Nordisk Skibsrederforening
(NORDISK DEFENCE CLUB)

ANNUAL REPORT 2011

CONTENTS

THE MANAGING DIRECTOR'S COMMENTS

A year of challenges – radioactive emissions, piracy, sanctions and a low freight market in most segments

Looking back on 2011 there were four events that in particular impacted shipping and Nordisk's work.

The first event was the earthquake and tsunami in Japan in March 2011, causing radioactive emissions from the reactor in Fukushima.

Secondly, the piracy problem developed further, and new problems arose, particularly in respect of armed guards.

Thirdly, new and extended sanctions were imposed against Iran.

Lastly, we have seen an increasing number of defaults caused by a problematic freight market in several segments. I will comment upon all four events.

The emission of radioactivity in Yokohama caused a number of owners (and charterers) to enquire whether they could refuse to go to Japan, in particular to Yokohama or the Bay of Tokyo.

Very few charterparties have clauses relating to emissions of radioactive substances. Consequently, one was left to evaluate whether the ports were dangerous under the normal doctrine of safe port, and the master's overall responsibility to ensure the safety of the vessel, cargo and crew.

Yokohama and the Bay of Tokyo were problematic, but a number of owners simply did not want to call at Japan at all. The problem was that the actual radioactivity measured in the Bay of Tokyo was not within what reasonably could be described as dangerous, so

Georg Scheel

one had to evaluate the risk of further and increased problems for the reactor. Would any increased emissions pose a threat to the Bay of Tokyo?

The main uncertainty was whether there would be further radioactive emissions, as the nuclear reactors were not under control. The radioactivity would be carried by air, so the wind direction and speed would also be important factors.

A number of vessels called at the ports in the area, but many of these vessels were ready to leave berth and the area quickly if there were further emissions from the reactors in combination with unfavourable wind conditions. These vessels used fewer moorings than usual and made plans to cease loading or discharging early in order to get the vessel moving.

Our experience in relation to Japan was that shipowners had very different attitudes to the problems. Some shipowners simply said that the radioactivity was too dangerous and, as any loss caused by radioactive contamination would probably not be covered by the insurance, they simply did not want to go. Others were more in line with the official view in Japan, namely that the danger did not rise to a level of significance.

I think the latter view is correct, even for the Tokyo and Yokohama areas. One particular problem is that many people perceive even low levels of radioactive exposure to be extremely dangerous. We are all exposed constantly to "background radiation" which has nothing to do with nuclear power plants or military activity. Even significant increases in exposure to radioactivity above normal background levels are not necessarily dangerous.

As a response to calls from the shipping industry for adequate charterparty clauses addressing such risks, BIMCO produced its Radioactivity Risk Clause. We participated in drafting this clause, and one of the problems we encountered was defining increased radioactivity. The clause refers to radioactive emissions that exceed what is normal for the kind of cargo involved. Reference to the type of cargo involved was important because some types of cargoes inherently contain radioactivity that far exceeds the level of general background radiation.

The piracy problems continued in 2011. In itself this was no surprise. From a legal point of view, there were two main questions to consider: Was the danger such that owners could refuse to take a certain route? Who should cover the costs of protective measures, such as guards, *etc.*? The use of armed guards came particularly into focus. Even if armed guards are accepted by an increasing number of flag States, there are a number of issues arising in connection with the use of such guards. These issues include, among others, where you can take armed guards on board; where armed guards can leave the vessel; and whether the vessel can have arms on board when calling at ports and travelling through areas such as Suez.

We have seen an extremely rapid growth in the number of companies offering the services of armed guards. At Nordisk we have had a large number of inquires from members and reviewed a number of contracts from such companies. The contracts we have seen vary from sophisticated, well balanced contracts where the security company also provides sufficient insurance cover for their liability, to contracts which are – from a legal point of view – extremely fragmented and hardly give the owners any legal protection at all.

In response to demand from the industry, BIMCO has now published *Guardcon*, a document we hope will be well received both by shipowners and the security companies.

The sanctions against Iran have continuously given rise to legal challenges. The main problem is that the sanctions are not general, but aimed at specific cargoes or companies/persons in Iran. The most recent sanctions imposed by the EU and the US will result in a near-total ban on trade from the summer of 2012, which makes the situation from a legal perspective somewhat easier to handle. Nonetheless, there is no general, international acceptance of the sanctions, so the vessel's flag, the owner's principal place of business and the owner's place of in-

corporation will be important factors. The gradual tightening of the sanctions brought us a number of inquires last year, as the dividing lines were difficult to assess, the rules were unclear, and whether it was legal to call at Iran or not depended on various factual matters of which the owner often had insufficient knowledge, such as the intended end user and the intended use of the cargo.

Shipping is a cyclical business, and a problematic freight market is nothing new. If we compare the downturn in 2011 with the market crash during the financial crises of 2007/2008 there are some significant differences.

When the financial crises of 2007/2008 hit we had experienced a long period with rather high freight rates. Most of the companies had rather healthy balance sheets, and even if the downturn in rates came rather abruptly, most had the financial resources to fulfil their charterparty commitments. Of course there were exceptions, and we also had a lot of cases arising out of default situations in 2007/2008. This time around the financial strength of the players in the industry is not as good. This has led to an increased number of defaults for which finding a satisfactory solution for our members has been difficult.

From a legal perspective, some of the most difficult cases arise when a company in a charterparty chain defaults. In such cases, the head owners may seek to exercise a lien on sub-freights or sub-hire down the line. If our member in the chain has paid the time-charter hire up the line, but is faced with a purported lien on the next hire payment he has to make to the time charterer up the line, what then is our member's position? And if a lien is imposed on a freight payment from a sub-charterer to our member, can our member successfully refuse to honour the lien because our member has paid hire up the line?

Further, in a default situation, creditors will often try to secure their interests. Typically such creditors are bunkers suppliers who threaten to arrest the vessel for unpaid bunkers. To add to the complexity, a vessel operated by the same manager as one owned by a defaulting party may be subject to a sistership arrest. Even if such a sistership arrest may be set aside, it takes time and may require significant findings of fact in order to persuade a court that there is no basis for a sistership arrest in the particular case at hand.

In spite of the problematic freight market in many segments, we have still been active in what we call "transaction-related work". We have in 2011 had higher activity in this area than ever before, with a number of sales and purchases, assistance in larger projects, and other such matters. We are pleased to note that our members appreciate our in-depth knowledge of the maritime legal system and the shipping business and acknowledge us as a well-qualified, experienced legal partner to assist in crafting the legal framework for new projects.

