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triton

The Swedish Club

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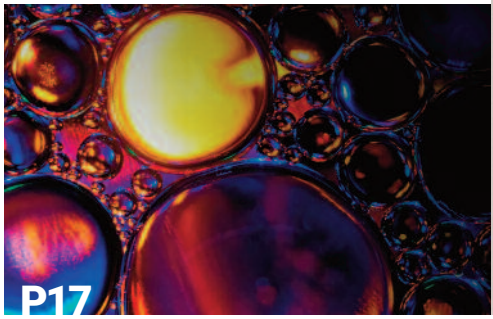

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The Swedish Club

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Taking the long term view

The COVID-19 pandemic continues to affect our personal lives, the business environment and The Swedish Club in all respects. At the Club, we have adapted to the new reality in how we communicate, support our members and conduct renewals. The transition to digitalisation has been seamless but, of course, we miss the touch and nuance of personal meetings. However, spirits are high amongst the staff, and we look forward to stepping back to normality gradually once the vaccine maturity in society allows.

The new way of working demanded from the current situation has generated valuable opportunities to reflect on our habits. A clear success has been the outreach we have experienced in relation to our loss prevention webinars. Many more members and business partners have shown an interest in the Club's latest insights into casualties than we thought possible. The aim of the seminar series has been quality before quantity in terms of lessons learnt. Digital distribution this way is here to stay.

The Club produced an operating surplus of USD 3 million in 2020 supported by strong investment returns. Volatility was experienced in both underwriting and on the investment front. Closing the year, the return on assets offset the deficit on the underwriting side. P&I, particularly, faced a challenging year with claims in the International Group's pool system perhaps at the highest level on record. Underwriting should deliver sustainable results over time as the market adapts to the shift in exposure trends.

The Swedish Club has had a good underwriting record over the last ten years – a testament to both the quality of the membership and stable pricing of risk over time.

Last year we were able to celebrate the 40th anniversary of our Greek office in Piraeus. An anniversary supplement in Triton marked the event, with testimonies from high-level members and brokers. In 2021 we herald a full ten years of local presence in Norway. Building sustainable relationships is a long-term project. We have the time and patience to do that.

Many interesting topics and articles are featured in this edition of the Triton. There are never two Tritons alike. I hope you enjoy reading this issue.

Lars Rhodin
Managing Director

Safety scenario

Pilot forgot about moved buoy

By Joakim Enström, Loss Prevention Officer

Each month the Club's Loss Prevention team issues a new safety scenario to assist members in their efforts to comply with international safety regulations and to follow best practice. Visit Swedish Club OnLine (SCOL) for more examples.

CASE STUDY

It was evening and the vessel had completed loading and was ready for departure. All pre-departure checklists had been completed. The Second Officer had checked the tide in the harbour and departure was scheduled for just after low tide. The tide was running between 1.5 – 2.5 knots with a height of 0.4 metres. The maximum draft for vessels entering the port was 9 metres. After loading the maximum draft was 8.2 metres, which was aft.

Two pilots boarded the vessel and met the Chief Officer on the bridge, who presented the departure calculations and gave them the pilot card. The Master, who had visited the port numerous times before, arrived on the bridge just before departure. He had been delayed because he had to complete the final paperwork with the agent. No pilot briefing was held as the Master wanted to leave port as soon as possible. A helmsman was also present on the bridge.

The vessel departed, the pilot was given the conn and the Master stood alongside monitoring. The pilot started to swing the vessel with the bow towards the quay. One tug assisted the vessel and was positioned pushing on the port quarter.

The Second Officer, who was on the stern, reported that the vessel was swinging 80 metres clear of the buoy that marked the channel. The Third Officer was on the bow and reported that the bow was about 100 metres clear of the wharf. The vessel had a speed of little more than 1 knot astern.

The channel was about 250 metres wide, about 1.5 times the vessel's length. The Chief Officer was in the cockpit and monitoring the radar and electronic chart. At that point the electronic chart indicated that the vessel was inside the 6 metre contour. The

The buoy had been moved further out from its original position because the channel was being dredged.

Chief Officer did not inform the Master or pilot about this discrepancy.

The pilot ordered dead slow ahead. Suddenly a loud noise was heard from the stern and the Master realised that the vessel had grounded, and he informed the pilot. The pilot did not respond. The vessel was now swinging quickly to port and the pilot tried to stop the swing by using both the rudder and bow thruster, but the vessel continued to turn and once again touched the bottom. The Master again informed the pilot that the vessel had touched the bottom. The pilot did not acknowledge this and was

Discussion

When discussing this case please consider that the actions taken at the time made sense for all involved. Do not only judge but also ask why you think these actions were taken and could this happen on your vessel?

Ask yourself:

- What were the immediate causes of this accident?
- Is there a risk that this kind of accident could happen on our vessel?
- How could this accident have been prevented?
- According to our procedures what should we have done?
- What are our requirements for the pilot briefing?
- What are our procedures regarding bridge roles during arrival and departure, what information should the OOW give the Master and pilot?
- Could training about assertiveness be improved upon?
- What sections of our SMS would have been breached if any?
- Does our SMS address these risks?
- How could we improve our SMS to address these issues?
- What do you think was the root cause of this accident?
- Is there any kind of training that we should do that addresses these issues?

clearly shocked. The vessel continued to swing to port.

The pilot struggled to stop the swing and tried to straighten up the vessel in the river but did not manage to do this. The bow hit the bottom for the third time, but this time on the port side, and the vessel heeled 2 degrees to starboard, finally coming to rest. The tug managed to push the vessel free while the vessel also used its bow and stern thrusters and the engine forward and astern.

Following refloating, the vessel proceeded to the pilot station with some difficulty because the bridge team had not realised that the rudder was stuck at an angle of 35 degrees to port.

It was later discovered that the buoy had been moved further out from its original position because the channel was being dredged. The pilot had been informed about the dredging operation by the port captain but did not inform the Master or the rest of the bridge team about this.

webinars

Webinars direct to you from Studio Mutual, Gothenburg:

27 January 2021
Navigational claims and how to avoid them

Introduced by Lorraine Hager, Loss Prevention & Marketing Advisor, and presented by Joakim Enström, Loss Prevention Officer, the webinar aimed at providing participants with an analysis of the navigational claims that have been handled by the Club over the last ten years and delivering practical advice on how to avoid them. Reference was made to the Club's recent Navigational Claims publication, as well as the new Loss Prevention Training Online *(for more information please see page 9)*. As The Swedish Club offers all classes of insurance, it has the breadth of experience and the depth of expertise to provide valuable insights into all aspects of this category of claim.

Following the webinar, Joakim Enström then was put to the test with a wide range of interesting and varied questions posed by webinar participants. Examples included:

Q. The statistics show that tankers have less navigational claims than bulkers. Why is this?

A. Over the years the tanker sector has invested a great deal in training. This along with very specific requirements from charterers, and guidance from publications such as the International Safety Guide for Oil Tankers and Terminals (ISGOTT) make for a very good safety record, proving that training does work.

Q. Looking at the various causes behind collisions and groundings, do you think that officers are poorly trained in COLREGS?

A. No. Every OOW will have received the proper levels of training to be certified. It is more about how they use the information they have – we often see poor communication and a lack of situational awareness – the so called 'human factor'.

Q. Are there statistics about specific dangerous waters where collisions and groundings take place frequently?

A. Yes, we use our statistics to identify accident hotspots around the world – for example there are issues with navigational claims for bulk carriers in Indonesia, as they carry out a lot of loading at anchor and face strong currents in the area. Club members can sign up to our TELP system and receive personalised alerts as they head towards these hotspots.

Q. If a pilot is on board and the Master has a different view on how the passage plan should be conducted who has the last word?

A. The Master is in charge of the vessel and ultimately anything that happens on board is his responsibility. Before you approach the berth you need a plan that both Master and pilot are happy with. My experience is that it's all about communication. Following discussion with the pilot you might find that they are not familiar with your vessel characteristics, and with good communication you can gain agreement. Saying that, I have sailed on vessels where we have relieved the pilot.

24 February 2021
Transporting cargo: Managing the risks

The Swedish Club joined with industry leading cargo consultants, CWA International, to deliver a webinar introducing the Club's new Cargo Advice series which, written in conjunction with CWA, provides expert advice and information on the carriage of a wide range of cargoes that have proven to be problematic. Dr Caline Sahyoun, James Blythe and Pierre de Jager from CWA Singapore and CWA International joined Joakim Enström, Loss Prevention Officer at the Club and Victor Johansson, Head of Claims, P&I and FD&D, Team Gothenburg, to discuss common cargo claims and share expertise on how to manage them.

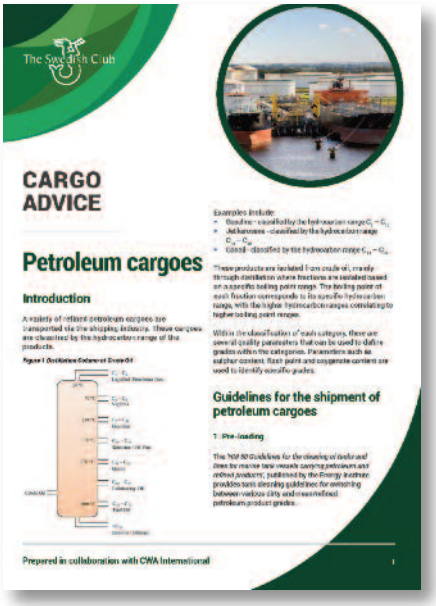
Introducing the Club's new Cargo Advice series

The new Cargo Advice series gives operators a unique, in depth insight into the proper handling and carriage of cargoes that are frequently subject to claims, with detailed advice on the basic characteristics of each cargo type and the measures to be taken during each stage of carriage. The series highlights the preventative actions which must be taken to minimise the risks associated with carriage, both in terms of safety and ensuring delivery of the cargo in proper condition.

