

New guide on stowage and securing

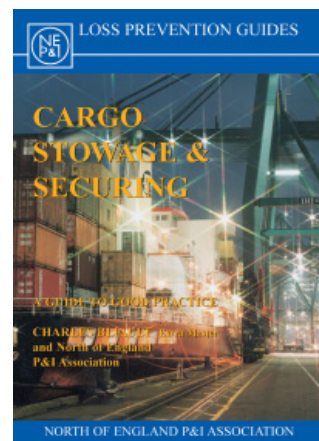
Proper stowage and securing of cargo is the topic of the Association's latest loss prevention guide.

All cargo ships other than those carrying bulk solids and liquids are now required to carry and use a cargo securing manual. Despite this, incidents of shifting cargoes continue to occur, causing ship damage and crew injuries as well as loss or damage to the cargo itself.

The new loss prevention guide, entitled *Cargo Stowage and Securing*, provides some basic rules to be remembered on every occasion during loading and securing of cargo with reference to published regulations, recommendations and guidance. It also describes recommended methods for particular items and types of cargo and gives guidance on the points to be remembered during passage-planning and the voyage itself.

The Association has long recognised that if ships' staff have greater knowledge and awareness of hazards, those hazards can be avoided and accidents prevented. The object of this new guide is to increase seafarers' knowledge of the forces acting on items of cargo, of how to control those forces by proper stowage and securing and of the consequences of failing to do so.

All Members' ships and offices will receive a free copy of the guide and Members can obtain further copies from the loss prevention department for £10 (non members £30).



European black lists come into force

The European Union is about to implement stringent new measures to control the access of some ship types to European ports and to strengthen the port-state control regime. The measures are contained in Directive 2001/106/EC, which is being introduced following the sinking of the tanker *Erika* in December 1999 and comes into force before 22 July 2003.

Members should be aware of the following criteria relating to refusal of access to European Union ports. Any gas or chemical tanker, bulk carrier, oil tanker or passenger ship will be refused access in the future to ports in the European Union if either:

- the vessel flies the flag of a state appearing on the Paris MOU annual report 'black list' and has been detained more than twice in the course of the preceding 24 months in a Paris MOU port or,
- the vessel flies the flag of a state described as 'very high risk' or 'high risk' in the black list and has been detained more than once in the course of the preceding 36 months in a Paris MOU port.

The refusal of access will become applicable immediately the ship has been authorised to leave

the port where it has been the subject of a second or third detention as appropriate.

The European Commission will publish information on ships that have been refused access to Community ports every six months. Information about port state control inspections and detentions is published on the Equasis information system as soon as possible after the inspection has been completed or the detention has been lifted.

RIGHT OF APPEAL

The owner or operator of a ship has a right of appeal against a detention decision or refusal of access, but an appeal will not cause the detention or refusal of access to be suspended. The following procedures – detailed in annex XI of the Directive – apply.

- To have an access refusal order lifted, the owner or operator must address a formal request to the competent authority of the member state imposing the order, which must be accompanied by a certificate from the flag state administration showing that the ship fully conforms to the applicable provisions of the international conventions. The request must

also be accompanied, where appropriate, by a certificate from the ship's classification society showing that the ship conforms to the class standards stipulated by that society.

- The access refusal order can only be lifted following a re-inspection at an agreed port by inspectors of the competent authority of the member state that issued the access refusal order, and if evidence is provided to their satisfaction that the vessel fully complies with the applicable requirements of the international conventions.

Members should ensure that they pay special attention to the condition of the vessel, machinery, equipment and record keeping in order to minimise the possibility of future detentions which could possibly have a significant impact on the trading ability of the vessel, perhaps for quite a prolonged period.

Members should also look at detention history when purchasing second-hand vessels as detentions under previous ownership could have a limiting effect on future activities.

Directive 2001/106/EC can be downloaded from http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_019/l_01920020122en00170031.pdf.

Details of flags appearing on the Paris MOU annual report black, grey and white lists can be accessed at <http://www.parismou.org/PDF/bwg2001.pdf>

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Malaria – a reminder

Malaria is a serious and sometimes fatal disease that is widespread in many tropical and sub-tropical countries – the World Health Organisation estimates there are 300-500 million cases of malaria each year. Fortunately it can be treated, but only if caught in time.

HOW IS MALARIA SPREAD?

Malaria is spread from person to person by the bite of an infected mosquito. When a mosquito bites a human, the malaria parasite is passed into the blood stream and quickly makes its way to the liver. Once in the liver it multiplies and eventually invades the blood stream. The infected mosquito can bite at any time of the day, though most attacks are during the night.

WHAT ARE THE SYMPTOMS?

Patients can have a variety of symptoms depending on the state of their immune system, the stage of infection and the infecting species. The most common complaints are fever and high temperature, chills, headaches, muscle aches, confusion, dizziness, vomiting lasting for several hours, sweating and tiredness. The early stages of malaria may resemble the onset of flu. In addition to the possible variety of different symptoms, these can be developed at different speeds – ranging from several days to several months. Malaria is diagnosed by an examination of a blood sample that reveals the presence of malarial parasites.