Some of these items referred to above have been commented upon in more detail in other articles in this Annual Report, see the general comments in the article on "Notable events and legal development" and the article on "Piracy cases".

PHOTO BY TROND SOLVANG

REPORT FROM THE BOARD

Strong financial result – record number of entered units

In general 2011 turned out to be a rather turbulent year for the shipping industry. Some of the optimism that was apparent in 2010 dwindled away, and we are now looking years ahead before a reasonable recovery may be anticipated. This attitude, however, does not apply to all market segments: in particular the outlook for the offshore services industry and for LNG carriers remains optimistic.

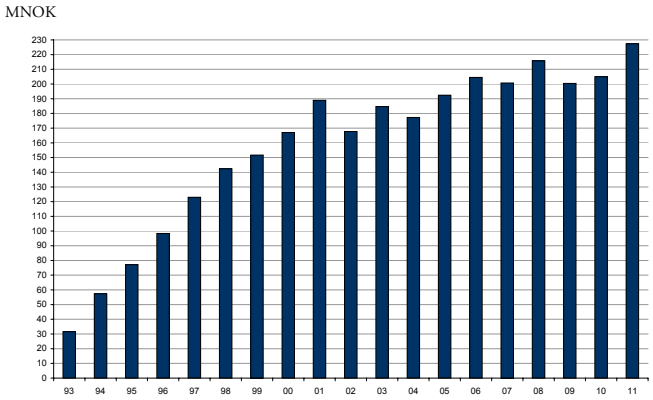
The general economic outlook for the world was adjusted downward in the second half of 2011. In Europe, difficulties with governmental debt in Southern Europe in particular fuelled a negative trend. Some signs of a slowdown in China have added to the uncertainty of the general worldwide outlook.

The lack of economic growth in the Western, industrialised countries, continued growth in Asia and in South America, and an optimistic outlook for growth in Africa are expected to result in a movement of economic strength from the traditional industrialised countries to the developing world. This might be correct, but the industrialised world's economic power is still dominant, and it will take many years for the developing world to catch up. Consequently, economic growth in the industrialised world is still of utmost importance for growth in international trade and shipping.

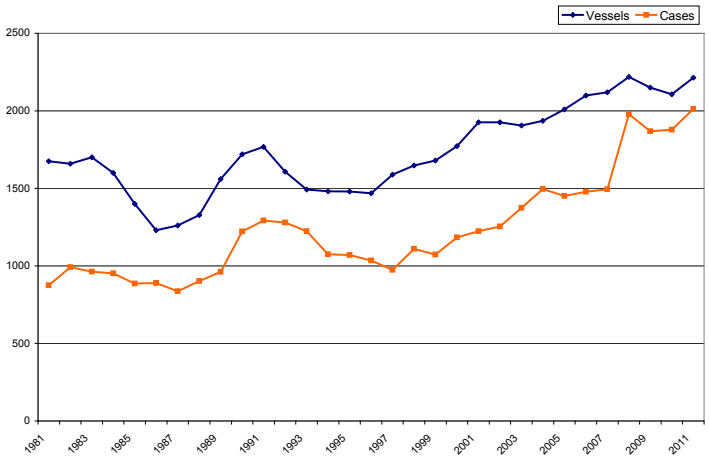
The reduced optimism has resulted in less enthusiasm for ordering newbuildings. On the other hand, overcapacity at the yards has led to a decrease in newbuilding prices, tempting some shipowners to seize an opportunity to order a newbuilding at what they perceived to be a favourable price. The newbuilding market is consequently not dead. There have also been reports of Chinese newbuildings that might be triggered more by China's political ambitions to ensure that import to China is controlled by Chinese companies, and perhaps also to maintain a strong shipbuilding capacity.

The social unrest and uprising in the Arab countries did not cause as many problems for the shipping industry as anticipated. The reason was probably that the interests of shippers, importers and owners were aligned – there was no need to call on ports where the infrastructure did not

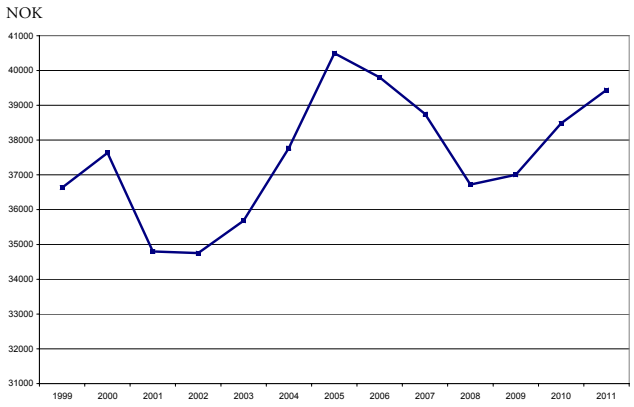
Total reserves available for payment of claims



Number of units entered vs. number of cases



Average premium per entered unit



function. From a legal point of view, the issue of ports becoming unavailable due to social unrest, strikes and similar reasons is a problem to which the shipping industry has been exposed on a more or less regular basis throughout its history.

The combination of low freight rates and high oil prices has increased the focus on slow steaming. In today's market, the most expensive element of the daily cost of running many vessels is the price of bunkers. Requirements reducing the sulphur content of fuel and rules on SOx and NOx emissions will reduce the consumption of heavy fuel and increase demand for distillates. This will in itself increase fuel costs and owners are consequently trying to get charterers to pay for the extra costs of using low-sulphur fuel.

For most owners and charterers slow steaming may be an attractive way to save fuel costs: since time is not so expensive due to the low freight market, it is easy to see the benefit of steaming at least a few knots below the service speed. If the IMO or other parties wanted to implement new mandatory rules in respect of curbing CO2 emissions, they could probably do so with fewer problems in the present market than in a few years' time when the market may be stronger.

Activity in the offshore services sector continued at a high level in 2011. The industry is growing, fuelled by high oil prices and the high level of exploration and field development in many offshore oil-producing areas of the world. The building of oil fields in deep water creates demand for large anchor-handling vessels, and the demand for platform service vessels is still rising. Our members are engaged in almost all areas where offshore drilling exploration is conducted. The Board is pleased to note that the entered fleet of offshore vessels continues to grow and

that the Association continues to have a strong hold on this market in which we have unique competence.

The Finnish tonnage tax regime was finally approved by DG Comp in late 2011. The regime, which is similar to the "benchmark" regime adopted in the UK, was approved by the Finnish parliament on 24 February 2012 and can be applied retroactively for the tax year 2011. Finnish shipowners are taking advantage of the opportunities offered by the tonnage tax regime, as well as the newly introduced mixed crewing option, with the result that all new cargo vessels built by Finnish shipowners are being Finnish-flagged. This is also improving employment prospects for Finnish seafarers.

