UK CLUB

SEPTEMBER 2003 ISSUE 16

LOSS PREVENTION NEWS

No room for ERROR

While the immediate reasons for marine accidents and incidents are often quite clear, the underlying causes may not be so obvious. To extend awareness and provide a perspective on these contributory factors, the UK P&I Club has produced *No Room for Error,* a 46-minute DVD.

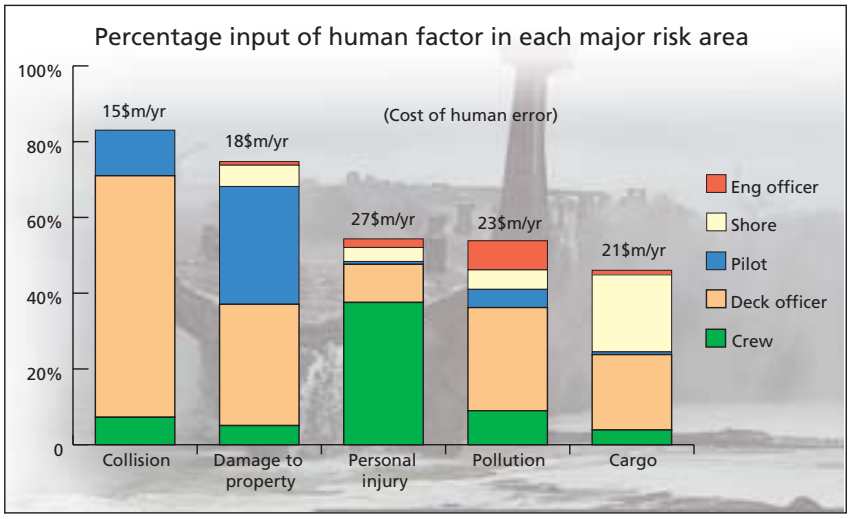
The title stems from the part played by human error in over half of all the large (over US$100,000) claims on the Club in its comprehensive ongoing Major Claims Analysis. Human error is crucial or significant in 83 per cent of collisions and 75 per cent of property damage claims. The incidence for pollution is 54 per cent, for personal injury 48 per cent and for cargo 46 per cent.

By contrast, equipment, structural and mechanical failures are the primary causes of less than a quarter of large claims between them.

The costs are enormous – around US$1.5 billion to the Club since 1987 and a steady $1.5 million a day to the industry as a whole.

No Room for Error looks beyond the immediate or proximate factors which trigger claims to the underlying or latent causes.

The theme is expressed in five scenarios, featuring familiar situations which lead all too often to collisions, personal injury, pollution, cargo and property damage. These are then reviewed and shortcomings categorised as procedure, hardware, design, maintenance management, error enforcing conditions, housekeeping, incompatible goals, communication, organisation, training and defences ■



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Oily water separator – pipe removal

We have been advised that Brazilian Port State Control is becoming more vigilant in its inspections regarding the oily water separator (OWS).

In a recent incident, Port State Control officers insisted that the pipe from the OWS to the overboard discharge valve be removed by ship's staff for a closer inspection. Although nothing abnormal was found and the section of pipe was replaced, no written evidence was retained onboard clearly stating that the pipe had been removed under the instruction of the Port State Control.

In its present condition with indications of possible tampering, there is cause for concern that Port State Control inspectors in other ports may wrongly assume that the ship has been pumping oil overboard and by-passing the OWS.

It is suggested that if Port State Control insists on the removal of any section of pipe that is connected to the OWS or overboard valve then an official entry is made in the log book and preferably a comment made on the PSC inspection form by the attending Port State Control inspector. Photographic evidence with the attending Port State Control inspector clearly in the picture will also help to defend the ship against any false accusations.

The US Coast Guard is particularly active in OWS inspections as mentioned in *LP Bulletin 247* and the Club would again remind Members of the following areas which, if not addressed, could lead to serious consequences for owners and crew:

1. The discovery of flexible hoses with flanges attached will alert the coast guard into believing wrongful practises have been carried out as this may be used by ships to by-pass the OWS and pump the oil directly overboard. This type of discovery has lead to many senior officers being prosecuted recently in the USA.
2. Signs of tampering e.g. flanges, bolts, nuts having recently been moved and the existence of blank flanges on the OWS or overboard discharge valve piping, are a major source of concern as investigators may wrongly assume that the ship has been pumping oil overboard without passing it through the OWS.
3. If there are signs of recent paintwork around the OWS not fully matching the older surrounding paintwork, the coast guard officer may think the OWS area has been painted to hide any evidence of tampering.
4. The crew should be able to operate the machinery in a competent way. If the crew are hesitant or unsure of the procedures to operate the machinery the coast guard may assume the machinery is not used very often, if at all, and investigate further.
5. Inaccurate piping schematic plans that are invalid due to the plans being out of date and not correctly depicting the present piping system.
6. Incinerator that is scarcely used or not working.
7. Missing sludge receipts.
8. The oil record book is a legal document therefore must be completed in a truthful manner. False and inaccurate entries will alert the PSC to suspect wrong doings.
9. Signs of leaking oil from valves, gauges and other equipment associated with non oil related systems.
10. High-level alarms must work efficiently and accurately when tested ■

UNITED STATES OF AMERICA

Dealing with US law enforcement officers

This advice, is to provide guidance to Members in handling those maritime claims which carry a threat of both civil and criminal penalties to the ship's personnel, shipowner and ship operators. The greatest exposure to criminal penalties will probably involve alleged pollution and serious maritime accidents in which there is loss of life. Given the increased risks, it may be necessary to engage both criminal and civil lawyers to defend the interests of all those concerned.

The enclosed guidelines pertain to US criminal investigations only. For guidance in dealing with other countries where US law does not govern, you will need the guidance of a local lawyer as arranged by the Club.

The purpose of this guide is to promote cooperation with law enforcement without waiving any legal rights during an investigation.

Nothing in this advice should be construed to excuse ship officers from reporting obligations to local authorities.

CHECKLIST

1 You should notify owner/operator immediately of any inquiries made of you by any law enforcement office or agency.

2 Law enforcement officers in the United States can include the US Coast Guard, Immigration Authorities, FBI, EPA, State Police, US Attorney, District Attorney, Attorney General, US Customs.

3 You should ask to see proper identification of any law enforcement officer who comes aboard the ship or wishes to ask questions. Full details of the identification provided should be recorded by you.

4 Early involvement of a defence lawyer is essential. In most cases, owners/operators or the P&I Club will arrange for specialised input of criminal lawyers.

5 You have the right to remain silent and have the opportunity to consult with a lawyer before giving either written or oral statements to law enforcement and have a lawyer present during any questioning. If you choose to remain silent communicate that to law enforcement officials to the effect that, for example, "I understand that I have the right to remain silent and to consult with a lawyer, which I wish to do before saying anything more."

6 You cannot order crewmembers not to speak to law enforcement but you should inform your crewmembers that they have the right to remain silent and the right to consult with lawyers before they must decide whether to give statements to law enforcement officers concerning a criminal investigation.

7 If English is not your first language or that of your crewmembers, you each have the right to insist on utilising the services of a qualified translator before responding to any interviews or questions.

8 It is a serious and separate crime to lie to a law enforcement officer. Accordingly, make sure that if you do say something it is the truth.

9 Do not coach or tell your crewmembers what to say. If they have any doubts about how to respond to questions they should be directed to consult with the lawyer appointed to assist them.

10 Law enforcement officers may offer you immunity from criminal prosecution in exchange for your statement/testimony. Do NOT rely on promises made by law enforcement officers to the effect that what you or a crewmember says cannot be used against you in a criminal proceeding. Law enforcement officers do not have authority to make such promises. Any valid immunity from criminal prosecution must be approved by a Court and US Justice Department lawyers and be in writing. Law enforcement officers cannot threaten or intimidate you to make statements. If this occurs, be sure to notify and consult with the lawyer appointed to assist you.

11 The US Coast Guard may have the right to take certain ship documents from the ship when in port. If they insist on taking documents from the ship, be sure

continued over

CHECKLIST continued

to ask for copies and an inventory of any documents or physical evidence removed from the ship.

12 Other than certain ship documents, the Coast Guard and law enforcement officers should need a search warrant signed by a judge to remove ship's machinery, equipment, or to search an officer or crewmembers' personal belongings. You do not have to consent to the removal of such items or search of personal belongings without being shown a search warrant. If you are asked to consent to a search of personal belongings or removal of ship's machinery or equipment, you should consult with the lawyer appointed to assist you. If you do not agree to the search, you should tell the law enforcement officers that "I do not consent to the search [or removal of items]."

13 While you may not consent to a search, you should not use force or physically prevent a law enforcement officer from taking or searching if they insist on proceeding despite your lack of consent. The legal validity of the search will be decided by a Court as long as you can demonstrate you did not consent. For that reason, if you do not agree to a search or removal of ship's equipment, you must:

- Clearly tell the law enforcement officer conducting the search that you do not consent.
- Keep a written record of the law enforcement officer's demands and your responses to those demands.
- Record the areas of the ship visited and the locations searched.
- A ship's officer should accompany any law enforcement officers searching the ship.