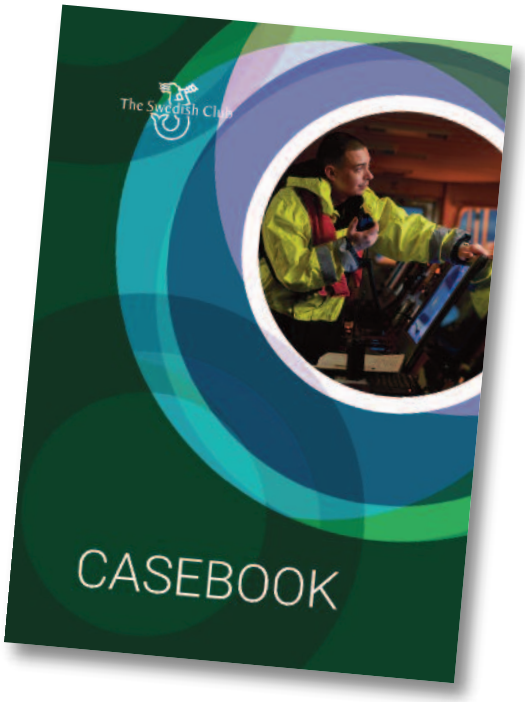
Lars Malm, Director Strategic Business Development & Client Relations at The Swedish Club sees many benefits in the collaboration with CWA. Forewarned is forearmed, he says. "We see the same problems with the same cargoes in the same locations time and time again – and this new initiative gives every one of our members access to detailed loss prevention advice from industry leading consultants."

The Cargo Advice series includes advice on the carriage of refrigerated cargoes in reefer containers, bagged rice, soybeans, hazardous chemicals, vegetable oils, petroleum, coal, and steel. In addition, reflecting the pressures faced by operators for rapid turnaround at port, the series also features advice on proper procedures for cargo hold cleaning.

Members can download the factsheets directly from The Swedish Club's SCOL platform.



The Swedish Club Casebook



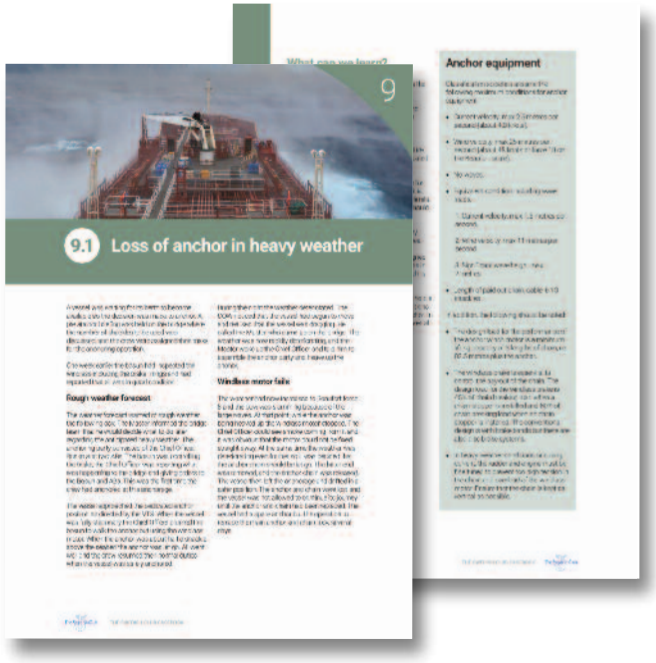
The Club has long earned a reputation for the quality of its cases. Published online, included in loss prevention publications and widely reproduced in the maritime press, feedback from Club members has always been positive.

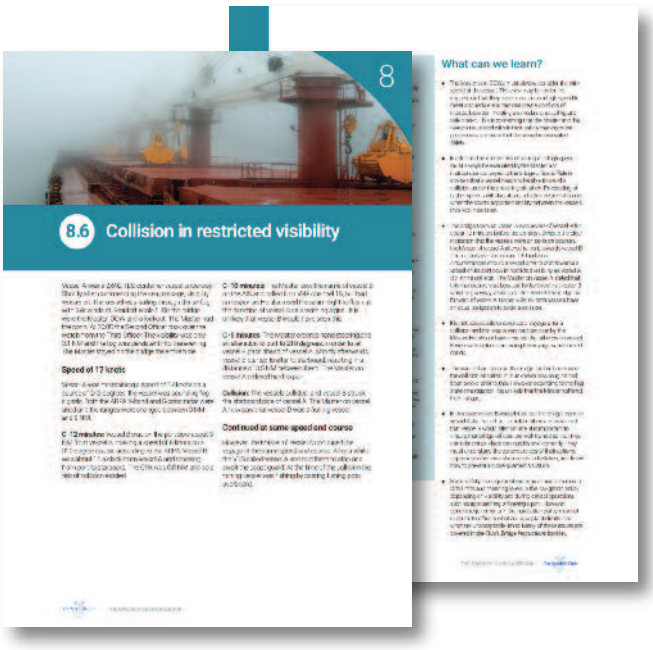
A great deal of work does in fact, go into these deceptively simple one or two pages of copy. As Joakim Enström, Loss Prevention Officer explains: "The Club's loss prevention team sifts through hundreds of surveyors' reports, often themselves hundreds of pages long, to identify those incidents which are the best examples of some of the more common situations faced on board. We are looking for those which will provide crews with the most opportunity for reflection and learning."

Once identified, they are then summarised and rewritten in language which is easily accessible to all nationalities and in a format which can be used in monthly safety training meetings. "It is important that the incidents we choose are seen as directly to relevant to an individual's own experiences," says Enström. "This way, when the case studies are used in training, the seafarer can identify with the problems faced, and some of the difficult decisions that those on board have had to make. When debating the case study with their crew colleagues, the reality of the situations makes discussions more relevant, and learning outcomes more likely to applied should they themselves face a similar situation."

The Club has now pulled together its most interesting case studies, and published The Swedish Club Casebook, a portfolio of case studies covering some of the most common incidents seen by the Club. These include incidents concerning heavy weather, fire, injury, stowaways, collision and machinery failure.

The Swedish Club Casebook is available online and can be downloaded at https://www.swedishclub.com/loss-prevention/cases/case-studies/. Adds Enström: "We will continue to add interesting and relevant new cases as they present themselves to us, and we are considering the option of making hard copies available to members for use on board ship."





New loss prevention training – online and with you at all times

The Swedish Club has launched a new online training programme, aimed at delivering proactive loss prevention services directly to our members and their crews wherever they are in the world. Loss Prevention Training – Online will enable seafarers and those onshore to benefit from the Club's skills training, despite the restrictions of the current pandemic, by providing training resources that can be delivered at the most convenient and efficient time for course facilitators and participants.

The programme features five modules, each centred around an animated video based on a typical onboard scenario relating to the crew's daily operations and demonstrates how such accidents or incidents can be prevented. In addition, the modules feature a full synopsis, and voice-over PowerPoint slides which include guide questions for discussion and workshop participation, and lessons learnt. A facilitator guide is also included to assist those leading the training.

Case studies cover a range of scenarios which are taken from real life examples and feature an onboard accident during mooring, collision in restricted visibility, container fire due to misdeclared cargo, unexpected stowaways and dealing with a piracy attack.

An exchange of ideas is invited through group discussions, and a new online training platform provides easy online access to course materials, any time, anywhere.

The training materials have been carefully designed to provide added value to our members

We are currently carrying out a pilot programme with three members, and plan to fully roll out the programme to all members of The Swedish Club during the summer months.

Lorraine M. Hager,
Loss Prevention & Marketing Advisor

Our hope is that once the online loss prevention training modules are completed, our members will continue training their seafarers and equipping them with the key learning points from these cases, thereby reaching our ultimate goal of achieving greater safety levels in their fleets. The training materials have been carefully designed to provide added value to our members and to help them reduce their number of claims.

For more information on the new online loss prevention training initiative, and to find out how to join the programme, please contact ***lossprevention@swedishclub.com***

Crane collapse: Damage, disruption and dealing with the consequences

A crane collapse is generally a catastrophe – and always has knock-on effects. Rob Williams, consultant maritime civil engineer at Waves Group, talks to Triton about damage, disruption and dealing with what comes next.

It makes for compulsive viewing: who among us hasn't watched, with a combination of fascination and horror, video footage of a giant quay crane crumpling and collapsing after being struck by a ship coming alongside?

Such incidents are, thankfully, rare. But when they do happen, the implications – both immediate and knock-on – are alarming. Waves Group, an independent consultancy firm advising the maritime, shipping and offshore industries, has first-hand experience of dealing with the fallout.

Joint webinar with The Swedish Club

Consultant maritime civil engineer Rob Williams spoke about ship-to-shore crane incidents at a recent webinar organised in partnership with The Swedish Club, discussing the significance of cranes, how damage can happen, how it can be repaired, and the steps needed to assess the scale of business interruption claims.

Talking to Triton, he says: "Cranes have come a long way in recent decades. As we know, container vessels have grown from around 1,500 TEU in the 1960s to the 20,000+ TEU ultra large vessels of today. The sustained growth in vessel size has resulted in a parallel evolution of the size of shore-based cranes."

A crucial link

He offers two standout facts: first, the crane is a crucial link in the fast-moving, critically timed operational chain of a port, with crane downtime inevitably resulting in disruption, sometimes extreme. Second, thanks to evolving crane design, manufacturer capabilities and materials, today's larger cranes are fabricated with comparatively thinner, more slender steel sections. That makes larger cranes vulnerable to deformation and buckling if they come into contact with a vessel during berthing or unberthing.

"This can consequently lead to disruptive and expensive repairs, significant component replacement or, at worst, the catastrophic collapse of the crane," says Williams. "Also, bear in mind that the size of these cranes comes at a cost - their significant weight requires a more substantial supporting structure."

