GARDNEWS

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Looking for the next challenge

Claes Isacson
Chief Executive Officer

The first half of 2010 has been marked by a series of natural and man-made disasters. The combination of volcanic ash, the oil slick in the Gulf of Mexico and the Eurozone crisis remind us – should a reminder be necessary – that we need to be prepared for a highly uncertain world.

Delivering results

We are pleased to report that, for the 2009 financial year, we made a surplus after tax of USD 240 million and increased our free reserves to USD 678 million (before the reduction of the deferred call). Our assets now total USD 1.9 billion.

The year saw solid results across all areas of the group's operations. Our insurance operations performed very well with a combined ratio across the group of 92 per cent and we wrote USD 812 million of gross premium. Strong results were delivered by P&I mutual and marine, the former now has 131 million GT on the books; while our marine book budgeted for a decline in premium but we were pleased that the final numbers were stronger than expected. The recovery in the financial markets meant that asset values improved significantly and our investment return was 19 per cent.

"The recovery in the financial markets meant that asset values improved significantly and our investment return was 19 per cent."

The strength of these results meant that it was decided to return USD 40 million to the mutual Members of the Club by reducing the deferred call for 2009 from 25 per cent to 10 per cent of the advanced call. Our premium policy is that when the results and capital position allow, the insurance cost for the mutual members will be reduced below the estimated total call. After the reduction in deferred call, Gard will have USD 638 million in free reserves.

"Why not"

In June we celebrated the 10th anniversary of the launch of Gard Services with the publication of a book to commemorate the event. The publication is designed to remind us of the steps along the journey; highlights and memories. It is not supposed to be a blow-by-blow account of the period, but it is sufficiently action-packed that we can look back with pride on the invigorating journey that we have shared!

One of the biggest shifts that the group has undergone has been in its mindset. Ten years ago people asked "why", now they say "why not". It is this, underpinned by analysis, measurement and controls, that makes us think differently about what we do and where we want to go. An example of this is the work being done in the Claims Initiative.

Delivering world-class claims handling

Central to our core purpose and long-term success is our ability to deliver world-class claims handling. This required us to build the best possible organisational framework for the more than 160 claims experts that we employ. Therefore, in order to take an important step forward in our strategic journey, we started a project focusing on claims during the 2009 policy year.

This project is focusing on:
– Creating a better understanding of current practices through statistical analysis, closed file reviews and internal workshops.
– Defining best practices for the various claims types. Closed file reviews are also an important part of this process.
– Evaluating our current claims platform.

"Central to our core purpose and long-term success is our ability to deliver world-class claims handling."

Work on this project has already yielded results. The analyses carried out so far have revealed a number of areas where we can improve our performance – for example by creating dedicated units for some specialised client groups – and as a first step, we have created a separate charterers traders claims team which can handle both P&I and Defence matters for this industry segment. Undoubtedly other changes will follow.

If the year continues in the same way that it has started, then we will need all the energy and enthusiasm possible to face the challenges ahead, so I would like to wish you all the best and hope for a restful and reinvigorating summer break. ■

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Gard News welcomes contributions from external authors. Articles must not have been published previously or be under consideration for publication elsewhere. Contributors may submit articles for consideration for publication to **claudia.storvik@gard.no**.

The Seven Seas and the Five Gyres

Studies of oceanic gyre currents and their relationship with marine pollution show that land-sourced plastics may pose at least as significant a threat to the marine environment as oil pollution from ships. This may have an impact on policies affecting shipping.

Recently, there has been much interest in the phenomenon of large, oceanic gyre currents and their relationship with environmental pollution, both for substances in the water column itself, as well as the indirect relationship these marine phenomena have on climate change, including ship air emissions. Thus, the study of these gyre currents and their effects have an impact on policies affecting the shipping industry. Scientific and social interest in these gyre areas has dramatically increased in recent years, and so a review of what this interest entails is helpful in understanding what future effects it will have on commercial shipping operations.

There are five identified permanent oceanic gyre currents: the North Atlantic, the South Atlantic, the North Pacific, the South Pacific and the Indian Ocean. All of the gyres in the Northern Hemisphere move in a circular, clockwise fashion, with the opposite in the Southern Hemisphere. All of these currents engender some environmental issues, and each can be examined, as to current status and future problems.

The North Pacific Gyre

Starting in the late 1980s, there were reported observations of large patches of accumulated floating debris, mainly plastics, in the vortex of this particular gyre.

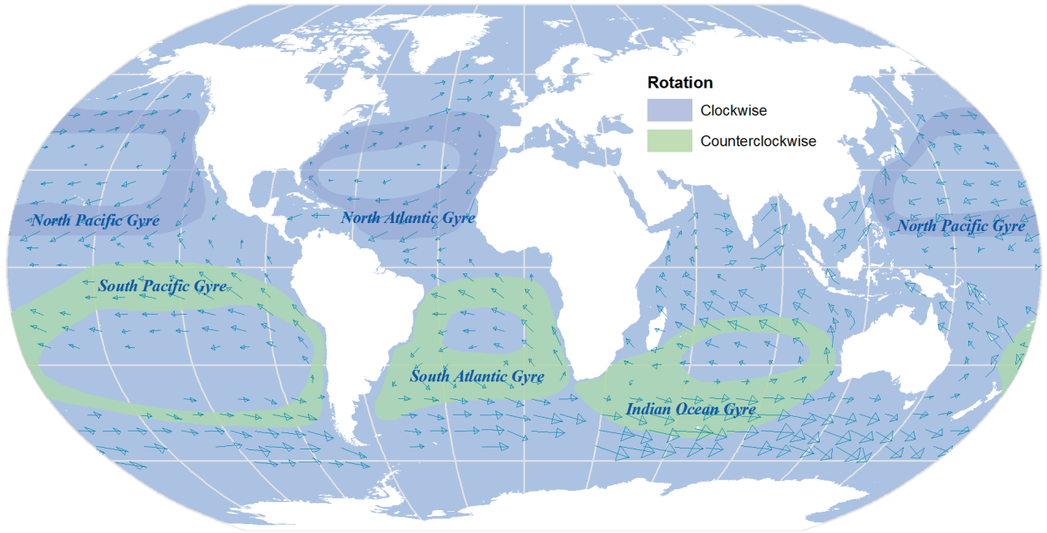
"The plight posed by this particular gyre vortex has been highlighted in the media in the recent start of the trans-pacific journey of the vessel PLASTIKI, a sailing boat built mainly of recycled plastic bottles and other plastic trash."

More information was then gathered, by aerial and satellite observations, and it was confirmed that a large zone of concentrated trash was located in this zone. This was reported in the popular media as the "Great Garbage Patch", and is the size of several hundred square miles.

The plastic debris contained in this patch is ingested by fish, resulting in their stomachs becoming full of non-digestible matter without any nutritional value whatsoever, and so these fish then die of malnutrition.

The plight posed by this particular gyre vortex has been highlighted in the media in the recent start of the trans-pacific journey of the vessel PLASTIKI, a sailing boat built mainly of recycled plastic bottles and other plastic trash, which has been the subject of a previous Gard News article.[1] This vessel departed San Francisco on 20th March 2010 and, as of this writing, was averaging 3 knots speed on its journey to Sydney. For more information readers should refer to www.theplastiki.com.

[1] See article "Plastics floating to the surface – MARPOL Annex V enforcement" in Gard News issue No. 195.



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The five gyre currents and flow direction.

The South Pacific Gyre

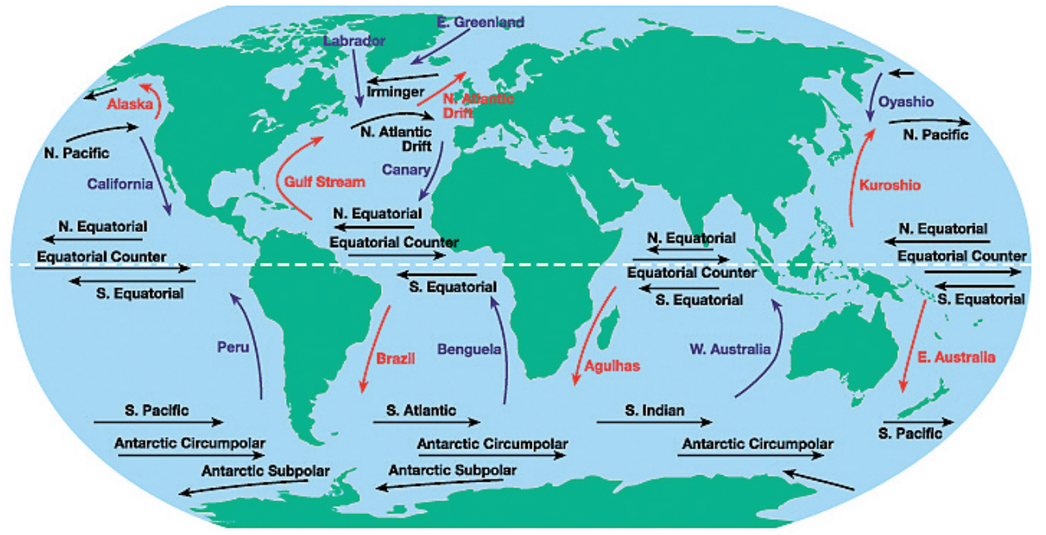
After the observations were made in the North Pacific area, scientists were then curious to know if this phenomenon of accumulation of plastic and floating debris was found in the similar current pattern in the southern hemisphere. Some visual observations of trash accumulation was spotted by vessels, although not to the extent of the analogous currents in the northern hemisphere. Then some French scientists, using satellite data from the years 1993 to 2001, plotted the trajectories of these currents and the debris on them, and found that the debris drifted into the gyre and was caught in the vortex and probably would not escape, confirming the mechanism of the phenomenon.

"The debris drifted into the gyre and was caught in the vortex and probably would not escape, confirming the mechanism of the phenomenon."

The North Atlantic Gyre

The centre of the gyre zone in the middle of the North Atlantic, where currents ebb to almost nil, is a phenomenon that has been known for centuries, as kelp and seaweed have congregated by current in this area, lending to it the name "the Sargasso Sea".

Scientific studies focusing on the concentration of floating plastic debris in this zone began in the mid 1970s, with several



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Individual currents that compose the gyres.

early studies drawing the conclusion that plastic debris from the North American continent was travelling eastward and becoming trapped in the centre of the gyre, staying there for years.

The South Atlantic Gyre

After the studies and observations were being reported about other oceanic gyres, in 1980 UK scientists began to make studies of the South Atlantic gyre, as to whether the same effect was occurring with plastic debris. Not too surprisingly, a vessel sent into the middle of the gyre vortex discovered large concentrations of plastic debris, as well as tar balls. These UK studies indicated that the amount of plastic trapped in this area was growing over time, unlike tar balls, which are quite ubiquitous in the world's oceans, but tend to diminish and disappear in large numbers the longer they are at sea, whereas plastic practically does not degrade at all.

The Indian Ocean Gyre

The Indian Ocean Gyre was the last of the great oceanic gyres to be studied to see if significant plastic pollution is evident. A study published in 2004, carried out by the British Antarctic Survey, indicated that even the most remote locations in the Indian Ocean were being adversely affected by large amounts of accumulated floating plastic debris of various sorts. The study concluded that almost all of this plastic was sourced from household rubbish, and it was suggested that the concentration of human habitation near the Indian Ocean accounts for the large quantity of material discovered throughout the area.

A greater threat to the marine environment than oil pollution from ships

The study of the five great ocean gyres of the world lend a new perspective in the study of marine pollution, and one that is particularly significant for the marine shipping industry.

For a long time, much of the focus of the study of marine pollution had been on the effects of ships, primarily oil spills, on the world's ocean. Rightfully so, since all can agree that marine oil pollution by ships is a negative by-product of shipping, one that is being attempted to be mitigated through better practices and procedures on ships, and the design and use of less polluting vessels and equipment.

But with these gyre studies, it becomes apparent that non-point source marine pollution, particularly with plastics, may pose a much greater threat to the marine environment than oil pollution from ships. While oil pollution can pose short-term toxicity, it does degrade over time, although this can vary with the location of the spill and the type of pollution. Oil pollution is almost always episodic in nature and acute in the area affected.

"Plastic pollution is much more difficult to prevent, as it appears to be the by-product of modern consumerism and industrial society, rather than a discrete event or casualty."

Plastic pollution, however, would appear to be continual in nature and without specific traceable sources; it is much more difficult to prevent, as it appears to be the by-product of modern consumerism and industrial society, rather than a discrete event or casualty. What makes this problem even more critical is that the plastics almost never bio-degrade and float, making them ideal lures for the fish in the area, and causing problems throughout the oceanic food chain. Besides the problems its physical presence can cause, scientific studies indicate that some plastics can leach out toxic and/or carcinogenic compounds that can create further damage, although the evidence for this is far from certain.

Ships can have a role in assisting in this problem, by ensuring no overboard disposal of plastics; MARPOL Annex V addresses this issue. But this potential risk pales in comparison with the onslaught of plastic flotsam from shore sources, produced by millions of people every day. That problem will be far more difficult to solve than pollution by vessels; yet, for the world's oceans, it may prove to be the most important issue to solve. ■

Add salt and some toxic chemicals to the marine plastic soup...

Although scientists have long thought plastics broke down only at very high temperatures and over hundreds of years, Japanese scientists have recently found that some plastics actually decompose within one year of hitting the ocean when exposed to temperatures of about 30°C, which is common in tropical and some sub-tropical waters. However, they have pointed out that this is actually bad news, as the degrading plastics have been shown to leach toxic chemicals into the seas, which are left behind in the water once the plastic has decomposed.

Water samples from the US, Europe, India, Japan and other areas were found to contain derivatives of polystyrene (a common plastic) which do not occur naturally in the sea. Some of these derivatives, such as Bisphenol A (BPA), have been shown to interfere with the reproductive systems of animals, while styrene monomer is a suspected carcinogen. According to the scientists, plastic should be considered a new source of chemical pollution in the ocean.

Large numbers of marine species are affected by plastic debris, by swallowing or becoming entangled in it. But in addition they seem to face the threat of toxic plastic-derived chemicals.

In all likelihood, the chemical derivatives are more concentrated in ocean areas heavily littered with plastic debris, such as the ocean gyres discussed in the article on pages 4-6 of this issue of Gard News. However, as has been pointed out by Captain Charles Moore of the Algalita Marine Research Foundation, "the plastic soup we've made of the ocean is pretty universal – it's just a matter of degree".

Extended loss of hire cover

An introduction to the latest addition to Gard's broad range of marine insurance products.

Gard's extended loss of hire cover (XLOH) has been developed to meet the need for broader income protection for shipowners. XLOH supplements the traditional loss of hire cover (LOH). With few exceptions, the trigger for standard LOH is damage to the ship. XLOH is designed to cover the owner's loss of hire where there is a delay arising from a P&I event or external circumstances beyond the owner's control but no damage to the ship.

It is the charterparty, with its off hire clause, that dictates when the charterer is entitled to take the ship off hire. The trigger for off hire varies and may include events such as "any cause preventing the efficient working of the ship" or just "any cause". With these wordings in an off hire clause, the shipowner could lose his income without there being any damage to the ship. There are several examples of situations where the ship is delayed as a direct or indirect result of a P&I incident. To illustrate, it is not uncommon for a third party cargo claimant to obtain an arrest order for the ship for the purpose of forcing the owner to put up security for a claim. The security negotiations between the cargo claimant and

"XLOH is designed to cover the owner's loss of hire where there is a delay arising from a P&I event or external circumstances beyond the owner's control but no damage to the ship."

the shipowner may last for a prolonged period of time, in particular if one of the parties takes the case to court. XLOH would respond to the shipowner's loss of income during the arrest period, provided the charterer is entitled to put the vessel off hire. Another example is where, through negligent navigation in a port, an entered ship causes a collision between two other vessels (without physical damage to the entered ship itself) within port limits and as a result of the collision there is an oil spill. The entered ship is detained by port authorities pending investigations by local authorities. Depending on the complexity and seriousness of the accident, the ship may be detained for quite some time. XLOH would protect the shipowner's income stream for the detention period, less the applicable deductible. Another category of incident which may result in delay is the discovery of

"XLOH would respond to the shipowner's loss of income during the arrest period, provided the charterer is entitled to put the vessel off hire."

stowaways on board. A ship may be denied entry into port due to the presence on board of stowaways. The ship would then have to try to locate a nearby port where the authorities would accept disembarkation of the stowaways. This process may result in a significant delay and the ship may be deprived of income until she is again free to trade.

