125 years
1885~2010

The Standard

# STANDARD BULLETIN

SETTING THE STANDARD FOR SERVICE AND SECURITY

November 2010


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IN THIS ISSUE



## FINANCIAL REVIEW AND CLUB UPDATE

The board met on 8 October and reviewed the club's financial performance. The club has had a good first half of this policy year. Free reserves are forecast to be up by $34m to $277m, another record high level. This result has been achieved through both an underwriting surplus and good investment performance.

Tonnage is also up since the start of the policy year. It now stands at around 116m gross tons, also a record level. Quality is not being compromised, however, with most of the tonnage coming from existing members, with a small number of new members joining also.

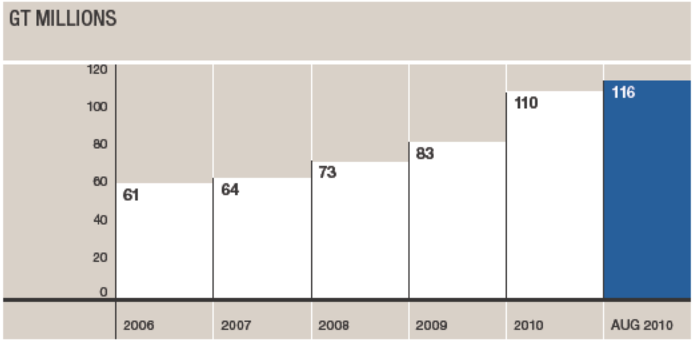
The board was able to determine that members should be advised that no supplementary calls are expected for any of the open policy years for either the P&I or Defence class. P&I class release calls are being held at low levels, 5% for the oldest open year, 10% for last year and 15% for the current year to reflect the higher degree of uncertainty in a year that is only partway through.

The club is in good financial shape. We are enjoying a stable general claims pattern within the routine claims, but the larger claims continue to be more expensive. The board therefore decided that it would be prudent to seek a 3.5% general increase at renewal to ensure a continuation of the stability that the club has been able to deliver.

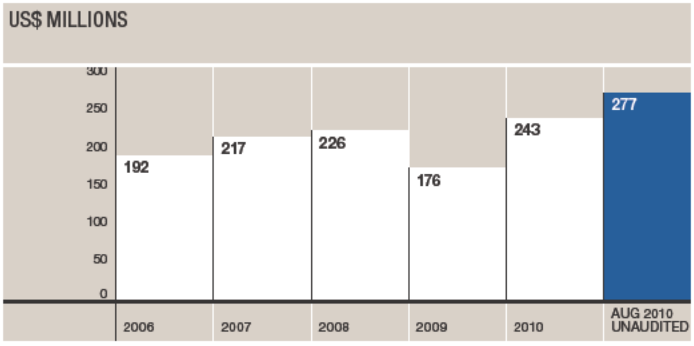
The board welcomed two new board members, Art Bensler from Teekay Shipping Limited and Matt Cox from Matson Navigation Company, Inc.