There is however a dark cloud on the horizon in the form of the new environmental regulations and the prospect of the implementation of the Sulphur Directive on 1 January 2015. Due to the lack of proven scrubber technology, efforts are being made to promote alternative fuels, such as LNG or bio fuels.

Despite the efforts of the ECSA (the European Community Shipowners' Associations) and the Finnish government to postpone implementation of the Sulphur Directive until 2020, the focus internationally is to enlarge the territory covered by the Directive to include sensitive areas in the Mediterranean Sea.

Trade to and from Finland grew only marginally in 2011 and trading prospects are once again gloomy for 2012. The oversupply of tonnage indicates that the shipping market will continue to be tough during the coming years. Finnish shipowners' hopes are once again resting on increased trade to Russia via the Baltic ports on the back of high crude oil prices and the entry of Russia into the WTO.

In Sweden the newly-appointed minister for infrastructure appears to view the Swedish shipping industry as one of the transport alternatives that could contribute to an integrated transport system. Use of vessels could increase efficiency both from an environmental and investment point of view. No changes in the rules have so far materialised. Meanwhile, Swedish shipowners continue to outflag their vessels to more competitive flags.

Our Singapore office continues to experience a slow but steady growth in the number of cases received, with a focus on vessels operated in the Far East.

The high level of activity experienced by the Association in 2010 was surpassed by the activity in 2011. We received 2012 new cases in 2011, an increase of 134 cases over 2010. The number of entered units at the end of the year was 2214, an increase of 107 vessels over 2010; this represents the highest number of entered vessels in Nordisk's history. The corresponding GT was about 57 million, compared with about 53 million at the end of 2010.

The average membership fee per entered unit was NOK 39,440, compared with NOK 38,480 in 2010. These figures include tonnage entered with Northern FD&D Company Ltd., a subsidiary of Northern Shipowners' Defence Club, Bermuda Ltd. The latter company is a mutual club that has substantially the same membership as the Association.

The Board is pleased that the Association is growing despite turbulent times for shipping. The growth is taking place against the background of a marginal increase in membership fees, with a satisfactory financial result for 2011.

The Association's financial statement for 2011 shows a surplus of NOK 7,857,826. The Association's equity was NOK 43,100,436, but the financial statements do not allocate funds to cover future costs of ongoing cases. The Association's resources, apart from fixed assets, are generally held in equities and in bank and money-market funds. Financial strength and liquidity are ensured through management and insurance agreements with the Bermuda companies. The aggregate equity/retained earnings of these companies and the Association were NOK 136,880,500. The reserves set aside in the Bermuda companies to cover future costs were USD 15,056,585. Due to the reinsurance agreement between the Association and the Bermuda companies and the financial strength of these companies, we have satisfactory reserves to cover the Association's potential future obligations in ongoing cases. In addition the Association has reinsurance cover on the Lloyd's market against the possibility of particularly high expenditure in individual cases.

The Association's financial resources as well as the skills and experience of its employees, together with a stable membership base, make the Association well positioned for future growth. The Association has recruited young, very well qualified lawyers from Scandinavia, England and the United States. The Association's lawyers have unique levels of expertise and experience in maritime matters, and continually strive to improve the service provided to our members.

The Board would like to take this opportunity to thank the Association's management and employees for their excellent work during the past year.

Nils P. Dyvik, Chairman

OSLO, 31 DECEMBER 2011
27 MARCH 2012

NILS P. DYVIK
Styreformann

JAN HÅKON PETTERSEN

HANS NORÉN

THOMAS FRANCK

STAFFAN CARLSON

TRYGVE SEGLEM

HANS PETER JEBSEN

TERJE SØRENSEN

GEORG SCHEEL
Adm. direktør

NOTABLE EVENTS AND LEGAL DEVELOPMENTS

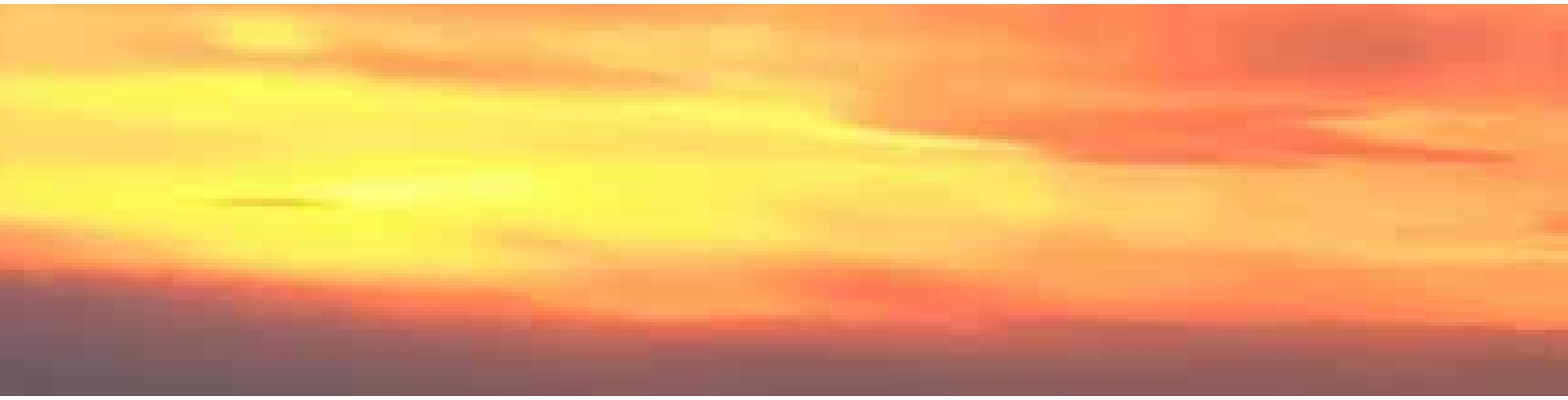
Few industries are as exposed as shipping to the impact of major international events. Below we focus on some such events during 2011, as well as some of the year's noteworthy arbitration awards and judgments.

By Knut Erling Øyehaug

Events and developments

2011 was an unusually eventful year. As well as major natural disasters, the Arab Spring, continuing pirate attacks *etc.*, we saw a number of significant regulatory developments. All these factors posed challenges both for our members and for Nordisk, as we will see below.