Further, an off hire situation may arise independently of a P&I incident. An example would be an LNG ship sailing for an LNG terminal. A ship about to leave the terminal runs aground. The damage sustained by the ship is so severe that it is considered a constructive total loss. The wreck blocks the entrance to the terminal and during the ensuing wreck removal operation the LNG terminal is closed down for a period of several

"As a result of the wreck blocking the entrance to the terminal, the LNG ship suffers a considerable delay. XLOH would cover the owner's loss of income resulting from the delay."

weeks, or possibly months. As a result of the wreck blocking the entrance to the terminal, the LNG ship suffers a considerable delay. XLOH would cover the owner's loss of income resulting from the delay.

Piracy may also lead to delay. For instance, a ship transiting the Gulf of Aden is attacked by pirates. The pirates manage to hijack the vessel and demand a ransom. Negotiations with a view to obtaining the vessel's release follow. After two months of negotiations the vessel is finally freed. Under the charterparty, the charterer is entitled to put the vessel off hire for "any cause". Under the XLOH, the shipowner is protected for a daily sum of USD 30,000. The owner will recover about USD 1.38 million after a (standard) deductible period of 14 days.

The standard limit of cover is USD 5 million per event. Higher limits are available.

For further information, readers should contact Gard's Underwriting Department or read about XLOH at www.gard.no. ■

The future of mediation in the UK

Is it mediation's fate to grow to be as legalistic and costly as litigation and arbitration?

Introduction

Mediation has been in effect in the UK for around 20 years. If Gard's experience is anything to go by, it has, in that time, developed considerably. It is now used, or at least proposed or considered, in many more disputes than previously. Several of the most senior judges in England have made it very clear that they believe that litigation should be the last resort and have expressed their support for mediation. They believe that settlement – however this is achieved – should be pursued as strongly as possible. One comment, from Lord Phillips, will suffice. He said: "It is madness to incur the considerable expense of litigation....without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, illusory".

A settlement tool

Among the tools available to parties to a dispute with which to achieve the "amicable settlement" mentioned by Lord Phillips is alternative dispute resolution (ADR), of which mediation is a part. Most people would acknowledge that ADR has grown out of an increasing dissatisfaction with the formal means by which disputes are resolved, i.e., through the courts, or by arbitration. Both are often very expensive and time-consuming. They are also adversarial and produce winners and losers. Many commercial parties and their

"Reports indicate a majority of cases settle, either on the day of mediation or shortly thereafter."

insurers prefer a procedure which is far less costly, which is quicker, which allows the parties to the dispute (rather than their legal advisers) to remain in control of the case and which means that existing relationships can be preserved and disputes resolved in private. More and more, ADR and especially mediation is perceived to meet these requirements. Most importantly, the process seems to work, in that reports indicate a majority of cases settle, either on the day of mediation or shortly thereafter.

Some problems

In the UK mediation is not mandatory. The courts can and usually do strongly encourage the parties to a dispute to at least consider mediation and are unlikely to regard with favour a refusal to mediate, unless there are very grounds for such a refusal. A party refusing to mediate without good reason may be penalised in relation to an award of costs against it, even if that party succeeds at trial. Nevertheless, for various reasons, a minority of cases do go to a full trial.

For cases in arbitration, the position is slightly different. Arbitrations are private, just as mediations are, although the results of some arbitrations become widely known. Then there is the concept of arbitration being a procedure where a dispute between commercial parties is decided by "commercial men", rather than by a judge deciding the dispute purely on legal grounds. It is suggested that this concept is today illusory rather than real and that this is one reason why mediation has grown in popularity, even where a dispute is subject to arbitration.

In fact, the London Maritime Arbitrators' Association has a set of Mediation Terms dated 2002. These are terms which set out the basis on which the mediation should be conducted, but they are "stand alone" terms, rather than being terms which are part of a broader arbitration agreement.

It is also essential that the parties enter into the mediation process with the intention of resolving the dispute. Paying lip-service to the process is a waste of everyone's time and money. Gard has had such an experience. The case in question involved a very significant amount of money, as well as some complex technical issues. Although the case was the subject of proceedings before the English High Court, the parties agreed to mediate. Despite the mediator doing his best to bring the parties together, the entire day was spent in a technical argument between the experts, which produced little or no agreement between them. Attempts to start settlement negotiations were rebuffed. The entire day was wasted. The case later went to trial, at which Gard's members were successful. The moral of this story: don't bring experts to mediation. The normal practice is for experts to meet before mediation, to record those areas on which they were able to reach agreement and those areas where they were not.

Key issues

Parties to a dispute should not rely on their legal advisers to recommend mediation. Some may do so, but it should be remembered that lawyers are naturally

"It is important that the parties themselves keep the concept of mediation well in mind and do not hesitate to push for mediation to take place."

conservative and reluctant to mediate at an early stage (and sometimes a late stage). Therefore, it is important that the parties themselves keep the concept of mediation well in mind and do not hesitate to push for mediation to take place.

Ensuring that the "right" mediator is appointed is also important. To be effective, the mediator needs to play an active role, doing what he/she can to establish common ground between the parties and seeking to bring them together. This does not necessarily mean expressing a view as to the merits of one party's case, but acting simply as a messenger is unlikely to be an effective use of the time and money invested by the parties and the mediator in preparing for the mediation.

Keep the mediation process simple. Lawyers will often prepare a short (10 minute) "position statement", summarising their clients' case, but for this to be effective, it is usually better for it to be phrased in plain English, rather than in the legal terminology used in court or arbitration. That said, there is no reason why the client can not and should not do so. Although almost all mediators are legally trained and qualified, many commercial parties are not and it will assist them in understanding their opponent's case if this is explained clearly.

During the mediation, it is important that the actual parties to the dispute get together by themselves. This normally happens late in the day, but is often the catalyst which leads to a settlement. This requires the parties

"To be effective, the mediator needs to play an active role, doing what he/she can to establish common ground between the parties and seeking to bring them together."

themselves to attend, or at the very least to authorise their insurers to reach a settlement on their behalf. Lawyers normally have little part to play in such commercial negotiations, which is why most mediation agreements will contain a stipulation that someone from, or with the authority to settle from, the actual parties to the dispute attends the mediation.

It should be remembered that any thing said or done during mediation is confidential and can not be used outside that process. Any settlement offer(s) can not be disclosed to the court, or relied on subsequently. This may encourage the parties to be a little more open during mediation than they might otherwise be.

The future

If used appropriately mediation can be a very helpful way of resolving disputes. It has been found to be especially useful in cases involving several parties and/or complex issues. Multi-party cases can be difficult and expensive to resolve, often because it is difficult to bring all the parties together. Mediation creates that opportunity. It is not necessarily the answer to every difficult case, but the advantages it offers – time, cost and the parties remaining in control – mean that its use and popularity are likely to spread. Its use will continue to be encouraged by the English courts.

"There are some who say that mediation is similar to what arbitration used to be like before it became virtually indistinguishable from litigation, but arguably more costly."

There are some who say that mediation is similar to what arbitration used to be like before it became virtually indistinguishable from litigation, but arguably more costly. The same people express concern that mediation may suffer the same fate. This would be a retrograde step.

All parties to the mediation process need to ensure that the spirit and practice of mediation remain unaffected. Most mediations seem to be attended by both parties' solicitors and some are attended by barristers. Gard sees no need for barristers to attend and, in some cases, the presence of solicitors is also unnecessary. The presence of these parties could well cause mediations to become more "legalistic/judicial", with a resulting increase in time and cost and a reduction in the control exercised by the actual parties. It is in the interest of the parties themselves to avoid this happening. It is the commercial parties who are currently in control of the process and they must all ensure they remain in that position. Mediation represents a real and effective alternative to arbitration or litigation and should be kept that way. The responsibility to ensure that happens rests with the commercial parties.[1] ■

[1] For a more in-depth analysis of some of the issues discussed above readers may refer to Rhys Clift's article "The phenomenon of mediation: judicial perspectives and an eye on the future" in the Journal of International Maritime Law (2009) 15 JML.

US law – Chartered Barges Clause

A recent decision of the US Second Circuit Court of Appeals[1] affirmed a summary judgment granted by the district court in favour of the American Steamship Owners Mutual P&I Association (the American Club) on a cover question arising out of Hurricane Katrina.

Cover issues

During Hurricane Katrina in late August 2005, hundreds of barges and vessels broke their moorings and were swept away. One of them, barge ING 4727 (the barge), was eventually found on the land side of the levee whose breach resulted in the flooding of part of New Orleans. The barge was owned by Ingram Barge Company (Ingram), but at the time of the hurricane it was moored at the terminal of Lafarge North America Inc. (Lafarge) under the terms of an agreement (the transportation agreement) between Ingram and Lafarge.

In an article published in the Wall Street Journal on 9th September 2005, the Army Corps of Engineers was quoted as saying that one possible cause of the levee being breached was that the barge "smashed through" it. In the same article, Ingram was quoted as stating that it was Lafarge's responsibility to properly secure the barge before the storm. Not surprisingly, Lafarge was subsequently sued in four class actions commenced in Louisiana with the class action plaintiffs seeking damages up to USD 100 billion. Various Lafarge primary and excess insurers, including

"On the basis of this evidence, the Court of Appeals concluded that summary judgment was appropriate, thus sparing the American Club a full trial on the cover issue."

the American Club, thereafter commenced declaratory judgment proceedings in New York, concerning cover issues.[2]

Lafarge (and its other insurers) argued that the barge was covered under the American Club policy's "Chartered Barges Clause", which provided in part: "If Lafarge ...acquires an insurable interest in any vessel *in addition to or in substitution for those set forth herein, through purchase, charter, lease or otherwise,* [the American Club policy will] automatically cover such ...vessel effective from the date and time [Lafarge] acquires an insurable interest in such...vessel" (emphasis added).

"Lafarge and its other insurers argued that the barge was covered under the American Club policy's Chartered Barges Clause."

Lafarge took the position that the words "or otherwise" were broad enough to include the arrangement contemplated by the transportation agreement with Ingram. That arrangement was described by the district court as follows: "Lafarge tells Ingram it needs a cement cargo to be transported from Joppa to New Orleans on a particular date. Ingram selects from its fleet of barges one to perform the work: it could be the ING 4727, or 4726, or 4728, or any other Ingram barge. Lafarge neither knows [n]or cares. All it knows is that if all goes well, an Ingram barge will arrive at Lafarge's New Orleans facility to discharge a cement cargo."[3]

The Second Circuit Court of Appeals

The Court of Appeals focused on the words "in addition to or in substitution for those set forth herein" in the clause: "This provides the appropriate context for interpreting the phrase that immediately follows, 'through purchase, charter, lease or otherwise', which essentially describes the way in which a substantial interest akin to the interest in the vessels 'set forth herein' may be acquired. The phrase 'through purchase, charter, lease or otherwise', therefore, reasonably signifies a limiting precept rather than an assurance of comprehensiveness."[4]

However, unlike the district court, the Court of Appeals was unable to conclusively determine "a single plain meaning of the Chartered Barges Clause"[5] from the language itself. Having found that the clause was ambiguous, the court turned to extrinsic evidence, including:

– Lafarge's insurance broker testified that the clause was not intended to insure a third party-owned barge that was delivering cargo to a Lafarge facility.

– Lafarge did not declare or pay any premiums for the more than 3,000 third party-owned barges that arrived at its terminals over the seven years that it had been a member of the American Club until *after* the litigation concerning the barge commenced. Only then did Lafarge tender the premium for the barge. Two years later it tendered the premiums for the remaining ones.[6]

– The transportation agreement between Lafarge and Ingram provided that it was not to be construed as a contract for the chartering, hiring or leasing of any barge, and that Lafarge exercised no control over the operation of any barge.

On the basis of this evidence, the Court of Appeals concluded that summary judgment was appropriate, thus sparing the American Club a full trial on the cover issue.[7]

Summary

Although the case did not establish a new legal principle, it is of interest because the court engaged in a painstaking analysis of a P&I Club policy, and because the court ruled that a cover question could be decided without a full trial *despite* finding that the clause at issue was ambiguous. ■

[1] *New York Marine & Gen. Ins. Co. v. Lafarge N. Am. Inc.* 599 F.3d 102 (2d. Cir. 2010).

[2] These declaratory actions were eventually consolidated. The insurers other than the American Club sought declarations that they should not be responsible for legal expenses incurred by Lafarge allegedly without authorisation as well as (in the case of excess insurers) that Lafarge had breached its obligation to maintain and keep in full effect the American Club policy. The latter claim was mooted by the ruling that the barge was not covered at all under the American Club policy.

[3] *Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Lafarge N. Am., Inc.,* 2008 WL 4449353 at *9 (S.D.N.Y. 2008).

[4] 599 F.3d 102 at 116.

[5] *Id.* at 118.

[6] The Chartered Barges Clause permitted automatic coverage for unlisted vessels that met the criteria stated above (i.e., acquisition by Lafarge of an insurable interest in any vessel through purchase, charter, lease or otherwise). However, declarations and payment of premiums for unlisted vessels had to be made annually.

[7] Lafarge had demanded a jury trial, but this was stricken by the district court on the basis that the proceeding had been brought under the court's admiralty jurisdiction. The Court of Appeals stated that because it was affirming the district court's granting of summary judgment, it "need not decide whether the district court erred in striking Lafarge's jury demand." 599 F. 3d 102 at 112, fn 3.

US law – There is hope in US tort cases

Two recent examples of US court decisions that may help deter frivolous lawsuits.

Quick unanimous verdict

A recent decision in a US district court for New Jersey case[1] resulted in a quickly returned unanimous verdict in favour of the defendant.

The plaintiff, a longshoreman, filed an action seeking damages allegedly caused by the negligent acts of the shipowner. The major element of the plaintiff's claim was based on his allegation that he was unable to perform the work of a longshoreman and would suffer a USD 10,000 loss of earnings as he would be forced to work in a lower paying position. Plaintiff did not support his loss of earnings allegation with expert testimony. Instead plaintiff insisted that the court could use work life expectancy tables as the sole basis for instructing the jury. The court precluded the plaintiff from pursuing his unsupported loss of future earnings claim.

Additionally, the plaintiff's wife was seeking damages for loss of consortium. During discovery the defence subpoenaed the plaintiff's tax returns and found he was filing as a single taxpayer without dependants. The defence was able to determine that the plaintiff and his wife were estranged at the time of the accident. This evidence caused the plaintiff to withdraw the consortium case during trial.

Summary judgment in longshore case

The trial judge in the US district court for the Eastern District of Pennsylvania granted a summary judgment in favour of the shipowner in the case of *Foley v. National Navigation Company.*[2] The plaintiff, a longshoreman, suffered severe injuries to his face, skull, left elbow and wrist, pelvic bone, right hip, right wrist, left shoulder, right knee and ankle. He also alleged vision problems. There was no dispute to the fact that the accident happened or the extent of his injury. The only legal controversy hinged on the determination of which party was responsible for lighting in the area of the accident.

In order to sustain a summary judgment motion the party moving for the summary judgment must prove there is no genuine issue of material fact. While not unheard of, summary judgment motions are not commonly granted in serious injury cases. The court found that none of the duties owed to a stevedore by the shipowner under the "Scindia" doctrine[3] were breached. The court applied the Third Circuit's ruling that the owner is not responsible for correcting obvious hazards when control of the ship is turned over to the stevedore and, therefore, there was no dispute of material facts. The court determined instead that the duty to provide adequate lighting was the responsibility of the stevedore company.

Comment

The result in these cases clearly illustrates the benefit of good trial preparation and supports the contention that, in a case with the "right" set of facts, trial should be considered a viable action. While attractive in many cases, a "cost of defence" settlement does not deter frivolous suits. With the right set of facts, serious consideration should be given to trying a case to verdict. ■

[1] *Evans v. Seatrade Groningen*, No. 07-03139 (D NJ 2009).

[2] *Foley v. National Navigation*, No. 07-1002 (ED Pa 2009).

[3] Turnover in safe condition; duty to warn; active involvement duty; active control duty; duty to intervene; duty to supervise and inspect.