Avoiding incidents

The bow flare of a large vessel can significantly overhang the wharf structure when approaching the berth at an angle and can therefore come into contact with the crane legs, even though the cranes

Repair costs after a collision can range from USD 50,000 up to more than USD 10 million – sometimes more than the actual cost of replacement.

are generally set back 4-5 metres from the berthing line. "A parallel approach to the berth is intended and is typically considered good operational practice to avoid a potential contact by the bow or stern of the vessel," says Williams.

But things can go wrong. What happens next?

Damage to cranes

The extent of damage can vary considerably – there could be localised buckling and comparatively slight damage, extensive localised damage to the crane legs, displacement of crane bogies or a significant derailment. Depending on the severity of the damage, stabilisation or anchoring works can be required.

"The worst case is the total collapse of the crane, which will likely result in the total loss of the crane and cause damage to the wharf structure and pavement below."

Crane repair costs alone after a collision can range from USD 50,000 up to more than USD 10 million – sometimes more than the actual cost of replacement. Sometimes the crane manufacturer wants the crane returned to their facility for repairs, adding significant transport costs. There can be damage to the wharf structure and even to the supporting piles.

Obtaining evidence

Swift and detailed investigations by an experienced engineer are vital to assess the actual damage, says Williams. In light of COVID-19 travel restrictions, this has included working with local surveyors and using drone and mobile phone footage; evidence can be digitalised and the damage can be remotely processed and assessed, including through the creation of a 3D model.

Such evidence is required for assessing the scale of overall potential damages, any stabilisation measures required and options for repair or replacement, he explained. Some repairs can be limited to cutting out and replacing a section in the frame or a leg section, or jacking a crane back on to the rails after a small derailment.

At the other end of the scale, the entire crane might need dismantling to install replacement sections; a large floating crane might be needed to assist; the berth might be out of action for many weeks; a barge needed to remove or relocate the damaged crane to a separate, remote working area; and depending on the location chosen, this last option might cut capacity in the stacking area or reduce efficiency in other ways.

Calculating loss

Finally, there are the business interruption costs, and making a fair assessment.

"If a terminal is normally operating close to optimum efficiency, as soon as crane damage occurs, there is disruption and a reduction in throughput is likely to occur. How we go about recording this disruption is important," says Williams. "Revenue losses could occur due to reduced available quay length, fewer available cranes, reduced vessel calls, and longer vessel turnround and waiting times. This can lead to an increased cost of handling each container, third party costs such as demurrage, impact on market share, and so on."

As he says, a container terminal operating close to full capacity is a complex interaction of multiple operations and activities. Hence, the most complex claims require expert input.

As always, it's about attention to detail. For example, AIS data can be used to assess vessel numbers before and after the incident, and berth occupancy assessments can be used to identify possible spare capacity and flexibility within the terminal.

Finally, he emphasises: "Early engagement and good constructive dialogue is essential."

New TELP Bunker Alerts

Peter Stålberg,
Senior Technical Advisor

As members' take up of TELP continues to increase, The Swedish Club has added a brand-new service to its TELP portfolio, Bunker Alerts. Vessels heading for port will now receive alerts through the TELP system, warning of fuel quality issues that have been reported in the area.

The Swedish Club has partnered with industry leaders, VPS, the largest bunker fuel testing company for ship operators in the world, to provide this new service, which is free of charge to members of The Swedish Club.

Examples of poor fuel quality issues include cat fines, chemical contamination (for example polymers or corrosive chemicals), high sodium levels, water contamination and fuel that is of too high a density.

Advance warning

Peter Stålberg, Senior Technical Advisor, explains the benefits of the new service: "It's really all about following best practice, and optimum loss prevention processes," he says, "A vessel heading for a port with fuel quality concerns needs to be extra vigilant. Receiving advance warning of potential issues with fuel quality really puts the spotlight on the importance of good sampling routines. Doing things 'by the book', and taking care not to burn the new fuel until you have received the first test report, will ensure that if you do experience problems with the bunker fuel and have a case, you will have gone through proper procedures."

Correct sampling is extremely important to today's operations, he says. "Nowadays, with the new environmental standards for fuel, we no longer have straight run bunkers. Today's fuels are extremely complex and the potential for issues when blending has increased."

An intelligent system

Offering this kind of personalised service is only available because of the capabilities of the TELP system. Information comes into the Club from VPS and is fed into TELP. The system broadcasts for vessels heading to affected ports, using AIS to identify those within a few days of arrival. The system continues broadcasting, supporting individual vessels entering the area, until the affected fuel is no longer an issue.

Unique to members

Whilst it is possible for companies to access bunkering reports, only members of The Swedish Club have access to the TELP system, with information delivered only when relevant and timely to the vessels current voyage pattern. Peter Stålberg says: "This avoids the danger of information overkill, and coupled with the other personalised services we are able to deliver to members during a voyage – information on dangerous hotspots, correspondents updates on local issues, and advice on COVID-19 restrictions – we are really seeing TELP coming into its own as a major force in the drive to improve loss prevention.

Sign up today

If you are a Swedish Club member and want to take advantage of the benefits that TELP offers please visit https://www.swedishclub.com/loss-prevention/trade-enabling-loss-prevention-telp/ and sign up today.

The importance of *Eternal Bliss*

In 'The Eternal Bliss', the English High Court decided that demurrage is not the exclusive remedy for a shipowner in circumstances where their voyage charterer exceeds the contractual laytime period.

Background facts

K Line Pte Ltd ('Owners') fixed their vessel 'Eternal Bliss' with Priminds Shipping (HK) Co Ltd ('Charterers') for a shipment of soyabeans from Brazil to China. The contract was an amended Norgrain 1974 form, which provided inter alia for a contractual discharge rate of 8,000 metric tonnes per day, with demurrage payable at an agreed rate if laytime was exceeded.

Pursuant to Charterers' orders, the vessel loaded about 70,000 metric tonnes of soya beans at Turabão and proceeded to Longkou to discharge. Upon arrival at Longkou, severe congestion and a lack of storage facilities within the port meant the vessel was forced to wait for a period in excess of one month. By the time the vessel was finally able to berth and discharge, the cargo had suffered significant physical damage. Owners and their liability underwriters were compelled to provide security in the sum of USD 6 million to the receivers in order to prevent an arrest of the vessel. The cargo damage claims were subsequently settled for USD 1.1 million. Owners then commenced arbitration proceedings against Charterers seeking compensation for the full amount paid to cargo interests. Charterers rejected liability, arguing that demurrage represented Owners' only remedy for the breach of contract (that breach being the failure to discharge the cargo within the permitted laytime period).

The parties agreed to refer the matter to the High Court under section 45 of the Arbitration Act. The case was heard by Andrew Baker J. Various facts were assumed for the purposes of the hearing:

- The vessel was detained at the discharge port beyond the contractual laytime period due to port congestion and lack of storage.
- Charterers were in breach of charter for failing to discharge the vessel within the allowed laytime.
- The cargo sustained damage due to its prolonged retention on board the vessel and not due to any fault on the part of Owners.
- The cargo damage claims brought by cargo interests were reasonably settled by Owners.
- The losses suffered by Owners were consequences of Charterers' orders to load, carry and discharge the cargo.

On the basis of these assumed facts, the parties agreed that the specific question for determination by the court should be as follows:

Were Charterers liable to compensate or indemnify Owners in respect of the losses Owners incurred in relation to the cargo damage; either by of way of damages for Charterers' failure to complete discharge within the permitted laytime, or an indemnity in respect of the consequences of complying with Charterers' orders to load, carry and discharge the cargo?

The judgment

The first observation made by Mr Justice Baker was that this was fundamentally a matter of contractual interpretation. In other words, it was possible for parties to a charterparty to contract in such terms so that their demurrage clause would answer the issue presently before the court. However, the Norgrain charterparty used in the 'Eternal Bliss' did not contain any clarification in this regard, merely providing that 'Demurrage… if incurred' was to be paid at a certain rate. The judge remarked that this was a "familiar phenomenon" in standard voyage charter forms.

Mr Justice Baker considered the type of loss claimed by Owners. Charterers' case was that Owners' claim was effectively only a claim for detention of the vessel, being that the cargo damage resulted from delay at Longkou. Owners accepted that the cargo liability was a by-product of the delay but submitted that this did not stop the damage in question being a different kind of loss. The judge considered both arguments but ultimately preferred Owners' submission, finding that "the damage to the cargo was quite distinct in its nature from, and is additional to, the detention of the ship, as a type of loss".

The court asked the question: 'What does the law take to be covered by a demurrage rate? What does demurrage liquidate?' The court decided that the demurrage rate is intended to liquidate the vessel owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime. It is not intended to do more. It does not seek to liquidate any claim for different kinds of loss; whatever the basis for any such claim. Demurrage, therefore, is agreed damages compensating the shipowner solely for the value of the ship's lost time. It is (only) a temporal remedy.

Mr Justice Baker held that, had the matter been from free from judicial authority, he would have considered that Owners had the better of the argument "by a clear margin". Nevertheless, the governing authorities were contradictory, and it was necessary for Mr Justice Baker to undertake a thorough review of the existing legal authorities. In doing so, the judge was required to tackle an enduring debate as to whether it was necessary for there to be one or two breaches of contract by the charterer in order for a shipowner to successfully recover damages for a loss that is different in kind to that which demurrage compensates.

The 'two breach' school of thought was based on the Court of Appeal decision in Aktieselskabet Reidar v Arcos [1927]. That case concerned a claim for deadfreight which arose due to the voyage charterers' failure to load the vessel during the applicable laytime period. All three Court of Appeal judges in Reidar v Arcos agreed that the Owners' claim should succeed. What they disagreed upon was how many breaches there had been. Two of the judges considered there had been two separate breaches: (1) to load a full cargo, and (2) to load within the allowable laytime. The third judge (Bankes LJ) decided that the charterers had only committed a single breach of contract: failing to load within the allowed time.