14 Under no circumstances should you tamper with, hide or destroy any documents or evidence aboard the ship. To do so is a serious crime under US Law.

15 It is important to let the lawyer appointed to assist you to respond to official inquiries involving jurisdictional questions, i.e. the application of the law of the flag, the scope of territorial waters, etc. Your innocent statements could be misunderstood or taken out of context.

16 On occasion, separate lawyers may have to be appointed, one to protect your individual interests and another to protect the ship's interests. The appointment of the lawyer to protect the ship's interests and/or your interests will be made by the owners in consultation with the P&I Club. This does not mean there can be no cooperation between the lawyers appointed as often your interests and the ship's interests are the same.

17 You should note that in the United States, there are pollution crimes based on strict liability and simple negligence. There does not have to be criminal intent for an individual to be liable for a pollution crime in the US.

18 It is recommended that before responding to any media inquiries during a criminal investigation, the matter should be discussed with the home office to identify a spokesperson and to coordinate a proper response. This needs to be accomplished on a high priority basis.

19 You and your crew should be familiar with and must follow all rules and regulations concerning your ship, including reporting requirements relating to notification of pollution, accident, or hazardous conditions.

20 If you have any questions concerning these guidelines, please contact your home office.

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Fumigation (phosphine) explosions

We have been informed of an explosion that occurred recently on a ship while at sea and under fumigation with phosphine gas. Whilst no crewmember was injured as a result of the explosion, a pair of hatchcover panels were blown upwards, coming to rest against the accommodation block. The cause of the explosion was attributed to the ongoing fumigation of the cargo grain that was being treated with phosphine gas generated from aluminum phosphide tablets.

We understand that whilst not a regular occurrence, this is not the first time this has occurred.

Phosphine gas has long been recognized as highly toxic. However, it is not widely known that it is, potentially, an inflammable gas, with a low flammability level of 1.8% by volume in air. In the event that a mixture of air/phosphine – in which the phosphine concentration exceeds its inflammable limit – is ignited in a confined space, it is highly probable that an explosion will occur.

Phosphine gas is generated from aluminum phosphide tablets by reaction of the aluminum phosphide with moisture in the air. This process, in addition to liberating phosphine, also produces aluminum oxide as a by-product. Additionally, small quantities of another gas known as diphosphine is also sometimes produced during this reaction. Unlike phosphine, diphosphine is spontaneously inflammable, reacting instantly with oxygen in the air. Production of diphosphine occurs in a similar way to that generating phosphine i.e. by reaction between aluminium phosphide and moisture, but in this case the aluminium phosphide

tablets contained an imbalance between the aluminium and phosphorous, with an excess of phosphorous compared to aluminium. Such a situation may arise during production of the tablets if an excess of phosphorous is inadvertently used during preparation.

Although not proven definitively, we have been advised that it is likely that potentially explosive mixtures of air and phosphine are frequently encountered during the first 12 to 24 hours of phosphine fumigations when the phosphine concentration in the upper areas of the hold reaches a peak concentration. The resulting high concentrations of phosphine then disperse by diffusion, with the gas diffusing into the less accessible lower portions of the cargo. In this recent case, the explosion occurred some 12 hours or more after the fumigation had been started and the hatchcovers had been closed. Although no source of ignition was identified conclusively, it is suspected that defective aluminum phosphide tablet(s), containing localised excesses of phosphorous were the cause. Such tablets could be envisaged as producing localised high concentrations of diphosphine leading to a very rapid reaction with oxygen and to ignition.

Aluminum phosphide tablets are routinely used in fumigation and a very large number of shipments are fumigated annually without any problems. Incidences of explosions are therefore very rare and, as far as we have been advised, fumigant explosions have only been encountered when companies have used cheaper brands of aluminum phosphide tablets produced in developing countries.

We would advise Members that when cargoes are fumigated in ports in the developing world that the presence of crewmembers on deck adjacent to or in the vicinity of the holds and hatchcovers under fumigation is kept to a minimum during the first 24 to 48 hours after the fumigation has been set ■

NOVOROSSIYSK – RUSSIA

Declaration of medicines in first aid kits

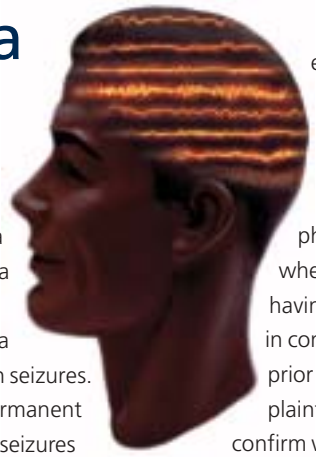
We have been advised recently that the Novorossiysk Customs have been initiating cases against shipowners for administrative violations for false declaration of medicines that contain narcotic, psychotropic or poisonous components, contained in ships' first aid kits. Criminal cases have also been brought against ships' masters on the basis that they have signed the general customs declarations.

Ships' first aid kit medications that contain narcotic and strong substances are usually kept in the master's safe. Other common medications that may be found onboard may also contain such properties. In the General Declaration, approved by the Russian Governmental Custom Committee, there is the following question regarding medications, "YES/NO – medications with narcotic influence, drastic medicines, psychotropic, poisonous." Some masters do not consider this question carefully and answer NO, assuming that the question does not relate to the first aid kit.

If a criminal case is brought against the master, he will be disembarked from the ship and must remain in Novorossiysk for at least one month while the case is investigated. The ship may also be detained in port for several days.

We advise all Members to make their masters aware of this advice and require that they are very attentive while filling out the general customs declaration, keeping in mind that the first aid kit usually contains narcotic or/and psychotropic/strong substances. Masters should ask the agent for assistance, if required, when registering the General Declaration. The agent should put their signature to the master's copy of the Declaration with the agency company and agent's name. Masters should immediately contact the local P&I correspondents should a problem arise ■

Proving a point



A Member facing a substantial lawsuit from a ship's pilot, recently won a motion to compel him to undergo examination by a neurologist specializing in seizures. The pilot was claiming permanent disability due to complex seizures resulting from a head injury sustained while disembarking ship. The examination is a 5-7 day stay in a medical clinic under 24-hour monitoring by videotape, electrodes and medical staff. By comparing EEG monitor results with the videotape and interview of the plaintiff after a claimed seizure, the physicians can determine whether the plaintiff is actually having seizures. This information in conjunction with readings of prior EEG testing from the plaintiff's treating physician, will confirm whether or not the plaintiff is having true seizures or a psychological response to the accident. The information will permit a more accurate assessment of plaintiff's significant claim for damages ■

Problems with solid carbon dioxide in ships stores

We have recently been advised of a potentially life threatening incident which occurred on a Member's ship while taking on stores.

Due to time pressure prior to departure, a last minute operation took place to get the frozen and fresh foodstuffs off the deck. As there were time and manpower constraints, this meant the delivery was quickly checked off and placed in the storerooms. There had been no time to correctly unpack and stow the dry, frozen and fresh items.

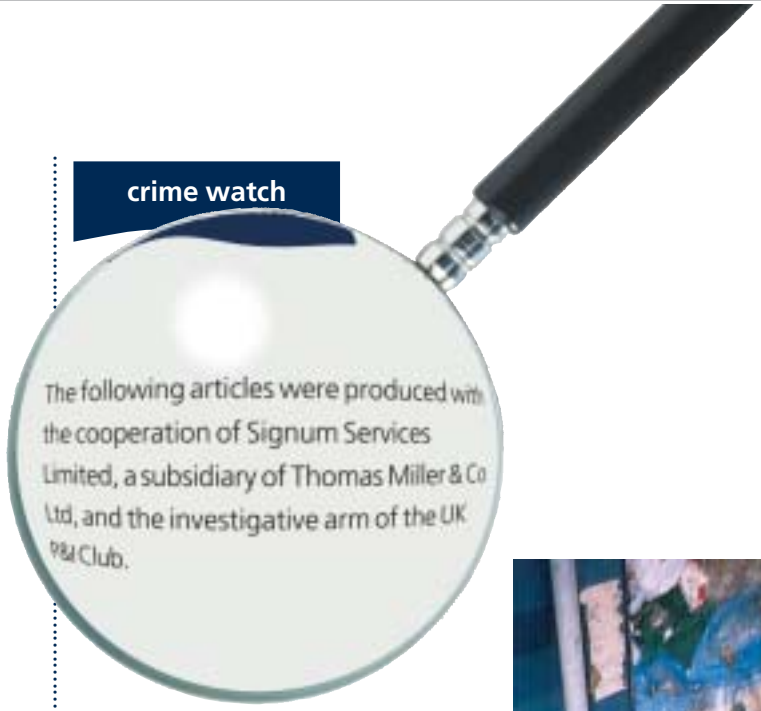
We have been advised that amongst the stored items was a large order of fish that had been packed in dry ice (CO_2).

When a member of the catering staff entered the cold store the next day to attend to the delivery, the crewmember nearly passed out. It seems that when the dry ice evaporated, the atmosphere in the fridge was saturated with CO_2 and this depleted the oxygen content in the room.