US law – Motion to compel arbitration under P&I policy's arbitration clause

Overturning nearly two decades of precedent, the Fifth Circuit Court of Appeals recently ruled that a marine insurer may seek to compel arbitration of a suit brought against it under Louisiana's "direct action" statute.

In *Todd v. S.S. Mutual Underwriting Association (Bermuda) Ltd.*[1] a seaman first brought suit and obtained a judgment against his employer, Delta Queen Steamboat Company (Delta Queen) for injuries he sustained aboard the M/V AMERICAN QUEEN. Delta Queen had previously filed for bankruptcy protection and failed to satisfy the judgment. The seaman then filed suit in state court against Steamship Mutual, the vessel owner's P&I Club, under Louisiana's "direct action" statute. This statute permits an individual to sue the insurer of an insolvent assured "...regardless of any provision in the [insurance] policy forbidding an immediate direct action".

Motion to compel arbitration

After removing the case to federal district court, Steamship Mutual made a motion to compel arbitration under the policy's arbitration clause, which provided for London arbitration of differences or disputes "between a Member and the Club" concerning "the insurance afforded by the Club under these Rules, or any amount due from the Club to the Member..." The district court denied Steamship Mutual's motion, stating that it would be "wasting trees" to issue a written opinion when the law was so clear that arbitration could not be compelled in a direct action suit.

Fifth Circuit Court of Appeals

Steamship Mutual appealed the district court's decision to the Fifth Circuit Court of Appeals. Before the appeal was decided, the US Supreme Court handed down its decision in *Arthur Anderson LLP v. Carlisle,*[2] holding that an arbitration agreement may be enforced by a non-party to the agreement if state law so permits. The Supreme Court gave the following examples of when state law may permit a non-party to enforce an arbitration agreement: third-party beneficiary, incorporation by reference, waiver and estoppel, and piercing the corporate veil/ alter ego.

Steamship Mutual's motion to compel arbitration could not be denied on the ground that the injured seaman was not a party to the insurance policy and its arbitration provision."

The Fifth Circuit Court of Appeals ruled that the effect of the Supreme Court's decision in *Arthur Anderson LLP v. Carlisle* was that Steamship Mutual's motion to compel arbitration could not be denied on the ground that the injured seaman was not a party to the insurance policy and its arbitration provision. However, the Court of Appeals did not determine that the seaman should be compelled to arbitrate. That issue will be decided by the district court on remand.

The Court of Appeals suggested, but did not order, that the district court, on remand, address: what law should be applied to determine whether the seaman should be bound by the arbitration clause;[3] whether the causes of action asserted by the seaman in the "direct action" case fall within the scope of the insurance policy's arbitration clause; whether requiring a "direct action" plaintiff to arbitrate conflicts with the "direct action" statute's language authorising suit "regardless of any provision...forbidding an immediate direct action"; and, finally, whether, even if there is a conflict, arbitration may nevertheless be compelled because federal law (the Federal Arbitration Act and/or the New York Convention) pre-empts state law.

Comment

It has been suggested that the Fifth Circuit Court of Appeals seized on the Supreme Court's decision in *Arthur Andersen v. Carlisle* not because it established new law on the general question of whether non-signatories could be required to arbitrate in certain circumstances but, rather, because the Court of Appeals was looking for a way to overturn its own rule that arbitration could not be compelled in "direct action" cases. Although it is far from clear whether arbitration will be ordered by the district court in this particular case, the Fifth Circuit Court of Appeals has clearly reversed course by permitting insurers to invoke policy arbitration provisions when faced with direct action suits. ■

[1] 601 F.3d 329 (5th Cir. 2010).

[2] 129 S. Ct. (2009).

[3] The arbitration clause applies to disputes between "a Member and the Club" and the policy is subject to English law. It is possible that the district court will conclude that the clause does not bind the seaman in this case because it is limited to disputes between the Member and the Club.

"The Enforcers" – US Coast Guard to prepare to monitor the Vessel General Permit program

The US Environmental Protection Agency has been placed in the position of regulating the environmental impact of ships and is seeking to delegate inspection responsibility to the USCG.

EPA

As reported in detail in the article "The case of the reluctant regulator", in Gard News issue No. 194, after a series of court challenges and regulatory process, the US Environmental Protection Agency (EPA) has finally implemented a set of comprehensive regulations setting best practice standards for virtually every type of effluent that could possibly be emitted by a ship, other than oil pollution, with a date for implementation of 9th February 2009.

Besides the particulars of the standards for compliance, another issue was how compliance would be monitored and enforced, and perhaps more importantly, who would do it. Traditionally, the US EPA regulates shore based facilities as to liquid effluents, leaving the enforcement of marine pollution law to the US Coast Guard (USCG). But with this program, and also with regard to the recent emergence of ship engine air emissions as a vector to be regulated more closely, the EPA has now been placed in the position of regulating the environmental impact of ships.

The EPA lacks experience in this regard, and since that agency is already stretched thin concerning regulatory enforcement ashore, with the Vessel General Permit program the EPA has been working with the USCG to draft and put into place an intra-agency Memorandum of Understanding, a written agreement whereby the duties for compliance monitoring and enforcement would be "sub-contracted" to the USCG.

The initial registration period for existing vessels was completed by 19th September 2009. Then, on 6th February 2010, the next step in the program needed to be concluded , namely to complete the first comprehensive annual inspection of effluents, and to make an annual report to the EPA of non-compliances that occurred within US waters. Complicating matters, while the VGP is a federal program, it allows the individual states to add on their own peculiar effluent requirements under state law. For example, New York authorities have their own standards that will be effective on 1st January 2012, with requests for extension possible if filed by 30th June 2010.

Within this phase now completed, the program is moving to the point of maturity where the EPA will assume that there is appropriate regulatory compliance by the shipping industry, and thus the time will be right for the unfettered enforcement of the regulations.

Enforcement

But what will the USCG do in connection with their role as "the enforcers"? While as of this writing the formal agreement with the EPA has not been finalized and signed, it would appear likely that the enforcement of this particular program by the USCG will be done within the context of other regular ship inspections already carried out, such as Port State Control visits or security boardings pending entry into the US. This will necessitate additional time for such inspections, and the need to review additional ship documentation and potentially look at numerous different areas and machinery on the ship, meaning more time involved for such visits by USCG inspectors.

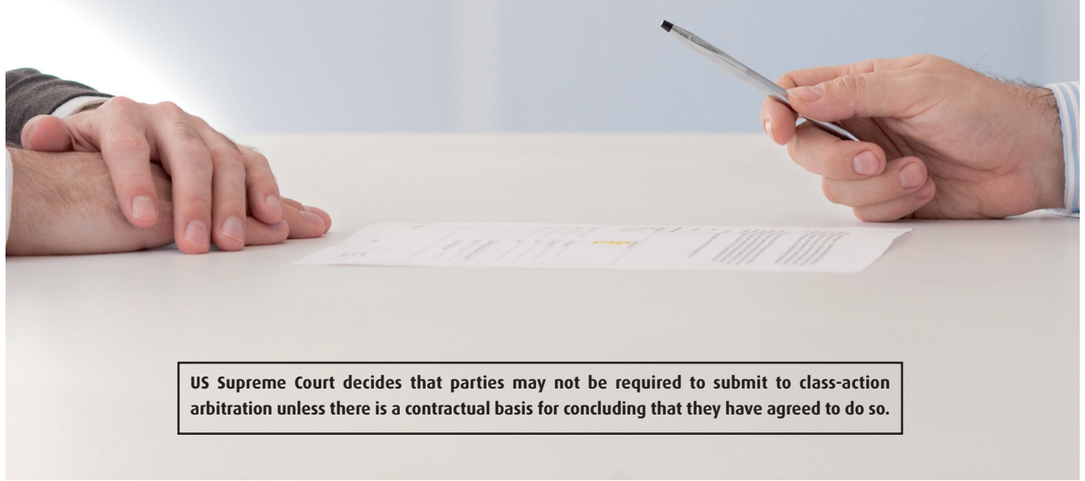
And what if the USCG visitors detect violations of the Vessel General Permit program? Again, it is unclear what will happen, since the discussion and agreement with the EPA has not been completed. However, the likely division of responsibility would result in the USCG detecting the violation, then the EPA determining the consequences. One hallmark of EPA governance of instances of non-compliance is that a "corrective action" is specifically mandated within the Permit terms, with time limits for completion, as specified within section 3.3 of the Permit, so that there should be no question of what to do to achieve compliance going forward. It should be understood that taking timely corrective action as required does not absolve a vessel operator of the original violation, but simply serves to bring to an end the ship's condition of non-compliance.

Violations of the Permit and/or failure to institute corrective actions can possibly result in permit revocation, which would render a vessel ineligible for trade in the US, and giving false reporting or information can result in civil and criminal fines, and even possible imprisonment for the violator.

Future challenges

It will be interesting to see how the USCG will carry out these new inspection duties that are supplemental to their already long roster of inspection requirement, as well as how efficiently the EPA will use information from the USCG in policing its Vessel General Permit program. What makes this novel for operators of vessels calling in US waters is the interaction with the US EPA, an agency not normally involved with the shipping industry. Becoming acquainted with how the other operates may pose a challenge to both parties and may prove to be a "learning experience" for both, with the associated trials and tribulations. ■

US law – Arbitration "a matter of consent, not coercion"



US Supreme Court decides that parties may not be required to submit to class-action arbitration unless there is a contractual basis for concluding that they have agreed to do so.

May a party be compelled to submit to class-action arbitration where the arbitration agreement is silent on the issue? This important question was the subject of a recent opinion issued by the US Supreme Court in a case involving a Vegoilvoy arbitration clause.[1] The court, in a 5-3 decision, ruled that "a party may not be compelled under the FAA (Federal Arbitration Act) to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so".[2]

History

In 2003-2004, a number of chemical traders, including AnimalFeeds International, JLM Industries, KP Chemical, Nizhekamsknetekhim USA and Tulstar Products, filed class actions against various parcel tanker shipping companies in the district courts of Connecticut, Pennsylvania and Texas. The suits claimed that the shipping companies had violated the Sherman Antitrust Act and other statutes in connection with shipments contracted for under Asbatankvoy or Vegoilvoy charterparties. These actions were eventually consolidated and transferred to the District of Connecticut.

"The claimants and the shipping companies entered into an agreement to each designate a single arbitrator to serve on a three person panel in New York."

The shipping companies moved to compel arbitration of the disputes in the suit filed by JLM and its affiliates.[3] In an unreported decision, the district court denied the motions, holding that the claims were not within the scope of the arbitration clause. The Second Circuit Court of Appeals reversed,[4] characterising the arbitration clause as "broad" and one that could extend to "collateral matters" such as anti-trust claims.

In May 2005, the chemical traders filed a Consolidated Demand for Class Arbitration. The claimants and the shipping companies entered into an agreement to each designate a single arbitrator to serve on a three person panel in New York. It was agreed that the panel was authorised to "...determine as a threshold matter...whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class". The parties stipulated that the Asbatankvoy and Vegoilvoy arbitration clauses were "silent" concerning class arbitration.

"After hearing evidence on the issue, the arbitrators issued a Partial Final Award, holding that both the Asbatankvoy and Vegoilvoy arbitration clauses permitted the consolidated arbitrations to proceed as a class action."

After hearing evidence on the issue, the arbitrators issued a Partial Final Award, holding that both the Asbatankvoy and Vegoilvoy arbitration clauses permitted the consolidated arbitrations to proceed as a class action. In arriving at this conclusion, the panel relied on the fact that the clauses were "broad"[5] and that there were more than 20 published arbitration awards directing class arbitrations in cases involving similarly broad clauses.[6] The panel took note of (but was ultimately not persuaded by) the shipowners' argument that there had never been a class arbitration of a maritime charterparty dispute, or the uncontroverted evidence that international, commercial parties to a maritime arbitration agreement would never contemplate or intend that disputes would be resolved by class arbitration.

The shipowners then petitioned the district court to have the Partial Final Award vacated. The district court noted that the shipowners had presented what was "tantamount to an established rule of maritime law",[7] i.e., that the interpretation of maritime contracts, particularly charterparties, should be governed by "custom and usage". The court vacated the award because the panel had failed to make any "meaningful" choice of law analysis and had therefore acted in manifest disregard of the law.

On an appeal taken from the district court's decision by AnimalFeeds, the Second Circuit reversed. According to the court, "custom and usage" is more of a guide than a rule; and the fact the arbitrators may not have correctly applied it was not a basis for *vacatur*. The court quoted with approval an excerpt from a decision of the Seventh Circuit Court of Appeals: "the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause".[8]

Most significantly, the court noted that there was no rule of construction, either federal or state, that governed the specific question of whether class arbitration is permitted when an arbitration agreement is silent on that subject. The court pointedly distanced itself from the line of cases (including two of its own)[9] that had prohibited even consolidation of cases unless the arbitration agreement specifically provided for it. The Court of Appeals was of the view that those decisions were no longer binding after the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle.*[10]

The shipowners had also urged that the arbitrators' award should be vacated on the statutory ground that the arbitrators had exceeded their powers under s. 10(a)(4) of the FAA. The Court of Appeals rejected this argument, stating that arbitrators only exceed their powers if they determine an issue that they are not permitted to determine. In this case, the parties had specifically agreed that the panel would decide whether class action arbitration was permitted. Accordingly, the panel "did not exceed its authority in deciding that issue – irrespective of whether it decided the issue correctly".[11]

"Given the difficulty of overturning an arbitration award, it seemed unlikely that the petition would be granted."

Following the Court of Appeals' decision upholding class arbitration in this case, the Society of Maritime Arbitrators (SMA) amended its rules to prohibit claims on behalf of or against a class from being submitted to arbitration under the SMA Rules. The shipowners filed a petition for Writ of *Certiorari* with the Supreme Court. Given the difficulty of overturning an arbitration award, it seemed unlikely that the petition would be granted. Nevertheless, the Supreme Court agreed to hear the case. By then, the case had drawn considerable attention within the international maritime community and many organisations joined in the filing of an *amicus curiae* brief with the Supreme Court in support of the shipowners' position.[12]

The decision of the Supreme Court

The opinion of the majority acknowledged at the outset that in order for the decision of the arbitration panel to be vacated, the shipowners "must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error – or even a serious error".[13] The court found that the hurdle was cleared because the arbitrators had made their decision using public policy considerations (favouring class arbitration) rather than on the basis of the parties' agreement. By doing so, the arbitrators had exceeded their authority, entitling the shipowners to vacatur of the award.

The guiding principle underlying the court's decision is that arbitration "is a matter of consent, not coercion"[14] and that "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties.[15] ... In this endeavour, as with any other contract, the parties' intentions control. ...This is because an arbitrator derives his or her powers from the parties' agreement to forgo

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[1] *Stolt-Nielsen S.A. et al v. AnimalFeeds International Corp.* 130 S. Ct. 1758; 2010 U.S. LEXIS 3672.
[2] 2010 U.S. LEXIS at 40.
[3] It was reasonable for the shipping companies to assume that if arbitration was ordered, the cases would proceed as separate, bilateral arbitrations between the parties to each charterparty. Under prior decisions of the Second Circuit Court of Appeals, even consolidated arbitrations – a far cry from class-action style arbitration – had been ordered only in cases where the arbitration clauses so permitted. Moreover, as the shipping companies later established, there had never been class-action arbitration in the context of a charterparty dispute, nor would this have been something that would have contemplated by parties entering into a charterparty.
[4] *JLM Indus., Inc. v. Stolt-Nielsen, S.A,*. 387 F. 3d 163 (2d Cir. 2004).
[5] The Vegoilvoy arbitration provision provides: "Any dispute arising from the making, performance or termination of this Charter Party..." The Asbatankvoy arbitration clause provides: "Any and all differences and disputes of whatsoever nature arising out of this Charter...".
[6] These were primarily consumer cases, rather than agreements between sophisticated business entities..
[7] *Stolt-Nielsen, S,A, et al. v. AnimaFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 385 (S.D.N.Y. 2006).
[8] *Wise v.Wachovia Sec., LLC,* 450 F.3d 265, 269 (7th Cir.), cert. denied, 127 S. Ct. 582 (2006) cited in *Stolt-Nielsen,S.A. et al. v. AnimalFeeds Int'l Corp.,,* 548 F. 3d at 95.
[9] *Glencore Ltd. v. Schnitzer Steel Products,* 189 F. 3d 264 (2d Cir. 1999)and *United Kingdom v. Boeing Co.* 998 F. 2d 68 (2d Cir. 1993); *Champ v. Siegel Trading Co.,* 55 F. 3d 269 (7th Cir. 1995).
[10] 539 U.S. 444.
[11] *Id.* at 101.
[12] The brief was filed on behalf of the Association of Ship Brokers and Agents (ASBA), BIMCO, Bergen Shipowners Association, Chamber of Shipping of America, International Association of Independent Tanker Owners, Japan Shipping Exchange, Inc., Norwegian Shipowners' Association, Society of Maritime Arbitrators and Teekay Corporation.
[13] 2010 U.S. LEXIS at 18.
[14] *Id.* at 36.
[15] *Id.* at 37.

the legal process and submit their disputes to private dispute resolution".[16] It followed "[f]rom these principles, ... that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so".[17]

"The guiding principle underlying the court's decision is that arbitration is a matter of consent, not coercion and that courts and arbitrators must give effect to the contractual rights and expectations of the parties."