# THE CLUB AT A GLANCE

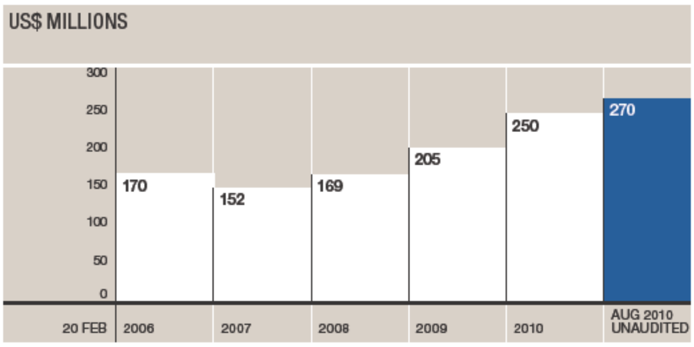
## TONNAGE




## FREE RESERVES



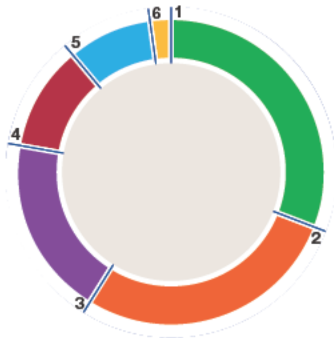

## PREMIUM




## SHIP TYPES

OWNED TONNAGE

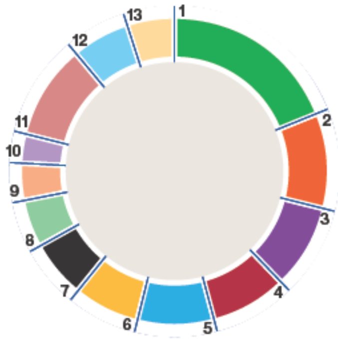
| | | |
|---|---|---|
| 1 | Tanker | 31% |
| 2 | Container & general cargo | 28% |
| 3 | Dry bulk | 19% |
| 4 | Offshore | 11% |
| 5 | Passenger & ferry | 9% |
| 6 | Other | 2% |




## MEMBERS

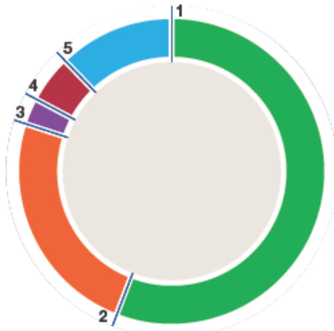
OWNED TONNAGE

| | | |
|---|---|---|
| 1 | USA | 14% |
| 2 | Greece | 10% |
| 3 | Italy | 10% |
| 4 | Canada | 8% |
| 5 | Germany | 8% |
| 6 | United Kingdom | 7% |
| 7 | Japan | 6% |
| 8 | Singapore | 6% |
| 9 | Switzerland | 4% |
| 10 | Republic of Korea | 3% |
| 11 | Rest of Europe | 11% |
| 12 | Rest of Asia | 5% |
| 13 | Rest of World | 8% |




## ASSET ALLOCATION

| | | |
|---|---|---|
| 1 | Bonds | 56% |
| 2 | Equities | 24% |
| 3 | Gold | 3% |
| 4 | Alternative assets | 5% |
| 5 | Cash | 12% |



# AMENDMENTS TO THE PHILIPPINES MIGRANT WORKERS ACT 1995 (MWA)


| | |
|---|---|
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The MWA regulates the employment of Filipino seafarers overseas, as well as protecting and promoting their welfare.

Members may be aware of recent amendments to the MWA, extending the compulsory insurance coverage required for death, injury, illness and further liabilities. Members who employ Filipino seafarers will be affected by these changes and they will need to ensure that adequate insurance cover is in place to comply with them.

The amendments to the MWA took effect in May 2010 but the new insurance requirements did not come into force until 7 November 2010.

The MWA provides that manning and recruitment agencies must either obtain the necessary insurance cover or certify that such cover has been arranged on behalf of the seafarer, in order for the Philippine Overseas Employment Administration (POEA) to issue an overseas employment certificate. This is necessary to allow a seafarer to be deployed overseas. Cover can either be provided by a policy issued by a private insurance company registered with the Philippine Insurance Commission or, in the case of seafarers who are insured under policies issued by foreign insurance companies, certificates or other adequate proofs of cover can be provided by manning and recruitment agencies, as long as the minimum compulsory insurance requirements of the MWA are met.

Obtaining additional insurance in the Philippines will impose a further financial burden on members. The International Group of P&I Clubs (IG) understands the POEA has indicated that a “certificate of cover” confirming P&I cover is in place, provided by a manning agent on the letterhead of a POEA accredited principal, will be considered suitable evidence that appropriate insurance cover is in place. However, the POEA is aware that this approach has not been approved by the IG because P&I cover does not provide direct cover to seafarers as required by the MWA and the compulsory insurance provisions of the MWA are broader in scope than P&I cover.

As members will be aware, P&I cover is indemnity cover and, as such, it does not provide insurance direct to an individual seafarer as is required by the MWA. P&I cover indemnifies an assured shipowner member in relation to the member’s contractual obligations (subject to approval and the term/conditions of entry) and legal liabilities to a seafarer on board or in relation to an entered ship resulting from the member’s negligent act or omission.

The MWA provides, amongst other things, that any claim arising from accidental death, natural death or disablement shall be paid to the seafarer or their heirs without dispute and on an absolute liability basis i.e. without the necessity of the seafarer or their heirs having to prove fault or negligence of any kind. Hence, regardless of whether the death, illness or injury is work-related or not, the seafarer or their heirs would be entitled to US$15,000, US$10,000 and US$7,500 in cases of accidental death, natural death or permanent disablement respectively.