TREATMENT

If diagnosed early malaria can be effectively treated. Delay can have serious consequences and, if left untreated, malaria can result in organ

failure, coma or even death. The treatment itself will depend on the type and severity of the attack.

PREVENTION

The ABCD of malaria treatment is as follows.

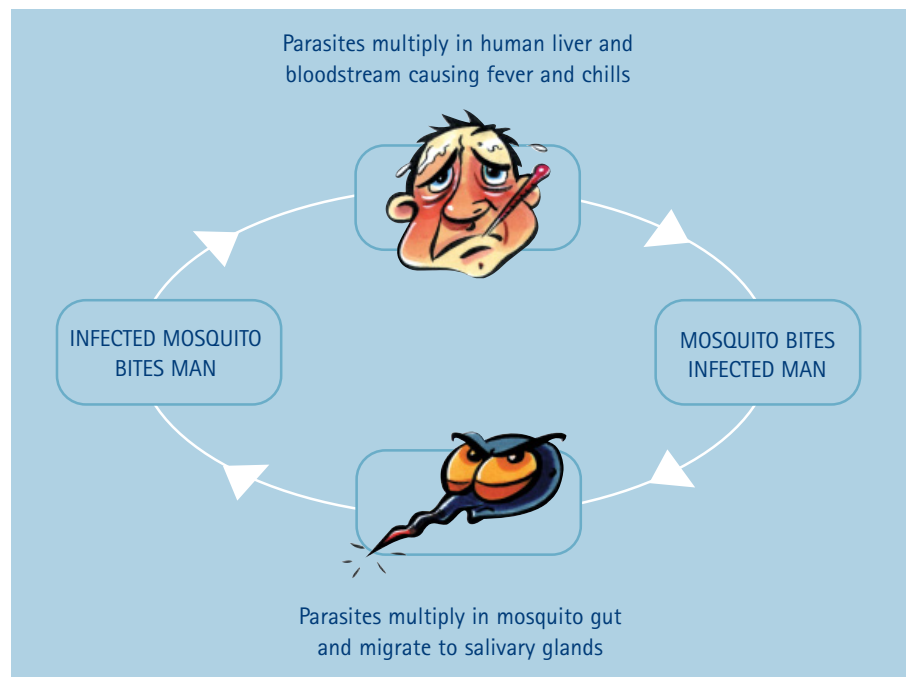
- **Awareness** – be aware of the risk of malaria in the countries you may be visiting.
- **Bites** – avoid mosquito bites by taking appropriate measures. Reducing the number of bites reduces the chances of getting malaria.
- **Compliance** – comply with appropriate prophylactic drug regime for the area you are visiting. Studies have shown that there is a

reduced risk of contracting malaria even if the wrong drug regime is being taken.

- **Diagnosis** – early diagnosis for malaria is vital. Malaria can be fatal but early diagnosis and treatment is usually 100% effective.

POLICY

It is strongly recommended that Members have a policy for the prevention of malaria on board their ships. They should take specialist advice as to the type of drugs most suitable and the dosage required. They should also ensure that crews understand the dangers that malaria presents.



Filipino medical scheme achieves substantial savings

North of England's pre-employment medical scheme for Filipino seafarers has now been running successfully for several months through two approved clinics in Manila. In just a few months participating Members have saved significant sums in repatriation costs alone through the screening process.

The scheme was introduced due to increasing concern that a number of unfit seafarers were slipping through the screening process, putting ships and crews at unnecessary risk as well as the lives of the unfit seafarers themselves.

Under the guidance of Dr Baker from Medical Rescue International, an enhanced medical screening scheme was developed in conjunction with the two Manila clinics – SM Lazo and Maritime Clinic for International Services – and initiated in July 2002.

There are now several Members participating in the scheme, all keen to reduce costly repatriations for pre-existing illnesses and prepared to pay a little extra for more effective pre-employment screening.

FAILURE RATES SETTLE AROUND 5%

In the first two months, rejection rates were fairly high but figures have now dropped to anticipated levels of 4-6% of seafarers being found unfit. Manning agencies have quickly appreciated the high standards imposed under the scheme and appear to have become more selective in the seafarers they submit for examination. Sadly, those rejected could still potentially submit for less effective screening elsewhere and gain employment with some unsuspecting ship operator.

The most common conditions for failure are hypertension, diabetes, mellitus, hepatitis B for food handlers, hepatitis C reactive and pulmonary tuberculosis. A number of candidates were rejected for significant cardio-vascular disease or multiple medical problems that would have almost certainly required urgent medical attention within a few weeks.

In February 2003 Dr Baker and Judith Burdus from the Association travelled to Manila to conduct the first audit of the clinics. They were pleased to find that both clinics are committed to the continuation and development of the scheme.

For further details please contact Judith Burdus at the club's Newcastle head office.

Double hulls – double benefit or double trouble?