A Department of Transport Merchant Shipping Notice No M 1254, *Use of Solid Carbon Dioxide*, has covered this subject.

We advise Members to bring this M Notice to the attention of all crewmembers and to advise never to bring dry ice into the accommodation, storerooms or other enclosed spaces. Dry ice must remain on deck at all times ■

crime watch



Fraudulent shipments of plastic waste

We have been recently informed of a situation where several major ocean carriers of containerised cargo have been contracted to carry containers said to contain plastic goods, but on opening contained plastic waste.

The cargo concerned was loaded in Canada and the USA for consignees based in Hong Kong. Upon delivery of the containers the consignee named on the bill of lading refused to accept delivery as previous shipments had been found to contain plastic scrap waste rather than the cargo described on the bill of lading.

We have been advised that several hundred containers have been shipped by this method, involving two shippers, one based in Halifax Canada and the other in Inglewood California USA. In both instances the shipper has fraudulently avoided paying the freight and the ocean carrier has also become liable for additional costs while negotiations take place to seek the most appropriate means to dispose of the cargo.

This type of shipment is very similar to the used tyres fraud, *LP Bulletin 315*. The sole reason for moving this type of cargo is to shift the burden of disposing of the waste on to others.

We advise all Members to be aware of this type of shipment, especially when dealing with an unfamiliar shipper who seeks within a short period of time to export large numbers of containers. If in doubt, please contact Signum Services Ltd ■

Container security

The container security seal industry is constantly striving to improve on the designs of seals in order that they cannot be breached without leaving evidence that the seal has been opened.

Signum Services Limited, is also the UK Government's official agency entitled 'Security Seal Testing Authority' for the testing of security seals.

The seals themselves, from manufacturers all over the world, are sent to the Authority and are then strenuously tested by an engineer to ensure that they cannot be unsealed without leaving telltale signs of interference. Having undergone these stringent tests, only those that pass receive the approval of the UK Customs and Excise, a qualification highly sought after by manufacturers as a selling point; no other country in the world requires seals to be tested in this way.

Consequently, over the years, the quality of seals has risen with a far greater proportion being impregnable without leaving signs of tampering.

The result is that thieves wanting to steal all or some of the cargo from a sealed container and wishing to leave the seal intact are resorting to other means to open the doors.

If, on receipt of a container at the consignee's premises, the cargo is missing but the original security seal is in place and intact, there is a simple explanation and the explanation is always simple – cargo cannot magically disappear through the walls of a steel container.

If the seal is of good quality and is one which cannot be opened without leaving evidence, and the container bears no evidence of a hole having been cut in its metal work then the only way entry has been gained is by tampering with the door mechanism.

This is becoming a more frequent problem and usually occurs in one of two ways: either by removing the handle lock set complete, with the seal in place, from the right hand container door by cutting off the rivets which hold it on (*photo below top*), or by cutting off the rivet which holds the handle in the locking bar handle hub (*photo below bottom*).

Thieves who adopt either of these two methods can then open the doors of the box and remove the cargo. The door is then secured by replacing the missing rivets with bolts, the original seal being undisturbed.

All this is possible because the entire door locking mechanism and both parts of the seal bracket are fixed to the door itself and no part of them to the body of the container.

Cable and barrier or bar seals combat the problem by being looped or hooked around the locking bars of both doors. These seals of course cost extra money.

However, boxes are now being manufactured with one part of the seal bracket being at the foot of the locking bar, on the cam on the right hand door and the second part of the bracket welded to the container itself on the bottom of the box on the door sill.

The seal therefore, when in place, secures the locking bar to the container itself.

The result is that no bolts, rivets or parts of the locking mechanism can be removed enabling the container to be opened leaving the seal intact.

If the doors have been opened, the seal must have been breached.

As containers are renewed and replaced over the years, they should be replaced with those bearing the seal brackets at the bottom of the locking bar and on the door sill ■

UNITED STATES OF AMERICA

Watch your butts

In recent times, many of the cargo theft cases in the US have involved container loads of cigarettes. Once stolen, they are then exported out of the USA for onward sale in Europe and the Far East.

Signum Services, investigating such thefts, were surprised on reading a number of official reports.

In one particular case the crafty thieves worked a simple but effective scenario. The potential thief, a truck driver, with inside assistance obtained the pin number of a large container shipment of cigarettes waiting to be picked up for local delivery.

The thief, then found out which transport company had been hired to transport the cigarettes and stole a delivery truck from their yard. The crafty thief then proceeded to the container yard early in the morning and gained entry by producing a photocopy of a commercial drivers license. Once inside, the thief simply proceeded to hook up the container holding the cigarettes. He then drove to the front gate, waved goodbye and passed merrily into the bright new day with approximately US$500,000 of the now illegal cigarettes destined for the black market.

The only way authorities became alerted to the loss was when the official truck driver, with the correct paperwork, showed up to collect the container and was told, that according to their records he had left with the container an hour earlier.

In another case the reported theft of a large amount of cigarettes was supposed to have been caused by an attack on the rail carrier by, illegal aliens! ■

Obtaining cargo by fraud

This type of crime offers high profits with minimal risk of detection and so makes it an attractive proposition to a fraudster.

They will use whatever means are necessary to obtain such cargo, generally by the use of a forged bill of lading or deception. Their ability to choose the place, the time and method to commit the fraud makes it an impossible task to totally eliminate this type of crime.

To combat the threat, it is essential that those who issue a bill of lading or the release of cargo are aware of potential problems and understand that, by taking positive steps to counter them, they are providing some deterrent.

Bills of lading

There are five general types of fraud relating to bills of lading:

- Fraudulent bill of lading created to secure the release of the cargo;
- Fraudulent bill of lading created for non-existent cargo and vessel in order to obtain payment from an unsuspecting consignee;
- Fraudulent bill of lading created for non-existent cargo allegedly carried on an existing vessel in order to obtain payment from an unsuspecting consignee. Often it is shown that the vessel was at the port at the relevant time that the bill of lading was said to have been issued;
- Fraudulent bill of lading created to present to a bank to obtain letter of credit funds;
- Cargo released without presentation of the original bill of lading retained by the shipper.

The use of modern technology to reproduce creditable documents provides great assistance to the fraudster. However, a more serious issue is the low security profile that exists in respect of blank original bills of lading. All too frequently, they are left unprotected in offices making it easy for the fraudster's to obtain them. Poor practices often provide these people with the essential information needed to create the fraudulent document.

There is also a need for tight managerial supervision and a security presence for blank original bills of lading, in order to offer safeguards against dishonest persons obtaining possession of these forms.

Every effort should be made to help agents identify forged bills of lading. For instance, is there a security presence within the bill of lading or is a copy provided for comparison?

Release of cargo without authority

Just as serious, and as common as forged bills of lading, is the release of cargo without the authority of the shipper or the issuer of the bill of lading. Agents continuously disregard their legal responsibility in respect of the notified release instructions and permit unauthorised parties to receive the cargo without presentation of the original bill of lading. This lack of judgement is all too often influenced by their close association with the consignee or their agent with whom they have no legal obligation other than to release the cargo to them on presentation of the correct document. Such releases can have serious financial implications for other parties.

The general methods used to achieve possession of such cargo are:

- Consignee promises to present the original bill of lading at a later date;
- Consignee provides his own letter of guarantee;
- Consignee provides a letter exonerating the agent from their action.

Prevention is simple. If the original bill of lading is not produced or there is a doubt as to whether it is genuine then seek advice from the issuer of the document.

Signum Services is available to offer its assistance in respect of these matters ■

STARSIN [2003] – Bills signed by charterers as 'carrier': owners' or charterers' bill?

Where a bill is signed on behalf of named charterers "as carrier" and the charterers subsequently become insolvent, it is not surprising that cargo interests should look to owners for reimbursement of their claim. In this case, the bill of lading, which was on charterers' Liner Form, contained an identity of carrier clause which provided that the contract was between the merchant and the owner. A demise clause provided that if the vessel was not owned by or chartered by demise to the issuer of the bill, then the bill would only take effect as a contract between the merchant and the owner or the demise charterer. In the definitions clause, however, the carrier was described as the party on whose behalf the bill had been signed.

Cargo interests claimed that owners were the carrier under the bill.

At first instance, it was held that the bill was a charterers' bill. This decision was overturned by the Court of Appeal but the House of Lords has now overturned the Court of Appeal's decision reinstating the charterers as carrier. Lord Bingham who gave the leading judgement said;

" I need no persuasion that businessmen expect the identity of the carrier, together with other variables which describe the object of the particular voyage, such as the vessel, the goods, and the ports of loading and discharge, to be found on the face of the bill of lading and not tucked away among the standard terms and conditions printed on the back.".

It seems therefore that where there is a conflict between the terms on the reverse side of the bill and the face of the bill, it is the information on the face that determines who the carrier is.

HAPPY RANGER – Does a bill of lading need to be issued under Section 1(4) COGSA 1971 before the Act can bite?

This case concerns a US$2.4m claim for damage to a reactor dropped during loading. The same was to be shipped from Italy to Saudi Arabia. Under the Hague Rules, the carrier could limit his liability to £100 but under the Hague-Visby Rules, the limit was close to US$2m.