The self-immolation of a street vendor in Tunisia on 18 December 2010 triggered the series of protests and demonstrations across the Middle East and North Africa frequently referred to as the ***"Arab Spring".*** The unrest spread from Tunisia to Egypt, Libya, Yemen, Syria and Bahrain. In Libya, following the declaration by the UN of a no-fly zone over the country, a number of countries led by France, the US and the UK commenced a bombing campaign against pro-Gaddafi forces. Not surprisingly, these events significantly affected a number of our members. Tanker owners found themselves with vessels either heading towards or in the process of loading in Libya when hostilities commenced. Meanwhile other owners, such as cement vessel operators, had contracts frustrated and/or terminated as a result of the turmoil. Offshore oil activities were affected in countries such as Egypt and Libya. Although the wave of protests and demonstrations in the region can be seen as a single move-



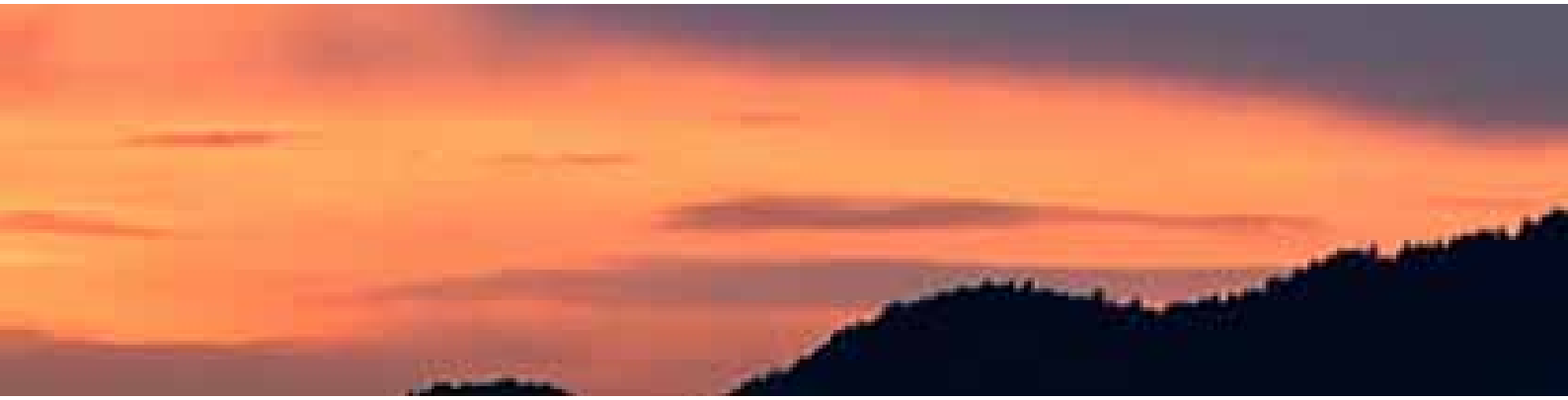
ment, matters have developed quite differently in the various countries affected and the final outcome remains uncertain. Although from a shipping perspective the situation gradually normalised in most areas during 2011, in some countries the situation remains difficult. In Syria, for example, the existing regime continued to oppress its population by violent means, provoking the imposition of sanctions by the international community (see below).

Last year international trade was also affected by a series of ***natural disasters***. In addition to the catastrophic earthquake and tsunami in Japan, Australia, the US and Thailand all experienced severe flooding, causing widespread disruption to trade, as well as cargo supply problems and delays. Each of these disasters had a significant impact on many of our members' activities and we were called on frequently to advise on contractual issues such as *force majeure*, frustration and "Act of God". So far, however, few disputes appear to have been pursued through legal channels.

Another topic demanding much attention in 2011 was ***"sanctions"***. Sanctions have posed a familiar obstacle to international trade for many years, with examples including the ban on oil imports into South Africa during the apartheid years and the ongoing US sanctions against Cuba. The main focus during 2011 was on Iran, with the UN, the US and the EU gradually increasing the pressure in response to Iran's nuclear programmes. The ever-stricter sanctions imposed on Iran, as well as on persons and companies with Iranian links, have made trading to Iran and related shipping activities more and more difficult and in many respects even impossible. As a result our members regularly approach us for advice on issues relating to the Iran sanctions. Recently sanctions have also been imposed on other countries, such as Syria, Libya, Sudan and the Ivory Coast. Although these sanctions may be less strict than those affecting Iran, they give rise to similar issues.

A continuing challenge for our members is ***piracy***. Although not a new development in 2011, piracy in the Gulf of Aden and Indian Ocean, as well as off the west coast of Africa, continued to be a major issue last year. In 2011 several countries, including Norway, accepted the use of armed guards on board vessels sailing through pirate-infested waters. The use of armed guards appears significantly to reduce a vessel's risk of being captured by pirates, while raising other challenges of a contractual nature. For example, how should the time and costs of taking armed guards on board be distributed between owners and charterers? What contractual terms should apply when hiring armed guards? And so on. In May 2011, the IMO issued Industry Guidelines for Use of Private Marine Security Contractors and the Security Association for the Maritime Industry (SAMI) produced MARSEC 2011, a standard agreement for the provision of maritime security services. BIMCO also started the process of drafting its own form for the hiring of armed guards (*Guardcon*), with the final version being published in March 2012.

The low freight rates in certain segments in recent years resulted in some notable insolvencies last year, including Korea Line and General Maritime Corporation (Genmar), among others. These ***insolvencies*** created problems for a number of members who had their vessels on long-term charters to such entities. Last year we also saw several non-US shipowners file for chapter 11 protection in the US. Chapter 11 proceedings in the US offer more generous protection to the debtor than the equivalent proceedings in many other jurisdictions. Somewhat surprisingly for those not familiar in detail with US bankruptcy law, some owners were granted standing for chapter 11 purposes on the basis of rather tenuous links to the US. For example, the Dutch company Marco Polo Seatrade BV was found to be subject to US jurisdiction, partly on the basis of



unallocated pool revenue held by a US pool manger, and partly on the basis of an unused fee retainer held by the company's US lawyers.

Safety issues were also high on the agenda in 2011. A particular safety problem in recent years has resulted from the tendency of certain bulk cargoes to liquefy during transportation. If this happens, there is a serious risk of the vessel capsizing and sinking. Four vessels carrying nickel ore were lost from late 2010 through to the end of 2011, causing the deaths of 66 seafarers. Cargoes from Indonesia, China, the Philippines, India, Brazil, Ukraine and Venezuela seem to have caused the most difficulties. At Nordisk we have handled a number of cases involving unsafe bulk cargoes. Typically these cases involve misdescription that gives rise to major delays, putting shippers and charterers in a desperate situation. The IMO's International Maritime Solid Bulk Cargoes Code (IMSBC Code) entered into force on 1 January 2011, and the international group of P & I clubs also issued their Solid Bulk Charter Party Clause. Despite these developments, there is reason to believe that we have not seen the last of these problems.