Another area of concern is the obligation to arrange insurance cover in respect of money claims brought by a seafarer and the scope of such a claim involving disputed or unpaid wages not being covered by P&I. Also, the obligation to arrange insurance cover does not contain any exceptions in relation to liabilities specifically excluded from P&I, such as those arising from acts of terrorism or war risks. It is also unlikely that P&I cover could indemnify a member’s obligations under the MWA to provide subsistence allowance benefit of at least US$100 per month for a maximum of six months.

Club cover cannot act as the default position to meet the insurance obligations imposed on the recruitment and manning agencies by the MWA for the reasons set out above. Clubs cannot, therefore, provide certificates or other evidence of cover attesting that the minimum insurance requirements under the MWA are met and members will now need to consider the insurance required to achieve compliance with the MWA in close liaison with their manning agents.

The IG is continuing to work closely with relevant international and domestic shipowner industry associations in lobbying for the necessary changes to the law to overcome any unnecessary additional deployment costs and the increased obligations that will be imposed on the sea-based employment sector in complying with the MWA.

The club is continuing to monitor developments in conjunction with the IG and will provide members with further updates.

# US SUPREME COURT APPLIES MARITIME LAW AND COGSA TO CLAIM FOR CARGO DAMAGE OCCURRING AS A RESULT OF TRAIN DERAILMENT


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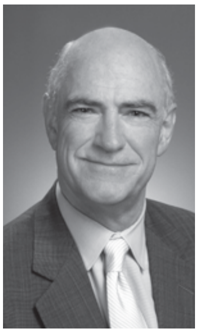
The Supreme Court of the United States issued its decision on 21 June 2010 in *Kawasaki Kisen Kaisho Ltd. v. Regal-Beloit Corp.* This decision clarifies and affirms the scope of the maritime jurisdiction of US courts in cases involving transportation of goods by water under multi-modal (through) bills of lading. As a result, if a through bill of lading is properly drafted and used for a multi-modal shipment from a foreign country to the US and damage occurs on an inland leg of the transportation, the ocean carrier will be able to limit its liability in accordance with the United States Carriage of Goods by Sea Act (COGSA) to $500 per package or customary freight unit. In addition, a foreign choice of forum clause in such an ocean bill of lading will be enforced. Although it sounds odd that federal maritime law applies to damage occurring as a result of a train wreck in Oklahoma or that the parties in such a case are required to proceed in Tokyo, the Court's decision in *Kawasaki* will make predicting the outcome of such cases easier and should be welcomed by all parties who are involved in such contracts.

The decision in Kawasaki builds on the Court's decision in 2004, in *Norfolk Southern Ry. Co. v. Kirby Pty Ltd.* In this case, the Court held that disputes arising under an ocean carrier's multi-modal bill of lading were to be determined under federal maritime law, not the law of the state where the damage occurred and even though the damage resulted from a train derailment. In *Kawasaki*, the Court had to interpret and reconcile an apparent conflict between maritime law and another federal law, the Carmack Amendment, which governs the terms of bills of lading issued by domestic rail carriers. The Carmack Amendment requires a rail carrier to offer terms by which the carrier is liable virtually as an insurer. The carrier and shipper may contract for a lesser liability and usually do; however, the carrier must have offered full liability as a condition to enforcing the lesser, contractual terms.

In *Kawasaki*, the shippers delivered goods to the ocean carrier in China for shipment to inland destinations in the United States. The ocean carrier issued a multi-modal bill of lading that, among other things, gave the carrier the right to subcontract to other carriers, made COGSA applicable to the entire journey and required disputes arising under the bill of lading to be resolved in court in Tokyo. The ocean carrier subcontracted the carriage to a railroad company at the US port of arrival for transportation to the inland destinations. The railroad company did not issue its own bill of lading to the shipper. The goods were damaged inland while being transported by rail. The owner of the goods sued both the ocean carrier and the rail carrier. The rail carrier invoked the Tokyo forum selection clause and the $500 per package limitation of COGSA. The owner of the goods sought full liability, contending that the rail carrier had not complied with the Carmack Amendment. The district court ruled in favour of the carriers. The appeals court reversed this decision. Disagreeing with the appeals court, a majority of six justices of the Supreme Court held that the Carmack Amendment does not apply to the inland segment of an overseas import shipment under a through bill of lading. Three justices joined in a dissent.