Ever since the grounding of *Exxon Valdez* much has been heard of the environmental benefits of double hulls and almost all new tankers are being built with them. Since *Prestige*, the move towards actively replacing single-hulled tankers has gathered pace.

But there is little evidence of a similar move toward double-hulled bulkers. One Member has recently ordered five double-hulled bulkers and expects considerable savings.

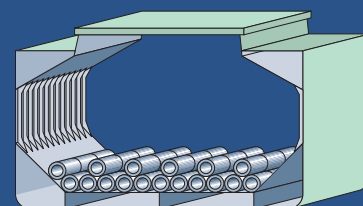
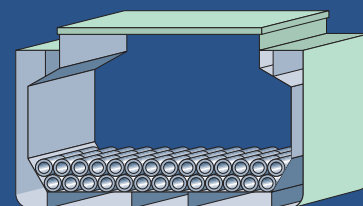
Similar safety and environmental protection benefits are claimed for double-hulled bulkers as for double-hulled tankers, along with greater strength due to better steelwork distribution and easier inspection even when loaded. The Member estimates savings of approximately US\$400,000 a year in port time, port charges and cleaning costs and around US\$140,000 a year in reduced operating and maintenance costs.

However, as the Member is fully aware, double-hulled vessels can introduce their own special risks. A double-hulled vessel has to meet the same

strength requirements as a single-hulled vessel, which means that each skin can be weaker than the single hull it replaces. It is thus possible that impact damage to the outer hull will be greater than that sustained by a single-hulled vessel. There are also concerns that inner hulls will experience greater stresses than single hulls due to having to carry cargo without the direct and continuous support of surrounding water.

The greater number and size of void spaces on double-hulled vessels may actually increase the risk of fire, explosion, corrosion and suffocation. The cellular structure of double-hulled spaces generally makes inspection and adequate ventilation more problematic, yet thorough internal inspection is crucial since the risk of corrosion may be more severe than expected.

Double-hulled bulkers undoubtedly offer cost savings to ship operators but they can also bring increased risks and demands. Members need to bear these in mind when weighing up the advantages of switching to such vessels.



Beating bogus bulk cargo claims

In the Association's experience, bulk cargoes seem to attract more claims – in particular shortage claims – than almost any other type of cargo. Unfortunately, shortage claims appear to be an industry in their own right in certain countries and those involved are becoming increasingly ingenious.

ITALY

Receivers in certain Italian ports are discharging all but 10-15 tonnes of a bulk cargo and then stop, claiming there is a shortage based on shore weighbridge figures plus the amount of cargo estimated to remain on board. Such shortages rarely amount to more than 40-50 tonnes and the receiver requests either a guarantee or an immediate cash settlement at a lesser figure. The receiver refuses to allow the remaining cargo to be discharged until one or other is provided. Since there is no formal arrest, it is difficult to obtain the court's assistance in forcing the receiver to take the remaining cargo and, in any event, Italian courts are not known for their haste. Further, because cargo is still on board, the ship cannot obtain customs clearance to sail.

NORTH AFRICA

A Member regularly trading to North Africa loads more cargo than stated on the bill of lading, after

reaching a private agreement with the shipper, but still suffers from alleged 'shortages' at the discharge ports – supported by weighbridge

dockets. As the weighbridges are run by customs, courts are most reluctant to disregard the 'official' dockets. One example of a blatantly manufactured claim is an instance in which a Member had a valid claim for demurrage against the charterer, which was passed to the receiver under the sales contact. The receiver immediately arranged for a 'shortage' claim to be presented in an amount which just happened to equal the amount of demurrage claimed. The receiver was quite open about what he had done and stated he would only withdraw the shortage claim if the owner dropped the demurrage claim.

In loss-prevention terms, it is very difficult for owners to fight against a well-established claims industry. However, by following the standard advice for avoiding such claims, namely

- issue bills, or allow bills to be issued, stating only the quantity of cargo found to be on board by a draught survey, held jointly with the shipper if possible
- carry out a draught survey at the discharge port, if possible jointly with the receiver, and, if necessary, have it conducted by a court appointed surveyor or similar,

the number and size of the claims can be limited if not entirely stopped.



Straight bills of lading

The recent decision of the Singapore Court of Appeal in the case of the *'Hyundai General'* highlights the importance, from a carrier's point of view, of ensuring that cargo is discharged against presentation of an original bill of lading.

This case involved the carriage of a cargo under a straight bill of lading, that is one in favour of a named consignee, without the words 'to order'. In common law jurisdictions the effect of this is that the bill of lading is not negotiable. However it remains unclear whether or not such a straight bill of lading must be presented in exchange for delivery of the cargo or whether it can be treated as if it was a seaway bill. A seaway bill generally does not have to be presented before cargo can properly be released.

The appeal court decided that a straight bill of lading is not necessarily the same thing as a seaway bill. If the parties to the contract of

carriage intend the bill of lading to have the effect of a seaway bill then they must make that intention clear. Therefore for the purposes of delivery of cargo a straight bill of lading should be treated in the same way as a negotiable bill.