The ***environment*** continues to be a major area of focus. Slow steaming has become ever more of an issue and last year BIMCO issued its Slow Steaming Clause. Other developments included the EEDI (the Energy Efficiency Design Index) and the SEEMP (the Ship Energy Efficiency Management Plan) introduced by the IMO in 2011. The current focus on ballast water management is also worth mentioning, as well as new rules introducing sulphur caps, e.g., the rules that will come into force on 1 August 2012 in the US (the North America Emission Control Area).

Finally, we should mention ***anti-corruption***. Anti-corruption legislation has been around for quite a few years, with rules gradually becoming stricter worldwide. The main development in this area in 2011 was the entry into force of the UK's Bribery Act 2010 on 1 July 2011. This legislation is said to be the strictest so far, and to establish a "gold standard" for anti-corruption legislation. The act introduces a zero-tolerance approach to bribes, which are defined as including so-called "facilitation payments" *etc*. It also has a wide scope of application, applying to UK citizens and companies worldwide, as well as to non-UK companies with a UK office or operation. Sanctions under the act apply at a corporate level, and the only defence is for the company in question to show that it had "adequate procedures" in place.

Noteworthy judgments and arbitration awards

Each year rulings by courts and arbitration panels contribute to the development of shipping case law, and 2011 was no exception. Below we comment briefly on a few of these cases in which our members were involved.

Although piracy has been a hot topic for a number of years, few cases have reached the legal system so far. On behalf of one of our members, we handled the first major case to deal with the issue whether owners are entitled to refuse to proceed through the Gulf of Aden under a time charter incorporating the well-known war-risk clause *Conwartime 1993*. The case (*The Triton Lark)* is dealt with in a separate article in this annual report.

In 2007 the Norwegian authorities imposed NOx dues on vessels trading between Norwegian ports. Several long-term charterparties in force at the time did not address adequately whether these dues should be for the owner's or the charterer's account. Some charterers argued that these expenses should be for the owner's account, while others accepted that they should be for the charterer's account. Subsequently it soon became common practice for charterparties to include a clause making these expenses for the charterer's account. However, two disputes about pre-existing charterparties

ended before Norwegian arbitrators, and in both cases charterers prevailed. We then brought a case on behalf of one of our members as owners against Statoil before the Norwegian courts, with the case eventually reaching the Court of Appeal. Our member's case was partly based on a clause in the contract stating that all sums payable under the contract "*include for [sic] compliance with all applicable laws and regulations of all governmental and other authorities having jurisdiction which are in effect at det [sic] the date of signing of this Frame Contract*". On behalf of the owners we argued that since the contract expressly referred to the inclusion of laws and regulations "*in effect at det [sic] the date of signing*", it must follow that it did not include subsequent laws and regulations. Further, we argued that NOx dues should be considered as voyage-related expenses, which as a general rule are for the charterer's account under Norwegian law. The Court of Appeal did not agree, and stated that the wording quoted above was not sufficiently specific to make NOx dues for the charterer's account. The court also did not accept that NOx dues should be considered as voyage-related expenses. The court further emphasised that the purpose of the NOx rules was to create an incentive for shipowners to reduce their NOx emissions. In the court's view this meant that the dues should be for the owner's account.

Finally, we assisted one of our members in a noteworthy case before Norwegian arbitrators. Our member was in dispute with a shipyard concerning a newbuilding that had suffered a breakdown following delivery. The newbuilding contract provided that repairs were to be performed "*within a reasonable time*". The question was whether the yard's attempts to repair the vessel had breached this requirement, in which case owners would be entitled to recover damages. The arbitrators found that a normal repair time for the kind of breakdown in question was 45 weeks. Further, they concluded that the vessel could suffer two or three breakdowns of this type before the builders would be in breach of the repair obligation. On this basis the arbitrators found that owners would be entitled to damages unless the breakdown had been finally corrected within 135 weeks. As the builders ultimately failed to repair the vessel successfully within this time limit, owners were entitled to damages for time lost and costs incurred *etc*.

NEWS FROM OUR SINGAPORE OFFICE

A busy year reflected Singapore's importance as a maritime hub.

By Magne Andersen

Key facts

Despite the fact that the financial turmoil of recent years is still having a chilling effect in most parts of the world, Singapore experienced economic growth in 2011. Singapore's GDP grew by 4.9% in 2011, although growth is expected to slow to 1 to 3% in 2012.

At any given time, there are about 1,000 vessels within the Singapore port limits, with a vessel arriving or leaving every fourth minute. The Singapore Registry of Ships is one of the 10 largest registries in the world, with over 4,000 vessels. Singapore also commands about 70% of the global market for building jack-up rigs and two-thirds of the global FPSO market.

There are more than 5,000 maritime companies in Singapore, which together account for about 7% of Singapore's GDP. Of the 170,000 people employed overall by these companies, about 75,000 are local employees, up from about 50,000 a decade ago.

Nordisk's Singapore office

Since Jude McWilliams joined us from Holman, Fenwick and Willan in August 2011, the Singapore office has been staffed by three lawyers and an office manager. Accordingly we now have a "full complement of crew", making us capable of handling all kinds of core business, as well as arbitrations, closings and assistance in the negotiation of all sorts of maritime contracts. 2011 was a busy year. We handled 317 cases, up from 267 in 2010. Quite a few new

members joined us in Singapore during the year, increasing demand for our services. Most of the cases handled in our Singapore office in 2011 related to time and voyage charterparties for tankers and dry bulk carriers, although we also did a fair amount of work on offshore contracts. With regard to arbitration, the Singapore office only handles purely document-based arbitrations. Any arbitrations that are likely to end up in a hearing, typically in London, are handled from Oslo, in order to save time and costs. We benefit from seamless cooperation with Nordisk's head office in Oslo for all kinds of case-handling, enabling us to take advantage of the time difference and the particular skills possessed by different members of Nordisk's legal staff.

While there is an increasing focus on local maritime arbitration, not only in Singapore but also in other parts of Asia, we have not come across many such arbitrations. In fact, we rarely see matters subject to any jurisdiction other than London and New York. Offshore contracts represent an exception, however, as many such contracts are subject to the laws of the country where the services are provided.