Mr Justice Baker concluded that Reidar v Arcos was not in fact authority for the proposition that a separate breach of charter (i.e. in addition to a breach of the laytime provision) was required in order for a shipowner to claim damages for an additional and different head of loss. He then went on to consider The Bonde [1991]. In that case, the presiding judge (Potter J) had come to the conclusion (based on his reading of Reidar v Arcos) that a separate breach was necessary. Mr Justice Baker held after completing

his own thorough review of the authorities that The Bonde was wrongly decided and should not be followed. This left Mr Justice Baker free to decide the issue before him, without being constrained in any way by judicial precedent. He did so, ruling in favour of Owners.

Comment

As a result of Mr Justice Baker's decision in the 'Eternal Bliss', the current position is that, where a charterer has failed to load or discharge a vessel within the allowable laytime period and the shipowner suffers a different type of loss (i.e. in addition to their loss of use of the vessel during the period it is detained), the shipowner is not required to prove a separate breach of charter in order to recover damages for that loss.

The 'Eternal Bliss' is a positive decision for the shipowning community, paving the way, as it does, for them to recover damages beyond demurrage in circumstances where laytime has been exceeded and they suffer additional losses as a result. We may expect to see various different types of loss claimed by shipowners, ranging from deadfreight to cargo damage to hull fouling, all said to have been incurred as a result of their charterers' failure to load or discharge during the permitted laytime period.

Voyage charterers, on the other hand, will be distinctly unenthusiastic about the potential implications of this decision, as they now have a clear exposure to cargo liabilities if delays in cargo operations for which they are responsible result in any damage to or deterioration of the cargo.

But as Mr Justice Baker observed in his judgment, demurrage is a contractual issue. It is perfectly possible for the parties to a voyage charterparty to clearly define the extent of demurrage. So, for example, a voyage charterer may wish to consider whether they agree terms which expressly provide that demurrage is the exclusive remedy for any loss due to exceeding laytime.

As Mr Justice Baker acknowledged, this is an important decision, and one which resolves a long-lasting debate on this area of law. However, the case is subject to consideration by the Court of Appeal in the autumn of 2021, and both shipowners and charterers will be waiting with interest for the outcome of the appeal.

"From time to time, a case provides the opportunity to resolve a long-standing uncertainty on a point of law of significance in a particular field of commerce. This is such a case." *(Andrew Baker J).*

Oil and water don't mix

The issue of water content in crude oil and other cargoes is not a new one. But best practice in terms of identifying the water, managing notification procedures, and putting in place the necessary legal instruments is evolutionary, and a process that owners and cargo owners alike need to properly manage in order to best protect their legal interests.

Peter Glover,
Partner and Master Mariner
at Reed Smith, Hong Kong.

Loss prevention

How does water get into crude oil cargo tanks?

Extraction

The starting point when considering sources and mechanisms for the ingress of water is the origin of the oil and the production or extraction process. Oil is produced using different methods, with these methods varying depending on the geology of the region being exploited.

In broad terms, crude oil is extracted by creating pressure gradients within the target reservoir which serves to propel the liquid to the oil well. Oil recovery takes places over two phases: primary recovery and secondary recovery. Primary recovery can take a number of forms, one of which is known as a 'water drive,' where the oil reservoir is fuelled by a water drive, or an aquifer, that interacts with the oil and provides the drive energy. Another primary recovery mechanism is gravity drainage, which relies on density differences between oil, gas, and water. Axiomatically, these represent various mechanisms for introducing water into crude oil.

Following primary recovery, many oil wells will be subject to secondary recovery. Secondary recovery commonly involves waterflooding and gas injection of the oil reservoir.

Stabilisation

While water can be introduced into the crude oil column in these ways, it is normal for crude oil to have a degree of retention or stabilisation time in terminal tanks (shore side or FPSO) where gas is liberated and free water has time to coalesce into droplet sizes sufficient to descend through the oil column and be removed prior to export to a tanker. It follows that if the retention time is insufficient, or the viscosity of the oil is incorrectly calculated, water may be trapped in the oil column and be loaded onto the export ship.

Human error and structural failure

While the oil production and stabilisation process is one mechanism for introducing water into a ship's tanks, another means is human error. Human error can manifest itself in a number of ways. These include:

- Terminal valve alignment error – permitting water to be drawn or educted into a loading line.
- Terminal line contamination – where a loading line already contains water which is displaced into one or more ship tanks prior to first oil being received by the ship.
- Steam heating coil failure or damage and leaking – where condensed water from a ship's cargo heating system drains into a cargo tank, or steam escapes and condenses in the cargo tank.
- Ballast tank or ballast line leakage.
- Crude oil washing system valve leakage or misalignment – permitting water to enter a cargo oil tank.
- Hull failure – seawater ingress.

Detecting water in crude oil

There are a number of opportunities for a ship to detect water in oil during the loading and post loading phases.

Manifold samples

The first opportunity is the manifold. Owners should be alert to the fact that an oil line may have been flushed with water (salt or fresh) following loading of the previous export ship, and the potential for this water to be loaded as the first parcel in advance of the nominated grade. Means to guard this are through first flow manifold samples, initially restricting loading to a single ship tank and taking first metre samples of this tank.

During the loading process, time interval samples should be taken. These can be manually taken if automatic in-line sampling is not arranged. If manual samples are drawn, these should be taken under the supervision of a deck officer, drawn directly into a clean and dry sample bottle and the bottle then sealed with a record of the time, date and place of the sample, together with the names of the persons involved in taking the

sample. These details, and the sample serial number, should be recorded in the ship's cargo operations book.

Tank sounding

The next opportunity to sample for water is the first few metres sounding in each tank. It is recommended that this takes place by way of both a sounding stick with water finding paste and use of an ullage temperature interface (UTI) device. Both devices have advantages and disadvantages. Any water reading, or suspected water reading, should be repeated to guard against measurement error.

At either the initial loading or intermediate stages, if free water (being water present that is not in suspension) is detected, or if it is suspected that there is free water or a detectable quantity of water in the as-loaded oil column, the Master should record this observation in the ship's cargo operations book, issue a letter of protest, notify the terminal, and inform his principals. If a considerable volume of free water is found, consideration should be given to suspending loading while the source of the free water is identified.

The next opportunity is on completion of loading. In addition to taking the usual measurements for ullage and temperature, water finding paste should be used to check for free water, and the UTI should be lowered through the oil column to gauge any detectable concentrations of water. Again, if free water is detected, the gauging process should be repeated to guard against sampling error.

It is also considered good practice to check for free water on departure from the load port, and, if there are multiple load ports, between such load ports. Otherwise, a check for free water should be done about three days after departure from the load port. Any free water detected, whether consistent with the load port records or not, should be recorded and the results communicated to the ship's owners and charterers.

Actions to be taken if free water is detected

In all instances, the following should be considered if free water is detected in the cargo tanks:

- Any gauging which detects free water beyond trace detection should be confirmed with a second gauging.
- Where possible, any free water detected should be confirmed by both sounding stick, water finding paste and UTI measurement.
- The terminal representative should be notified and a record of the notice should be recorded in the ship's cargo operations book. If free water is confirmed, a letter of protest should be issued by the ship to the terminal.

It is considered good practice to check for free water on departure from the load port, and, if there are multiple load ports, between such load ports.

- The terminal representative should be invited to participate in confirmation gauging. If the invitation is declined, or a terminal representative is not available, this fact should be recorded in the ship's cargo operations book.

Conclusion

Water in oil cargoes is not uncommon and may originate from a number of potential sources, including production, terminal operations, and the ship itself.

It should be possible to detect free water at various points throughout a voyage and owners should take steps to ensure that they are not exposed through a lack or absence of appropriate testing.

It is critical that any water found be notified to the relevant parties as soon as possible, and appropriate action (such as clausing bills of lading, correctly describing the cargo, and issuing letters of protest) should be promptly taken.

The source of water should be quickly and thoroughly investigated. Gathering best, and preferably independent, evidence is critical to the prospects of successful claim or defence management.

If the water itself contains other potentially harmful (to the environment, equipment, or machinery) elements such as microbial growth, additional steps should be taken to segregate and correctly treat and/or dispose of the water and contaminants.

Be wary of contractual time bars and what must be presented within the time frame.

- Samples of the free water should be obtained. The samples should be taken into a clean and dry receptacle. Sampling should be performed under supervision of a deck officer, witnessed, and sealed on taking the sample.
- In addition to samples of the free water, samples of the oil column in each tank should be taken, including top, middle, and bottom samples (to capture evidence of emulsion or otherwise water in suspension).
- Sample seal numbers should be recorded in the cargo operations book and in a seal record, which forms part of the load port documentation bundle.
- Samples should be securely stored on board the ship in a cool, dry place which is away from direct sunlight.
- Samples should always be stored in accordance with the ship's safety management system (SMS) procedures to guard against any inadvertent disposal of samples.
- If ballast operations are in progress, samples of the ballast water should be taken. If ballast was loaded in different regions, representative samples of each ballast water region should be taken. If materially significant volumes of free water are detected, the Master should consider suspending ballast operations.
- A sample of the load port water should be taken. This sample should be taken remote from the ballast discharge (and preferably when ballast is not being discharged) and any engine room heat exchange points. A sample should also be taken from both sides of the ship.
- All sampling should be witnessed and a contemporaneous note made of the sampling performed, including recording the date and time of sampling, where the sample was taken, and who took the sample.
- Samples should be taken in duplicate wherever possible.

Detecting free water - legal considerations

There are a number of legal issues to be considered in the event of free water detection.

If free water is suspected or detected, prompt notification of the same to the terminal, owners, and charterers may provide an opportunity to properly describe the cargo in the bill of lading.