This is the first decision on this point by a court in a common law jurisdiction. It is not possible to predict accurately the attitude of any other courts that may be faced with a similar issue.

The only safe advice that can therefore be offered to Members who may be carriers under bills of lading is to ensure that cargo is only delivered against the presentation of an original bill of lading, whether that bill is a straight bill or is a "to order" bill of lading. Failure to do so could expose Members to claims for misdelivery of cargo which, because no bill of lading is presented, may not fall within a Member's P&I cover.

Subject details



Many Members will already be aware that in fixture or other contractual negotiations the effect of words such as "subject details" can have different effects depending upon whether the contract and the negotiations are to be subject to English law or US law.

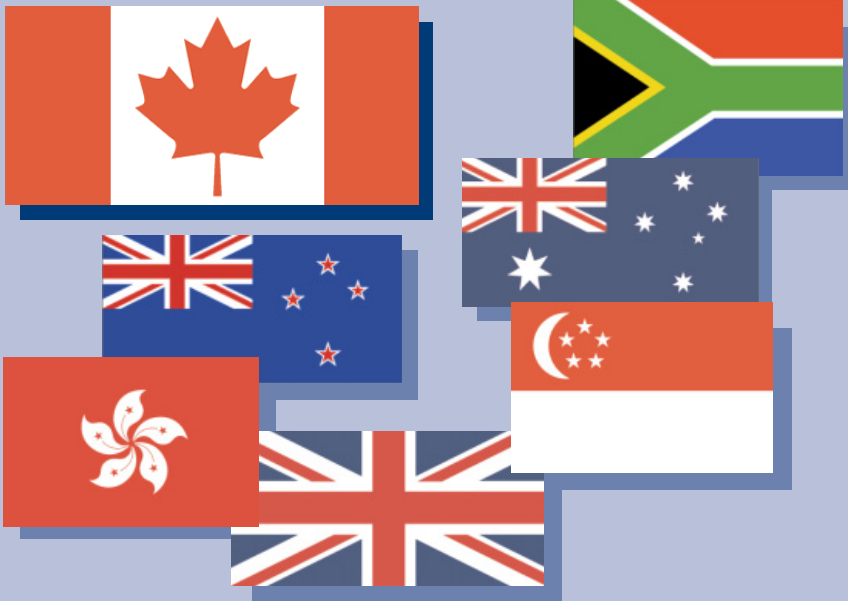
As a matter of English law there is no contract at all until the "subjects" are lifted and everything has been agreed. As a matter of US law, notwithstanding that negotiations may be "subject details" there may nevertheless still be a properly concluded contract. This is the case so long as the main terms of the proposed contract have already been agreed.

This is notwithstanding that there may be various issues that need to be agreed.

This distinction has given rise to practical difficulties and the US position in particular is unpopular in many circles.

Recently attempts have been made to persuade the US Court of Appeals for the Second Circuit (which covers New York) to reconsider the law on this point. Unfortunately however the court has declined to do so and as a result this difference remains.

Negotiations that would not amount to a binding contract under English law or indeed in many other countries will nevertheless still be binding under US Law. Therefore if Members wish to avoid being bound by negotiations for a contract under US law until agreement has been reached on each and every detail then that should be agreed with the other party from the outset.



Extension of writ search to Canada

Members will be aware that as part of the FD&D cover for MOA risks, the Association has arranged maritime lien insurance that provides cover for Members who face claims for maritime liens that arose against the ship before it was purchased. As part of that cover, we have arranged writ search facilities with Ince & Co in London, Singapore and Hong Kong; Garlick & Bousfield in Durban; and Norton White for Australia and New Zealand. Searches are carried out in these jurisdictions before the ship is delivered to identify whether any claims may already have been lodged against the ship.

The Association is pleased to announce that this writ search facility has now been extended to cover Canada. Arrangements have been made with a Montreal based firm Borden Ladner Gervais, to carry out searches in the Federal Court of Canada and the Supreme Court of British Columbia. However, as to the latter jurisdiction, at this time the writ search is limited to the British Columbia Supreme Court Registry offices of Vancouver and Prince Rupert.

If Members require further information they should contact the FD&D Department at the Association.

Oily water separators – no room for doubt

Shipowners face increasing enforcement of Marpol Regulations both in Western European and United States ports, particularly in relation to suspected improper use of oily water separators. The cost and delays associated with consequent investigations means the appearance and operation of separators must be beyond doubt.

Breaches of Marpol regulations, and concealment of Marpol breaches have recently resulted in prison sentences being imposed in the US on a Master, Chief Engineer and another crewmember. They were found guilty of breaches relating to the by-passing of the vessel's oily water separator ("OWS"), and the making of false entries in the oil record book. A fine of US\$5.5 million was also imposed against the ship owner. In Europe a fine of €600,000 was recently imposed by the Spanish courts on a vessel found guilty of flushing oily sludge directly into the sea.

US law firm Keesal Young and Logan, which regularly deals with defence of breach of Marpol prosecutions on the US west coast, has advised the Association that US Coast Guard inspection teams are now paying considerable attention to oily water separators and associated pipework.