The contract of carriage was subject to English Law. A specimen bill of lading was annexed to and formed part of this contract. The specimen bill contained a clause paramount to the effect that the Hague Rules were applicable unless there was a different enactment in the country of shipment. It went on to say that in trades where the Hague-Visby Rules applied compulsorily, the provisions of the respective legislation would be considered incorporated into the bill of lading.

Under English Law, section 1(4) of the UK COGSA 1971 provides that the Hague-Visby Rules shall not apply to any contract of carriage "unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title". On the facts, a bill of lading was not issued.

At first instance, it was held that the contract was not covered by a bill of lading because no bill of lading was issued. The Court of Appeal has now overturned this decision, holding that it did not matter that a bill was not issued. The contract could still be covered by a bill of lading if the contract contemplated the issue of a bill of lading. The contract in question did contemplate the issue of a bill of lading. Furthermore, for the purposes of s.1(4) COGSA 1971, it was the fact that the bill of lading was issued or that its issue was contemplated which mattered, not that the bill issued should have contained the terms of the contract.

It was also argued that a bill of lading referring to the "consignees or to his or their assigns" was a straight bill which was not a negotiable bill and thus not a bill of lading within s.1(4) COGSA 1971. The Court held that the words "or to his or their assigns" were to be read as "or order" and the bill was therefore not a straight bill.

Whether or not a straight bill is a bill of lading within s.1(4) COGSA 1971 has now been decided by the Court of Appeal in the case of the *Rafaela S* below.

As Italy is a Contracting State for the purposes of the Hague-Visby Rules, the Hague-Visby Rules applied to this contract and the carrier was therefore unable to rely upon the lower limit of liability.

RAFAELA S [2003] – Is a straight consigned bill of lading a "bill of lading" within section 1(4) COGSA 1971?

The answer to the above question determined whether the carrier's liability in this case was to be limited under US COGSA or the UK COGSA 1971. COGSA 1971 incorporates the Hague-Visby Rules into English Law.

Owners claimed that such a bill was not a bill of lading within s. 1(4) of COGSA 1971. The arbitrators and the High Court agreed with owners holding that such a bill was not a "document of title" and s.1(4) COGSA 1971 referred to a bill of lading as a document of title. The Court of Appeal has now overturned the High Court's decision.

The straight consigned bill of lading in this case

expressly required presentation for delivery. The court held that this bill was a "bill of lading or a similar document of title" for the purposes of the Hague-Visby Rules. In arriving at this conclusion, the court made the following five points:

- A straight bill, like a negotiable bill, is transferred into the hands of a third party, the named consignee, who may be affected by its terms.
- A straight bill is used, like a negotiable bill, as a document against which payment is required. The transfer of the bill indicates the intended transfer of property.
- A straight bill is closer in form to a negotiable bill than to a sea waybill.
- A straight bill is in principle and function closer to a negotiable bill than to a non-negotiable receipt.
- The working papers of the Hague Rules support the view that a straight bill was within the Rules.

More importantly, perhaps, the Court went on to say that even if the straight bill did not have a clause requiring its production in return for delivery of the goods, this bill would still be a document of title and therefore would still need to be produced.

In the light of this case, the current position under English Law on straight bills is that such a bill does have to be presented against delivery of cargo. If parties wish to avoid the need for the production of a straight bill, the parties should insert a clear provision in the bill of lading to this end. Alternatively, the parties could consider using seaway bills.

Leave to appeal to the House of Lords has however been granted and the legal position on straight bills may yet change.

Trafigura Beheer BV v Golden Stavraetos Maritime Inc [2003] – What constitutes delivery within the meaning of Art III Rule 6 of the Hague-Visby Rules?

The dispute in this case was whether proceedings were issued within a year of delivery as required under Art III r.6.

At the initial agreed discharge port ("first port"), the intended purchaser rejected the cargo for being off-specification. The vessel was then ordered by the charterers to another port where she sat for nearly a month during which time the parties discussed what should be done with the cargo. The parties then entered into an agreement at a new freight rate and new period of laytime for the vessel to sail to another port ("third port") where the cargo was sold.

The charterers issued proceedings against owners within a year of the time that cargo was delivered at the third port but outside a year from the time that cargo should have been delivered at the first port.

At first instance, the Court held that the charterers' claim was time-barred but this decision has now been overturned by the Court of Appeal. In looking to American cases for assistance, the court said that the correct question to ask was whether the delivery at the third port was made under an entirely separate and distinct transaction. The Court decided that on the facts, delivery at the third port was still delivery under the original contract of carriage albeit that the contract had been varied. The proceedings were therefore brought within a year of delivery for the purposes of Art III r.6.

JORDAN II [2003] – Can owners transfer away responsibility for cargo operations?

Owners often negotiate a term in the charterparty and bill of lading that the cargo interests (shippers, charterers or receivers) will arrange and pay for certain of the cargo operations, such as loading, stowing and discharging. Where loss or damage occurs during these operations, owners take the position that they will not be responsible unless the alleged damage was caused by owners or owners' agents. Owners' ability to do this has now been put in question.

Under the charter party in question, freight was to be paid "FIOST- lashed/secured/dunnaged" (clause 3) and cargo operations were to be performed by the "shippers, charterers, receivers" (clause 17). These terms were incorporated into the bill of lading terms.

The arguments against owners were that whilst such clauses could effectively transfer away from owners to the charterers the 'obligation' to pay for the cargo operations, such clauses were not effective in transferring the 'responsibility' for such operations to charterers. Otherwise, such a clause relieving owners of their duties under Art III r.2 of the HVR would be null and void and of no effect pursuant to Art III r.8 of the HVR.

As against this argument, owners argued, relying upon the comments of Devlin J in *Pyrene v Scindia (1954)2 QB 402,* that Art III r.2 only obliges the carrier to load, stow, carry and discharge the goods properly and carefully only if the carrier has *agreed* to perform those functions. Whilst these comments did not form part of the judgement in that case, these comments have repeatedly been referred to and relied upon in subsequent cases, and were approved by the judgment of the House of Lords in *Renton v Palmyra [1957] AC 149*. In the present case, cargo interests lost in both the High Court and Court of Appeal. Leave has however been given to take this case to the House of Lords ■

THE HUMAN ELEMENT

A LOSS PREVENTION NEWS SUPPLEMENT

Errors and violations

Over the past two decades there has been a growing appreciation of the many and varied ways that people contribute to accidents in hazardous industries or simply in every day life. Not long ago most of these would have been lumped together under the catch-all label 'human error'. Nowadays it is apparent that this term covers a wide variety of unsafe behaviours.

Most people would agree with the old adage 'to err is human'. Most too would agree that human beings are frequent violators of the 'rules' whatever they might be. But violations are not all that bad – they got us out of the caves!

One of the most important distinctions between errors and violations is that each has different mental origins, occur at different levels of the organisation, require different counter-measures and have different consequences. Everyone in an organisation, from members of the Board to those at the coal-face, bears some responsibility for the commission of violations. It also follows that all employees have a part to play in minimising their occurrence.

Assuming that a safe operating procedure is well-founded, any deviation will bring the violator into an area of increased risk and danger. The violation itself may not be damaging but the act of violating takes the violator into regions in which subsequent errors are much more likely to have bad outcomes. This relationship can be summarised:

Violations + errors = injury, death and damage

It can sometimes be made much worse because persistent rule violators often assume, somewhat misguidedly, that nobody else will violate the rules, at least not at the same time! Violating safe working procedures is not just a question of recklessness or carelessness by those at the coal-face. Factors leading to deliberate non-compliance extend well beyond the psychology of the individual in direct contact with working hazards. They include such organisational issues *(latent failures)* as:

- The nature of the workplace
- The quality of tools and equipment
- Whether or not supervisors or managers turn a 'blind eye' in order to get the job done
- The quality of the rules, regulations and procedures
- The organisation's overall safety culture, or lack of.

continued over

Errors and violations continued

Violations are usually deliberate, but can also be unintended or even unknowing. They can also be mistaken in the sense that deliberate violations may bring about consequences other than those intended, as at Chernobyl. In this case, out of the seven unsafe acts *(active failures*) leading up to the explosion, six were a combination of a rule violation and an error (a *misventure*). Here was a sad and remarkable case in which a group of well-motivated and exceedingly expert operators destroyed an elderly but relatively well-defended reactor without the assistance of any technical failures.

The distinction between errors and violations is often blurred but the main differences are shown in the table below.

As can be seen from the table, errors may be simple memory or attentional failures exacerbated by:

Routinisation – the mark of a craftsman whereby the individual becomes so expert at exercising a particular skill, that he/she no longer consciously thinks about it allowing the mind to wander and the unexpected to happen – drivers who regularly travel the same route to the station each day suffer from this – "am I here already?"

Normalisation – the process of forgetting to be afraid – interestingly most accidents on mountains happen on the way down from the summit – only a relatively small number happen on the way up.

Intrinsic hazard – no matter how well you defend yourself the dangers 'out there' never go away – move outside your protective 'bubble' and something or someone will get you!

