk that a writ or claim form could be issued between the date of the search and the date of the closing.
- (g) Members should appreciate that if there are maritime liens in existence in any jurisdiction to which the vessel trades, these could be the subject of proceedings against the vessel, notwithstanding the change of ownership. In other words, the writ searches carried out do not give protection against maritime liens which have not yet become the subject of proceedings.
- (h) Finally, it is of course possible that claims may have been issued in jurisdictions other than those referred to above.

For the avoidance of doubt, none of the law firms nor the Association will have any responsibility beyond the limitations set out above.

In the event that you have also taken out maritime lien insurance through the Association, we would remind you that it is a condition of that insurance that the above writ searches be carried out within 7 days of delivery of the vessel. It is therefore of crucial importance that you keep us and our underwriting department apprised of the intended and actual delivery dates of the vessel.

If you have any questions which you would like us to raise with any of the lawyers, please let us know as soon as possible.

Yours faithfully

- North Insurance Management Limited
As Managers on behalf of the North of England P&I Association Limited

RISK DETAILS

TYPE:	Maritime Lien Insurance
ASSURED:	Members, as may be declared, of the FD&D Class of the North of England P&I Association Ltd.
VESSELS:	As declared by Members of the North of England P&I Association Ltd.
PERIOD:	Open Cover to accept declarations attaching during the period from noon on the 20 th February 2009 G.M.T until noon on the 20 th February, 2010 as made by the North of England P&I Association Ltd. Each declaration to run for a 12 month period as defined.
INTEREST:	Maritime Lien - A maritime lien is defined as including any claims being asserted against a declared vessel including but not limited to statutory rights of action in rem which it is alleged by the claimant give a right against a vessel which continues notwithstanding a change of ownership.
LIMIT:	USD1,000,000 any one ship.
DEDUCTIBLE:	USD5,000 any one ship.
CONDITIONS:	<p>This insurance is to indemnify the Assured for financial losses incurred by them arising directly from a maritime lien claim being made on a declared vessel as a result of disputes, debts, etc., which originated prior to the Assured taking delivery of the vessel, and which were beyond the Assured's control.</p> <p>The North of England P&I Association will handle all claims (and recoveries) hereunder as FD&D disputes within the scope of the Association's FD&D class, keeping Underwriters advised.</p> <p>It is a condition precedent to Underwriters liability under this insurance that the settlement of a claim by the Assured with a third party shall be approved by Underwriters or be the subject of a final judgement of the court or tribunal seized of the claim.</p> <p>Excluding claims for legal costs incurred by the Assured falling within the scope of the Assured's defence entry with the North of England P&I Association Limited, but including claims for legal costs incurred by the Assured at Underwriters' request and which would otherwise fall within the scope of the Assured's defence entry with the North of England P&I</p>

Association Limited but for the exercise of discretion by the Directors of the Association against the Assured.

Excluding loss of hire or running expenses of the vessel or liabilities of the Assured for business interruption.

Underwriters will be under no obligation to post bail or security of any kind.

Excluding claims in respect of any maritime lien, encumbrance or cause of action known to the Assured on or before the date of delivery or discovered during the Writ Search by Ince's &/or their correspondents &/or Garlicke & Bousfield &/or their correspondents &/or Norton White &/or their correspondents.

Declared vessels to attach from time of delivery to the Assured.

Institute Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic Weapons Exclusion Clause CL 370 (10.11.2003)

Institute Cyber Attack Exclusion Clause CL 380 (10.11.2003)

Brokers Cancellation Clause 538HD00073.

EXPRESS WARRANTIES:

Vessels to have a purchased FD&D cover with the North of England P&I Association Limited, and such cover to continue for the entire period of this insurance.

Unless otherwise agreed by Underwriters in writing, it is a condition of this insurance that not more than one week prior to the planned delivery date a "Writ Search" is to be conducted by Ince & Co., &/or their correspondents in London, Singapore, Hong Kong, by Garlicke & Bousfield &/or their correspondents in Durban and Cape Town, and by Norton White &/or their correspondents in Australia and New Zealand for three years prior to the planned delivery date, subject to the actual delivery occurring within 30 days after the "Writ Search" was completed, and that no lien, encumbrance or cause of action is discovered during such search.

Vessels to have been purchased on terms including a maritime lien warranty" clause such as clause 9 of Norwegian Sale Form 1987 set out below:-

"The Sellers warrant that the vessel, at the time of delivery, is free from all encumbrances and maritime liens or any other debts whatsoever. Should any claims which have been incurred prior to the time of delivery be made against the vessel, the Sellers hereby undertake to indemnify the Buyers against all consequences of such claims"

**SUE AND
LABOUR:**

Following notice of any actual or potential loss hereunder it is the duty of the Assured(s) to notify the North of England P&I Association Limited immediately and to take all practical and reasonable remedial actions for the purpose of averting or minimising the claim hereunder, in respect of which Underwriters hereunder will at their discretion reimburse the Assured(s) for all necessary costs and expenses in pursuance of this duty.

**CHOICE OF
LAW AND
JURISDICTION:**

This insurance shall be governed by and construed in accordance with the law of England & Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England & Wales.

PREMIUM:

USD7,500 per vessel declared with all declarations to be made quarterly in arrears. No return of premium to be made in the event of any vessels entry with the North of England being cancelled or terminated.

Alternatively

At Assured's option if the limit hereon is reduced to USD500,000 any one ship then the premium is amended to USD4,500 per vessel declared. Option to be exercised upon order being given.

**PAYMENT
TERMS:**

Subject to quarterly payments of premiums to Underwriters within 60 days from the end of each quarter.
Premium Payment Clause LSW3000 (11/2001) – 60 days