Singapore's ratification of the ILO Maritime Labour Convention 2006

One significant event in 2011 for Singapore as a maritime nation was its ratification of the ILO Maritime Labour Convention 2006 (MLC). The MLC, which is the result of a joint initiative started in 2001 by international seafarers' and shipowners' organisations, provides comprehensive rights and protection at work for the world's more than 1.2 million seafarers. Singapore's ratification of the MLC is a measure of its commitment both as a flag state and as a port state to ensure decent working conditions for seafarers. Although the MLC has not yet entered into force, as it has not been ratified by a sufficient number of states, it is likely to enter into force in 2013.

Burma/Myanmar

In the light of recent developments in Myanmar, we had a few inquiries from members about the sanctions against Myanmar and the possibilities of doing business in Myanmar during 2011.

While some political sanctions have been lifted, the economic sanctions imposed by the USA, the EU and Norway, among others, remain in place. Moreover, the legal situation in Myanmar is not very favorable to foreign investors: as far as we understand, foreign investors are not allowed to acquire immovable property, to lease a property for more than one year or to lease property from a private individual. There are also restrictions on funds transfers and foreign-exchange quotations. In addition, the legal environment is untested and the legal infrastructure is rudimentary. Nonetheless, we anticipate that our offshore members in particular will follow developments in Myanmar closely. We will of course do likewise so that we will be ready to assist when the time comes to do business in Myanmar.

Regulations of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships

The above-mentioned regulations came into force on 1 January 2012. Their purpose is to establish comprehensive rules governing oil pollution prevention, response and clean-up within PRC waters.

The regulations, which do not apply to Hong Kong, Macau or to vessels calling at Nantong Port on the

Yangtze River, require the owners/operators of any ship carrying polluting or hazardous cargoes in bulk or of any other vessel above 10,000 gt to enter into a pollution clean-up contract with a Ship Pollution Response Organization (SPRO) before the vessel enters a PRC port. Any such SPRO has to be approved by the Chinese Maritime Safety Agency (MSA).
The MSA has published a model contract, which is to be used whenever an owner/operator concludes a clean-up contract with an SPRO. The contract's clauses/provisions relating to the rights and obligations of the parties are mandatory and thus cannot be amended even by mutual agreement.

Additional clauses may be added as an Annex to the main clean-up contract. The International Group of P&I clubs has produced some guidelines and additional clauses, principally in relation to termination and insurance. We would generally advise owners to consult their P&I clubs in order to ensure that the clean-up contract (in particular the clauses that have been added by the parties) do not cause the agreement to fall outside the parameters of the International Group's guidelines and/or the P&I cover.

An approved SPRO is essentially a clean-up company approved by the MSA. Such a company will possess a certificate (more specifically, a Ship Pollution Response Unit Qualification Certificate) showing that it has been approved by the MSA for clean-up response. A list of MSA-approved SPROs can be found on the MSA's official website.

The following points provide a brief overview of additional salient information:

- A charterer of a vessel cannot contract with an SPRO. The contracting party must be the owner or the manager of the ship.
- An owner/operator can enter into a single contract covering a number of different vessels calling at the port where the SPRO has been approved.
- An owner taking delivery of a new vessel in a Chinese port will need to ensure that a clean-up contract is in place with an approved SPRO for the purposes of the vessel's maiden voyage. This applies even if the vessel will not be calling at a Chinese port during the following year.
- A vessel transiting Chinese territorial waters or calling at Chinese ports must have a copy of the clean-up contract on board.
- Failure to conclude a clean-up contract may trigger the imposition of hefty fines. The MSA also has powers to prevent a ship from entering a port and/or to detain a vessel that is already in port for failure to have a clean-up contract in place.

The MSA is expected to adopt a hardline approach and has emphasised that it will enforce requirements for clean-up contracts strictly. Shipowners are strongly recommended to ensure full compliance with the regulations in order to avoid fines and possible delays in port.

OFFSHORE AND ENERGY GROUP ACTIVITIES

Healthy market conditions and a high level of activity in the offshore and energy sector are keeping Nordisk's offshore and energy group very busy. Below we present an overview of some recent work.

By Knut Erling Øyehaug

While other segments of the shipping industry are facing depressed markets and a potentially gloomy outlook in the years ahead, the situation is quite different within the offshore and energy sector. At Nordisk we have been engaged in the offshore sector ever since its beginnings in the North Sea in the 1970s, but the sector has never been as active as now. The number of offshore-sector members continues to increase, both absolutely and relative to other areas of shipping. Below we focus on some of our activities within the offshore sector during the past year.

Ranked by the number of units, *offshore support vessels (OSVs)* remain by far the largest group of offshore entries. OSVs mainly comprise platform support vessels (PSVs) and anchor handlers (AHTSs), but also include a number of other specialised vessels such as offshore construction vessels (OCVs), cable-laying vessels, seismic vessels *etc*. Members who are OSV owners frequently submit charterparties to Nordisk for pre-contractual review. In some cases, we assist more extensively in contract negotiations, tender processes *etc*. As a result, it is

fair to say that members within this segment make more extensive use of Nordisk as a loss-prevention tool than do members in most other segments. Given the large number of contract reviews we handle every year, we are well positioned to advise on whether various charterers' terms are acceptable, in line with the prevailing market practice *etc*.

Although relatively few OSV-related cases end in court or arbitration, we do handle a number of disputes each year. Off-hire disputes are probably the most frequent. Offshore contracts are almost invariably entered into on a time-charter basis, with such vessels – perhaps more often than others – having idle periods. Charterparties in this sector often allow for regular periods, *e.g.*, 24 hours per month, for owners to carry out repairs and maintenance. Disputes frequently arise under such contracts as to whether owners are entitled to carry out maintenance and minor repairs at times when the vessel is idle anyway, without the vessel going off-hire and without owners using the maintenance allowance. OSVs also typically have expensive and sophisticated equipment such as cranes. If the vessel's main crane suffers a breakdown, and there is a lengthy wait for the delivery of replacement parts, a number of issues are likely to arise, *e.g.*, is the vessel off-hire, fully or partly, until repairs are completed, or only for the time actually lost? Are charterers obliged to use the vessel to the extent possible without the crane? Do owners have an obligation to provide a substitute vessel, and are they liable in damages if they fail to do so? Such questions arise on a regular basis.

Healthy offshore markets and optimism about the future have also resulted in a steady flow of *newbuildings* over recent years. As a result, we have seen a number of guarantee claims against the yards *etc*., although it must be said that compared to the number of newbuildings, the number of disputes is fairly low. The market conditions have also resulted in the establishment of a number of *new companies* focusing on this area of shipping, and we have had the pleasure of assisting several of these start-ups, sometimes with the entire process of setting up a new company *etc*., and other times with structuring and negotiating charterparties, management agreements *etc*.