Other factors include:

Creeping entropy – systems, policies and procedures grow old or fail to adjust to changing external factors thus increasing the propensity for accidents to happen.

Murphy's Law – if it can happen it will happen, but there is also Schultz' Law. Mr Schultz merely said that Murphy was an optimist!

Errors	Violations
Stem mainly from *informational* factors: incorrect or incomplete knowledge, either in the head or in the world.	Stem mainly from *motivational* factors. Shaped by attitudes, beliefs, social norms and organisational culture.
They are *unintended* and may be due to a memory failure (a 'lapse') or an attentional failure (a 'slip').	They usually involve *intended or deliberate deviations* from the rules, regulations and safe operating procedures.
They can be explained by reference to how *individuals* handle information.	They can only be understood in a *social context.*
The likelihood of mistakes occurring can be reduced by *improving the relevant information*: training, roadside signs, the driver-vehicle interface, etc.	Violations can only be reduced by *changing attitudes*, beliefs, social norms and organisational cultures that tacitly condone non-compliance (culture of evasion).
Errors can occur in any situation. They need not of themselves, incur risk.	Violations, by definition, bring their perpetrators into areas of increased risk i.e. they end up nearer the 'edge'.

Safe operating procedures

These are written to shape people's behaviour so as to minimise accidents. As such they form part of the system defences against accidents. Defences are installed to protect the individual, the asset or the natural environment (the 'object of harm') against *uncontrolled hazards* and come in two forms:

- **'Hard' defences** provided by fail-safe designs, engineered safety features and mechanical barriers.
- **'Soft' defences** provided by procedures, rules, regulations, specific safety instructions and training. 'Soft' defences are more easily circumvented by people than 'hard' defences and thus constitute a major challenge to any safety management system.

Procedures are continually being amended to cover changed working conditions, new legislation, new equipment and, most particularly, to prohibit actions that have been implicated in some recent accident. Following an accident how often have you heard people (usually senior) exclaim "and what did the procedures say?" Over time these procedural changes become increasingly restrictive yet the actions necessary to get the job done haven't changed and often extend beyond these permitted behavioural boundaries. Ironically then, one of the effects of continually tightening-up procedures in order to *improve* system safety is to increase the likelihood of violations being committed. The scope of permitted, or allowable action shrinks to such an extent that the procedures are either routinely violated or whenever operational necessity demands. In either case the procedures are often regarded as unworkable by those whose

behaviour they are supposed to govern. Whereas errors arise from various kinds of informational under-specification, many violations are prompted by procedural over-specification – a classic own goal you might say!

As already implied system failures or weaknesses such as design, maintenance management, hardware, procedures, housekeeping, communications, organisation, training, error-enforcing conditions, incompatible goals and defences are called 'latent failures' as opposed to unsafe acts which are 'active failures'.

Performance levels

Now we come to the scientific bit. Error types can be classified at three levels:

Skill-based level

At the skill-based level, we carry out routine, highly practised tasks in a largely automatic fashion, except for occasional checks on progress. This is what people are very good at for most of the time

Rule-based level

We switch to the rule-based level when we notice a need to modify our largely pre-programmed behaviour in line with some change in the situation around us. This problem is often one that we have encountered before and for which we have some pre-packaged solution. It is called rule-based because we apply stored rules of the kind*: if (this situation) then do (these actions).* In applying these stored solutions we operate very largely by automatic pattern-matching: we automatically match the signs and symptoms of the problem to some stored solution. We may then use conscious thinking to check whether or not this solution is appropriate

Knowledge-based level

The knowledge-based level is something we come to very reluctantly. Only when we have repeatedly failed to find a solution using known methods do we resort to the slow, effortful and highly error-prone business of thinking things through on the spot. Given time and the freedom to explore the situation with trial and error learning, we can often produce good solutions. But people are not usually at their best in an emergency – though there are some notable exceptions. Quite often, our knowledge of the problem situation is patchy, inaccurate, or both. Consciousness is also very limited in its capacity to hold information, usually not more than two or three distinct items at a time. It also behaves like a sieve, forgetting those things as we turn our attention from one aspect to another. In addition, we can be plain scared, and fear (like other strong emotions) has a way of replacing reasoned action with 'knee-jerk' or sometimes over-learned responses.

Classifying violations

Case and field studies suggest that violations can be grouped into four categories: routine violations, optimising violations, situational violations and exceptional violations. The relationship of these to both the performance levels and error types is summarised in the table below.

A few simple definitions will help clarify these violations.

Routine violations – almost invisible until there is an accident (or sometimes as the result of an audit), routine violations are promoted by a relatively indifferent environment i.e. one that rarely punishes violations or rewards compliance – "we do it like this all the time and nobody even notices."

Optimising violations – corner-cutting i.e. following the path of least resistance, sometimes also thrill seeking – "I know a better way of doing this."

Situational violations – standard problems that are not covered in the procedures – "we can't do this any other way." An excellent example concerns railway shunters: the Rule Book prohibits shunters from remaining between wagons when wagons are being connected. Only when the wagons are stopped can the shunter get down between them to make the necessary coupling. On some occasions however, the shackle for connecting the wagons is too short to be coupled when the buffers are fully extended. The job can only therefore be done when the buffers are momentarily compressed as the wagons first come in contact with each other.

continued over

Performance levels	Error types	Violation types
Skill-based	Slips and lapses	Routine violations Optimising violations
Rule-based	Rule-based mistakes	Situational violations
Knowledge-based	Knowledge-based mistakes	Exceptional violations

Situational violations continued

Thus the only way to join these particular wagons is by remaining between them during the connection and watching your head. The result is obvious

Exceptional violations – unforeseen and undefined situations – "now this is what we got trained for". The Chernobyl disaster is the best documented account of exceptional violations, however a simpler example on an oil-rig illustrates the point: a pair of engineers was inspecting a pipeline. One of them jumps into an inspection pit and is overcome by hydrogen-sulphide fumes. His companion, fully trained to handle such situations raises the alarm but then jumps down to help his partner, whereupon he too is overcome. Familiar isn't it? Nothing could have prepared the second man for the emotions that he felt on seeing his colleague in desperate need of help. Exceptional violations often involve the transgression of general survival rules rather than specific safety rules. Gut impulse is frequently stronger than the dictates of training and common-sense and quite often has fatal consequences. Survivors of such exceptional violations are often treated as heroes. Exceptional violations can sometimes be seen as an exercise of initiative even sometimes provoking reward if, that is, you get away with it.

Conclusion

There is a general formula which states:

Uncontrolled hazard + Undefended target = Unplanned event

Given that human beings, for whatever reason, are able to circumvent both controls and defences with sometimes quite remarkable cunning, the problem, for that is what it is, can be summed up as follows:

- Everyone is fallible and capable of bending the rules.
- All systems have technical and procedural shortcomings.
- Whatever you do, there's always something beyond your control that can hurt you.

Finally there is the theory of Sheep and Wolves. Studies have identified two sorts of people – sheep and wolves. Wolves accept rule violation as a norm. There are:

- Sheep in sheep's clothing.
- Wolves in wolf's clothing.
- Sheep in wolf's clothing.
- But the largest group are wolves in sheep's clothing – they haven't violated the rules – yet!

NO ROOM FOR ERROR is a 46-minute DVD, produced by the UK Club, on human error – how to predict when and where it will occur and prevent its consequences.

The theme is expressed in five scenarios, featuring familiar situations which lead all too often to collisions, personal injury, pollution, cargo loss and property damage. These are then reviewed and shortcomings categorised as procedure, hardware, design, maintenance management, error enforcing conditions, housekeeping, incompatible goals, communication, organisation, training and defences.

In addition to English, the DVD has subtitles in eleven languages.

Copies are available from Karl Lumbers (see contact details below).

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Inspectors' suggestions

The UK P&I Club's Ship Inspection Programme depends on a handful of dedicated former ship masters determined to help owners and masters towards safe working practices, which in turn enhance the overall quality of the entered fleet.

Based on their widespread experience, the UK Club inspectors offer the following advice and suggestions in the interests of safety, operations and maintenance.

Q How can greasy mooring wires be made more visible in port?

A Connect two small tiger striped boards together with a small piece of pointline and hang them over the wire. For greater effect (at night) the ends of the 'warning boards' should have a small strip of retro-reflective tape fitted on each side.

Q Why do we recommend having a fire blanket in the galley?

A It is quick, easy to use and very effective in putting out an oil pan fire by excluding the air until the pan and oil cool down enough to prevent re-ignition.

Q Why should mooring ropes not be turned up on winch drum ends?

A 1. They can slip suddenly causing injury, especially when crew are adjusting the moorings.

2. The drum ends are not designed for sustained, heavy loads, which can cause damage to the drive shafts, bearings and gearing mechanism.

Q What is an easy way to protect the crew from injury from corroded/ jagged edges on plating (such as on save-alls)?

A Take a length of thick, small-bore, rubber hose (such as an air hose or small wash-down hose), slice it along the length and slide it over the rough plate edge until the plating can be correctly repaired/replaced.

Q What is an inexpensive but effective way to rapidly protect large areas of rusted steel?

