UK DEFENCE CLUB

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soundings

Message from the Managers

At the end of the June Board Directors meeting the Chairmanship of the Association transferred from Mr Paul Vogt to Mr Panos Laskaridis. Mr Vogt has served as Chairman since 2005 having first joined the Board in February, 1990. Mr Vogt has been heavily involved in the regulatory changes that have faced the Association in the past few years and has been instrumental in guiding the Association through this period of change. At the June meeting Mr Vogt was warmly thanked by the Board and the Managers for his services to the Association over his many years of service. A handcrafted glass dish, personally engraved, was presented to Mr Vogt at the meeting. Mr Laskaridis who has served as Director since March, 1992 takes over as Chairman of the Association for the next three year period.

On a separate note as of the 4th August, 2008 the Managers London office has moved to 90 Fenchurch Street. All email and telephone numbers remain the same. We look forward to welcoming you to our new offices shortly.

Daniel Evans, Club Manager.

UKDC IS MANAGED BY **THOMAS MILLER**

Posidonia 2008

Daniel Evans (Club manager), Philip Clacy (Area Director, Thomas Miller Hellas Ltd) and Alan Mackinnon (Senior Director of Claims)

As mentioned in the last issue of Soundings the Managers attended the Posidonia exhibition in Greece in the early part of June. For those who might not be aware the Posidonia exhibition itself started officially in 1969 and was named after the Ancient Greek God of the sea, Poseidon. This first exhibition was attended by more than 80 shipping and shipbuilding companies representing 15 maritime countries. In 2008 in of excess of 1,650 maritime associated companies were represented from over 70 countries. As part of this years exhibition the Thomas Miller Hellas office hosted a highly successful open day at their office in Piraeus. At various times the Managers were also seen - as this photo shows - travelling throughout Athens in a specially equipped Smart car to mark the occasion.

Fitness for service?

Charterparties often require an owner to provide a ship which is "fit" for the service or the voyage in question, and "fit" to carry a charterer's intended cargo. A commonly held view was that these words related only to a ship's physical condition. This view was however rejected in a case which involved a ship entered in this Association, the ELLI.

The ELLI (and its sister ship) was on long term time charter, in which it was described as double sided. However, after the MARPOL single hull phase out provisions came into force in April, 2005 the ship's classification society concluded that the ship was not fully double sided, as a result of which it was no longer able to carry fuel oil. Had it been fully double sided, the ship would have been entitled to an exemption from the relevant section of the MARPOL Regulations.

In considering the resulting dispute, the English High Court decided that whilst there was nothing physically wrong with the ship, the concept of "fitness for service" extended to legal fitness and that once the ship was no longer legally able to carry fuel oil, the owner was in breach of the charter.

With the support of the Association, the owner appealed to the Court of Appeal. In its judgment, the Court of Appeal did seem to question whether fitness for service had the wide meaning given to it by the lower court. However it dismissed the owner's appeal on the grounds that the charter required the ship to have "on board… all certificates required from time to time by any applicable law to enable her to perform the charter service." The court ruled that in failing to obtain an exemption from the relevant MARPOL regulation after April, 2005 which would have allowed the ship to carry fuel oil, the owner was in breach of the charter.

The Court of Appeal's judgment is surprising in its brevity. During the proceedings the Court had noted that there was no clear authority on what is meant by "fit for the service" but declined to come to any conclusions on the issue. As to the finding on certificates, the ship would not have been entitled to a MARPOL exemption unless it was physically modified to become fully double sided, so the effect of the court's finding was that the owner was obliged to effect these modifications. But even if the owner had done so, some countries would have refused to recognise a MARPOL exemption and only allowed the ship to enter port if it was double hulled. It could be argued therefore that the only way for the owner to avoid being in breach of the charter would have been to convert the ship into a double hulled ship, at a cost of many millions of dollars.

The owner is now seeking permission to appeal to the House of Lords, and an update will follow in a future edition of Soundings. In the meantime, Members should be aware of the wide scope of any term that a ship is fit for service. In light of the decision in the ELLI this can embrace future changes in international regulations and entail significant costs in order to meet charterparty obligations.

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Anti-Suit Injunctions and Rule B attachments

The Singapore High Court recently decided in Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd [2008] SGHC 74 whether an anti-suit injunction could be used to defeat a Rule B attachment taken out by Seatrek. It decided not to grant the injunction even though Singapore was the natural and proper forum and Seatrek would not have been able to obtain pre-judgment security under Singapore law.

Prior to commencing arbitration, Seatrek started an action against Regalindo in New York together with an ex parte application for a Rule B attachment to obtain security for US$3,777,200. The Rule B attachment was granted and US$249,975 was attached soon thereafter. Seatrek then commenced arbitration proceedings against Regalindo (as charterer) in Singapore in accordance with the time charterparty. Regalindo subsequently applied to the Singapore High Court for an order to restrain Seatrek from continuing with the New York Proceedings and to release all monies attached pursuant to the Rule B attachment.

The judge applied the well settled principles enunciated by Lord Goff in the Privy Council case of Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 ("Aerospatiale") that, among other things, the court's jurisdiction to grant an anti-suit injunction is to be exercised when the "ends of justice" require it. The Singapore Court of Appeal applied the Aerospatiale principles in Koh Kay Yew v Inno-Pacific Holdings Ltd [1997] 3 SLR 121, adding that "it must only be in the clearest of circumstances that the foreign proceedings are vexatious or oppressive before an injunction can be granted and justified".

The judge found it significant that Regalindo's net worth (S$290,212) was substantially less than its paid up capital S$2m and that the last available audit showed an accumulated loss of S$1,709,788 over the years.

Also the directors of Regalindo had set up 3 other companies, 1 of which was carrying out the same business as Regalindo. Further, the directors and shareholders of Regalindo held the shares in the 3 companies in the same proportion as their current shareholdings in Regalindo. Seatrek argued that these were indications that the directors might not be carrying on business through Regalindo but have diverted its business to the 3 newly incorporated companies.

The judge held that notwithstanding Singapore being the natural and proper forum for the resolution of the dispute, he would not grant an anti-suit injunction even though the New York proceedings could have a disruptive effect on Regalindo's business. This was because it could not be said that the New York proceedings were unwarranted in the circumstances and any reasonable person would be concerned with Regalindo's ability to satisfy an eventual arbitral award.