RED FLAG ITEMS

The discovery of certain features or aspects on a vessel is very likely to trigger further detailed investigation by the US authorities and in-depth interview of the crew with a view to gathering evidence for a criminal prosecution. These 'red flag' items include

- discovery / use of flexible hoses with attached flanges
- existence of blank flanges on piping associated with the oily water separator and / or overboard discharge valve
- nuts and bolts on flanges that have been turned recently
- fresh paint on piping system
- different colours of paint on the piping system
- crew's lack of familiarity of oily water separator system
- lack of sludge receipts for discharge ashore
- oil record book inconsistencies or irregularities, or excessive "too regular" types of entry
- evidence of oil leaking from valve stem packing or from gauges associated with non-oil or ballast water systems.

The investigation may take the form of a Port State inspection during which unusual time or effort is made inspecting the oily water separator, associated piping and oil record book. The Coast Guard inspectors may also ask the crew how the oily water separator is operated or maintained, ask for a demonstration or ask to inspect the incinerator to see if it is regularly used (as the oil record book may indicate).

SEVERE CONSEQUENCES

If the inspectors observe sufficient evidence that the oily water separator is not being used or maintained properly, or identify some other 'red flag' during an inspection, they may later return to the vessel unannounced and armed with a court order or search warrants.

If during an inspection the crew make false statements or present an oil record book containing false entries, they will have committed a separate felony for each such false statement and entry and will be liable for separate punishment or penalty for each offence.

In some instances, vessels are investigated upon arrival simply because another vessel under the same ownership or management or of the same class is also under investigation. Although an investigation may ultimately prove that there have been no Marpol breaches, it will still result in substantial delay to and loss of earnings for the vessel, together with a significant bill for both marine and criminal lawyers.

THE NEED TO ACT NOW

Members should therefore consider conducting thorough documented reviews of each vessel's equipment and / or procedures to ensure that any potential 'red flag' items are identified.

Rectifying items – or documenting the reasons for their existence and re-familiarising the crew with those reasons – may make the difference between a smooth passage through a Marpol port state inspection and a trip to the local criminal court.



Hydrogen sulphide warning

The Oil Companies Marine Forum (OCIMF) has once again issued a warning relating to the increasing levels of hydrogen sulphide (H₂S) in some crude oil.

Oil exported from Iraq, Qatar, South America, Mexico, Poland, Russia, Latvia and Turkey are all known to contain hydrogen sulphide but OCIMF says 'very significant' amounts have recently been detected on tankers loading in the Middle East.

Hydrogen sulphide poses two principal risks onboard ship. First and foremost is the serious risk to personnel, as the gas can be lethal. Second is the phenomenon known as 'super rust'.

Hydrogen sulphide in concentrations as low as one part per million (ppm) has a characteristic smell of rotten eggs but, when concentration levels increase, the odour will not be detected as the sense of smell is destroyed by the gas. Concentrations in excess of 500 ppm can cause unconsciousness in a matter of seconds and, if a victim is not removed to fresh air, death will quickly follow.


Recently hydrogen sulphide has been connected to highly aggressive corrosion of steel, resulting in corrosion rates onboard ships up to 30 times more than normal. A combination of elevated temperatures and humid conditions can lead to corrosion rates of over 3 mm per year.

Members should certainly raise awareness of the dangers of hydrogen sulphide onboard ship and are advised to seek clarification from cargo interests and bunker suppliers as to the levels of the hydrogen sulphide in cargo and bunkers. Shipowners should ensure that suitable testing equipment capable of detecting toxic gases is available to shipboard personnel, who should be suitably trained in the use of such equipment.

Concentration of hydrogen sulphide (ppm)	Effect on people
0.15	Perceptible odour
4.6	Moderate odour
10	Eye irritation
27	Strong odour intolerable
100	Loss of sense of smell
200 to 300	Eye inflammation and respiratory problems
500 to 700	Loss of consciousness and death in 30 minutes
700 to 1000	Rapid unconsciousness and death
1000 to 2000	Immediate unconsciousness

Colregs rule 19 – restricted visibility

COLREGS
Conduct of Vessels in Restricted Visibility



Rule 19 – Conduct of Vessels in Restricted Visibility

(a) This rule applies to vessels not in sight of one another when navigating in or near an area of restricted visibility.

(b) Every vessel shall proceed at a safe speed adapted to the prevailing circumstances and conditions of restricted visibility. A power-driven vessel shall have her engines ready for immediate manoeuvre.

(c) Every vessel shall have due regard to the prevailing circumstances and conditions of restricted visibility when complying with the Rules of Section I of this Part.

(d) A vessel which detects by radar alone the presence of another vessel shall determine if a close-quarters situation is developing and/or risk of collision exists. If so, she shall take avoiding action in ample time, provided that when such action consists of an alteration in course, so far as possible the following shall be avoided:

- An alteration of course to port for a vessel forward of the beam, other than for a vessel being overtaken;
- An alteration of course toward a vessel abeam or abaft the beam.