A Obtain a supply of industrial standard phosphoric acid, dilute it with five parts of fresh water and apply with a brush (not spray) to the corroded areas. The acid mix reacts with the rust to form a seal, which can be left for some time. (Eye and skin protection should be used during handling/ application)

Q What is an effective way to keep rat guards in place?

A Make up two small canvas bags and fill them with sand then secure them to the lower sectors of the guards. This keeps them upright and in place during windy periods and can avoid fines.

Q Why do we suggest a battery torch should be fitted in the lift with retro-reflective tape?

A Not all lifts are fitted with emergency lighting. If the ships power fails you may be trapped in the dark. A little light always helps to provide some comfort and the torch may be required if you have to use the lift's emergency escape.

Q Why do we suggest CABA units should be positioned on bulkhead brackets rather than stowed in a box?

continued over

ship inspection continued

A In an emergency 'speed of response' is important. If the CABA units are correctly positioned on bulkhead brackets it makes for easier and quicker donning. When CABA units are stowed in boxes, these boxes are often stored on shelves or overstowed with other equipment which takes precious time to sort out.

Q Why do we suggest firemans outfits should be hung up on coat hangers or hooks ready for immediate donning?

A Past experience has shown that over a period of time, fireman's outfits stowed in a bag or a box develop cracks in the outer fabric, and due to the lack of air circulation, suffer from internal fabric rotting. This leads to expensive replacement. Fire suits neatly hanging on coat hangers in the EHQ do not suffer from this deterioration as they allow for a greater air circulation. In addition, fire suits on coat hangers or hooks also allows for easier and quicker donning of the protective equipment in times of emergency. Precious time can be saved if the trouser leggings are 'attached' (trousers tucked outside of the boots) so that the seafarer can just step into the boots and quickly pull up the fire trousers ■

cargo matters

Clinical waste must be properly stowed

Following a recent case, where a 40ft reefer container leaked hazardous clinical waste due to poor internal stowage and packing, the UK P&I Club has warned Members to guard against similar occurrences.

A Club Member received a shipper's unit in poor condition, apparently lacking a valid Container Safety Certificate and Acceptance Continuously Evaluated Programme. The cargo was thought to be leaking blood. The manifest revealed that the commodity was clinical waste, Class 6.2, UN3291, an infectious substance. It included body parts, pharmaceutical waste, medicines, empty vials and syringes. Due to the severity of the container leakage, the local port authorities deemed it a potential health hazard and refused entry. After a sizeable delay, the ship was cleared to enter an inner berth to discharge this one unit. Only then could she proceed to her normal berth.

Because the container's internal stow was not blocked off at the top layers, the cargo had shifted, resulting in the leakage. As there had been no adverse weather conditions during the sea passage, a number of shortcomings were indicated:

- Improper and unseaworthy lashing and securing of the cargo inside the container.
- Ineffective plastic receptacles for the waste.
- Improper stowage of plastic receptacles on pallets.
- Incorrect descriptions of packaging.
- Boxes and buckets not loaded in accordance with packing instruction 621 of the International Maritime Dangerous Goods Code.
- Not all receptacles hermetically sealed.

The Club points out that significant extra costs have arisen from separate discharge of the container; loss of time due to delays and deviations in berthing; cleaning the container and surrounding deck area; and collecting all wastewater.

According to the IMDG Code, when dealing with infectious clinical waste, carriers should: "Inform the public health, veterinary or other competent authority if persons or the marine environment might have been exposed. A competent authority to which actual or suspected leakage is reported should notify the authorities of any countries in which the goods may have been handled, including countries of transit." ■

Cargo shortage claims – who's responsible?

Requirement to state quantity of cargo in the bill of lading

Under the Hague and Hague-Visby Rules Article III Rule 3, the carrier must state the quantity of cargo in the bill in accordance with the information provided in writing by the shipper. The statement is *prima facie* evidence that the ship received that quantity. Under the Hague-Visby Rules the carrier is bound by this statement of quantity where the bill has been transferred to a third party.

Proviso under the Hague and Hague-Visby Rules

However, there is a proviso at the end of Article III Rule 3 that the carrier is not bound to state the quantity of cargo where he has grounds for suspecting that the shipper's figure is not accurate or he has no way of checking it.

Reservations in the bill of lading

It is common to see reservations made to the statement of quantity in the bill, e.g. "*Weight ... quantity ... unknown*". Under English Law this has been held to be effective where the master has no means of knowing the quantity shipped, so that other evidence will have to be produced to prove any shortage (New Chinese Antimony Company Ltd v Ocean Steamship Company Ltd [1917] 2 KB 644 approved in the 'MATA K' [1998] 2 LLR 614). There are however many jurisdictions which will not give effect to such reservations e.g. USA.

Knowledge that the shippers' figure is inaccurate

The master may not be able to rely on the reservation where he knows the shippers' figure is inaccurate. The safer course then is for the master to write the ship's figures alongside the shippers' figures in the bill of lading. Where the discrepancy is so great the bill of lading figure is obviously wrong, it may not be safe even under English Law to rely on the reservation (see the 'SIRINA' [1988] 2 LLR 613 at 615).

Where the master is pressured to sign an inaccurate bill of lading

Where physical threats or coercion are used, the master may be forced to sign the bill of lading stating an inaccurate quantity. Once the master reaches a place of safety, he should consider issuing a protest.

Where the charterer relies on a clause stating that bills must be signed by the master as presented, the master is not required to sign bills which are factually incorrect (see the 'BOUKADOURA' [1989] 1 LLR page 393).

If commercial pressure is applied by the shipper, the owner may have to consider whether to try to negotiate, accept the commercial risk of signing the incorrect bills of lading or accept a letter of indemnity.

> If a letter of indemnity is issued where the bill of lading figure is clearly wrong it will be unenforceable under English Law on the grounds of fraudulent misrepresentation. (Brown Jenkinson v Percy Dalton [1957] 2QB 621, 639).
>
> It is also dangerous to sign bills of lading containing inaccurate information as P&I Club cover may be lost.

The law in this area is complex and the consequences serious. It is essential that the Member discuss the position with his P&I Club and lawyers.

Owners' or charterers' bills of lading

If a party is identified on the front of the bill of lading as the 'carrier' on whose behalf the bill has been signed, this is likely under English Law to prevail over printed clauses on the reverse e.g. a Himalaya Clause (the House of Lords in the 'STARSIN' LMLN 611 overturning the Court of Appeal). (*See page 9* 'case updates')

Where it is a charterers' bill, owners may still be sued in tort or bailment.

The NYPE Inter-Club Agreement (ICA)

Where there is an ICA clause in the charterparty, owners are normally entitled to recover a 50% contribution from charterers for shortage claims. If the shortage was due to cargo handling and Clause 8 has not been amended with "and responsibility", charterers' contribution is increased to 100%.

Shortage resulting from stevedore pilferage or negligence

If the stevedores are responsible for shortage, this may operate as a defence to a cargo claim or the basis of a recovery against charterers, depending on who is contractually responsible for those stevedores.

continued over

Under the bill of lading:

If the bill incorporates the charterparty terms under which charterers are responsible for loading and discharge, under English Law this arguably absolves owners from responsibility for losses resulting from stevedore operations, (see the 'CORAL' [1993] 1 LLR 1).

Under the charterparty:

Where charterers are responsible for loading, stowage and discharge, owners may recover cargo shortage claims from charterers on the basis of breach of contract.

Period of responsibility

Under the Hague and Hague-Visby Rules the carrier's responsibility ceases when the cargo is discharged over the ship's rail. Any shortage after discharge should not be the ship's responsibility (although in practice this depends on having the appropriate evidence in a jurisdiction which applies the Rules properly).

Evidence

Obviously, evidence is vital in trying to show that there is no real shortage. The ship's draft survey, tallies and independent surveys can prove invaluable. However, the weight they are given depends on the particular legal regime where the claim is brought.

A more detailed paper on the above subject is available to Members on the *Encyclopaedia* on www.epandi.com ■

WEST INDIES

Coffee contaminated by wood preservatives

We have been advised of an incident where the treatment of container flooring resulted in a consignment of coffee being contaminated.

Prior to loading the coffee into the containers, wood preservative products containing dichlorophenol were used for the treatment of the container's boarded wooden floors. Dichlorophenol, a chemical used to produce the herbicide 2.4D, is toxic and causes severe tainting in most foodstuffs through its pervasive and long-lasting odour. Articles detailing the effects of dichlorophenol are available to Members on the *Encyclopaedia* on www.epandi.com.

On delivery, the coffee was found to give off a bad odour. Further analysis of the coffee showed that small amounts of dichlorophenol were present. Due to this contamination all the coffee carried in these containers was condemned for human consumption, and with no other alternative, the coffee was destroyed.

Considering the consequences of carrying foodstuffs in containers previously treated with products containing dichlorophenol, we advise all Members to ensure that they try to obtain data on the history of containers prior to their use. If practicable, separate pools of containers designated for loading chemicals or foodstuffs could be kept, so as to avoid claims such as this in the future ■

Fake cargoes

Many claims occur due to the increasing problem of fake cargoes. This is especially prevalent in the trade between China and Western Europe where FCL containers are being offered for shipment with the description of contents as 'ladies wear', 'children's wear' and 'general cargo' etc. When these are inspected by customs the containers are usually found to contain fake brand products.