These principles and their application to this case may seem obvious, but the fact remains that in the arbitrators' view, the parties did not have to affirmatively agree to class arbitration; it was sufficient if there was no intention to *preclude* it. As the Supreme Court noted, while it is accepted that arbitrators may "adopt such procedures as are necessary to give effect to the parties' agreement",[18] class arbitration is not simply a "procedural mode":

"[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. ... But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. ...Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure...no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. ... And the commercial stakes of class-action arbitration are comparable to those of class-action litigation...even though the scope of judicial review is much more limited. ... We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."[19]

The Supreme Court's task in this case was made easier by the parties' stipulation, as expressed by counsel for AnimalFeeds to the arbitration panel, that "silence" with respect to class arbitration did not only mean that the clause made no express reference to class arbitration, but that *"all parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue"*.[20] Given this agreed explanation of "silence", once the Supreme Court determined that the FAA requires that the parties must agree to something as important as class arbitration, the outcome was ordained. It was not even necessary in this case to analyse the language of the arbitration clause or any extrinsic evidence, such as custom and usage, to determine the parties' intention. The arbitrators only had to apply the correct legal rule applicable to the situation – that class action could not be imposed without the agreement of the parties. Having failed to apply that rule, the arbitrators exceeded their authority.

The majority opinion of the court left open the question as to what might be the result in a case where the parties did *not* stipulate that "silence" meant that there was no agreement on the class issue. (It can be safely assumed that future claimants will never again so stipulate). Presumably, the correct approach would then be for the court (or arbitrator) to consider whether the arbitration clause, other terms of the contract, or extrinsic evidence (such as "custom and usage") evidences an affirmative agreement by the parties to resolve their disputes by class-action arbitration.

It is possible that the court's ruling in this case will not be applied to all types of transactions, such as consumer contracts. Nevertheless, it is fair to conclude that, absent a finding that the parties have affirmatively agreed to it, class-action arbitration will not be imposed in cases involving negotiated commercial transactions, such as charterparties. ■

[16] *Id.* at 38.
[17] *Id.* at 40; emphasis in original.
[18] *Id.* at 41.
[19] *Id.* at 42-45.
[20] *Id.* at 13; emphasis added.

IMO agrees to designate North American coastal waters as new emission control area

The article "Marpol Annex VI – Solving the low sulphur issue" in Gard News issue No. 184 reported the entry into force of the North Sea emission control area (ECA) in May 2005. The United States Environmental Protection Agency (EPA) recently announced that the International Maritime Organization (IMO) has also agreed to designate waters off the North American coast as an ECA. When this new ECA takes effect, the sulphur content of fuel oil for vessels subject to MARPOL Annex VI can not exceed 1 per cent.[1] Vessels may also employ certain approved technical measures to reduce their sulphur-oxide emissions to an equivalent level.

The North American ECA will apply to most Canadian and United States coastal waters, thereby having a substantial impact on those vessels employed in the Canada/US coastwise trade. While the ECA takes effect as of 1st August 2011, it provides that vessels operating in the new ECA are exempt from its requirements for one year. Thus, vessels must be compliant as of 1st August 2012. ■

[1] The Revised MARPOL Annex VI, adopted in 2008, is scheduled to come into force on 1st July 2010 and lower the sulphur content standard from 1.5 per cent to 1 per cent.

Befriending stowaways – Revisited

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

Crew members are reminded not to befriend stowaways – even if they are women.

Breaking a cardinal rule

An article which appeared in Gard News issue No. 182[1] reported an incident in Durban which illustrated the dangers of crew members befriending stowaways. The article received wide coverage and sparked off much debate about stowaways on vessels and how crew members should handle them.

In the case in question, the crew followed the IMO guidelines with regard to stowaways found on board a vessel.[2] However, the master failed to notify the owners of the presence of the stowaways and subsequently the crew broke the cardinal rule when it comes to stowaways in that they allowed the stowaways to befriend them. As a result, the master and three crew members were arrested and charged with murder after a plan to illegally land the stowaways went terribly wrong. The stowaways climbed off the vessel by way of a rope, fixed to the offshore side of the vessel, and dropped down into Durban harbour. However, two stowaways drowned and the five surviving stowaways claimed that they had been forced off the ship. The master and three crew were charged with murder, which was later reduced to culpable homicide (equivalent to manslaughter in other jurisdictions). They were also charged with breaches of South Africa's immigration regulations. After lengthy negotiations with the authorities, the crew members agreed a plea bargain, pursuant to which they were heavily fined and received suspended prison sentences. The matter received major media attention.

The article in Gard News 182 explained that stowaways will always seek to befriend the crew in the hope that the crew will feel sorry for them, and emphasised that crews should be advised not to befriend stowaways, as stowaways are not their "friends".

P&I Clubs were very quick to advise members to inform all their crews about the above incident and to remind them to follow the IMO guidelines with regard to stowaways. Once stowaways are found on board a vessel the incident should immediately be reported to the vessel's owners and the crew should never think of the stowaways as being their friends. Stowaways will not be the crew's friends when something goes wrong. In fact, as the above case clearly illustrates, they will turn against the crew as quickly as they have tried to befriend them.

How not to treat stowaways

P&I Associates have been monitoring the treatment of stowaways quite closely and have recently removed two female stowaways from a vessel in Cape Town. Based on P&I Associates' records and statistics, female stowaways are not prolific and in fact, P&I Associates have only ever found female stowaways in the company of male stowaways.

In this case, investigation showed that the crew had overlooked the IMO guidelines on the treatment of stowaways. The two female stowaways appear to have been allowed to spend far too much time with the officers. Photographs of the women wearing the officers' clothes, and considerable sums of money, which is unusual for stowaways, were found in the women's possession. One of the stowaways had a letter from a crew member stating how much he would miss her. The IMO guidelines emphasise that stowaways are not allowed to work on vessels. It is not clear whether these were "working girls". They were, however, landed and repatriated as stowaways.

P&I Associates have also recently dealt with a case in which two females who had visited a vessel had fallen asleep on the vessel and were not discovered until after the vessel had sailed to her next port. Fortunately, the vessel was sailing between two South African ports and therefore the expenses to land the two females were minimal.

The Cape Town incident could have turned sour for the crew members had the female stowaways made allegations of impropriety on board the vessel. Again, P&I Associates remind owners to inform their crews that befriending stowaways and becoming involved with them on any level is a dangerous state of affairs and must be avoided at all cost. If female stowaways are found on board a vessel they must be treated in accordance with the IMO guidelines. They must not be invited to any parties on board the vessel and no favours must be granted to them. It is advisable that they are removed from the vessel and landed as soon as possible in order to avoid any situation which could result in the crew members being charged with any criminal wrongdoing. The female stowaways could turn the tables on the crew members that befriend them quite quickly and manipulate the situation to suit them.

Crew members should follow the IMO guidelines which are there for their own protection and the protection of the shipowner. ■

[1] "Befriending stowaways".
[2] 1997 IMO guidelines on "Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases". See article "IMO binding regulations on stowaways" in Gard News issue No. 169.

Hull and machinery incident – Consequences of using off-specification bunkers

Another example of the importance of sampling and testing bunkers.

Bunkering

A medium-sized bulk carrier was delivered HFO (heavy fuel oil) bunkers whilst at anchorage at a port in the Far East. Since the vessel was scheduled to sail to Europe, and due to the prevailing fuel prices, charterers decided to bunker the vessel to almost full capacity. The operation itself took several hours and was completed without problems. However, the vessel did not take its own fuel samples during the bunkering, but instead received two sealed samples from the barge operator. Both samples were signed by the vessel's chief engineer; however, neither of the samples was sent ashore for further analysis.

The fuel delivered was specified as 380cst – RMG 35, which was in accordance with the applicable charterparty.

Problems

Soon after leaving port, the engineers started using the new bunkers. Shortly thereafter, they experienced abnormal sludge generation in the purifier, which resulted in excessive water-sludge content in the settling and service tanks. A large amount of water and

"The engine crew had to consume the recently bunkered HFO for the propulsion machinery as nothing else was available and as a result the vessel had to reduce speed and slow steam to the next port."

View of damaged cylinder liner.

sludge was drained from these tanks. The amount of water and sludge also resulted in problems with the performance of the main engine, in the form of fluctuations in exhaust temperatures, as well as a rise in the scavenge temperatures of the various units. The main engine fuel pumps and fuel injection valves also sustained some damage.

In order to prevent any power failure, the fuel consumption of the auxiliary engines was switched to diesel oil. The engine crew switched the fuel consumption to another double bottom tank, containing the newly bunkered HFO, but with the same result. Consequently, the engine crew had to consume the recently bunkered HFO for the propulsion machinery as nothing else was available and as a result the vessel had to reduce speed and slow steam to the next port, which was 12 days away. It took several days to reach the next port whilst maintaining reduced speed. They also had to stop several times each day to replace fuel valves, fuel pumps and to clean filters and change exhaust valves dealing with turbocharger problems. The service and settling tanks were being drained almost continuously.

Repairs

The vessel finally arrived at the next port of call several days late. The owner decided to pump the off-specification bunker ashore and ordered new bunkers. During the vessel's stay in port, various repairs were carried out to the

"The main engine fuel system and turbocharger had to be completely overhauled and the settling and service tanks had to be emptied and cleaned."

main engine. All pistons were dismantled and overhauled and piston rings were replaced. Several of the piston top rings were broken whilst one was badly worn. One of the cylinder liners was cracked and had to be replaced. The main engine fuel system and turbocharger had to be completely overhauled and the settling and service tanks had to be emptied and cleaned.

Several fuel samples were taken during the vessel's stay in port and sent ashore for testing, which revealed that the fuel was off-specification. The whole operation became very costly, time-consuming and caused delays to all involved.

View of damaged cylinder liner with piston fitted.

Lesson learned

It is strongly recommended that:

– the crew ensure there is sufficient quantity of tested reserve HFO on board for consumption to cover the time delay involved in sending newly-bunkered representative samples for testing and receiving the laboratory test results.

– the crew take sufficient representative samples of bunkers received and send them ashore for testing.

– laboratory test results for newly received bunkers are known before consuming the bunkers. ■

Piston complete.

Clean after green – Tank cleaning after biofuel cargoes: latest industry guidelines

By David Robert Jones,
Director, CWA International.

In 2009 the Energy Institute, formerly the Institute of Petroleum, published the first edition of Guidelines for the Cleaning of Tanks and Lines for Marine Tank Vessels Carrying Petroleum and Refined Products.

The Guidelines for the Cleaning of Tanks and Lines for Marine Tank Vessels Carrying Petroleum and Refined Products bring together the recommendations of the Energy Institute (EI) hydrocarbons management technical committee, the members of which include major oil companies and other oil industry experts, and provide guidance on preparation of ships' cargo tanks when changing over between refined cargo grades and some "black" products.

Cleaning recommendations in one form or another have been around for many years, mostly formulated by the oil majors or their shipping/chartering arms. It is not the intention in this article to reproduce the new guidelines; the reader is referred to the EI itself where the document, designated HM 50, can be obtained.

Of particular interest, however, are the recommendations relating to biofuels. This new class of cargo is carried aboard combined chemical/petroleum carriers and poses novel challenges with regard to cargo tank cleaning changeovers between grades.

Biodiesel

Biofuel, in the context of diesel oil, describes the blending of Fatty Acid Methyl Esters (FAME) and in the future Fatty Acid Ethyl Esters (FAEE), with mineral diesel oil. The production of diesel fuels containing FAME is increasing worldwide, not least in Europe, where as a result of several EU directives[1] diesel fuel now contains 7.5 per cent v/v FAME (so-called B7.5). This is to increase to B10 in the near future, when the EN590 specification for diesel fuel is amended by the European Committee for Standardisation (CEN).

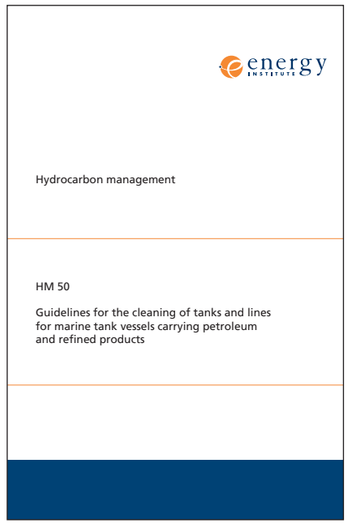
As a result of this development the guidelines contain recommendations for cleaning from:
– pure FAME (B100) and blends containing B15 or greater
– diesel blended with B5-B15 FAME
– diesel blended with up to B5 FAME

The carriage of aviation fuels, in particular, has been found to be problematic after any of the above biofuel categories. The strict regulatory

"The strict regulatory quality requirements for aviation fuels do not allow for any degree of contamination."

quality requirements for aviation fuels do not allow for any degree of contamination, hence the allowable FAME content in aviation fuels is <5 ppm wt, the recognised analytical detection limit for the test procedure.

The task of tank cleaning is exacerbated by the known surfactant properties of FAME, which cause the product to adhere to the surfaces of tanks and pipes, leading almost unavoidably to cross-contamination of the next product.



The Energy Institute's publication HM 50.

Several recent incidents are recorded of aviation turbine (jet) fuel being found to contain low levels of FAME picked up from the transport and storage distribution systems; this renders the fuel off-specification. Such distribution systems include ocean carriers and shore terminals, as well as pipelines and land tanks.

– The guidelines recommend when loading aviation gasoline and aviation turbine fuel after diesel blended with B5, that a hot seawater machine wash be performed followed by draining and drying. This is in contrast to the recommended procedure for regular diesel, without a FAME component, where at most only a cold seawater wash has hitherto been the norm.

– For the loading of aviation gasoline and turbine fuel after diesel blended with between B5-10 (all European diesels and the majority of diesels worldwide), the guidelines recommend a *"stringent hot water wash may be sufficient if tanks are in good condition". Alternatively, the guidelines suggest "...one clean product/zero biological content intermediate cargo is recommended, followed by hot water wash, drain and mop".*

– For both of the above, a fresh water rinse after the seawater main wash is required in order to remove inorganic salts remaining from the seawater.

– For the loading of aviation gasoline and turbine fuel after the carriage of FAME itself or blends between B15-100, the guidelines recommend that these cargoes should not be loaded without special cleaning instructions or until *three* clean product/zero biological content intermediate cargoes have been carried.

The message is clear. Great care must be exercised after the carriage of biodiesel if it is intended to carry aviation fuels.

Where the FAME content of any particular diesel cargo is unknown it is prudent to assume that it is B15 and be guided accordingly.

Biogasoline

Biogasolines include components of methanol or ethanol and, in the future, butanol derived from biomass sources. Currently, gasoline can contain oxygenate compounds such as methyl t-butyl ether (MTBE) , ETBE[2] and TAME[3] which are not of a biological origin, but which have been used as lead replacement octane enhancers since the 1970s. The trend is to replace these synthetic ether additives with bio-components.

In the EU up to five per cent v/v of ethanol (E5) is allowed in automotive gasoline under the EN228 specification. In Brazil, long known for its biogasoline production, E25 is used. In Scandinavia, E85-95 is used in especially modified engines.