While we have fewer entered units in the *drilling* segment than for OSVs, the values involved (both day rates and asset values) are significant. As a consequence, disputes in this segment tend to involve significant sums, and correspondingly high costs. In particular, we have handled some extremely complicated and expensive disputes related to the upgrading and conversion of older drilling rigs. Even a regular docking, however, may give rise to a million dollar dispute.

On the operational side, disputes under drilling contracts often relate to whether certain situations cause downtime or a reduced rate under the contract. With day rates at USD 500,000 or more, even short periods involve significant amounts. Another frequently encountered topic is the rate-escalation clause. Day rates are typically divided into CAPEX and OPEX elements, with the latter being subject to escalation on the basis of indices or other parameters. The variety of issues arising under these clauses is surprising, with examples including: when and how to trigger the escalation clause; the mechanics of the escalation formula; unexpected consequences of dramatic cost changes *etc*. Once again, the amounts involved tend to be very significant.

The turmoil in the global financial markets since mid-2008 has highlighted some serious issues concerning the type and quality of *security* pledged to ensure the due performance of a party's contractual obligations or payment of a party's indebtedness. On

the offshore side, we have handled a series of newbuilding projects in the Far East involving OSVs and jack-up rigs. Unfortunately the builders failed to perform and the buyers eventually cancelled by reason of delay. Cancellation of a newbuilding contract normally triggers a right for the buyer to have all payments made under the contract refunded by the builder. This obligation on the part of the builder is usually secured by a bank guarantee (a "refund guarantee" or "RG"). In the cases we handled, the yards in question sought to avoid immediate payment and applied for injunctions in the Singapore courts to stop payment under the RGs. In some cases the RGs were subject to Singapore jurisdiction and English law. The guarantees were "on demand" and in order to succeed the builders had to show "fraud" on the part of the buyers. Although they failed to do so, by applying for an injunction and taking advantage of their right to appeal, the builders nonetheless managed to delay payment by half a year or so. In one case the builder did not give up after losing in the Singapore court and applied for a further injunction in Norway after the money had been transferred. Fortunately, the builder did not succeed and the funds were released quickly. In another case, which is still pending, the RGs were subject to Singapore law and jurisdiction. Under Singapore law, an "on demand" guarantee may be disputed on the basis of both "fraud" and "unconscionability". In addition, the RGs in question had somewhat more complicated wording than usual. At first instance the builder succeeded with its application for an injunction, delaying payment from the banks by more than a year. Fortunately the Singapore Court of Appeal recently gave judgment in favour of our members. In its judgment the court stated that it was "not impressed" by the builder's contention of unconscionability. The court also found in favour of our members on the interpretation of the wording, and accordingly it found that our members' demand for immediate payment should be honoured. As well as showing that "on demand" guarantees are not quite as "on demand" as one might like to think, the cases have also shown that the Singapore court system is not quite as expeditious as might have been hoped, particularly in cases involving injunctions. However, the main lesson to be learnt from these and other cases is the importance of addressing these issues and seeking legal advice before a contract is entered into. When the house is on fire, it is generally too late to carry out a fire-safety inspection.

Another noteworthy development last year was the increased activity related to *LNG projects*. High oil prices, as well as the tsunami in Japan last year, which significantly increased scepticism about nuclear power plants, brought a number of new LNG projects and optimism regarding the future growth of this segment resulted in a number of newbuilding orders for LNG vessels. Floating production/liquefaction (FLNG) and storage and regasification (FSRU) projects have become the name of the game. At Nordisk we have handled a number of FSRU projects involving complicated negotiations with shipyards and, in particular, charterers. We have a dedicated team of lawyers who can handle all legal aspects of a project tender from the ITT to the conclusion of final contracts. This includes dealing with tax issues and local content requirements through the use of our extensive network of highly qualified correspondent lawyers. At the time of writing, it seems clear that the increased LNG activity is continuing into this year, with no signs of slowing down in the foreseeable future.

In response to the increase in offshore activities, we have gradually expanded our offshore group at Nordisk. We expect this trend to continue in the years to come.

PIRACY CASES

English law – charterparty issues arising out of acts of piracy – Conwartime – deviation – off-hire

By Bernard Glicksman

The steep escalation in piracy activity in the Gulf of Aden in 2008 has now given rise to three charterparty cases in the High Court, all of them on appeal from London arbitrators and two of them giving consideration to the ubiquitous *Conwartime* clause.

The first case, *The Triton Lark* did not in fact involve any passage through the Gulf of Aden at all, since in that case the disponent owners, Bulkhandling Handymax AS ("Bulkhandling"), took the view that the Gulf of Aden was unsafe for the vessel and refused the charterers' orders to proceed from Hamburg to China via Suez and the Gulf of Aden. The vessel went round the Cape of Good Hope instead. The charterers claimed that this was a wrongful deviation and objected to paying for the additional hire and bunkers occasioned by the extended voyage.

The voyage was performed under a time charter in the NYPE form, which incorporated the *Conwartime* clause in its 1993 version. The clause defines "war risk" as including "acts of piracy", meaning that in effect it contains the following wording:

"The Vessel shall not be ordered to … any place … where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgment of the Master and/or the Owners, may be, or are likely to be, exposed to acts of piracy … which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel."

Bulkhandling relied on the clause. Given the upsurge of piracy activity, if the clause did not protect shipowners in November 2008, when would it apply? The issue went to arbitration in London. The charterers contended (amongst many other things) that the risk of hijacking by pirates was so small as to be no more than a bare possibility, if that, and that this was not sufficient to trigger the operation of the clause.

The arbitrators took the view that there had been a serious risk of the vessel being hijacked in the Gulf of Aden and decided in favour of Bulkhandling.

The charterers appealed this decision to the High Court. They pointed out that there was a difference between a serious risk that an event will occur and a risk that a serious event will occur. (In this case, the event being an act of piracy.) It was the latter that the arbitrators had relied upon, (*i.e.*, the seriousness of the event rather than the seriousness of the risk). This, the charterers argued, must be wrong.

The judge, Teare J, who gave his decision in two separate judgments, was minded to agree with the charterers that the arbitrators had incorrectly emphasised the qualitative at the expense of the quantitative aspect of the enquiry.