If the bill of lading purports to exclude free water, when it is considered or known that free water exists, the Master (or in practice those authorised to sign the bill of lading on their behalf and/or the supplying entity) should not sign the bill of lading until the owners' instructions have been obtained. Failure to properly describe the cargo may constitute a breach of the Hague-Visby Rules (H-V Rules) Article III rule 3(c): *the apparent order and condition of the goods.*

Determining the source of the free water is critical. If the free water source is alleged to be the ship, owners may be in breach of H-V Rules Article III rule 1(c) in failing to exercise due diligence to make the holds fit and safe for the cargo. In a worst-case scenario, the ship may be found to be unseaworthy. Further, or alternatively, the ship may be exposed to a claim that it did not properly and carefully load, handle, stow, carry, keep, care for, and discharge the cargo as required under H-V Rules Article III rule 2. At the discharge port, free water present in the cargo but not detected at the load port may give rise to quality and/or quantity claims against the ship by the receivers and/or the charterers.

The underlying sales contract for the crude oil may state that the quality of the oil supplied thereunder shall be the production quality of the oil being supplied at the time and place of loading. More usually, however, the sales contract will state that the quality of the oil delivered shall be the quality of the oil as usually made available at the time and delivery point as specified in the contract. This is commonly evidenced by the terminal presenting sample evidence drawn from the terminal tanks, and not from manifold samples or the ship's tanks. It is therefore crucial that free water is detected and proper sampling of the oil received is performed.

Further, any complaint of variation of quality shall commonly be admissible only if made within a defined number of days, common limits being 30, 45 and 60 days after discharge. It is not uncommon for sales contracts to contain a requirement that independent survey or expert evidence be produced within such a time frame in support of the claim, which is commonly a difficult hurdle to overcome unless the affected parties act quickly and decisively. It follows that the evidence that the affected parties are able to obtain (and the evidence trail) and the speed at which it may be obtained may be crucial in determining any quantity and/or quality claim made under the underlying sales contract, or potentially claims under the relevant bills of lading.

CYBER SECURITY

Recognising and tackling the multiple risks

Peter Sponer,,
Lloyd's Register marine and offshore cyber security expert

The IMO's new cyber security regulations entered into force on 1 January 2021. Peter Sponer, Lloyd's Register marine and offshore cyber security expert, tells Triton why they are so important for the industry.

Imagine you are buying a new car. It needs to be functional – of course it does. But it also has to be safe to drive. "You always think of safety when you look at a car," says Peter Sponer. "We believe we do the same when we consider the running of a ship – but we must also really start considering cyber security as part of that safety package. It needs to be at the heart of everything we do because cyber threats are a very serious challenge to the industry.

"Owners and operators really need to think of cyber security as part of every activity they carry out, whether building a new vessel, implementing a new system on board, working with suppliers and third parties, or considering the potential actions of their crew," he says.

‘The biggest risk factor when it comes to breaches is not the technology – it is actually the people that operate it”

IMO regulations

Sponer welcomes the implementation of the IMO’s new cyber security regulations, introduced through Resolution MSC.428(98) on Maritime Cyber Risk Management in Safety Management Systems. The resolution encourages administrations to ensure that cyber risks are appropriately addressed in existing safety management systems, as defined in the International Safety Management (ISM) Code.

“For shipowners and operators, the deadline is to get this done in time for the first annual DoC (Document of Compliance) audit on or after 1 January. So the deadline will be different for each company,” he says. “From the conversations we have been having with companies, most of them have been aware of the deadline. They have either started working towards fulfilling the requirements themselves, if they have internal resources, or have hired in an external party to help them either to validate the approach they have taken, or to perform some of those activities on their behalf.

“Only a very few companies, from my experience, have either done nothing or have not given those requirements any priority – that would probably result eventually in them encountering a major non-conformity at audit.”

A willingness to learn

Sponer says plenty of companies are ‘not very mature’ when it comes to cyber risk management and understanding. “This is quite common with shipping companies. But they do confirm to us that it has been a really good learning experience for them to go through the IMO 2021 requirements.

“They have not only understood the impact that a cyber breach could potentially have on their operations but, more importantly, understood what it could actually cost them in terms of disruptions per day if they were unable to operate. It has helped them to understand the importance of defining what their critical assets are and how to protect them; to better define cyber security responsibilities within their organisation, something that was very often missing; and to understand what risks third parties could pose for them. In the end, they have been able to create a risk management framework that is not only compliant with IMO 2021 but also makes them better prepared should there be any cyber security issue.”

Danger of confusion

Interestingly, he says the biggest challenge for ship owners and operators is that the IMO resolution is actually quite generic. “It doesn’t really state specifically what you have to do or define the actions you have to take, so it might have created a bit of confusion for ship operators. However, there are several ways to address those requirements, including the guidelines on maritime cyber risk which were released in parallel by the IMO and feature a set of best practices on how to tackle compliance.”

“We have seen incidents where there has been manipulation of GPS signals – for example, to deliberately divert a tanker in the Strait of Hormuz off course towards hijackers”

Other industry guidelines will also help, he says, including those from BIMCO. “These are very good because they are based on the industry standard and the five-point framework – identify, protect, detect, respond and recover.”

The human factor

Many companies tend to focus on addressing only the technical controls of security – for example, making sure that firewalls have been deployed on board or security configurations properly implemented. “However, the biggest risk factor when it comes to breaches is not the technology – it is actually the people that operate it,” says Sponer. “When we look at good cyber risk management, we should always focus on the big picture – not only looking at the tech but also the people and processes.”

There should always be regular cyber security awareness training, not only of office staff but also of crew members, he said. Policies and procedures must be in place setting out how crew members are able to use their own devices on board, for example, as well as procedures to follow should there be a cyber breach.

Increasing sophistication

High-profile hacks such as those that affected Maersk Line, crippled by a Petya cyberattack in 2017, CMA CGM, hit by a ransomware cyber attack in 2020, and the IMO, which was forced to shut down key systems due to a cyber attack a few days later, are well known in the industry.

However, the nature and intent of targets evolves, and the sophistication of the

hackers continues to increase. There have been some disturbing targeted attacks towards the industry, such as malware that targets ECDIS. "We have seen incidents where there has been manipulation of GPS signals – for example, to deliberately divert a tanker in the Strait of Hormuz off course towards hijackers. So the threat landscape has really changed."

Penetration testing

An important part of any cyber risk management framework is regularly conducting penetration tests, not only in the office but also on board. This gives operators a much better visibility into the cyber risk, says Sponer. "The testers will identify risks and also actively try to exploit the vulnerabilities that exist in the infrastructure.

"There is still definitely a long way for companies to go"

"By doing a penetration test, you want to ensure that the critical systems are isolated from the rest and that even if there is an incident on board, these systems cannot be compromised."

The tests should be carried out by outside experts, he adds: "Even though some companies have expertise in-house, it is really important to have an independent expert look at their cyber security posture."

Lack of control

Some owners and operators have admitted privately to their systems being breached repeatedly; one relatively small operator was hit by the CryptoLocker ransomware. "It happened to them twice and as a result all their navigation systems were encrypted; not a problem in terms of having control over the vessel but if you are at sea and relying on technology you cannot use, that is a big problem."

Some shipping companies have admitted to Lloyds Register that while the cyber threat is one of the top five

You must constantly monitor whether your strategy still works and if it needs updating."

risks they face, it is one they feel they don't have a lot of control over, says Sponer.

"In terms of the IMO resolution, it is definitely a good first step to ensure that there are some basic cyber security controls in the industry – but there is still definitely a long way for companies to go.

Regulation

"It is important to mention that the IMO is not the only stakeholder that is doing something about cyber security in the industry. For example, the European Union implemented the GDPR (General Data Protection Regulation) in 2018, and there is also the EU's less well-known

The ‘attack surface’

The increased connectivity of ships has, of course, made the industry more vulnerable. Not only is there increased activity on the part of attackers but also the ‘attack surface’ itself has increased.

Connectivity

Most vessels are now connected by VSAT or 4G. Components on board such as the propulsion system often have a remote technical capability so the manufacturer can perform remote maintenance. Companies are deploying IoT (Internet of Things) devices on board to collect data for performance optimisation or to reduce their CO_2 footprint and all these create additional cyber risk.

Third parties

Operators need to consider third parties, including any kind of contractor coming on board to inspect systems. It is important that the company has a clear policy on contractors and that the policy clearly defines the level of user access – e.g. a contractor can only access the specific system that they came on board to inspect.

Employees

Many believe that there is a far higher risk of systems being compromised from the ‘inside’ than through a targeted attack from outside. The crew member connecting their tablet or mobile phone to the ship’s network can put the vessel at risk by unknowingly downloading malware. There needs to be a proper segregation of the network, with the crew network properly divided from the business and operational network, to avoid the risk that this malware could spread from one network to another and potentially compromise any of the critical systems on board.

NIS (Security of Network and Information Systems) Directive which came into force in 2016.

“In addition, the International Association of Classification Societies (IACS) published a set of 12 cyber recommendations which have since been consolidated into one document.”

Getting through the DoC audit is not where it ends, of course. “Cyber security is an ongoing process and never stops. You must constantly monitor whether your strategy still works and if it needs updating.”

Multiple consequences

In conclusion, ship owners and operators need always to look at the big picture and consider that there are multiple fronts to be protected and multiple possibilities where a breach could happen. “The IMO is looking at cyber security mostly from the point of view of safety of navigation at sea. But you only need to go a little bit beyond that to understand that there are other consequences to consider in a breach, including loss of data, disruption, costs and damage to reputation. That tends to put things in context.”

Ten years in Norway and counting - new energy ahead

Interview with Tore Forsmo, Area Manager for Team Norway

Uncertainty is said to be the only certainty in life – and the development of The Swedish Club's Norway office seems a perfect reflection of that.

When the Club's Board met in Dubai in 2010 and unanimously backed a plan to enter the global property and loss of hire insurance market for drilling rigs, accommodation rigs, service rigs and floating production/storage units, could anyone have foreseen the rollercoaster journey ahead?

During the decade since Team Norway opened for business, oil prices have swung from peaks of USD 120 per barrel to lows of around USD 20. In its early days, Team Norway's business was 100% focused on the energy (oil & gas) segment; today, the energy portion makes up 20% of the portfolio.