(e) Except where it has been determined that a risk of collision does not exist, every vessel which hears apparently forward of her beam the fog signal of another vessel, or which cannot avoid a close-quarters situation with another vessel forward of her beam, shall reduce her speed to the minimum at which she can be kept on her course. She shall if necessary take all her way off and in any event engage with extreme caution and danger of collision is over.

NORTH OF ENGLAND

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Not surprisingly, maritime collisions tend to occur more frequently in situations involving restricted visibility. The gravity of this problem is reflected in the Colregs, where a full section of the rules – Section III – is dedicated to the conduct of vessels in restricted visibility.

The situation no-doubt improved following the introduction of Radar and more recently ARPA. Unfortunately, such technical developments whilst serving to improve navigational safety may also encourage watchkeepers to maintain speeds in excess of what should be considered safe in the prevailing conditions.

Failure to maintain a safe speed is probably the most common causal factor of collisions in restricted visibility. Mariners clearly need to pay special attention to the advice in Colregs rule 6 – *Safe Speed when navigating in or around an area of restricted visibility.*

Restricted visibility, and more especially fog, often occurs when making a difficult port approach or navigating in a congested channel or at other times of high stress levels. In such situations the master or officer of the watch must have a thorough understanding of Colregs rule 19 – *Conduct of vessels in restricted visibility.*

MAIN POINTS TO KEEP IN MIND

To help understand the rule, there are a few key points to keep in mind.

- First and foremost, there are no stand-on vessels in rule 19 situations. Every vessel must assume the responsibility of the give-way vessel – even in narrow channels and traffic separation schemes – (TSS).
- Every vessel must proceed at a safe speed and have its engines ready for immediate manoeuvre.
- Special attention should be paid to the relevance of other rules in Colregs section I, such as look-out, risk of collision, action to avoid collision, narrow channels and traffic separation schemes.
- Do not make the mistake when navigating in restricted visibility within a narrow channel or TSS of believing that you have the right of way over other vessels – remember every vessel has the responsibility to give way. Rule 9 and 10, Narrow Channels and TSS dictate the proper conduct of vessels in such areas but do not provide collision avoidance advice.
- When the presence of another vessel is detected by radar alone, and a close quarters situation is developing and / or risk of collision exists, avoiding action must be taken. Avoiding action may involve a reduction in speed and / or alteration of course. However, when an

alteration of course is all that is required, it must not involve

– an alteration to port for a vessel forward of the beam other than for a vessel being overtaken.

or

– a turn towards a vessel abeam or abaft the beam.

- When the fog signal of another vessel is heard and indicates the vessel to be apparently forward of the beam, or when a close quarters situation cannot be avoided with another vessel forward of the beam, reduce speed to the minimum at which steering can be maintained or if necessary take all way off (stop) until the danger of collision is over.
- Make the appropriate sound signals in accordance with rule 35 – *Sound signals in restricted visibility* – one prolonged blast when under way, two prolonged blasts at intervals of not more than two minutes when stopped.

MINIMUM MEASURES TO TAKE

The minimum measures which the officer of the watch should be taking when navigating in or around an area of restricted visibility include

- call the master
- place the engines on stand-by
- reduce speed
- sound fog signals
- post extra lookouts
- ensure Radar / ARPA is switched on and working.

Navigating a vessel in restricted visibility is a serious business. Officers should not be lulled into a false sense of security by high technology Radar and ARPA equipment – they should go back to basics, comply with the Colregs and above all else navigate safely.

Combined safety signs poster

The final poster in the Association's series on safety signs accompanies this issue of *Signals*. It illustrates the use of combined signs, which may contain a warning and an instruction to take action, or a warning and a prohibition order. For example, a potential hazard may be illustrated as a warning sign and the action or operation that is prohibited illustrated as a prohibition sign.

The full set of posters is also available as part of a training package about signs and signals designed to assist Members to meet their obligations to

provide onboard familiarisation training as required by the STCW Code and the ISM Code.

Members can order a complete training package for £15 (non-members £25), by contacting the Association's loss prevention department. The packages each contain a set of four posters with a choice of instructional CD-Rom, VHS video, or video CD (VCD) as requested.

Full details and an order form can be found in the loss prevention section of the club's website at www.nepia.com



Club participates in major Indian conference



The International Maritime Conference and Exhibition (INMARCO) is one of the major events in the Indian maritime calendar. Organised by the Institute of Marine Engineers, India the panel and delegate lists read like a 'who's who' not only of Indian shipping but of the international industry as a whole. The most recent event was held in Mumbai towards the end of 2002.

Chris Horrocks of the International Chamber of Shipping gave the inaugural address followed by presentations from PK Srivastava, President of the Indian National Shipowners' Association, and DT Joseph, Director General of Shipping for India.

Two of North of England's managers also took part in the event, reflecting the increasingly high profile of the club in the region. Joint managing director Rodney Eccleston chaired one of the main seminar sessions and underwriting director, Captain Savraj Mehta, presented a paper on P&I clubs and developments in the mutual insurance sector.