Some examples of recent cases are:

- The description on the B/L for an FCL unit was 'children's wear'. On investigation the cartons loaded did contain children's wear but were found to be fake as the items had Walt Disney figures, a protected brand, depicted on them.
- A container was loaded with toys that appeared to be toy horses looking very much like the 'My little Pony' brand of horses, which is also brand protected. The toys, which were obviously counterfeit, were confiscated and destroyed at the expense of the carrier.
- Another very common fake cargo shipped in containers is CDs.

Members may suffer many consequences if situations like those above occur, especially in cases when there is a mix of genuine and fake goods in the same container as there will be a substantial delay in delivery of the genuine cargo. Also costs will be incurred for the costs of stripping and stuffing the containers and there will be lengthy discussions with lawyers acting on behalf of the branded product and the cargo owners, persuading Members to sign a document in which they voluntarily agree to release the fake products for destruction.

Members can assist in avoiding situations as above, by avoiding contracts with unknown shippers ■

ROTTERDAM

Fireworks restrictions

According to Dutch regulations a vessel may carry cargoes of fireworks into Rotterdam, however the limit of explosive substances should not exceed 1000 kilos IMCO 1.4S (UN number 0337) and/or 500 kilos IMCO 1.4/1.4G (UN number 0336) when transiting inland waterways.

According to an investigation by the Dutch authorities, vessels have been found to carry substantially more explosive substances than permitted and have allegedly been under-declaring the amount of dangerous cargoes onboard. The masters of the vessels inspected were not aware of this mis-declaration as although they knew about the fireworks being stowed onboard, according to the shippers of the cargo the limit of explosive substances was not reached.

It is the master's duty to prepare a dangerous goods list and declare the weights of the dangerous goods, hence why the writs are issued against them.

If there is excess fireworks onboard a vessel, it is not allowed to enter the port of Rotterdam. These ships must moor at a special berth for dangerous goods instead of transiting inland waters for a berth close to the city.

The maximum fine is approx 10,000 euros or 1 year imprisonment for the master if the vessel did not breach the rules willfully, however, if the public prosecutor succeeds in proving that the vessel deliberately breached the rules the maximum fine is in the region of 45,000 euros or 6 years imprisonment ■

The merits of carrying carefully

With worldwide cargo claims running at nearly $8 million a week and operating conditions becoming steadily tougher, best practice in the carriage of marine cargoes is a massive concern to the merchant shipping industry. At the same time, cargoes are becoming more sophisticated and require more care.

In these circumstances, the UK P&I Club feels it could hardly produce the latest edition of *Carefully to Carry* at a better time. The publication aims to provide practical, well-founded and up-to-date advice to help Members to reduce their exposure to cargo damage.

Carefully to Carry consists of a series of articles based on best practice over a wide spectrum of marine carriage matters. There is a focus on solid and liquid bulk, refrigerated and containerised cargoes.

Topics include measurement of bulk cargoes, karnal bunt, direct reduced iron, oil samples and sampling, calcium hypochlorite, radioactive cargoes, coal, carriage instructions for reefer cargoes, fishmeal cargoes, coffee, refined sugar, timber deck cargoes and moisture migration.

The Club's Major Claims Analysis provides further evidence of the need for constant vigilance and improvement in respect of cargo standards. Over the 1987-2001 period, the cargoes heading the claims settlement table were dry bulk, containerised, steel, bagged bulk, oil products, reefer-bulk and crude oil.

These seven categories accounted for about 63% of all UK Club cargo claims but 82% of the amount paid out.

Carefully to Carry, first published in 1961, has been written by leading industry experts in commodities, chemicals, steel, oil, container carriage, minerals and claims handling and their work has been subject to peer scrutiny.

Contributions from correspondents, surveyors, consultants and Thomas Miller managers have been coordinated by the Club's Advisory Committee. It is the most extensive edition yet produced and has taken two years to compile. Copies are being distributed mainly to Club Members.

Carefully to Carry is presented in a loose leaf, ring-binder format, for shipboard use, and is also available as a CD and online. The Club intends to provide regular updates, and will continue to publish the *Carefully to Carry* newsletter ■

Ferro silicon

In a recent case, a Member's vessel was bound for Rotterdam with a loaded cargo of ferro silicon in big bags which was found to have a high percentage of silicon (silicon content of 25%-30% is the upper limit).

The cargo was wetted during the voyage resulting in the production of poisonous gasses and the possibility of flammable gases, which can result in explosive mixtures with air. The *IMDG Code* states "These gases are evolved in proportions which, under mechanically ventilated conditions, make the poison hazard by far predominant over the explosion hazard."

If the silicon content is high and the cargo being carried is in a moist environment then poisonous gases can develop. Ferro silicon with 30% or more, but less than 90% silicon should be stowed as per *IMDG Code* Cat A (if this commodity contains less than 30% or not less than 90% silicon, is not subject to the provisions of this Code):

"Only to be loaded under dry weather conditions. Keep as dry as reasonably practicable. **Under deck in a mechanically ventilated cargo space**. Clear of living quarters."

continued over

In this case the shipper prior to loading provided the master with a testing report from Tianjin research institute, approved by the Maritime Safety Administration People's Republic of China, stating that the product had been correctly tested in line with the *UN Manual of Test and Criteria* (see Part 111, 33.4.1.4) and had been found as not hazardous i.e. It was not subject to the *IMDG Code* as it states:

"If the chemical or physical properties of a substance covered by this description are such that, when tested, it does not meet the established defining criteria for the class or division listed in column 3, or any other class or division, it is not subject to the provisions of this Code except in the case of a marine pollutant where 2.10.3 applies."

Therefore, with view of the above, the owners made the decision to load the cargo.

When the cargo was loaded the master found dangerous concentrations of gases such as phosphine and arsine, which are highly toxic.

Reference should be made to the *IMDG Code* and the *IMO Code of Safe Practice for Solid Bulk Cargoes* for further information on this commodity ■

CHIRP

The Club has been advised of a new confidential reporting system funded by the UK Department of Transport.

CHIRP (Confidential Hazardous Incident Reporting Programme) is an independent charitable trust whose objective is to promote safety in the maritime sector for employees and others by: 'Obtaining, distributing and analysing safety related reports which would not otherwise be available'. Whilst at all times keeping the identity of the reporter confidential.

Reports from CHIRP will be made available to the Club for circulation and will provide another source of loss prevention advice.

Details of the scheme can be found at www.chirp.co.uk

SOUTH AFRICA

Fines for ships arriving with stowaways

The local Durban P&I correspondent has been informed by the South African Immigration Authority, that planned changes in the South African Aliens Control Act, No. 96 of 1991 as amended, are likely to include a penalty in the form of a fine for vessels arriving at ports in South Africa with stowaways. The fine is likely to be R2,500 (about US$300.00 at the current exchange rate) per stowaway and unlike the deposits that have in the past been requested by some ports in South Africa, to cover detention and repatriation costs, the money will be a pure fine and non-refundable.

In addition to this we are advised that should the master of a vessel fail to declare the presence of a stowaway a further R10,000 (about US$1,200) non-refundable fine will be imposed.

Notwithstanding the above, the South African Immigration Authorities do not appear to have any immediate plans to change their present ruling on stowaways inasmuch as they will permit the majority of stowaways to land from vessels provided always that the shipowner pays all expenses of detention and subsequent repatriation to the stowaway's home country. We say the majority of stowaways as, on the rare occasion where documentation and repatriation of a particular nationality of stowaway is known to be very difficult, the authorities may not grant the permission for the stowaway to be disembarked from the vessel.

We caution shipowners that they must advise their masters to be extremely vigilant for the presence of stowaways, not only in South Africa but also in the whole sub-Saharan region. In our view all ports are high-risk areas and proper and

effective gangway and deck watches need to be maintained, together with a properly organised stowaway search prior to the vessel departing. In ports in South Africa the Immigration Authority deems the vessel to have departed once the harbour pilot is disembarked and any stowaways found after this time are the responsibility of the shipowner.

The latest estimated number of illegal immigrants in South Africa is a staggering 8 million and represents about 17% of the populous. Unemployment in South Africa is very high, so it is inevitable that many of the illegal immigrants, unable to find work and resented by the local people, will want to leave the country and stowing away is perceived as a way out of their predicament. Unfortunately security at the majority of ports in South Africa, at least for pedestrian traffic, is poor so it has to be up to the vessel's crew to put in place effective security on the gangway and any other point of access to the vessel ■

new regulations

US visas for foreign seamen – new interim rule

As from 1 August 2003, an Interim Rule published by the US Department of State will significantly effect how US visas are issued for foreign seamen. Under prior law, a personal appearance before a US consular officer was required in order to obtain a visa, but it left the question of a personal appearance by a non-immigrant applicant to be defined by regulation. The Department's regulations gave authority to a US consular officer to grant a personal appearance waiver (PAW) for certain applicants, including foreign seamen who were non-immigrant applicants *(e.g.* crew changes, *etc.).*

Following 11 September 2001, the Department of State reviewed its visa application and issuance procedures and found a larger percentage of non-immigrant visa applicants than previously existed. As a result, the State Department decided to amend its regulation on PAW. Under the Interim Rule, US consular officers will no longer have the broad discretion under previous regulation to grant a PAW with respect to foreign crew visas.