Taking a gamble

Area Manager for Team Norway is Tore Forsmo, who joined the Club in 2012: "I have worked in the maritime industry for my whole career. For ten years I was CEO of a trade association for Nordic marine insurance, and I had a lot of contact with The Swedish Club's management team," he says. "The Swedish Club has always had a high standing in my book, for what it does and how it operates – including, for example, the fact that loss prevention is a part of its DNA. That is why I was attracted to the Club."

When he was approached by Lars Rhodin to see if he was interested in leading Team Oslo, he accepted. "The Club had a good reputation and many exciting things were going on. It was a bit of a gamble – you can't build something completely new in a day – but it's a decision I've never regretted."

Major upheavals

And then came the upheavals in the oil & gas market. "If you look on the premiums side, we started with energy and it was 100% of our business. Our overall volumes have obviously increased since then, but nevertheless the energy portion now stands at around 20%."

According to the Norwegian Shipowners' Association's Outlook Report for 2021, Norwegian shipowners had more than 200 vessels in layup at the turn of the year – exceeding the highest layup figures during the offshore crisis in 2016-2017. Hardest hit are the offshore service and rig segments, along with passenger ferries, due to the COVID-19 crisis.

A new approach

Uncertainty is freedom, says Forsmo. "Many of our members are already looking at renewables as an alternative option to the oil & gas industry. Those servicing oil & gas can also service the renewables sector, which needs accommodation and service vessels, crew vessels and installation vessels for wind turbines. Many are able to use the competence and skills they have acquired in the oil & gas industry in this way."

In terms of operational vessels, Team Norway is looking at floating (moored) wind turbines rather than those fixed on the seabed. "Floating turbines are more comparable to what we are already doing in the energy side, i.e. like FPSOs," says Tore.

"We can insure FPSOs without having to take on the downstream infrastructure such as pipelines, refinery, etc. Right now, the renewables sector tends to be more of a package deal where you have to take your share in both upstream and downstream. We are not looking to insure pipelines and refineries on the energy side and similarly not looking to insure renewables, such as electrical cables to shore. Floating turbines are where we would set the boundaries, but also where I think the growth will be, because of the flexibility and economies of scale."

"Those servicing oil & gas can also service the renewables sector, which needs accommodation and service vessels, crew vessels and installation vessels for wind turbines."

Looking seawards

Team Norway has also been looking at the potential in the aquaculture sector, although these are early days. "The aquaculture sector will be going further and further offshore with their constructions looking more and more like ships," he says. "The volume is low at present but the sea is increasingly going to be a major supplier of foodstuffs for the world, and it is something we have in mind."

Core business

In addition to the energy business, Team Norway has a strong focus on the development of P&I and Marine lines in Norway. "Because Oslo is such a small office, we are able to get to know our customers well," Tore explains. "My colleagues and I are used to travelling and meeting customers face-to-face, though this has been limited during the COVID-19

pandemic. Relationship building has continued via Skype and Teams, but we are looking forward to the day when we can meet again face to face."

Staying close

The past year has, of course, been very different in terms of how The Swedish Club has been able to support its members. "We have been trying to compensate for not being able to travel by actively promoting our loss prevention products and services – for example, with

"Diversity makes a culture the best it can be. The broader the perspective, the better the decisions and the work environment."

"The best thing about working at The Swedish Club is the people at the company."

TELP, working to establish our presence within our member community on those particular topics. As for support in general – yes, that is what we do. We are a service provider and we support our members, especially in difficult times."

Teamwork

Offering a full-service business, there is a strong focus on teamwork in Team Norway. Tore says: "There are six of us employed in the Oslo office at present. We're in an open-plan office and we work together closely. Decision paths are short and there's a great deal going on.

"Besides our relationships with customers, relationships between employees are extremely valuable. It's important to have respect for one another and for our differences. Within the team we have an age range between 30 and 60, and people come from different professional backgrounds. Diversity makes a culture the best it can be. The broader the perspective, the better the decisions and the work environment."

Of course, Team Norway does not exist alone, and when circumstances demand, is closely supported by the expertise available across the Club. "The best thing about working at The Swedish Club is the people at the company. There's a chemistry between the offices and though we're scattered all over the world, everyone basically knows everyone else," says Tore. "We are a relatively small company. The Club feels like a family."

Building relationships

As well as covering the worldwide energy market, Team Norway also covers Eastern Europe and Cyprus and is the only office to cover construction vessels for The Swedish Club.

The Norwegian market itself can be difficult to penetrate because of a culture of longstanding relationships, but Tore is a firm believer in taking the long-term view. "It has been a challenging ten years but we have firmly established our presence in the Norwegian market. Attracting new members is often the result of several years of work, meeting people and building relationships. That in itself is very fulfilling. And we keep trying!

"It has been a challenging ten years but we have firmly established our presence in the Norwegian market."

The future

Shipping itself is currently facing a green transition and Tore believes that being at the leading edge and changing along with the world is at the core of The Swedish Club's identity. "Questions will arise in future about how we as a company will position ourselves when the world switches to more environmentally friendly alternatives," he says. "We're already seeing oil & gas being phased out in favour of wind power. The Club is committed to key UN environmental goals. We have a long history of safeguarding health, life and the environment at sea."

He concludes: "If the past ten years in Norway has taught us anything, it is that the future is uncertain. If I were to make one prediction, it would be that we will still be here and we will still be offering our members the highest possible levels of service, but the environment in which we will be doing that will be very different indeed."

A change from breakfast for Oslo

Team Norway has traditionally held a breakfast seminar every March in Oslo. This year it was replaced by a webinar attracting a somewhat wider audience than usual. A total of 55 participants representing shipowners, brokers, maritime lawyers and the wider Norwegian shipping community spent an hour together with Team Norway on the morning of 8 April.

Managing Director Lars Rhodin shared his customary State of Affairs review, and this was followed by an online lecture by award-winning Norwegian speaker Per Henrik Stenstrøm on how to develop and maintain working relationships. He also provided tips on how to deal with annoying colleagues when working from home, which provoked smiles all round from the audience.

New insights into bills of lading

Introduction

Over the last year, The Swedish Club has been working on a new set of publications aimed at providing members and brokers with a guide to the most commonly encountered situations relating to bills of lading.

The aim is to give members and brokers on the one hand – and The Swedish Club on the other – a common platform to discuss these topics and to find hands-on solutions should a situation involving bills of lading arise. This new advice series provides yet another addition to the toolbox of P&I solutions provided by The Swedish Club.

The Club will present the advice in two different formats:

Practical Guide

These are aimed at providing a more practical take on how to deal with the topic, with the aim of assisting the crew, as well as those dealing hands on with the day to day issues ashore.

In Focus

These articles provide greater depth on the particular topic – often touching upon the legal framework that surrounds the issue. In Focus articles have been written with claims staff at members and brokers, as well as in-house legal counsel in mind.

The Club has identified a number of topics which our members have encountered. These include:

- Switch bills of lading
- Ad valorem bills of lading
- Freight prepaid bills of lading

Torbjörn Claesson,
Senior Claims Executive, P&I and FD&D

Our partners

The articles have been written by The Swedish Club in conjunction with a number of shipping law firms. They have been written with English law in mind, since English law is still the predominant law in the context of charterparties – as well as many bills of lading.

We appreciate, of course, that the laws of other countries may also apply to bills of lading but, at least, the articles in the cases selected can be used as a starting point for further discussion.

We invite you to read the first article in this issue of Triton. It covers the topic of the incorporation of charterparty terms into bills of lading, and has been written in conjunction with Hill Dickinson (with special thanks to Siiri Duddington, Partner and Rachel Hoyland, Senior Associate).

Which charterparty is being incorporated into a bill of lading

Written by Hill Dickinson LLP – with special thanks to

Rachel Hoyland, Senior Associate

Siiri Duddington, Partner

Summary

- It is important to identify exactly which charterparty the bill of lading has incorporated, as some of the terms of the charterparty will apply to the bill of lading.
- A charterparty is incorporated into a bill of lading by way of reference in the bill of lading to the charterparty.
- There are rules for identifying which charterparty has been incorporated where a charterparty has been described in the bill of lading but more than one charterparty fits that description.
- There are rules for determining which charterparty has been incorporated where no charterparty has been described in the bill of lading.
- Not all the terms of the incorporated charterparty will apply to the bill of lading.
- To incorporate law and jurisdiction and/or dispute resolution clauses, the bill of lading must contain wording which specifically refers to those clauses.

Why is it important to identify which charterparty has been incorporated into the bill of lading?

Where a bill of lading provides for the incorporation of a charterparty, such a provision can have the effect of making the charterparty terms part of the bill of lading so that they govern the legal relationship of the parties to the bill of lading.

The terms of the charterparty that the bill of lading seeks to incorporate may stipulate, for example, the freight payable, the payment terms, as well as which law governs the bill, and which jurisdiction and modes of dispute resolution disputes are to be referred to. The wording the bill of lading uses to incorporate the charterparty will determine which of the charterparty terms are incorporated - explained in more detail below.

Accordingly, in order for the parties to a bill of lading to understand what terms govern it, it is important to be able to identify exactly which charterparty the bill of lading has incorporated.

How is a charterparty incorporated into a bill of lading?

Not all bills of lading seek to incorporate a charterparty.

Where a bill of lading seeks to incorporate a charterparty, it will usually contain a section on the front page where details of the charterparty, normally the date of the charterparty, should be set out. A clause on the reverse or face of the bill of lading may also operate to incorporate a charterparty.

A charterparty is incorporated into a bill of lading by way of reference in the bill of lading to the charterparty.

Which charterparty has been incorporated into the bill of lading?