The bio-additives of gasoline, or existing oxygenates, do not exhibit surfactant properties in the same manner as FAME, consequently there are no additional tank cleaning risks between bio and non-bio fuel analogues. Contamination by oxygenated components, whether of bio or non-bio origin, is equally unwelcome in aviation fuels, naphtha or condensates and appropriate care should be exercised in conducting tank cleaning for these change-overs.

Summary

Enhanced tank washing procedures are recommended for the carriage of aviation fuels after biodiesels because of the particular quality risks they present. Alternatively, sequencing of non-bio "buffer" cargoes should be considered.

It is recommended that owners retain records of biofuel cargoes carried aboard their vessels, i.e., whether B5, B10 E5, etc., as this information has implications not only for tank cleaning, as above, but also for chartering and cargo stowage planning. ■

[1] Biofuels Directive 2003/30/EC; Renewable Energy Directive 2009/28/EC; Fuel Quality Directive 2009/30/EC.

[2] Ethyl t-Butyl Ether.
[3] t-Amy Methyl Ether.

Where to find the full text of the guidelines

Hard copies of the Energy Institute's publication HM 50 "Guidelines for the cleaning of tanks and lines for marine tank vessels carrying petroleum and refined products" can be bought directly from the Energy Institute (www.energyinstpubs.org.uk) or from selected booksellers. A PDF version can be downloaded for free from the Energy Institute's website at http://www.energyinstpubs.org.uk/tfiles/1277886852/1295.pdf.

Norway – Ballast water regulation

A new regulation concerning the prevention of transfer of alien organisms via ballast water and sediments from ships (the Ballast Water Regulation) is set to enter into force in Norway on 1st July 2010.

The regulation provides requirements for ballast water management with regard to exchange of untreated ballast water, ballast water treatment, ballast water discharge to reception facilities, ballast water and sediments management plan and ballast water record book. Norwegian ships using ballast water treatment technologies and with a gross tonnage of 400 or above shall be surveyed and certified by the Norwegian Maritime Directorate. This requirement does not apply to mobile offshore units.

With few exceptions, the regulation will apply in Norwegian territorial waters and in the Norwegian economic zone to all ships built to carry ballast water. Submersible vessels and mobile offshore units under transport are also regarded as ships.

An English version of the regulation can be found at www.bimco.org/~/media/2010/BIMCO_News/Ports/Norwegian_Ballast_Water.ashx. ■

Introducing Gard (Sweden) AB

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

The staff at Gard Sweden. Back row, from left: Patrik Friberg, Malena Edh, Jonas Gustavsson, Thomas Forssen, Thomas Nordberg, Mariela Karvanen, Ann Pettersson, Johan Henriksson. Front row, from left: Yvonne Mikulandra, Gunilla Coxner, Jonas Albertsson, Maritha Svensson, Michaela Arnell.

Gard's Swedish office, Gard (Sweden) AB was established in 1996 and operates from premises located in the centre of Gothenburg. The company offers a full range of underwriting and claims-related services to members and clients in Sweden and Germany, and is listed as Gard's general claims correspondent in Sweden. Further, the growing daily activities of Gard Marine & Energy Försäkring AB, which serves as the Gard option for European Marine and Energy clients that require a risk carrier domiciled within the EEA area, are under the management of Gard Sweden.

"Efficient claims handling is offered on the basis of the team's many years of experience and specialist competence on the technical, engineering and legal side."

Gard Sweden has a staff of 14, including three underwriters, one underwriting assistant and a controller primarily involved with underwriting. The claims team consists of one senior claims executive, four claims executives and two claims assistants.

Claims handling and underwriting services and capabilities

The Swedish underwriting and claims teams assist both Swedish members and foreign clients seeking local support on a daily basis in a wide range of different matters.

Efficient claims handling is offered on the basis of the team's many years of experience and specialist competence on the technical, engineering and legal side. The claims team comprises employees with sea-going experience as masters, chief engineers, naval architects and management functions in shipyards and coastguard operations. Staff with a technical background work closely together with the two lawyers in the team. Legal competence in collision, grounding, general average, personal injury and cargo claims, combined with the in-house technical expertise, makes the claims team well equipped to handle efficiently most aspects of both P&I and Marine claims. The team also

"Services are offered across the P&I and Marine business areas including also expertise within the field of small craft."

arranges loss prevention seminars and workshops for members and clients in Sweden and Germany, commonly tailor-made to suit the specific needs of the different clients. The Swedish claims team is closely integrated with other parts of the Gard claims organisation.

A team of four offers full underwriting services to members and clients in Sweden and Germany. Services are offered across the P&I and Marine business areas including also expertise within the field of small craft. On the back of relevant academic training and experience gained from long-term service within insurance, the underwriters are well positioned to meet client demands, including risk assessment and contractual evaluations, often in co-operation with in-house lawyers. The underwriters at Gard Sweden are an integral part of the Gard underwriting organisation, as members of the Nordic and Europe North underwriting teams.

Members of staff

Thomas Nordberg is the Managing Director of Gard Sweden and Gard Marine & Energy Försäkring AB. He has a Law degree from the University of Lund and a Maritime Law extension degree from the Scandinavian Institute for Maritime Law, University of Oslo. Thomas, who worked as a lawyer in private practice for five years prior to joining Gard, is also the Area Manager for small craft underwriting, responsible for staff in Gothenburg, Helsinki, Bergen and Arendal. He is primarily involved in underwriting and serves as key account manager for several of the larger members in Sweden.

Senior Claims Executive Johan Henriksson holds LLM degrees from the University of London and the University of Lund, Sweden, and worked for Atlantica/Sampo as Claims Manager of Hull and Cargo for several years. He has operational responsibility for the Gothenburg claims department and handles contractual matters, general average, collision and liability claims.

Controller Yvonne Mikulandra worked for Atlantica dealing with reinsurance, cargo and hull insurance for 30 years before joining Gard. She is an expert in Gard Sweden's internal insurance registration systems and assists in regulatory issues, in particular those related to Gard M&E Försäkring AB.

Maritha Svensson is Office Manager and her responsibilities include administration, book-keeping, accounting and human resources. She also assists Thomas Nordberg in a range of activities including, but not limited to, co-ordination and planning of client events.

Underwriting staff

Michaela Arnell has a BSc degree in Business Management from Oxford Brookes University. Prior to joining Gard she worked with business development at Business Region Göteborg. As an underwriter her main focus is on German members and clients.

"The underwriters at Gard Sweden are an integral part of the Gard underwriting organisation, as members of the Nordic and Europe North underwriting teams."

Prior to joining Gard Mariela Karvanen studied at Gothenburg School of Business Economics and Law and worked with cargo insurance at Skandia and IF. She has underwriting responsibility for the Swedish market and is also involved in underwriting and business development in the small craft area.

Malena Edh attended Gothenburg University and worked in the finance and banking sector before joining Gard. At Gard Sweden she underwrites small craft.

Underwriting Assistant Jonas Albertsson has studied at University West, Trollhättan, and has worked for a Piraeus-based shipowner and for Gothenburg shipbrokers. He currently works with Swedish Marine clients and small craft entries.

Claims staff

Thomas Forssen holds an MSc degree in Mechanical Engineering and Naval Architecture from Chalmers University of Technology and a BSc degree in Marine Engineering from the Merchant Marine Academy in Gothenburg. He served at sea in the Broström Group for 17 years, the last two as Chief Engineer. Before joining Gard he worked as General Manager in Wärtsilä Field Service. Currently he handles hull and machinery claims and provides technical advice.

"Legal competence in collision, grounding, general average, personal injury and cargo claims makes the claims team well equipped to handle efficiently most aspects of both P&I and Marine claims."

Jonas Gustavsson holds a BSc degree in Marine Engineering from Chalmers University of Technology. Prior to joining Gard he served on board merchant vessels and worked at Wärtsilä as a Superintendent Engineer and as Senior Surveyor for the Swedish Coastguard. At Gard Sweden Jonas works as Claims Executive/Surveyor with a focus on claims handling, marine surveying, claims adjusting and loss prevention.

Jerker Paulusson is a qualified Master Mariner and has served as deck officer on Swedish vessels. Between 1991 and 2003 he worked as a P&I claims handler at the Swedish Club. At Gard Sweden he handles all types of P&I claims.

Patrik Friberg has a Master's degree in Law and Economics from the University of Linköping, Sweden. Before joining Gard he was a trainee at a maritime law firm and at the Swedish Shipowners' Association. At Gard Sweden he handles primarily P&I claims.

Claims Assistant Ann Pettersson has a Bachelor's degree in Legal Science from Luleå University. Prior to joining Gard she worked at the risk management department of the Port of Gothenburg. She assists Claims Executives in Marine and P&I claims handling.

Claims Assistant Gunilla Coxner attended Gothenburg University and worked for a container leasing company prior to joining Gard. Gunilla is involved in the handling of P&I and Marine claims. ■

Package limitation in Germany

The German Federal Supreme Court has recently issued a remarkable decision[1] on a carrier's loss of the right to limit liability.

A German freight forwarder agreed to ship 14 wind turbines from Denmark to Australia. The turbines were shipped to Portland, Australia, from where they were to be on-carried by road to the place of final destination. During the inland carriage of one of the turbines, a trailer on which the turbine was being carried toppled over and seriously damaged the cargo. After initial inspection, the trailer and the cargo were brought back to Portland and shipped to Hamburg by the freight forwarder for a detailed survey. During discharge in Hamburg it was detected that the trailer had again toppled over on board and further damage to the turbine had occurred during the sea carriage back to Germany. The contract of carriage was subject to German law.

Subrogated cargo insurers sued the freight forwarder in Germany for about EUR 500,000 arguing that the goods were not properly secured against the risks of road transport, and especially that the freight forwarder had failed to comply with its burden of proof regarding the details of the accident in Australia and the circumstances of the damage on board the vessel — such failure giving rise to a presumption of gross negligence and resulting in the loss of the right to limit liability.

The first instance court found that the freight forwarder was liable for the damage caused in both legs of the journey and ordered them to compensate the insurers in accordance with the applicable package limitation under the German Commercial Code: 8.33 SDR per kilo for the damage caused during road transport and 2 SDR per kilo for the damage caused during sea carriage.

The insurers appealed the decision arguing that package limitation should not be available in relation to the damage caused during the sea transport. The Court of Appeal reversed the first instance decision on that point and on further appeal the Supreme Court upheld the Court of Appeal's decision.

Pursuant to the German Commercial Code, a sea carrier is liable for any loss of, or damage to goods from the time he takes over the goods until the time they are delivered, unless the loss or damage is due to circumstances that could not have been avoided by the carrier exercising due diligence. Further, a sea carrier shall lose the right to limit liability if it can be shown that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

"It was up to the carrier to give evidence not only regarding the individual operation in question, but also to show that proper general routines and loss prevention measures had been in place."

The Supreme Court made clear that the carrier loses its right to limit liability only if the damage is caused by the carrier's personal fault. However, it found that the Court of Appeal was correct in deciding that the defendant was not allowed to limit its liability, because it had failed to discharge its burden of proof in respect of the cause of the damage, giving rise to a presumption that the carrier acted with gross negligence.

The Federal Supreme Court found that bad stowage or lashing qualify as a reckless act of the carrier personally, which makes the operation unsafe and constitutes gross negligence of the company's management. Causation should refer to the safe practice codes within the carrier's organisation. The loss of the unit under the circumstances constituted prima facie evidence that the unit had not been properly stowed or lashed on board. It was then up to the carrier to give evidence to the contrary, not only regarding the individual operation in question, but also to show that proper general routines and loss prevention measures had been in place.

When damage has been caused by bad stowage or lashing, the carrier must show what has been done to secure the cargo. The carrier must show that he had control over the cargo operations to the extent that they were his responsibility. If the carrier fails to discharge this burden of proof, a legal presumption arises that he had no operational control over the shipment, which he knew (or should have known) must inevitably lead to the risk of loss or damage to the goods in his custody.

Unless the carrier produced evidence that stowage and lashing were properly carried out and that proper routine and loss prevention measures were in place, there would be a presumption that the act or omission was that of the carrier, that it was reckless and done with knowledge that damage would probably result, so limitation of liability would not be available.

In the circumstances, the carrier was not able to discharge the required burden of proof and was therefore unable to limit liability.

We thank Marco Remiorz, a partner at Dabelstein & Passehl, Hamburg, for drawing our attention to the above decision. ■

[1] BGH judgment from 29th July 2009 – I ZR 212/06.

Warning – Mercury contamination of LPG cargoes

Circular highlights the dangers of poor documentation and cargo quality certificates.

A recent SIGTTO (Society of International Gas Tanker & Terminal Operators Ltd) circular concerning mercury contamination of LPG cargoes highlights the dangers of poor documentation and cargo quality certificates being issued by shippers. SIGTTO is a not-for-profit company formed to promote high operating standards and best practice in gas tankers and terminals throughout the world.

SIGTTO has received reports from its membership of mercury occurring in petroleum products, specifically those produced in South East Asia. Mercury contamination may be found in the raw gas streams or crude oil which, through the production or refining process, find its way into the LPG export stream. With the exception of imports to Japan and to receivers who may have aluminium storage tanks, mercury content limits are not usually specified for LPG and therefore are not routinely checked.

Some, but by no means all, refineries handling the subject crude oil have installed mercury removal facilities. If there are no mercury removal facilities (guard beds), or the LPG is stripped from a raw gas stream prior to any guard beds, then there is a risk of mercury contamination.

The risk from mercury aboard gas carriers arises since the contamination may be adsorbed onto the tank surface. In normal operations this should not represent a hazard until the cargo system is prepared for tank entry. The mercury may then be released from the surface and contaminate the atmosphere, presenting an inhalation risk to personnel.

Good ventilation, together with monitoring, is important in mitigating the risk; however, if mercury concentration is above safe levels, then respiratory protection should be considered for all personnel entering the tank. "Hot work" on a contaminated surface will accelerate desorption and should be viewed as an activity warranting particular care.

Due to insufficient information sometimes being provided to ships, the extent of this problem is unclear and it is recommended that risk assessments should reflect the possibility of mercury contamination in cargo handling systems. SIGTTO is encouraging its members where necessary to seek expert advice and report such issues for the wider dissemination of information to the industry.

Further information can be obtained from SIGTTO (secretariat@sigtto.org or + 44 (0) 207 6281124). ■

Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation comes into force

Maritime security is expected to improve with the entry into force of the Protocol to the Convention on Suppression of Unlawful Acts.

Following ratification by Nauru, the 2005 Protocol to the 1988 IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) will come into force on 28th July 2010.

The 2005 protocol ensures that the legal framework developed by the IMO is kept up to date and provides an adequate basis for the arrest, detention and extradition of alleged terrorists acting against shipping or using ships to perpetrate acts of terrorism. The protocol includes new rules on consensual boarding, which provide states with a legal basis to intercept terrorist activities at sea that are planned or already in progress.

The SUA Convention is complementary to the International Ship and Port Facility Security (ISPS) Code, which aims at putting in place practical measures to make international shipping and port facilities safe from terrorist activity and is mandatory under SOLAS.

Further information can be obtained from www.imo.org. ■

The ERIKA – Paris Court of Appeal finds multiple parties criminally liable

The second instalment of the ERIKA litigation is delivered in France.

Introduction

On 30th March 2010 the Paris Court of Appeal[1] issued its decision in the litigation following the ERIKA oil spill, finding four defendants – Total, Rina, Mr Savarese, (the director of Tevere Shipping, the owners of the ERIKA) and Mr Pollara (a director of the technical managers, Panship) – criminally liable for the ERIKA oil spill in 1999. However, in contrast to the first instance decision, Total itself was held not to be liable for civil damages, as Total was found to be protected by the channelling provisions of the CLC convention.

MARPOL v. French domestic law

The Court of Appeal concluded that MARPOL applies to both wilful and accidental pollution, and furthermore (and importantly) that MARPOL does not restrict the French state's ability to impose criminal liability upon parties under French domestic law.[2] In line with this reasoning, the court applied French domestic law to the incident, and found that the defendants could be held both civilly and criminally liable under French law unless positively protected under the CLC convention.

Total's liability

The court concluded that Total had been negligent in their vetting procedures, which amounted to "imprudence", the standard for criminal liability under French domestic law.[3] This conclusion was reached notwithstanding the fact that vetting is a voluntary activity done by charterers. The court also held that there was a causal link between the negligent vetting and the incident – basically reasoning that had the vessel been vetted appropriately she would not have been chartered for this voyage and the incident would not have taken place. Finally, for liability to attach under the relevant legislation, the court had to show that Total had control over the management or operation of the vessel. This was achieved by citing a number of provisions of the voyage charterparty.