A bankruptcy primer

THE AUTOMATIC STAY UNDER CHAPTER 11 AND IS THERE A WAY AROUND IT?

The Enron bankruptcy proceeding has drawn world-wide attention to the bankruptcy system in the United States. Hardly one day passes in which some aspect of the Enron case is not reported in the Nation's daily newspapers. The purpose of this Article is to provide a basic understanding of the effect that the automatic stay issued by a bankruptcy court has on a creditor's claims against a debtor that has filed for Chapter 11 protection and the potential basis to lift the stay.

THE AUTOMATIC STAY AND BANKRUPTCY COURT'S JURISDICTION

When a Chapter 11 reorganisation proceeding is filed in the United States, the primary means by which a bankruptcy court can control distribution of the debtor's property is a judicial device called an "automatic stay". The stay is issued automatically upon the filing of the petition with the bankruptcy court and prevents the commencement or continuation of any legal proceeding against the bankruptcy debtor or against any of its property.

The geographic reach of an automatic stay is considerable. In addition to conferring jurisdiction on matters affecting the debtor inside the United States, the automatic stay also has effect outside of the United States to the extent that a foreign creditor is subject to the personal jurisdiction of the bankruptcy court. *In Re McLean Industries, Inc.*, 68 B.R. 690 (S.D.N.Y. 1986).

The extent of personal jurisdiction over a foreign creditor can be far-reaching. In the *Lykes Bros.*

Bankruptcy, the court found that it had personal jurisdiction over a foreign creditor which had *Lykes Bros.* vessels arrested overseas since the foreign creditor knew or reasonably should have known that the seizure of the vessels would have an effect on the United States. *In Re Lykes Bros Steamship Co. Inc.*, 207 B.R. 282 (M.D. Fla. 1997).

LIFTING OF THE AUTOMATIC STAY

While the automatic stay is a powerful tool of the bankruptcy court, it does not mean that the stay will remain in effect under all circumstances until the debtor emerges from the Chapter 11 reorganisation. In limited circumstances, the Bankruptcy Code allows a creditor to seek to have the automatic stay lifted "for cause" 11 USC / 362 (d)(1).

"For cause" is not defined in the Bankruptcy Code. In New York, courts will apply a twelve factor test in reaching a decision on whether to lift the automatic stay. *In Re Sonnax Industries Inc.*, 907 F.2d 1280 (2nd Cir.1990). Court decisions that have lifted the automatic stay under the *Sonnax* criteria typically involved circumstances where the non-bankruptcy proceeding was at an advanced stage of discovery or trial was about to begin or had already taken place.

The existence of an arbitration clause in a contract between the bankruptcy debtor and a creditor may alone be sufficient for the stay to be lifted. In this circumstance, the court will look to the nature of the claim against the debtor. If the claim were found to be "non-core" as opposed to "core" the bankruptcy court would be required to lift the automatic stay. If the matter were found to be "core" to the bankruptcy proceeding, however, the bankruptcy court would exercise its discretion as

to whether the automatic stay should be lifted. *In Re United States Lines Inc.*, 197 F.3d 631 (2nd Cir. 1999).

This same reasoning should also apply to enforcement of a foreign litigation clause. *In Re Sonatrach*, 80 B.R. 606, 612 (D. Ma. 1987).

A word of caution in the event the automatic stay is lifted. The bankruptcy court would probably allow only the claims to be litigated on the merits in the non-bankruptcy forum but no more. Any arbitration award or court judgment obtained outside of the bankruptcy proceeding could be enforced only in the bankruptcy proceeding and not elsewhere. *In Re Holtkamp*, 669 F.2d 505 (7th Cir. 1982).

For creditors with pre-existing security, however, the result would be different. Bankruptcy courts have generally lifted the automatic stay to allow litigation or arbitration against the debtor outside of the bankruptcy proceeding in circumstances where the creditor has sought nothing more than a declaration of liability against the debtor that could serve as a predicate for a recovery on an arbitration award or court judgement directly against insurers, sureties, or guarantors, *In Re Fernstrom Storage and Van Company*, 938 F.2d 731 (7th Cir. 1990).

CONCLUSION

As can be seen, the automatic stay issued by the bankruptcy court can have preclusive effect even on a foreign creditor's claim that is pending overseas. Even so, the automatic stay can be lifted in appropriate circumstance, particularly where the creditor has extensively litigated its claim against the bankruptcy debtor elsewhere or it has pre-existing security from the debtor's insurer.

The editor thanks Mr Kirk Lyons of New York lawyers Lyons, Skoufalos, Proios & Flood, LLP for the above topical article.

Fortune smiles...