As set out above, it is important to be able to identify exactly which charterparty a bill of lading seeks to incorporate. This will not always be straightforward and various sets of circumstances may arise:

(i) The parties have inserted charterparty details in the bill of lading

Where there is reference in a bill of lading to a particular charterparty, the bill of lading will incorporate that charterparty. If the charterparty is specified by date only - and there is more than one charterparty with the same date - the general rule under English law is that the bill of lading incorporates the head charterparty in the chain, to which the ship-owner is a party. This is on the basis that the law presumes the party issuing the bill of lading (the ship owner), must contemplate incorporating a charterparty to which it is party, rather than any other.

However, the general rule in favour of incorporation of the head charterparty does not apply if there is both a time charterparty and a voyage charterparty in the chain and both charterparties fit the description in the bill of lading. In these circumstances, under English law, the bill of lading will usually be deemed to have incorporated the voyage charterparty.

(ii) The parties have not set out charterparty details in the bill of lading

Where the parties have omitted the charterparty details, this will not necessarily prevent the relevant charterparty from being incorporated. Where this is the case, English law seeks to determine which charterparty the parties intended to incorporate.

Where there is only one charterparty governing the voyage, the position is simple: that charterparty is treated as having been incorporated. Where there is more than one potentially relevant charterparty, the position is as set out above: the head charterparty will take precedence unless there is a voyage charterparty in the chain, in which case the voyage charterparty will be deemed to be incorporated.

Identifying what terms of the charterparty have been incorporated into the bill of lading

The fact that a bill of lading seeks to incorporate a charterparty does not automatically mean that all of the terms of that charterparty will be incorporated into the bill of lading.

Precisely which terms of the charterparty the bill of lading incorporates, will depend upon the following factors:

(i) Whether the bill of lading uses specific or general words of incorporation

If the bill of lading uses general words of incorporation, such as 'all terms as per cp dated….', or 'other conditions as per charterparty dated…' then the bill of lading will only incorporate the charterparty terms that relate directly to shipment, carriage and delivery. In order for the bill of lading to incorporate any of the charterparty terms that are not applicable to carriage or delivery of the cargo, the bill of lading must contain specific words of incorporation.

General words of incorporation, such as above, will not be sufficient for the bill of lading to incorporate, for example, the charterparty law and jurisdiction clause or dispute resolution clause. In order for the bill to incorporate terms such as these, the bill must contain wording which specifically refers to these terms.

For example, the CONGENBILL 2016 contains the following, specific, wording:

- 'All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration clause/Dispute resolution clause, are herewith incorporated.'

This type of wording is sufficient to incorporate into the bill of lading the law and arbitration/dispute resolution clauses.

(ii) Whether the charterparty that the bill of lading seeks to incorporate (a) has been concluded, (b) is in writing and (c) has been amended

(a) Where the bill of lading seeks to incorporate a charterparty that has not been concluded/finalised by the parties, the position under English law is that the incorporation will not be effective.

However, the parties can circumvent this by inserting wording into the bill of lading that shows it is their intention to incorporate a charterparty that the parties have not yet concluded.

(b) English law provides that a bill of lading can only incorporate the terms of a written charterparty. In this respect, a recap telex will suffice as long as the terms of the charterparty can be readily ascertained.

A bill of lading cannot incorporate an oral charterparty.

(c) Where the terms of the charterparty that the bill of lading seeks to incorporate have been amended, the charterparty terms as they were at the date the bill of lading was issued will be incorporated, and not any later amended version(s).

(iii) Whether the terms of the charterparty are consistent with the terms of the bill of lading

If any terms of the charterparty are inconsistent with the express terms of the bill of lading, the bill of lading will generally not incorporate those terms. However, if specific words of incorporation have been used, such as 'including the arbitration clause' the incorporation will, in the first instance, be effective despite the inconsistency. However, a Court determining the overall effect of the two inconsistent provisions may well conclude that the clause was not, in fact, incorporated.

(iv) Whether a term would make sense if incorporated into the bill of lading

It has been held by the English Court that a charterparty clause that requires only slight manipulation of its wording in order to make sense in the context of the bill of lading, may be incorporated. However, a clause which would not make sense within the bill of lading without extensive re-drafting, will not be deemed to be incorporated.

Furthermore, a clause which would be contrary to commercial sense, such as one with the effect of transferring to a consignee of part of the cargo liability for all demurrage incurred by the vessel, is unlikely to be deemed incorporated.

Forward thinking

The Swedish Club works continuously with its members and business partners to develop global marine insurance of exceptional quality. Its diversity of products is aimed at supporting the high demands of the shipping world.

Every member of the Club has met our demanding conditions of entry. These standards can only be met with total commitment to quality and an openness to innovation moving forward.

The Swedish Club

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Pitfalls and uncertainties

Disease Clause for Time Charter Parties

Written by

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BIMCO's Infectious or Contagious Diseases Clause for Time Charter Parties ('the Clause') will have been welcomed by the industry when it was published in response to Ebola in 2015. But can it be said to deal fully with disputes arising out of COVID-19 in 2021, and beyond, and how far does it address the peculiarities of a time charter party for a single trip? How does it decide issues of responsibility between shipowners and charterers, and how might it be amended to offer shipowners greater protection?

Definition, definition, definition

Shipowners will have welcomed the Clause more than most. On the face of it, the Clause purports to provide shipowners with blanket protection when the vessel proceeds to, or remains at, what is called an 'Affected Area'. Under Sub-clause (h)(iii), 'Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers' account and the Vessel shall remain on hire throughout.' Under Sub-clause (k), 'The Charterers shall indemnify the Owners if after the currency of this Charter Party any delays, costs, expenses or liabilities whatsoever are incurred as a result of the Vessel having visited an Affected Area during the currency of this Charter Party.'

The nature of COVID

However, to rebut the obligation to pay hire during delays and indemnify the owners for the additional costs and consequences suffered by the vessel generally, charterers will be quick to challenge the definitions appearing at the top of the Clause. Few would argue that COVID-19 is not a 'highly infectious or contagious disease that is seriously harmful to humans'—though some have.

Affected area

More would argue, and have argued, that the vessel is, or was not, in an 'Affected Area': that is, 'any port or place where there is a risk of exposure to the Vessel, crew or other persons on board to the Disease and/or to a risk of quarantine or other restrictions being imposed in connection with the Disease'. Arguments are increasingly made that the entire world is an 'Affected Area', and the risk at any given port is no greater than anywhere else.

Yet more have argued that whereas the vessel might currently be within an Affected Area, when the fixture was

concluded (many months earlier), or when the orders were given for the vessel to proceed to the Affected Area (many weeks earlier), the port or place where the vessel was eventually detained was not in fact 'Affected'. Back then, they argue, there was no risk of exposure or quarantine.

Known risks

And there is a fundamental point: what if the time charter trip is for one voyage, the risks of which were known by all at the time of the fixture? The Clause was designed to cover the unusual risks of a mere possibility of calling at particular ports over a period of time. So is it appropriate for the certainty of risks in connection with a time charter trip during the pandemic in 2021?

Finding solutions

A potential solution is for the owners to attempt to redefine, or further define, key words governing the application of the Clause, so as to turn it into a COVID-specific clause for a period time charter or for a time charter trip. It would be prudent, for example, to include in the definition: 'any viral respiratory disease falling within the definition of COVID-19 and its variants, or similar', bearing in mind that new terminology may emerge.

At what point in time is the risk to be assessed? At the time of the fixture, or when the order is given, or when the vessel arrives? And who takes the risk of a change of circumstances?

As to 'Affected Area', the existence of social contact restrictions (as opposed to 'other restrictions' in the Clause, and probably unthinkable in 2015) could be added. Or the yardstick of whether a port is an 'Affected Area' could be whether personal protective equipment is compulsory.

There is also the temporal question: at what point in time is the risk to be assessed? At the time of the fixture, or when the order is given, or when the vessel arrives? And who takes the risk of a change of circumstances? These are all points that give rise to disputes in relation to the Clause.

Take notice of your decision

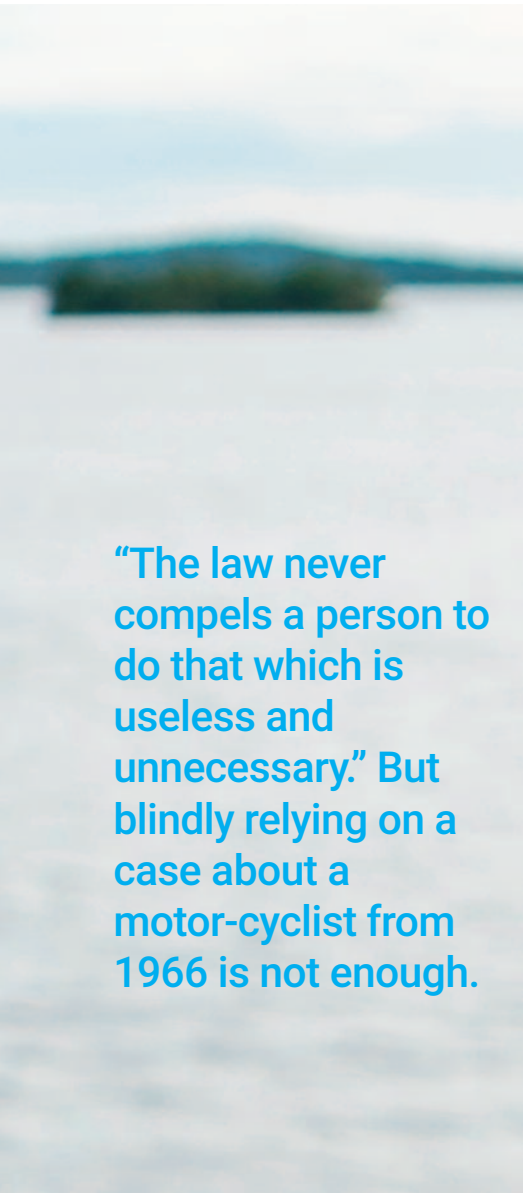
Sub-clause (b) provides that 'The Vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgement of the Master/Owners, is an Affected Area.' And if (Sub-clause (c)) 'the Owners decide in accordance with Sub-clause (b) that the Vessel shall not proceed or continue to an Affected Area they shall',

naturally, 'immediately notify the Charterers.' The charterers can then issue alternative voyage orders pursuant to Sub-clause (e).