"The court applied French domestic law to the incident, and found that the defendants could be held both civilly and criminally liable under French law unless positively protected under the CLC convention."

Civil liability

Unlike the first instance court, the Court of Appeal did find Total to be the charterers of the ERIKA and thereby protected from civil liability by the channelling provisions of the CLC.[4] However, Total underlined in a statement that following the lower court's decision (which found Total and other parties liable for civil damages in the amount of EUR 192 million), as a sign of solidarity yet without admitting liability, they paid a total of EUR 171.5 million to claimants willing to accept this as full and final settlement of their claims. This was on top of the more than EUR 200 million spent by Total on clean-up/pollution prevention efforts. As such, it seems that, although this part of the judgment by the Court of Appeal will be welcomed by Total and charterers in general, it comes too late to have a significant financial implication for Total.

It should also be noted that the Court of Appeal held that environmental damages claimed do fall within the scope of damages covered by the CLC convention. Under the CLC convention, liability for impairment to the environment is limited to reasonable measures of reinstatement actually undertaken or to be undertaken.[5] Under French domestic law, however, not-for-profit environmental NGOs can claim damages

[1] See article "French court holds multiple defendants liable for ERIKA spill", Gard News issue No.190 for a discussion of the first instance decision, which found Mr Savarese (the director of Tevere Shipping, the owners of the ERIKA) and Mr Pollara (a director of the technical managers), Total and RINA jointly and severally liable for EUR 192 million in civil damages. Furthermore, Total and RINA received criminal fines of EUR 375,000 each and Mr Savarese and Mr Pollara were each fined EUR 75,000, the maximum allowable under the applicable legislation. The decision was appealed.

[2] Under French law criminal liability may be based on imprudence or negligence, a relatively low standard.

[3] Article 8 of the French statute of 5 July 1983.

[4] The first instance court had attempted to circumvent the CLC convention by holding that the channelling provision only protected Total Transport Corporation, the voyage charterers of the ERIKA, but not Total SA, who performed the allegedly negligent vetting, and that Total SA were not acting as agents or servants of the voyage charterers.

[5] International Convention on Civil Liability for Oil Pollution Damage, 1992, article 1.6.

The ERIKA: environmental damages claimed fall within the scope of damages covered by the CLC.

when a defendant is liable for environmental damage, and the court will assess an amount to be paid to the NGO, on the assumption that the NGO's actions will benefit the environment and the public and therefore compensate the loss. By confirming that environmental damages do fall within the scope of the CLC, such damages can not be claimed against Total as charterers.

With respect to the other defendants held liable by the first instance court, the Court of Appeal held that all three defendants were jointly and severally liable under French domestic law. The director of the shipowners was found to fall within parties protected by the channelling provisions of the CLC; however, he was deemed to have acted recklessly with knowledge that damage would probably result, the standard for losing protection under the CLC convention.[6] The director of the technical managers and RINA were not considered to be covered by "other person who, without being a member of the crew, performs services for the ship",[7] and thus were not protected by the channelling provision of the CLC. Consequently, these three defendants were held jointly and severally liable for damages in the amount of almost EUR 197 million.

"The rationale for finding criminal liability with Total for negligent vetting, which in itself is voluntary, is a curious conclusion."

Fines

As is apparent from the above, the Court of Appeal found all the defendants criminally liable under French domestic law and the fines imposed by the first instance court were upheld.

Commentary

Although the appeal court, unlike the first instance court, arrived at the logical conclusion that Total were the charterers of the ERIKA, and therefore could not be held liable for civil damages, there are a number of issues in this judgment which raise concern. Shipping is a truly global industry, and while it is encouraging that the Court of Appeal has applied the CLC to a greater extent than the first instance court, it is unfortunate that the French courts have also found that MARPOL does not pre-empt the application of French domestic law. Additionally, the decision clearly goes against the spirit of the CLC, which France has ratified, in that one of the main purposes of the CLC is to channel liability to one party only: the registered shipowner. Instead, the courts have applied domestic legislation, thereby extending the number of parties which may be held liable. Furthermore, the rationale for finding criminal liability with Total for negligent vetting, which in itself is voluntary, is a curious conclusion.

Consequently, although a step in the right direction compared to the first instance court decision, there are numerous aspects to the appeal court decision which should cause concern to charterers, managers and classification societies.

The decision has been appealed to the French Supreme Court, and Gard News will keep readers updated. ■

[6] International Convention on Civil Liability for Oil Pollution Damage, 1992, article 3.4.

[7] International Convention on Civil Liability for Oil Pollution Damage, 1992, article 3.4.b.

English law – Vessel remains on hire while detained by pirates

The London Commercial Court has recently ruled that a vessel chartered on NYPE terms remained on hire whilst under the control of pirates.

In an important decision[1] on an appeal to an arbitration award, the London Commercial Court has ruled that a vessel chartered on the NYPE 46 form which was seized by pirates remained on hire while it was detained.

The charterparty

The charterparty off-hire clause (clause 15) provided:

"That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost..."

The words "default and/or" and "including strike of Officers and/or crew or deficiency of" were amendments to the standard wording.

In addition, the rider included the following additional clause:

"Clause 40 – Seizure/Arrest/Requisition/Detention

Should the vessel be seized, arrested, requisitioned or detained during the currency of this Charter Party by any authority or at the suit of any person having or purporting to have a claim against or any interest in the Vessel, the Charterers' liability to pay hire shall cease immediately from the time of her seizure, arrest, requisition or detention and all times so lost shall be treated as off-hire until the time of her release..."

The charterparty also included a put-back clause and the CONWARTIME 2004 clause.

The facts

Whilst on charter, on 22nd February 2009 the vessel was seized by Somali pirates in the Gulf of Aden and detained until 25th April 2009. The vessel reached an equidistant position with the location at which it was seized on 2nd May 2009.

The arguments

It was common ground that the charterers were required to pay hire for the use of the ship unless they could bring themselves within the ambit of the off-hire exceptions.

The shipowners argued that the vessel remained on hire during the period of detention because seizure by pirates did not fall within the scope of the off-hire clause.

"It was common ground that the charterers were required to pay hire for the use of the ship unless they could bring themselves within the ambit of the off-hire exceptions."

Charterers argued that the vessel was off-hire because: detention by pirates amounts to "detention by average accidents to ship or cargo"; the phrase "default and or deficiency of men" encompasses errors, alternatively negligent errors, by the master and crew (maintaining that the crew had been negligent in failing to prevent the pirates from seizing the vessel); seizure by pirates falls within the clause 15 provision "any other cause preventing the full working of the vessel".

The decision

All of charterers' arguments were rejected by the judge, who held that capture of the vessel by pirates could not properly be described as an "accident" within the scope of clause 15. He also held that damage to the ship is an essential ingredient of an "average accident ... to ship". In addition, the expression "default of men" does not encompass inadvertent or negligent errors by the crew and its meaning is restricted to a wrongful refusal by the crew to perform their duties. A failure or inability of the officers and crew to perform their duties in circumstances where they were under duress by the pirates falls outside the scope of the sweep-up provision "any other cause preventing the full working of the vessel".

The judge also noted that the charterparty included a clause dealing specifically with the risk of seizure, which did not extend to cover seizure by pirates.

According to the judge, seizure by pirates is a "classic example" of a totally extraneous cause that falls outside the scope of the off-hire clause. The charterers' appeal against the arbitration award was dismissed.

At the time of writing it is not known whether charterers will seek permission to appeal to the Court of Appeal.

We thank Ince & Co. for the above information. ■

[1] *COSCO Bulk Carrier Co., Ltd v. Team-Up Owning Co. Ltd,* The SALDANHA [2010] EWHC 1340 (Comm).

Hague-Visby Rules – "Act, neglect or default" in the navigation or management of the vessel

The New Zealand Supreme Court decides whether "outrageous" conduct on the part of a master after a casualty is an "act, neglect or default" in the navigation or management of the vessel.

In a decision[1] which overturned the findings of both the New Zealand High Court and the Court of Appeal, the Supreme Court of New Zealand has decided that the conduct of the master after the casualty – such conduct being described as "selfish" and "outrageous" – is, nevertheless, an "act, neglect or default...in the navigation...or management of the ship".

The words "act, neglect or default" in the navigation or management of the vessel are part of Article IV, Rule 2 of the Hague-Visby

"The New Zealand Supreme Court held that this nautical fault defence applies to all acts – apart from barratry – of the master and crew in the navigation or management of the ship."

Rules. This Article contains a list of exceptions from liability available to the carrier, of which the "error in navigation" defence is one.

In the case in question, the vessel ran aground on laden passage. Significant damage to ship and cargo resulted. The crew refloated the vessel and continued the voyage. The master deliberately declined to report the incident to anyone, including the shipowners. During this time, further cargo loss/damage was suffered. By failing to report the incident immediately, it appears the master was trying to avoid blame.

In proceedings started by cargo interests, the New Zealand High Court and Court of Appeal both decided that the post-casualty conduct of the master, which was described as "selfish" and "outrageous", was such as to deny owners the opportunity to rely on the "error in navigation" defence. However, the New Zealand Supreme Court held that this "nautical fault" defence applies to all acts – apart from barratry – of the master and crew in the navigation or management of the ship. The Supreme Court found that although the master's conduct was worthy of criticism it did not amount to barratry and therefore did not prevent the shipowners from relying on the "error in navigation" defence. Accordingly, the shipowners were protected from liability. The "error in navigation" defence will disappear under the Rotterdam Rules, if and when they come into effect.

Carriers and probably masters will breathe a sigh of relief at the Supreme Court's decision, of which a more detailed analysis will follow in a future issue of Gard News. ■

[1] *Tasman Orient Line CV v. New Zealand China Clays Ltd* [2010] NZSC 37 (16 April 2010).

Ship arrest in Algeria

A new law on ship arrest, amending the Algerian Maritime Code and containing provisions that should mean good news for shipowners, has been submitted to the Algerian government by the Ministry of Transport.

Among other things, the new law proposal provides that any party requesting a ship arrest in Algeria will have to first deposit a security of at least 10 per cent of the claimed amount. It is hoped that this will deter wrongful arrests and restrict local claimants' tendency to arrest vessels for insignificant or frivolous claims.

The new law proposal is to be submitted to Parliament and, if approved, published in the official gazette of the Algerian Republic before coming into force. ■

Year of the Seafarer

World Maritime Day 2010 celebrates the "Year of the Seafarer".

Every year the International Maritime Organization (IMO) celebrates World Maritime Day. The day is used to focus attention on the importance of shipping safety, maritime security and the marine environment and to emphasise a particular aspect of the IMO's work. This year's theme for World Maritime Day is "2010: Year of the Seafarer".

The theme was selected to give the IMO and the international maritime community the opportunity to pay tribute to the world's seafarers for their unique contribution to society and in recognition of the risks they shoulder in the execution of their duties in an often hostile environment. The objectives of the commemoration are:

– to provide the maritime community with an opportunity to pay tribute to seafarers for their unique contribution to society and in recognition of the vital part they play in the facilitation of global trade;

– to add impetus to the ongoing "Go to sea!" campaign, which the International Maritime Organization (IMO) launched in November 2008, in association with the International Labour Organization (ILO), the "Round Table" of shipping industry organisations (International Chamber of Shipping (ICS), International shipping Federation (ISF), BIMCO, International Association of Independent Tanker Owners (INTERTANKO), International Association of Dry Cargo Shipowners (INTERCARGO) and International Transport Workers' Federation (ITF);

– to reassure those working at the "sharp end" of the industry that those responsible for the international regulatory regime and those who serve shipping from ashore understand the extreme pressures that seafarers face and, as a result, approach their own work with a genuine sympathy for the work that seafarers carry out; and

– to convey to the 1.5 million seafarers of the world a clear message that the entire shipping community understands and cares for them, as shown by efforts to ensure that seafarers are fairly treated when ships become involved in accidents, are looked after when abandoned in ports, are not refused shore leave for security purposes, are protected when their work takes them into piracy-infested areas and also to ensure that they are not left alone when in distress at sea.

Details about the activities taking place in celebration of the Year of the Seafarer can be found at the IMO website at www.imo.org. ■

Go to sea!

In 2008 the IMO launched the "Go to sea!" campaign to attract entrants to the shipping industry and address the global shortage of seafarers, especially officers, which threatens the very future of the international shipping industry. The campaign calls on governments, industry and IMO, supported by ILO and other international organisations, to take specific actions, within their areas of influence, to increase the recruitment of seafarers to tackle the problem.

In a 2009 IMO review of the campaign, participants agreed that the industry should continue its efforts to ensure the provision of berths for cadets so as to enable them to undertake on-the-job training and build up sea-going experience; encouraged states to ratify expeditiously the consolidated Maritime Labour Convention, adopted by the International Labour Organization in 2006, with a view to ensuring its earliest possible entry into force; expressed concern over the continued and unjustified criminalisation of seafarers; denounced the unwarranted denial of shore-leave to seafarers; and endorsed three objectives associated with the "Go to sea!" campaign, namely, to achieve:

– an enhanced, more favourable public perception of the maritime industry, in line with its excellent safety and environmental record, and vital role as the carrier of world trade;

– greater knowledge among young people of the opportunities offered by a career at sea; and

– a marked shift in the quality of life at sea by bringing it more closely in line with that available ashore.

International Seafarers' Welfare Awards

In December 2010, during the Year of the Seafarer, the International Maritime Organization (IMO) Secretary General will present the first International Seafarers' Welfare Awards, which will be granted to companies, ports, welfare organisations and individuals who provide excellent welfare facilities and services to seafarers on land or at sea.

The awards are being launched by the International Committee on Seafarers' Welfare (ICSW), supported by the IMO and International Labour Organization (ILO), along with the International Shipping Federation (ISF), the International Transport Workers' Federation (ITF) and the International Christian Maritime Association.

There are four award categories: seafarer centre of the year, port of the year, shipping company of the year and welfare personality of the year. The first three categories will be nominated directly by seafarers via a dedicated website at www.seafarerswelfareawards.org or by post and email until 15th September 2010. The fourth award can be self-nominated or nominated by seafarers' organisations or individuals involved with seafarers' welfare. ■

The 2010 Gard Academy Summer Seminar

Gard's traditional summer seminar was held in Arendal from 2nd to 4th June 2010, with 125 delegates from 18 countries.

From 2nd to 4th June 2010 Arendal was the meeting place for delegates from many parts of the world, gathered to participate in Gard Academy's annual summer seminar.

With the benefit of warm sunshine and a clear blue June sky, many of the delegates marvelled at the light summer evenings.

The seminar opened with a status report for the Gard group by Chief Executive Officer Claes Isacson.

Other presentations by Gard staff included Frank Gonynor with an overview of air emissions regulations, Alf Martin Sandberg on anchor and anchoring problems, Tonje Castberg on the HNS Convention, Rolf Thore Roppestad on Gard's financial foundation and André Kroneberg with news about Gard products.

Seminar delegates enjoy the tour on the Sørlandet.

Guest speakers included Børge Brende, Secretary General of the Norwegian Red Cross, who addressed the audience on global humanitarian challenges in 2010, with a special focus on the aftermath of the earthquakes in Haiti and Chile.

Andrew Bardot, Secretary and Executive Officer of the International Group of P&I Clubs, presented an overview of the International Group.

Alf Tore Sørheim, Port State Control Co-ordinator at the Norwegian Maritime Directorate, presented an outlook on the new Paris MOU inspection regime coming into force in 2011.

Karen Purnell, Managing Director of ITOPF, addressed the audience on practical aspects of HNS incidents and Reinder Peek, Contract Manager of Smit Salvage B.V., spoke about challenges in salvage and wreck removal.

At the end of the first day, delegates were invited on board the 1927-built, fully-rigged sailing ship SØRLANDET for a tour around the local island Tromøya that included a cup of traditional fish soup and stories of the area told by Gard's Alf Martin Sandberg. During the trip, the local steamboat PETRINE made an appearance, under command of Gard employee Joe Taraldsen.