The newly formed Department of Homeland Security (DHS) has jurisdiction over implementation of the State Department's Interim Rule. The DHS is composed of former elements of 24 federal agencies, including INS, US Customs, and the Border Patrol.

In light of the Interim Rule, we have obtained some guidance from the DHS on visa issues that will arise in regard to an injured or ill foreign seaman who seeks medical treatment in the US and for foreign crew changes in the US.

Injured or ill foreign seamen

There is no question that an injured or ill foreign seaman will be given immediate medical treatment in the US without the need to first obtain a visa. In the event the US Coast Guard takes a sick or injured crewman to a US medical facility, it will notify the DHS. Alternatively, if the seaman is brought to a medical facility by the vessel's agent, the vessel's agent is obligated to notify the local office of DHS, in particular the Customs and Border Patrol (CBP). In most cases, the contact information for this office is the same as for the former INS office.

Once the CPB is aware that the foreign crew is in the US, it will perform an assessment of that individual. This assessment basically consists of three elements: (a) running the crewman's name through the terrorist watch list; (b) determining whether the crewman poses a flight risk; and (c) ensuring there is an actual medical emergency. On this latter point, different ports of entry in the US have had experience with different 'scams'. For example, in Miami the CPB is especially wary of 'sick' or 'injured' crew arriving on vessels from the Dominican Republic. If a crewmember is claiming to be sick or injured, or otherwise behaving in a way consistent with other scams run in that port, suspicion will be raised significantly.

The first two considerations are the most important If the crew is on the terrorist watch list, it is safe to assume that they will immediately be placed into custody and will be transferred to a secure medical facility. Assuming that the crewmember is not on the watch list, the agent conducting the review will determine if the crewmember poses a flight risk. This determination will take into account factors such as the crewman's ties to his home country, country of origin, criminal record, and other similar factors.

If the investigating agent believes the crewmember does not pose a flight risk, he or she will consult with a field supervisor in order to obtain approval for the issuance of a 'medical parole'. The medical parole will allow the crewmember to remain in the US under his own recognizance. If, on the other hand, the investigating agent believes there is a flight risk, he may issue a D-259 Order to Detain and Deport to the master and local agent This order will require the ship's agent to have the crewmember watched and to ensure his exit from the US, as medical circumstances allow. Depending on the level of flight risk assessed by the investigating agent, an armed guard and/or bond may be required.

Foreign crew changes in the US

On the issue of foreign crew changes in the US, a crew transit visa will be required. For incoming crew, a C-1 transit visa is required, as is a letter from the steamship company, detailing the crewman's hire, report to vessel date, and expected date of departure. The immigration officer reviewing this material at the border should issue an 1-94 (record of arrival in the US) with a restriction on how long the crewman can stay in the US. In practice the amount of time allowed may vary, as the rule calls for only enough time to get to the vessel, plus one day; while many officers routinely stamp '29 Days' (apparently, immigration officers often grant temporary paroles for this time period, and often just use the stamp rather than calculating and writing in the appropriate number of days).

For outgoing crew, the procedure is slightly different. For those crew in possession of valid D-1 visa (which would also permit shore leave), transit through the US can be done without further action (although the crew must present the valid D-1 to an immigration officer at the port of entry). For crew not in possession of valid D-1 visas, the local agent must complete a form 1-408, Application to Pay Off or Discharge Alien Crewman (we caution that this form number may have changed on 1 August). The immigration officer will determine the flight risk, if any, posed by the crew listed on the 1-408 and may, in his or her discretion, require the ship's agent to provide guards. Generally speaking, the immigration officer will take into account the same factors as with the case of the sick or injured crew.

Despite the overall limitation on the use of PAW, the Interim Rule contains a number of provisions allowing for a PAW in certain circumstances. For example, persons who qualify under certain visa categories are not required to appear in person and may enter the US without a personal appearance. These categories are generally limited to persons on official diplomatic business and the like, and are unlikely to assist the typical foreign crewman. Persons of certain ages are allowed a PAW as are persons who within 12 months of the expiration of the person's previously issued visa are seeking re-admission to the US. In addition, a PAW may be available in certain 'unusual circumstances' which are defined as including an 'emergency or unusual hardship'.

Overlaying the restrictive use of PAWs for foreign crew, is the Visa Waiver Program (VWP). This programme allows residents of certain countries to enter the US and remain for up to 90 days for business or pleasure. (There are also specific treaties with countries such as Canada that govern the visa issue.) According to the Bureau of Immigration and Customs Services (BICS), foreign crew who hail from countries participating in the VWP may take shore leave in the US without first obtaining a visa. However, should they elect to do so, these individuals must notify DHS and may have to present themselves in order to legally enter the US. The presentation would likely be at a local BICS office, airport, or may be waived altogether ■

PARIS MOU

New inspection rules

From the 22 July 2003 tough new rules to target high-risk ships were introduced by the Paris Memorandum of Understanding (MOU) Port State Control members.

Expanded inspections (see *Section 8* on its website www.parismou.org) will be carried out on tankers over 15 years, chemical and gas carriers over 10 years, bulk carriers over 12 years and passenger ships over 15 years. These new inspections will be mandatory if 12 months have lapsed since the last expanded inspection by a Paris MOU port. If a ship is due for an expanded inspection the onus is on the owner to arrange an inspection at a Paris MOU port giving three days notice of arrival.

Ships with a target factor of 50 plus (see website – *Target Factor*), will be inspected if they have not been inspected at a Paris MOU port within the last month. The Paris MOU is also extending its banning policy. All ships registered under flags on the *Black List* and considered 'very high' or 'high' risk will be refused access to all 19 member states' ports if they are detained twice in three years. Ships with flags considered to be in the lower risk category will be refused entry if they are detained three times in two years.

Detentions from 22 January 2002 will count towards a ban. These bans may be lifted if the ship completes an expanded inspection at the owner's expense. The flag state and, where appropriate, class must also confirm that the ship complies with required standards.

Owners of ships carrying liquid or solid bulk cargoes must make sure that charterer information is available onboard for the Port State inspectors to record.

A ship required under international rules to carry a functioning voyage data recorder may be detained if it is found not to be working properly.

We advise all Members to note these new rules and to act accordingly ■

Mandatory introduction of the IMDG Code

We would like to advise Members that as from 1 January 2004, the IMDG Code will become mandatory under international law as IMDG Code Amendment 31. At present the Code is advisory and only law if adopted as such by individual countries. Under this new mandatory measure, there are exceptions for certain sections that will remain recommendatory, with the amendment of SOLAS Chapter VII.

From 1 January 2003 to 31 December 2003 Amendment 31 will be implemented for a transitional period, though Amendment 30 may be used in this time.

Merchant Shipping Notice 1772 (M), and Merchant Guidance Note MGN 244 (M), are directed to ships within United Kingdom waters and United Kingdom ships wherever they may be. They have been issued to assist in understanding the amendments and list the inapplicable parts of the Code for which international law does not apply.

We advise all Members of these changes and encourage them to read the above documents ■

NETHERLANDS

Air Pollution

We have been advised by one of our Members of a recent case in which a ship, whilst transiting the River Schelde, was inspected and failed the sulphur content limit required by the EC Air Pollution Act Directive 199/32.

The vessel concerned had its MDO and HFO 380 tanks inspected by the VROM Inspectie of Eindhoven. The results of the inspection showed that the sulphur content of the MDO was in excess of the limit stipulated by the Act. This case is now in the hands of the public prosecutor who may decide to institute proceedings along with numerous other similar cases.

The samples concerned were analysed and the sulphur content of the marine diesel oil was found to be 1.61%. According to the Air Pollution Act, which has been in effect in the Netherlands since 27 September 1974, the sulphur content of fuels may not exceed 0.20%. The HFO was found to be within the allowed limits.

We would also draw Members' attention to regulations on the halogen content of fuel that have been in effect in the Netherlands since 1 March 1999. These stipulate that it is prohibited to use fuel (with a number of exceptions) that contains an organic halogen compound of more than 50 mg per kilo.

We would advise Members to be aware that Dutch authorities now seem to be enforcing these rules rigorously ■

miscellaneous

Disappearing act

During a berthing operation of a VLCC in the Delaware River, when the vessel went astern, a tug, which had positioned itself too close to the starboard aft curvature of the ship, became trapped in the wake created by the VLCC's massive propeller. To further the woes of the tug and its crew, the tug experienced engine problems. The engine problems coupled with the tug's attempt to extract itself out of the wake created by the prop resulted in the tug being virtually sucked into the VLCC's 31ft propeller. The result of this was the tug was almost cut in half with massive damage to hull and machinery and incredibly the tug starting operations on the starboard side but ending up on the port side of the VLCC. The miracle of this is the fact that no one on the tug came away with any type injury whatsoever ■

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