Notifying charterers

But what if the Vessel does proceed to, or continue to, or remain at an Affected Area? And what if, because it is a time charter trip, the charterers instruct the vessel to load in an Affected Area or to discharge in an Affected Area? Do the owners still need to notify the charterers that they are complying with the only order that the charterers could give?

Sub-clause (h)(i) states that, if the vessel does proceed to, or continue to, or remain at an Affected Area, then 'The Owners shall notify the Charterers of their decision'. The scheme of the Clause essentially treats an Affected Area in a manner analogous to an unsafe port (meaning that the owners are not obliged to follow the charterers' orders), but by Sub-clause (h)(i) the owners still need to 'decide' to comply or not comply (which presupposes that the owners are aware that a place is an Affected Area).



"The law never compels a person to do that which is useless and unnecessary." But blindly relying on a case about a motor-cyclist from 1966 is not enough.

Complications for owners

This raises serious complications for the owners, since the charterers can easily allege, and do easily allege, that the owners did not notify the charterers of their decision to proceed (or continue, or remain, as the case may be). If, then, the charterers are correct that the owners did not serve the required notice, the protection afforded by the Clause can evaporate. This is incredibly convenient for charterers seeking to avoid having to pay hire and expenditure which can quickly run into millions—especially if some (or even all) of the crew have to be hospitalised—and owners should be extra-careful to prevent charterers escaping mammoth liability on a technicality.

Contractual notice requirements

Sub-clause (h)(i) also contains the express qualification that 'the Owners shall not be deemed to have waived any of their rights under this Charter Party' (which would of course include the protection of the Clause itself). With this qualification coming at the end of Sub-clause (h)(i) (about notice) and not Sub-clause (h) (about the decision to proceed), it is arguable that the protection of Sub-clause (h) is not conditional upon the giving of a notice. There is also authority to the effect that contractual notice requirements need not be complied with in obvious circumstances. Indeed, Denning said: "The law never compels a person to do that which is useless and unnecessary." But blindly relying on a case about a motor-cyclist from 1966 is not enough.

Quite clearly, in every aspect of notification, the drafters of the Clause had envisaged a period time charter with the usual wide trading options, not a time charter trip.

Measure for measure

Whichever ways the owners can or cannot amend the Clause to offer maximum protection, one obligation is likely to remain non-negotiable. According to Sub-clause (h)(ii), 'The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organization.' Thus, a prudent owner will keep fully up to date with whatever reasonable measures are recommended by the World Health Organization as the situation develops.

The *Sedov* - celebrating one hundred years of history

In March, the steel four masted training ship *Sedov* celebrated its 100th birthday in the port of Kaliningrad. Currently owned by the Baltic Fishing Fleet State Academy, this beautiful vessel has spent the last 40 years training cadets in sailing the world's oceans.

The *Sedov* does however have a surprising history. Christened the *Magdalene Vinnen* when launched on March 23, 1921, it was the largest commercial sailing ship in the world and was originally built for Club member, F. A. Vinnen & Co.

"We are proud that the most famous ship in our 200-year company history is still in use," says Michael Vinnen, owner of F. A. Vinnen & Co., and member of The Swedish Club Board. "Even if the *Magdalene Vinnen* has not been part of our fleet for 85 years, it is still part of our company history and thus part of our family. We warmly congratulate the *Sedov* on the 100th anniversary of its launch and we look forward to another 100 years of sailing."

Successfully sailing to South America and Australia, the cargo-carrying sailing ship was not only larger than all sailing ships built at that time but was also equipped with a powerful auxiliary diesel engine. This made it able to travel much faster in the doldrums (now known as the Inter-Tropical Convergence Zone) than was possible with conventional sailing ships and greatly simplified entry and exit manoeuvres. In addition to other technical innovations, the *Magdalene Vinnen* even had electric light and heating, which made life at sea much more comfortable for the up to 42-strong crew.

In the mid 1930s, during the switch from sail to steam, the *Magdalene Vinnen* was sold and saw a new life - and a new name - as the training ship the *Kommodore Johnsen*. At the end of the Second World War, the ship was ultimately handed over to the Soviets, and named after the famous Russian polar explorer, Georgy Sedov.

At the time of the Iron Curtain, little was known about the whereabouts of the *Sedov*, but in 1981 it was converted into a training ship for the merchant navy and went into service in 1982.

Since then the *Sedov* has been a familiar sight at major global windjammer meetings.

Member profile

Members of The Swedish Club since 2006, F. A. Vinnen & Co. is not only a shipowner, but also operates as both a third-party ship manager and a crewing manager. A family owned and family run business, Managing Partner, Michael Vinnen is the seventh generation in the family who heads the business. Recently celebrating its 200th anniversary, F. A. Vinnen & Co. has seen the industry move from wooden sailing ships to today's container vessels, via big steel five-masters, steamers, and general cargo ships.

ESG: Maintaining momentum through a pandemic

Malin Hogberg faced a number of challenges as the COVID-19 pandemic took hold in early 2020. Remote working has now become the norm for many of us, but she faced the task of ensuring that both Board meetings and the AGM were legally compliant when held remotely, and that the Club's Board and members could hold legally valid meetings and take the decisions required to do business as usual, when not meeting face to face.

Environmental, social and corporate governance (ESG) remained, however, at the heart of the business.

Malin Högberg,
Director, Corporate Legal

Unsurprisingly, the ongoing development of the Club's ESG policy was somewhat delayed by the COVID-19 pandemic – but the delay was short, the momentum was not lost and in many ways the focus was sharpened, says Högberg.

Making a formal commitment

Although the policy was completed in time for the March board meeting, inevitably it was overshadowed by the immediate decisions that had to be made around the pandemic. Ultimately, it was adopted at the October board meeting. The policy establishes a common view on what sustainability means for the Club, as well as providing guidance to employees and members on what is being done in this field and which areas the Club will focus on next.

Back on the agenda

"ESG is about together taking responsibility for a sustainable future, raising awareness and showing transparency so members and, ultimately, the end consumer can make informed choices. Despite the pandemic, at the end of the year ESG returned to the forefront of the industry's agenda - and actually more quickly than I expected," says Malin.

The International Group

She welcomes the recent adoption of an ESG framework by the International Group. "We acknowledge that the 13 clubs can together do so much more than just one of us. Of course, each club will continue its own focus, but together we can do really great things."

Industry wide pressure

Even with the pandemic as a background, the industry is seeing continued pressure from financial institutions and other business partners with initiatives like the Poseidon Principles and the Sea Cargo Charter, says Högberg. "Despite COVID-19 business goes on, and people want to invest in an organisation that is sustainable and committed and takes responsibility.

"As a Club, we must continue to be transparent about the ESG risks we see and how we work to limit that impact. We have to respond to more stringent laws for financial reporting. As businesses begin to emerge from the pandemic, more and more shipowners will be asking what their suppliers are doing in the area, and that - of course - includes us. We have many Board members who are passionate on this topic, so for The Swedish Club, the focus on ESG has continued throughout the turbulence of the past year."

Notice board

Convention on Limitation of Liability for Maritime Claims, 1976

The Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 will enter into force for the United Arab Emirates on 23 May 2021, in accordance with article 11(2) of the Protocol.

The redesignation by the United States Government of Venezuela's Maritime Authority (Instituto Nacional de los Espacios Acuaticos (INEA))

INEA was designated under Executive Order 13850 for operating in the oil sector of Venezuela and providing assistance to Venezuela's state-owned oil company, PdVSA. The designation led to understandable confusion among shipowners who were exposed to the possibility that they would offend certain provisions of E.O. 13850 by utilising or paying for services provided by INEA at Venezuela ports on voyages unrelated to the oil or other targeted sectors.

To address this side effect of INEA's designation, OFAC has now issued General License 30A which clarifies the dilemma. GL 30A has addressed INEAs designation by authorising all transactions and activities prohibited by E.O. 13850 involving INEA (or any entity in which it owns 50% or more) that are *ordinarily incident and necessary to operations or use of ports in Venezuela.*

Further information can be found in P&I circular 2666/2021, published 9 February 2021.

Staff news

GOTHENBURG

Amin Mohamed
Amin joined the IT department in Gothenburg on 11 January 2021 as a Web Developer.

Club Quiz

1. What is the name of the first submarine to reach the North Pole?
1 Yellow
X Nautilus
2 The Dolphin

2. Which Portuguese explorer was the first to sail around the world?
1 Vasco Da Gama
X Amerigo Vespucci
2 Ferdinand Magellan

3. How long is a fathom?
1 Two yards
X Two metre
2 One shackle

Mail your answer to quiz@swedishclub.com The first correct answer pulled out of the hat will win a prize.

Winner of Quiz No 3-2020

Lena Göthberg
GIGS by Lena G
Gothenburg, Sweden

The right answers to Club Quiz No 3-2020 are:

X Unclear
Why was the submarine yellow in the Beatles' song?

2 USS George H W Bush
What is the name of the world's largest aircraft carrier?

1 Sirocco
What is the name of the cold northerly wind from central France and the Alps to Mediterranean?

Club Calendar 2021

For the safety and wellbeing of our valued members, business partners and staff members, we have cancelled all face-to-face Club events until further notice.

We are running a programme of webinars, which you will find on our web
https://www.swedishclub.com/training/webinars/

To take part, or to find out more, please contact ***webinar@swedishclub.com***.

Sadly, in line with the COVID-19 restrictions that remain in place, the Club's 2021 AGM activities will be held virtually. The Board meeting will be held on the 16 June and the Annual General Meeting will be held on 17 June. Please keep an eye on your inbox for information.

We all hope that you keep well, and we look forward to meeting again when circumstances permit.

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The Swedish Club
Est. 1872

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