Following the cruise, the traditional fresh seafood dinner was served in the gardens of the Gard headquarters. ■

Loss Prevention and P&I Member Circulars, spring 2010

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

Loss Prevention Circulars

– Loss Prevention Circular No. 06-10, April 2010: The dangers of hot work on cargo securings.

– Loss Prevention Circular No. 07-10, May 2010: Carriage of distillers' Dried Grain.

P&I Member Circulars

– P&I Member Circular No. 04-10, April 2010: Regulations of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships.

– P&I Member Circular No. 05-10, May 2010: Review of policy years.

– P&I Member Circular No. 06-10, June 2010: The Migrant Workers and Overseas Filipinos Act of 1995, as Amended by Republic Act No. 10022.

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

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

Staff news

Frank Gonynor, Senior Claims Adviser, Lawyer in the Casualty, Environmental, Property & Liquid Cargo section of the Claims Department, P&I, has relocated to Houston. He will continue to handle casualty, environmental, property and liquid cargo claims and will work from Gard's New York office on a regular basis. He will continue to be available as a resource for all Gard offices.

Tom Bent Opsal Nielsen has joined Gard as Claims Executive in the Dry Cargo section of the Claims Department, P&I. Prior to joining Gard Tom worked as Senior Manager for United European Car Carriers in Grimstad.

Tom Fredrik Valbrek has joined Gard as Claims Executive in the Claims Department, Energy. Tom has a Master's degree in Maritime Law from the University of Oslo and a Bachelor's degree in Business Administration from Østfold University College. Prior to joining Gard he worked with offshore energy operations at Aker Solutions in Oslo.

Tony Wong has joined Gard (HK) Ltd as Lawyer in the Defence Department. Tony has a law degree from London University and is a qualified solicitor in Hong Kong. Prior to joining Gard he worked for Thomas Miller (Hong Kong) Limited, Healy Baillie and Richards Butler.

Nancy Kam has joined Gard (HK) Ltd as a Claims Executive. Nancy attended HKU SPACE and obtained a LLB awarded by Manchester Metropolitan University and is a qualified solicitor in Hong Kong. Prior to joining Gard she worked for Ince & Co and in trade credit insurance in the UK and Hong Kong.

Patrik Lee has joined Gard (HK) Ltd as Claims Executive. Patrik has a degree in Shipping Technology and Management from the Hong Kong Polytechnic University and an LLM from London University (Hong Kong University SPACE). Prior to joining Gard he worked for Kingstar Shipping Limited in Hong Kong in commercial and claims management.

Bente Hellesund, Claims Consultant in the Claims Department in Bergen, has retired after 30 years of service. We thank her for all her hard work throughout the years and wish her a long and happy retirement. ■

Staff directory

Claes Isacson Mobile +47 97 55 93 37
Chief Executive Officer claes.isacson@gard.no

Sara E. Burgess Mobile +44 (0)7818 421723
Senior Vice President, Special Adviser sara.burgess@gard.no

Svein Buvik Mobile +47 97 55 93 18
Senior Vice President, Organisation, ICT svein.buvik@gard.no

Steinar Bye Mobile +47 99 29 22 10
Senior Vice President, Finance and Risk Management steinar.bye@gard.no

Kristian Dalene Mobile +47 97 55 91 42
Senior Vice President, Investment Management kristian.dalene@gard.no

Nicolas Wilmot Mobile +47 99 28 40 11
Senior Vice President, Customer Relations nicolas.wilmot@gard.no

Christen Guddal Mobile +44 (0)7867 978708
Managing Director, Gard (UK) Limited christen.guddal@gard.no

Jan-Erik Braathen Mobile +47 99 28 41 01
Vice President, Risk Management and Analysis jan-erik.braathen@gard.no

Inge Liltved Mobile +47 97 55 91 25
Vice President, Accounts inge.liltved@gard.no

Jens Martinius Nilsen Mobile +47 97 55 92 80
Vice President, Head of Gard Academy jens.martinius.nilsen@gard.no

Trygve Nøkleby Mobile +47 99 28 41 11
Vice President, Human Resources and Organisation trygve.nokleby@gard.no

Trond Willy Olsen Mobile +44 (0)7826 853782
Vice President, ICT trond.willy.olsen@gard.no

Roar Rasten Mobile +47 99 29 22 80
Vice President, Controller roar.rasten@gard.no

Harald Stridsklev jr Mobile +47 97 55 92 38
Vice President, Investment Management harald.stridsklev.jr@gard.no

Lily Karaiscos Mobile +30 693 220 0209
Special Adviser lily.karaiscos@gard.no

Claudia Storvik Home +44 (0)1689 851486
Editor, Gard News Mobile +44 (0)7775 644791
claudia.storvik@gard.no

Group Legal

Kjetil Eivindstad Mobile +47 97 55 92 18
Senior Vice President kjetil.eivindstad@gard.no

Karsten Sunde Mobile +47 97 55 91 83
Vice President karsten.sunde@gard.no

Underwriting

Bjørnar Andresen Mobile +47 99 29 22 90
Senior Vice President bjornar.andresen@gard.no

Rolf Thore Roppestad Mobile +47 97 55 92 45
Senior Vice President rolf.thore.roppestad@gard.no

Bjarne Sælensminde Mobile +47 99 28 40 61
Vice President, Special Adviser bjarne.saelensminde@gard.no

Terje Holte Mobile +852 9154 8101
Vice President, Special Adviser terje.holte@gard.no

Knut Goderstad Mobile +47 97 55 91 27
Vice President, Underwriting and Support knut.goderstad@gard.no

Lars Schedenborg Mobile +46 (0)70 792 60 84
Special Adviser lars.schedenborg@gard.no

Shipowners/Charterers

Stein Wahl Sande Mobile +47 99 28 40 84
Vice President Area Manager Nordic & Japan stein.wahl.sande@gard.no

Bjørn Fremmerlid Mobile +47 97 55 92 43
Area Manager Northern Europe bjorn.fremmerlid@gard.no

Iain Laird Home +44 (0)1962 777650
Area Manager Latin America & London Mobile +44 (0)7768 547401
iain.laird@gard.no

Sid Lock Mobile +852 9196 4210
Area Manager Asia East sid.lock@gard.no

Espen Olsen Mobile +47 99 28 40 51
Area Manager North America espen.olsen@gard.no

Audun Fjermedal Pettersen Mobile +47 97 55 92 10
Area Manager Southern Europe audun.pettersen@gard.no

Petter Eid Skalstad Mobile +47 99 29 22 74
Area Manager Asia West, Eastern Europe & Africa petter.skalstad@gard.no

Reidun Haahjem Mobile +47 99 28 40 56
Senior Underwriter reidun.haahjem@gard.no

Nina Hovland Mobile +47 99 28 40 62
Senior Underwriter nina.hovland@gard.no

Steinar Jørgensen Mobile +47 99 29 22 49
Senior Underwriter steinar.jorgensen@gard.no

Stephen Mulcahy Mobile +44 (0)7799 894670
Senior Underwriter stephen.mulcahy@gard.no

Michaela Arnell Mobile +46 (0)733 55 51 13
Underwriter michaela.arnell@gard.no

Wenche Dahle-Olsen Mobile +47 97 55 92 71
Underwriter wenche.dahle.olsen@gard.no

Inger Aasbø Flaten Mobile +47 97 55 93 12
Underwriter inger.aasbo.flaten@gard.no

Lisbet Fokstuen Mobile +47 99 28 40 54
Underwriter lisbet.fokstuen@gard.no

Sven Jensen Mobile +47 99 29 22 63
Underwriter sven.jensen@gard.no

Mariela Karvanen Mobile +46 (0)705 92 68 02
Underwriter mariela.karvanen@gard.no

Karianne Kristensen Mobile +47 97 55 92 72
Underwriter karianne.kristensen@gard.no

Samira Hmam Mobile +44 (0)7990 591911
Deputy Underwriter samira.hmam@gard.no

Sigrun Ottersland Mobile +47 97 55 92 97
Deputy Underwriter sigrun.ottersland@gard.no

Exploration & Production

Gunnar Aasberg Mobile +47 99 29 22 25
Vice President Area Manager gunnar.aasberg@gard.no

Sabine Colette Mazay Mobile +47 99 29 22 30
Senior Underwriter sabine.mazay@gard.no

Ingrid Helena G Larsen Mobile +47 99 29 22 15
Underwriter ingrid.helena.larsen@gard.no

Liv Johanne Nordvik Mobile +47 99 29 22 18
Underwriter liv.nordvik@gard.no

MOU & Offshore

Magne Nilssen Mobile +47 97 55 91 20
Vice President Area Manager magne.nilssen@gard.no

Tore Furnes Mobile +47 97 55 92 86
P&I Offshore tore.furnes@gard.no

Liv Sand Mobile +47 99 29 22 19
Marine Offshore liv.sand@gard.no

Christian Lillevik Mobile +47 97 55 92 49
Underwriter, Lawyer christian.lillevik@gard.no

Marianne Bruun Mackrill Mobile +47 97 55 93 38
Underwriter marianne.bruun.mackrill@gard.no

Atle Jonsborg Pedersen Mobile +47 99 29 22 65
Deputy Underwriter atle.jonsborg.pedersen@gard.no

Marine Builders' Risks

Knut Morten Finckenhagen Mobile +47 99 29 22 50
Vice President Area Manager knut.morten.finckenhagen@gard.no

Ingunn Brenna Mobile +47 99 29 22 55
Senior Underwriter ingunn.brenna@gard.no

Jan Solem Jacobsen Mobile +47 99 29 22 56
Senior Underwriter solem.jacobsen@gard.no

Charterers Traders

Terri Lynn Jay Mobile +47 97 55 93 25
Area Manager terri.lynn.jay@gard.no

Liv Kristensen Mobile +47 97 55 91 21
Senior Underwriter liv.kristensen@gard.no

Else Franck Mobile +47 97 55 92 07
Underwriter, Lawyer else.franck@gard.no

Small Craft Nordic

Thomas Nordberg Mobile +46 (0)70 311 70 02
Managing Director thomas.nordberg@gard.no

Patrik Palmgren Mobile +358 (0)40 046 5852
Manager patrik.palmgren@gard.no

Malena Edh Mobile +46 (0)705 469 697
Underwriter malena.edh@gard.no

Mette Ellefsen Mobile +47 94 52 92 69
Underwriter mette.ellefsen@gard.no

Henry Hemtman Mobile +358 (0)50 414 6943
Underwriter henry.hemtman@gard.no

Ivar Rokne Mobile +47 99 28 40 74
Underwriter ivar.rokne@gard.no

Market Research & Analysis

Line E.H. Dahle Mobile +47 99 28 40 53
Manager line.dahle@gard.no

Karin Nicolaisen Mobile +47 94 52 93 13
Research Executive karin.nicolaisen@gard.no

Vivi Sandsten Mobile +47 99 29 22 22
Research Executive vivi.sandsten@gard.no

Technical Underwriting

Helge A Nordahl Mobile +47 99 29 22 64
Manager helge.nordahl@gard.no

Tor Halvor Løyte Mobile +47 97 55 92 40
Business Analyst tor.halvor.loyte@gard.no

Product Development

Andre Kroneberg Mobile +44 (0)7920 423832
Manager andre.kroneberg@gard.no

Tonje Forøy Breivik Mobile +47 97 55 93 58
Product Adviser, Lawyer tonje.breivik@gard.no

Inger Eidem Mobile +47 97 55 93 90
Contract Adviser, Lawyer inger.eidem@gard.no

Documentation & Support

Ingebjørg Eliassen Mobile +47 97 55 92 70
Manager ingebjorg.eliassen@gard.no

Kenneth Meyer Mobile +47 99 28 41 05
Manager kenneth.meyer@gard.no

Trading Certificates (CLC/ITOPF/Bunkers Blue Card)

Inger-Helene Andersen Mobile +47 94 52 93 27
Underwriting Assistant inger.helene.andersen@gard.no

Liv Gundersen Mobile +47 94 52 91 23
Underwriting Assistant liv.gundersen@gard.no

Hanna Kristensen Mobile +47 94 52 93 22
Underwriting Assistant hanna.kristensen@gard.no

Claims

Svein A. Andersen Mobile +47 97 55 91 92
Senior Vice President svein.andersen@gard.no

Nick Platt Mobile +44 (0)7768 547402
Vice President, Special Adviser nick.platt@gard.no

Geir Sandnes Mobile +47 97 55 91 63
Vice President geir.sandnes@gard.no

Christopher Mackrill Mobile +47 97 55 93 61
Senior Manager christopher.mackrill@gard.no

Bjarne Printz Mobile +47 97 55 92 20
Special Adviser/Lawyer bjarne.printz@gard.no

Claims – P&I

Personal Injury & Crew Claims

Lene-Camilla Nordlie Langås Mobile +47 97 55 92 42
Senior Manager lene-camilla.nordlie.langas@gard.no

Per Fredrik Jensen Mobile +47 97 55 91 91
Senior Claims Executive per.fredrik.jensen@gard.no

Christopher Petrie Mobile +47 97 55 93 28
Senior Claims Executive, Lawyer christopher.petrie@gard.no

Pål Berglund Mobile +47 97 55 92 37
Claims Executive pal.berglund@gard.no

Lisbeth Christensen Mobile +47 97 55 92 75
Claims Executive lisbeth.christensen@gard.no

Trond Denstad Mobile +47 97 55 91 90
Claims Executive trond.denstad@gard.no

Roy Kenneth Jenssveen Mobile +47 97 55 93 41
Claims Executive roy.kenneth.jenssveen@gard.no

Gudrun Mortensen Aaserud Mobile +47 97 55 91 17
Claims Executive gudrun.aaserud@gard.no

Morten Mauritz Seines Mobile +47 97 55 91 82
Claims Executive, Lawyer morten.seines@gard.no

Dry Cargo Claims

Joakim Bronder Mobile +47 97 55 91 19
Senior Manager joakim.bronder@gard.no

Einar Gulbrandsen Mobile +47 97 55 91 64
Senior Claims Executive einar.gulbrandsen@gard.no

Odd Helgesen Mobile +47 97 55 92 02
Senior Claims Executive odd.helgesen@gard.no

Geir Kjebekk Mobile +47 97 55 92 52
Senior Claims Adviser geir.kjebekk@gard.no

Peter Leijs Mobile +47 97 55 91 93
Senior Claims Executive peter.leijs@gard.no

Torgrim Andersen Mobile +47 97 55 93 47
Claims Executive torgrim.andersen@gard.no

Heiko Bloch Mobile +47 94 52 92 08
Claims Executive, Lawyer heiko.bloch@gard.no

Andres Duran Mobile +47 97 55 92 61
Claims Executive, Lawyer andres.duran@gard.no

Sandra Guiguet Mobile +47 97 55 91 71
Claims Executive, Lawyer sandra.guiguet@gard.no

Paul Andor Marskar Mobile +47 94 52 93 69
Claims Executive paul.marskar@gard.no

Tom Bent Opsal Nielsen Mobile +47 94 52 93 62
Claims Executive tom.bent.nielsen@gard.no

Fredrik Doksrød Olsen Mobile +47 97 55 92 32
Claims Executive, Lawyer fredrik.olsen@gard.no

Gitana Røyset Mobile +47 97 55 91 41
Claims Executive, Lawyer gitana.royset@gard.no

Rasmus Tideman Mobile +47 94 52 93 57
Claims Executive, Lawyer rasmus.tideman@gard.no

Grethe Øynes Mobile +47 97 55 91 77
Claims Executive grethe.oynes@gard.no

Beatriz Åsgård Mobile +47 97 55 92 91
Claims Executive beatriz.asgard@gard.no

Casualty, Environmental, Property & Liquid Cargo Claims

Harald Fotland Mobile +47 99 28 40 67
Vice President harald.fotland@gard.no

Gunnar Espeland Mobile +47 97 55 92 53
Senior Claims Adviser gunnar.espeland@gard.no

Frank Gonynor Mobile +47 97 55 93 44
Senior Claims Adviser, Lawyer frank.gonynor@gard.no

Jan Kr. Jacobsen Mobile +47 97 55 92 27
Senior Claims Adviser jan.jacobsen@gard.no

Kim Jefferies Mobile +47 97 55 92 90
Senior Claims Adviser, Lawyer kim.jefferies@gard.no

Andreas Brachel Mobile +47 97 55 91 49
Senior Claims Executive, Lawyer andreas.brachel@gard.no