A woman and a man are involved in a bad car accident. Both of their cars are totally demolished but amazingly neither of them are hurt. After they crawl out of their cars, the woman says, "Wow, just look at our cars! There's nothing left, but we're unhurt. This must be a divine sign that we should meet and be friends and live together in peace for the rest of our days"

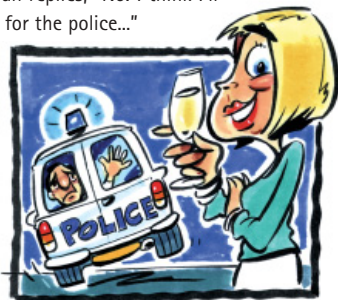
Flattered, the man replied, "Oh yes, I agree with you completely!"

The woman continued, "This must be another divine sign - my car is completely demolished but this bottle of wine didn't break. Surely whoever is looking over us wants us to drink this wine and celebrate our good fortune."

Then she hands the bottle to the man. The man nods his head in agreement, opens it, drinks half the bottle and then hands it back to the woman. The woman takes the bottle, immediately puts the cap back on and returns it to the man.

The man asks, "Aren't you having any?"

The woman replies, "No. I think I'll just wait for the police..."



Signals swot 15

Quiz Winner

Captain MJ Morton

Master MV "Arklow Brook"

Runners-up

Nick Chekan - Master MV "Viking Bulker"

Matthew Lamberton - Dohle Assekuranzkontor, Germany

Abdoulie Sagina - Maritime Agencies, W Africa

Giorgio Avolio de Martino - Holme & Co, Naples

Captain S Mukherjee - MV "Andhika Lourdes"

well done!!!!!!

Signals Swot Quiz

Welcome to Signals Swot number 16. We invite you to pit your wits against "Bosun Bo" and become a *Signals Swotter!*

This is not a general knowledge quiz but rather the answers to all the questions are to be found within this particular issue of Signals.

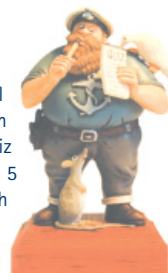
- The quiz is open to all readers of Signals.
- The quiz comprises 10 multiple choice questions - simply tick the correct answer ✓

- Send a photocopy of your answers, along with your name and, if appropriate, name of ship, position on board, company and address to the Editor of Signals at the Association.
- All correct entries received by the closing date will be entered in a prize draw.
- Closing date 20 June 2003.

PRIZES!

The first correct entry drawn will receive a 'Winners Plate' along with a limited edition statuette of our quiz master "Bosun Bo". The next 5 correct entries drawn will each receive a statuette.

Details of the winner and runners-up will appear in the following edition of Signals.



signalswot

Good luck to all you Signals Swotters!!

1 After 22 July 2003, how many detentions would trigger a 'refusal of access to European Union ports' order for a bulk carrier flying a flag of a state which appears on the Paris MOU 'black list'?

- One in 12 months.....
- One in 36 months.....
- Two in 24 months.....

2 Where has it been reported that receivers regularly suspend discharge leaving 10 - 15 tonnes of bulk cargo on board before lodging a highly inflated shortage claim?

- Italy.....
- USA.....
- Algeria.....

3 What proportion of Seafarers undergoing the enhanced pre-medical scheme are now being rejected as being unfit for duty?

- None.....
- About 5%.....
- About 25%.....
- About 50%.....

4 At what level of concentration can hydrogen sulphide start to cause eye irritation?

- 10 ppm.....
- 500 ppm.....
- 1,000 ppm.....

5 Where was the INMARCO conference held?

- India.....
- Indonesia.....
- Morocco.....

6 On a world-wide basis - how many cases of malaria does the WHO estimate occur each year?

- 500,000 - 1,000,000.....
- 5,000,000 - 10,000,000.....
- 300,000,000 - 500,000,000.....

7 In which of the following countries is the 'writ search' facility not yet available:

- Canada.....
- USA.....
- Singapore.....

8 If an investigator from the US authorities suspected that the OWS had not been operated in accordance with Marpol regulations, what might he display?

- A red flag.....
- A yellow card.....
- A blue notice.....

9 What is the correct sound signal in restricted visibility for a vessel which is stopped and not making way through the water?

- One prolonged blast every minute...
- Two short blasts every two minutes.....
- Two prolonged blasts every two minutes.....

10 What is the subject of the latest NEPIA loss prevention guidebook?

- Collision regulations.....
- Cargo stowage and securing.....
- Safety signs.....

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• In this publication all references to the masculine gender are for convenience only and are also intended as a reference to the female gender. Unless the contrary is indicated, all articles are written with reference to English Law. However it should be noted that the content of this publication does not constitute legal advice and should not be construed as such. Members with appropriate cover should contact the Association's FD&D dept. for legal advice on particular matters.

• The purpose of the Association's loss prevention facility is to provide a source of information which is additional to that available to the maritime industry from regulatory, advisory, and consultative organisations. Whilst care is taken to ensure the accuracy of any information made available (whether orally or in writing and whether in the nature of guidance, advice, or direction) no warranty of accuracy is given and users of that information are expected to satisfy themselves that the information is relevant and suitable for the purposes to which it is applied. In no circumstances whatsoever shall the Association be liable to any person whatsoever for any loss or damage whensoever or howsoever arising out of or in connection with the supply (including negligent supply) or use of information (as described above).

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