For the purposes of this article, the reasoning, much of it technical, of the majority and dissenting opinions need not be discussed. The decision announces a clear rule that is favourable to members and the club with respect to the carriage of goods to the United States under through bills of lading. Accordingly, members should consult their legal advisors with respect to the terms of their bills of lading as well as with respect to their procedures in order to take advantage of the Court's ruling and avoid becoming involved in litigation in inland US jurisdictions and/or to take advantage of COGSA's $500 per package limitation of liability.

# “GIUE” SOUNDS FUNNY, BUT IT’S SERIOUS



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## WHAT IS A GIUE?

GIUE, pronounced “gooey,” stands for Government-Initiated Unannounced Exercises. The US Coast Guard’s Vessel Response Plan (VRP) regulations, issued under the Oil Pollution Act of 1990, require periodic unannounced drills for tank vessel plan holders. Congress is extending these requirements to non-tank vessels under the Coast Guard and Maritime Transportation Act of 2004. In recent months, the Coast Guard has announced the need to “re-energise” and “re-emphasise” the GIUE programme, and Qualified Individuals (QIs) report increased numbers of GIUEs.

Captains of the port will select a particular plan holder and vessel VRP for a GIUE to the level of “average most probable discharge”. The GIUE will test the plan holder, the QI and the Oil Spill Response Organizations (OSROs) listed in the VRP in real-time, with real equipment deployment. Up to four GIUEs can be conducted annually in each “area” for which Area Contingency Plans exist under the National Contingency Plan. The plan holder is required to pay for the cost of the GIUE and is exempt from participating in another GIUE for three years.

## WHERE DID GIUES COME FROM?

Vessels subject to the VRP requirements must have approved response plans that demonstrate the plan holder’s (owner or operator) capability to activate the response through the designated QI. The QI must have the authority to engage OSRO services, to obligate funds on behalf of the plan holder and to act as the liaison to the federal On-Scene Coordinator. The VRP requires the plan holder to have contracts in place with ORSOs that are based in a geographic area covered by the plan and that provide response resources that meet the planning requirements for different volumes of spills – Average Most Probable Discharge, Maximum Most Probable Discharge and Worst Case Discharge. The regulations (33 CFR 155.1060) require plan holders to hold several different types of exercises on a regular basis, including table-top drills, annual equipment deployment exercises and unannounced, self-initiated drills. The GIUE requirements are in addition to the unannounced drills conducted by plan holders (33 CFR 155.1060(c)).

Many plan holders satisfy their pollution response exercise requirements by participating in the so-called PREP programme (National Preparedness for Response Exercise Program). PREP is a voluntary programme, and following PREP guidelines satisfies the regulatory exercise requirements. The PREP Guidelines (issued most recently in August 2002) include a description of the GIUEs. A GIUE is not deemed complete until the initiating authority determines that the plan holder has successfully demonstrated compliance with the VRP. If response personnel, for example, are found to be inadequately trained or if equipment is found inoperative, corrective action may be required, and the plan holder may be subjected to additional exercises. Unsuccessful exercises may lead to “appropriate enforcement actions (including, but not limited to, civil penalties)”.

## WHAT SHOULD PLAN HOLDERS DO?

Check to make sure that their QIs and OSROs are aware of this increased emphasis on GIUEs and are prepared to successfully complete a surprise exercise.

# PARTIES' CAPACITIES AND REFERENCES TO NEGLIGENCE IN AN EXCHANGE OF INDEMNITIES


| | |
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The dramatic images of the Buncefield fire in the UK in December 2005 demonstrated the destructive power of the release of a relatively small volume of hydrocarbons. The explosion resulted in substantial property damage. Liability for such losses has fuelled litigation between the participant oil companies that used the depot. The depot received fuel by pipeline. On 10 December 2005 one of the storage tanks received unleaded motor fuel but various alarms failed and, following the operational negligence of a Total employee, the tank overflowed. A vapour cloud developed from the spillage of approximately 300 tonnes of petrol. The vapour was ignited and an enormous explosion and fire occurred. A large proportion of the site was damaged, as too were third party commercial and residential properties outside the perimeter of the depot. The operating company, Hertfordshire Oil Storage Ltd (HOSL) was a joint venture company owned by Total and Chevron. There were several agreements which sought to delineate liability between the parties (a management, an operating and a joint venture agreement). The burden was upon Total to identify the contractual provision which gave them an indemnity as operator in respect of their own negligence. The Court of Appeal has now held that Total was not entitled to an indemnity under these contracts (Shell UK Ltd v Total UK Ltd; Total UK Ltd v Chevron Ltd [2010] 2 Lloyds Law Rep 467).