Hans-Øyvind Leikvin Mobile +47 97 55 92 63
Senior Claims Executive hans.leikvin@gard.no

Torgeir Bruborg Mobile +47 94 52 96 18
Claims Executive torgeir.bruborg@gard.no

Tonje Castberg Mobile +47 97 55 91 36
Claims Executive tonje.castberg@gard.no

Emil Evnum Mobile +47 97 55 91 28
Claims Executive emil.evnum@gard.no

Severin Frigstad Mobile +47 94 52 91 60
Claims Executive severin.frigstad@gard.no

Roar S. Larsen Mobile +47 97 55 91 43
Claims Executive roar.larsen@gard.no

Grethe Ljøstad Mobile +47 97 55 92 16
Claims Executive grethe.ljostad@gard.no

Isabel Martin de Nieto McMath Mobile +47 94 52 96 19
Claims Executive, Lawyer isabel.martin@gard.no

Jannike Rognøy Olsson Mobile +47 97 55 91 94
Claims Executive jannike.olsson@gard.no

Robert Skaare Mobile +47 94 52 93 52
Claims Executive robert.skaare@gard.no

Alf Ove Stenhagen Mobile +47 97 55 91 66
Claims Executive alf.ove.stenhagen@gard.no

Claims (London)

Mark Russell Mobile +44 (0)7747 758789
Senior Manager mark.russell@gard.no

Ajaz Peermohamed Mobile +44 (0)7747 758978
Senior Claims Adviser ajaz.peermohamed@gard.no

Ivor Goveas Mobile +44 (0)7881 921116
Senior Claims Executive ivor.goveas@gard.no

Adrian Hodgson Mobile +44 (0)7747 758956
Senior Claims Executive adrian.hodgson@gard.no

Chris Connor Mobile +44 (0)7747 758845
Claims Executive chris.connor@gard.no

Tina Lind Havdahl Mobile +44 (0)7826 854156
Claims Executive Tina.havdahl@gard.no

Kelly Turner Mobile +44 (0)7748 646665
Claims Executive kelly.turner@gard.no

Nigel Wright Mobile +44 (0)7795 843634
Claims Executive nigel.wright@gard.no

Claims (Oslo)

Ivar Brynildsen Mobile +47 99 29 22 31
Senior Manager ivar.brynildsen@gard.no

Alejandra H. Sterri Mobile +47 99 29 22 71
Senior Claims Executive, Lawyer alejandra.sterri@gard.no

Claims – Energy

Jan-Hugo Marthinsen Mobile +47 99 29 22 40
Vice President jan-hugo.marthinsen@gard.no

Torstein Søreng Mobile +47 99 29 22 47
Senior Claims Executive torstein.soreng@gard.no

Ragnar Løken Mobile +47 99 29 22 46
Claims Executive ragnar.loken@gard.no

Tove Kaasine Skjeldal Mobile +47 99 29 22 41
Claims Executive tove.skjeldal@gard.no

Asle Skola Mobile +47 99 29 22 42
Claims Executive asle.skola@gard.no

Tom Fredrik Valbrek Mobile +47 94 52 22 43
Claims Executive tom.fredrik.valbrek@gard.no

Claims – Marine

Claims Handling

Leif Erik Abrahamsen Mobile +47 99 28 41 12
Vice President leif.erik.abrahamsen@gard.no

Svend Leo Larsen Mobile +47 99 28 40 22
Senior Claims Adviser leo.larsen@gard.no

Reidar Ebbesvik Mobile +47 99 28 40 31
Senior Claims Executive reidar.ebbesvik@gard.no

Karl Petter Mühlbradt Mobile +47 99 29 22 78
Senior Claims Executive karl.p.muhlbradt@gard.no

Vidar Solemdal Mobile +47 99 28 40 25
Senior Claims Executive vidar.solemdal@gard.no

Thomas Christiansen Mobile +47 99 29 22 62
Claims Executive thomas.christiansen@gard.no

Trond Justad Mobile +47 99 28 40 27
Claims Executive trond.justad@gard.no

Jan Sundberg Mobile +47 99 29 22 72
Claims Executive jan.sundberg@gard.no

Påsan Vigerust Mobile +47 99 28 40 71
Claims Executive pasan.vigerust@gard.no

Claims Adjusting

Sveinung Måkestad Mobile +47 99 28 40 32
Vice President sveinung.makestad@gard.no

Anne Glestad Lech Mobile +47 99 29 22 76
Senior Claims Adjuster anne.lech@gard.no

Alf Inge Johannessen Mobile +47 99 28 40 28
Senior Claims Adjuster alf.inge.johannessen@gard.no

Atle Olav Nordbø Mobile +47 94 52 22 24
Senior Claims Adjuster atle.nordbo@gard.no

Marit Bjørnethun Mobile +47 99 28 40 21
Claims Adjuster marit.bjornethun@gard.no

Merete Engevik Home +47 55 12 45 93
Claims Adjuster merete.engevik@gard.no

Hans Jørgen Hald Mobile +47 99 29 22 17
Claims Adjuster hans.hald@gard.no

Svein Arne Nilsen Home +47 95 72 77 76
Claims Adjuster svein.arne.nilsen@gard.no

Defence

Alice Amundsen Mobile +47 97 55 92 65
Vice President alice.amundsen@gard.no

Kelly Wagland Mobile +44 (0)7789 938200
Senior Manager kelly.wagland@gard.no

Balvinder Ahluwalia Mobile +44 (0)7766 303047
Senior Lawyer balvinder.ahluwalia@gard.no

Peter M. Chard Mobile +44 (0)7766 251390
Senior Lawyer peter.chard@gard.no

Jim Edwards Mobile +44 (0)7879 235982
Senior Lawyer jim.edwards@gard.no

Helenka Leary Mobile +44 (0)7766 251387
Senior Lawyer helenka.leary@gard.no

Michael Moon Mobile +44 (0)7825 518447
Senior Lawyer michael.moon@gard.no

Helen Sandgren Mobile +47 99 29 22 14
Senior Lawyer helen.sandgren@gard.no

Arne Sætra Mobile +47 97 55 92 92
Senior Lawyer arne.satra@gard.no

Christopher Walker Mobile +47 99 29 22 75
Senior Lawyer christopher.walker@gard.no

Hélène-Laurence Courties Mobile +44 (0)7917 195810
Lawyer helene.courties@gard.no

James Hawes Mobile +44 (0)7887 508198
Lawyer james.hawes@gard.no

Monica Kohli Mobile +44 (0)7920 423832
Lawyer monica.kohli@gard.no

Tore A. Svinøy Mobile +47 97 55 92 01
Claims Executive/Lawyer tore.a.svinoy@gard.no

Hanne Topland Mobile +47 94 52 22 91
Lawyer hanne.topland@gard.no

Jove Ytreland Mobile +47 97 55 91 80
Lawyer jove.ytreland@gard.no

Loss Prevention & Risk Assessment

Terje Paulsen Mobile +47 94 52 40 85
Manager, Loss Prevention terje.paulsen@gard.no

Alf Martin Sandberg Mobile +47 97 55 92 51
Senior Technical Adviser alf.martin.sandberg@gard.no

Bjarne Augestad Mobile +47 97 55 92 54
Senior Marine Surveyor bjarne.augestad@gard.no

Stuart P. Ross Mobile +47 97 55 93 92
Senior Marine Surveyor stuart.ross@gard.no

Per Arne Sæther Mobile +47 99 28 40 29
Senior Marine Surveyor per.arne.saether@gard.no

Per Haveland Mobile +47 97 55 93 17
Marine Surveyor per.haveland@gard.no

Magnar Birkeland Mobile +47 99 28 40 18
Risk Assessment Executive magnar.birkeland@gard.no

Marius Schønberg Mobile +47 97 55 91 75
Loss Prevention Executive marius.schonberg@gard.no

Accounting

Solvor Ek Hayes Mobile +47 97 55 91 48
Senior Manager solvor.ek.hayes@gard.no

Inger Kristiansen Mobile +47 97 55 92 74
Senior Manager inger.kristiansen@gard.no

Jorunn Brekkestø Mobile +47 97 55 92 88
Manager jorunn.brekkesto@gard.no

Gard (Sweden) AB

Thomas Nordberg Mobile +46 (0)70 311 70 02
Managing Director thomas.nordberg@gard.no

Yvonne Mikulandra Mobile +46 (0)70 787 04 06
Controller yvonne.mikulandra@gard.no

Claims – P&I and Marine

Johan Henriksson Mobile +46 (0)70 787 04 07
Senior Claims Executive johan.henriksson@gard.no

Thomas Forssen Mobile +46 (0)70 655 92 92
Claims Executive thomas.forssen@gard.no

Patrik Friberg Mobile +46 (0)70 878 74 15
Claims Executive patrik.friberg@gard.no

Jonas Gustavsson Mobile +46 (0)70 633 92 94
Claims Executive jonas.gustavsson@gard.no

Jerker Paulusson Mobile +46 (0)73 442 60 70
Claims Executive jerker.paulusson@gard.no

Oy Gard (Baltic) Ab

Roberto Lencioni Mobile +358 (0)50 500 0000
Managing Director roberto.lencioni@gard.no

Claims – P&I and Marine

Saila Hiirsalmi Mobile +358 (0)50 595 1133
Senior Manager saila.hiirsalmi@gard.no

Martin Jansson Mobile +358 (0)50 414 6942
Claims Executive, Surveyor martin.jansson@gard.no

Johan Lång Mobile +358 (0)50 414 6941
Claims Executive johan.lang@gard.no

Gard (HK) Ltd

John Martin Mobile +852 6478 7261
Managing Director john.martin@gard.no

Einar Christensen Mobile +852 9106 9262
Claims Director einar.christensen@gard.no

Catherine Wong Mobile +852 6478 7260
Senior Lawyer catherine.wong@gard.no

Zoe Ho Mobile +852 6478 7262
Claims Executive zoe.ho@gard.no

Patrick Lee Mobile +852 9107 0302
Claims Executive patrick.lee@gard.no

Michelle Pun Mobile +852 9337 6463
Claims Executive michelle.pun@gard.no

Wallace Yeung Mobile +852 9124 6365
Claims Executive wallace.yeung@gard.no

Sigvald Fossum Mobile +852 9036 6561
Deputy Underwriter sigvald.fossum@gard.no

Gard (Japan) K.K.

Richard Corwin Mobile +81 (0)90 6479 2544
Regional Director – Asia, Gard Group richard.corwin@gard.no

Tadashi Sugimoto Mobile +81 (0)80 4142 9688
Managing Director tadashi.sugimoto@gard.no

Hideo Teramachi Home +81 (0)3 3440 2205
Gard P&I (Japan Branch): Representative Mobile +81 (0)70 5590 9062
hideo.teramachi@gard.no

Toyoo Mohri Mobile +81 (0)90 3095 2923
General Manager toyoo.mohri@gard.no

Katsumi Imamura Mobile +81 (0)90 4709 5174
Claims Executive katsumi.Imamura@gard.no

Gard (North America) Inc

Sandra Gluck Mobile +1 (917) 670 3169
President sandra.gluck@gard.no

Evanthia Coffee Mobile +1 (917) 399 5918
Senior Lawyer evanthia.coffee@gard.no

John Scalia Mobile +1 (516) 551 1577
Senior Claims Executive john.scalia@gard.no

Cheryl Acker Mobile +1 (203) 258 7059
Claims Executive cheryl.acker@gard.no

Claudia Botero-Götz Mobile +1 (646) 248 8109
Lawyer claudia.gotz@gard.no

Edward Fleureton Mobile +1 (917) 670 3510
Claims Executive edward.fleureton@gard.no

Hugh Forde Mobile +1 (917) 670 3753
Claims Executive, Lawyer hugh.forde@gard.no

Dina Gallaro Mobile +1 (917) 670 3209
Claims Executive dina.gallaro@gard.no

Christine Thomas Mobile +1 (917) 670 3271
Claims Executive christine.thomas@gard.no

Gard (Greece) Ltd

George Karkas Mobile +30 694 451 3350
Managing Director george.karkas@gard.no

Anne Boye Mobile +30 693 726 7653
Senior Claims Executive anne.boye@gard.no

Svein Ellingsen Mobile +30 693 726 7654
Senior Claims Executive svein.ellingsen@gard.no

Alexandra Chatzimichailoglou Mobile +30 697 412 0812
Claims Executive, Lawyer alexandra.chatzimichailoglou@gard.no

Emmanuel Tatianidis Mobile +30 693 726 7669
Claims Executive, Financial Controller emmanuel.tatianidis@gard.no

Ioanna Vitta Mobile +30 694 435 2372
Lawyer ioanna.vitta@gard.no

Stratos Zafiriadis Mobile +30 693 260 0491
Claims Executive stratos.zafiriadis@gard.no

Lingard Limited, Bermuda

Graham Everard Mobile +1 (441) 330 3445
Managing Director graham.everard@lingard.bm

DIARY

London
The office will be closed on:
30th August 2010

Hong Kong
The office will be closed on:
23rd September 2010
1st October 2010
16th October 2010

Tokyo
The office will be closed on:
20th September 2010
23rd September 2010
11th October 2010

New York
The office will be closed on:
6th September 2010

Bermuda
The office will be closed on:
6th September 2010

Piraeus
The office will be closed on:
28th October 2010

Gard AS
Postbox 789 Stoa
NO-4809 Arendal
Norway
Phone: +47 37 01 91 00
Fax: +47 37 02 48 10
companymail@gard.no

Gard AS
Skipsbyggerhallen
Solheimsgaten 11
NO-5058 Bergen
Norway
Phone: +47 37 01 91 00
Fax: +47 55 17 40 01
companymail@gard.no

Gard AS
Støperigata 2, Aker Brygge
NO-0114 Oslo
Norway
Phone: +47 37 01 91 00
Fax: +47 24 13 22 33 (Energy)
Fax: +47 24 13 22 77 (Marine)
companymail@gard.no

Gard (UK) Limited
85 Gracechurch Street
London EC3V 0AA
United Kingdom
Phone: +44 (0)20 7444 7200
Fax: +44 (0)20 7623 8657
garduk@gard.no

Gard (Greece) Ltd
2, A. Papanastasiou Avenue
185 34 Kastella, Piraeus
Greece
Phone: +30 210 413 8752
Fax: +30 210 413 8751
gardgreece@gard.no

Gard (North America) Inc
30 Broad Street
New York
NY 10004-2944
U.S.A.
Phone: +1 (212) 425 5100
Fax: +1 (212) 425 8147
gardna@gard.no

Gard (Japan) K.K.
Kawade Building, 5F
1-5-8 Nishi-Shinbashi
Minato-ku
Tokyo 105-0003
Japan
Phone: +81 (0)3 3503 9291
Fax: +81 (0)3 3503 9655
gardjapan@gard.no

Gard (Sweden) AB
Våstra Hamngatan 5
SE-41117 Gothenburg
Sweden
Phone: +46 (0)31 743 7130
Fax: +46 (0)31 743 7150
gardsweden@gard.no

Gard (HK) Ltd
35/F, The Centrium
60 Wyndham Street
Central
Hong Kong
Phone: +852 2901 8688
Fax: +852 2869 1645
gardhk@gard.no

Oy Gard (Baltic) Ab
Bulevardi 46
FIN-00120 Helsinki
Finland
Phone: +358 30 600 3400
Fax: +358 9 6121 000
gardbaltic@gard.no

Gard P. & I. (Bermuda) Ltd.
Gard Marine & Energy Limited
Lingard Limited
Trott & Duncan Building
17A Brunswick Street
Hamilton HM 10
Bermuda
Phone: +1 (441) 292 6766
Fax: +1 (441) 292 7120
companymail@lingard.bm

CATASTROPHE TELEPHONE NUMBERS
P&I: +47 90 52 41 00
Marine: +47 90 92 52 00

OUTSIDE OFFICE HOURS TELEPHONE NUMBERS
Gard AS:
+47 90 52 41 00
Gard (UK) Limited:
+44 (0)7747 021 224
Gard (North America) Inc:
+1 (917) 856 6664
Gard P&I Japan and Far East:
+81 (0)3 3503 9291
Gard (Sweden) AB:
+46 (0)31 743 71 48.
Gard (HK) Ltd:
+852 94 61 63 61
Oy Gard (Baltic) Ab:
+358 (0)50 402 7777

www.gard.no
companymail@gard.no