The court found that under the management agreement with HOSL, Total was not entitled to an indemnity as the losses were caused by their negligence.

The operating agreement stated that each of the participants would "indemnify and hold harmless and defend each other from… any and all liabilities… whatsoever arising directly or indirectly out of... the death or illness of or injury to any employee… or the loss of or damage to any equipment of property… of such participant, whether or not resulting from… any negligence … of HOSL or any other Participant." The court was prepared to uphold and give effect to this knock for knock agreement between the participants in respect of their own personnel and property risks. That knock for knock agreement expressly allowed for indemnities in the context of the indemnified party's own negligence.

The agreement also dealt with liability for third party claims and provided to Participants an indemnity from HOSL in respect of all claims by third parties for personal injury or property damage made against participants arising out of or in the course of or by reason of the Terminal Operations, the expectation being that HOSL would be insured. If HOSL were not insured it provided that the Participants would indemnify HOSL as to their respective percentage interest. It did not refer expressly to the negligence of the Participants. The court held that because negligence was not expressly referred to in this element of the indemnity then therefore it was likely to be a deliberate decision by the draftsman to exclude the operation of the indemnity in the event of negligence i.e. if a party were negligent then the indemnity would not bite.

In construing the operating agreement with HOSL, the court held that Total was not provided with an indemnity for its own negligence because (1) that negligence was committed as operator, not as participant and (2) that the indemnity in respect of third party claims was deliberately drafted not to cover a participant in respect of its own negligence.

The joint venture agreement's liability provisions were found to be redundant (given the existence and scope of the operating agreement) but in any event the court held that it was designed to deal with sharing risks as between participants; it would not cover Total's liability in negligence when acting as operator.

## SUMMARY

Parties should be clear as whether and to what extent indemnities apply when parties act in different capacities. If parties to an agreement intend that indemnities should always operate even in respect of their own negligence then the indemnity language used should expressly and consistently refer to negligence. A party seeking to be indemnified carries the burden of proving that any particular indemnity exists and will operate. Ambiguities will be construed against that party. Contract certainty will assist the parties in establishing the extent of their risk and thus enable effective insurance buying decisions to be made.

# STAFF NEWS

### UNDERWRITING

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### CLAIMS

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Djan Venturim has transferred to syndicate D as a claims executive
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# STANDARD CLUB EVENTS

## SEPTEMBER

**15 September 2010, Member and Broker seminar – Hamburg**
**30 September 2010, Member and Broker seminar – Rotterdam**
On 15 September in Hamburg and 30 September in Rotterdam, the club hosted seminars for members and their brokers in the German and Dutch markets. Presentations were made by the club and industry experts on the club's finances, eLoran technology and a new publication called The Human Element: a guide to human behaviour in the shipping industry.

## OCTOBER

**13 October, The 2010 Standard Offshore Forum – London**
This was the club's 10th Offshore Forum and our panel of experts considered 10 years of considerable change in the offshore industry and looked ahead to what the next 10 years may bring. Over the past decade, large fluctuations in the price of oil have seen peaks and troughs in industry employment, whilst geographical, political and societal factors have forced oil companies and their contractors to cope with increasing levels of risk. Discussions at the Forum revealed that most participants believe that we are at or have passed 'peak oil', but that demand for oil will continue to rise, particularly in the developing world. Looking forward, we are likely to see more deepwater developments, higher capital expenditure and an increasing dominance by national oil companies. Against this background, insurance purchasers will need to make informed choices to maximise limited capacity in a world of high-value projects and increasing regulatory exposure.

## NOVEMBER/DECEMBER

**10 November, Member and Broker seminar – Oslo**

**18 November, Member Forum – New York**

**29 November, Standard Asia Offshore Forum – Singapore**

**30 November and 1 December, Standard Asia member training – Singapore**


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