The judge's formulation of the question to be asked by the master when ordered to go through Gulf of Aden or any other area where there are pirates is whether *"there is a real likelihood that the vessel will be exposed to acts of piracy in the sense that the place will be dangerous on account of acts or piracy"*. Thus the formulation contains both an express quantitative aspect, *"real likelihood"*, and a qualitative aspect, *"dangerous"*.

In the judge's discussion there is what may be perceived as a slight commingling of these two aspects *"whether or not the Gulf of Aden was dangerous to* 'Triton Lark' *on account of acts of piracy will depend upon the degree of likelihood that they will occur and the gravity of the consequences to the vessel, cargo and crew should they occur"*.

There can surely be little controversy about the gravity of the consequences of an attack on a ship, let alone a hijacking. They will be severe if not catastrophic on both a human and commercial level.

What may be more difficult to grasp is the concept of *"real likelihood"*. Given the obvious gravity of the potential consequences, it should surely follow that the degree of risk required to trigger the clause should be commensurately low. Does this fit in with *"real likelihood"*? In his first judgment the judge said that "*may be or is likely to be*" (exposed to acts of piracy) meant *"may be, that is likely to be"*. (See para 38). But he also said that a "*real likelihood … can … include an event which has a less than even chance of happening*". The second judgment suggests that the judge was no more a supporter of a statistical approach than the arbitrators had been, but what he seems to be saying is that a *"real likelihood"* means a realistic as opposed to a fanciful possibility. If that is so, there can surely be little doubt that an objective observer would conclude that the Gulf of Aden was a potentially dangerous place. That is the conclusion which Bulkhandling will be looking for from the arbitrators

when they make their further decision, the judge having remitted the matter back to them.

A further issue in consideration of the clause concerned the exercise of "*the reasonable judgement of the master and/or the Owners*". How was that judgement required to be exercised? To what extent did enquiries have to be made and analysed before the owners could make the important decision whether or not to comply with the charterers' orders? The judge held in effect that an objective approach was appropriate, that is, even if the owners might not have made all necessary enquiries, provided the decision would have been considered reasonable had all necessary enquiries been made, that would have been sufficient to comply with the clause. ([2012] 1 Lloyd's Rep. 151).

It may be said that the decision in *The Triton Lark* leaves certain questions open, perhaps inevitably. The same cannot be said about the decision of Gross J on appeal from arbitrators in *The Saldanha*, which establishes that the unamended off-hire clause in the NYPE form does not render a time-chartered vessel off-hire in the event of hijacking and detention by pirates. ([2011] 1 Lloyd's Rep. 187).

This vessel, unlike *The Triton Lark*, went into the "dangerous" area and, on a westbound voyage from Indonesia to Slovenia, was seized by Somali pirates and was not available to the charterers for a 10-week period in early 2009.

The possible off-hire events under clause 15 on which the charterers relied were *"detention by average accidents to ship or cargo, "default and/or deficiency of men" and "any other cause"*.

The arguments which charterers advanced and which, notwithstanding their ingenuity, were comprehensively rejected by both the arbitrators and the judge are described in detail in Trond Solvang's article in *Medlemsblad* No. 571 (page 6200).

As the judge pointed out, at the conclusion of his judgment, however, there are two possible ways (at least) in which a charterer might try to change the allocation of risk of loss of time and put it back with the owners. The first is by adding the word *"whatsoever"* to *"any other cause"* (see *e.g. The Laconion Confidence* (1997) 1 Lloyd's Rep 139). The second is by agreeing a bespoke seizure or detention clause as was the case in the most recent "piracy" issue to come before the courts, in *The Captain Stefanos*, a decision of Cooke J on appeal from arbitrators ([2012] 844 LMLN 2).

The bespoke clause in question provided as follows:

"Should the vessel put back whilst on voyage by reason of any accident or breakdown, or in the event of loss of time either in port or at sea or deviation upon the course of the voyage caused by sickness of or accident to the crew or any person onboard the vessel (other than supercargo travelling by request of the Charterers) or by reason of the refusal of the Master or crew to perform their duties, or oil pollution even if alleged, or capture/seizure, or detention or threatened detention by any authority including arrest, the hire shall be suspended from the time of the inefficiency until the vessel is again efficient in the same or equidistant position in Charterers' option, and voyage resumed therefrom. All extra directly related expenses incurred including bunkers consumed during period of suspended hire shall be for Owners' account."

The argument centred on the words *"capture/seizure"*. While the charterers contended that these words were apt to cover precisely what had occurred, the owners asserted that they were qualified by the words *"by any authority"*, and that pirates did not constitute such an authority.

The owners also argued that the *Conwartime* clause, as incorporated into the charterparty, had the effect of allocating all risks of piracy to the charterers. In this they sought to rely on a passage in "Time Charters" (6th edition) at para. 37.115.

The problem with the owners' construction of the clause was that it ignored the comma significantly placed after the words *"capture/seizure"*. The argument that the capture/seizure referred to had to be that "by any authority", *i.e.*, excluding pirates, so as to bring the clause into operation did not convince the judge.

As to the *Conwartime* argument, it was held that this clause regulates the rights and obligations of the parties when the vessel is ordered to proceed to what is perceived to be a war/piracy zone. It does not deal with hire and off-hire as such. That was covered by the bespoke clause, which had clearly achieved its intended purpose.

SALEFORM 2012

Most contracts for sales of vessels are concluded on the basis of Saleform 1993, which has now been replaced by the recently published Saleform 2012.

By Georg Scheel

The Norwegian Shipbrokers' Association and BIMCO have agreed on a new version of the form, known as "Saleform 2012".

Both the Norwegian Shipbrokers' Association and BIMCO established sub-committees to evaluate what changes should be made to Saleform 1993. Nordisk was represented on both sub-committees, with Henrik Aadnesen sitting on the Norwegian Shipbrokers' Association's committee and Georg Scheel on BIMCO's sub-committee. BIMCO also carried out a consultation exercise within the industry, the results of which indicated that only a modest revision of Saleform 1993 was required. Seminars were also held in London, Oslo and Singapore. After both sub-committees had made their proposals for changes, several

joint meetings were held to agree the final draft. This was subsequently approved by the Norwegian Shipbrokers' Association and BIMCO in late 2011.

The revision was undertaken mainly because, given that the passage of nearly 20 years since the previous form was published, a number of clauses needed to be updated and possible ambiguities clarified. A study in Singapore resulted in a paper pointing out various clauses where the authors thought improvements could be made. The Singapore initiative resulted in a new form, the Singapore Sale Form 2011, whose structure and main contents are much in line with Saleform 1993.

There are no major differences in substance between Saleform 1993 and Saleform 2012. The 2012 version is more streamlined and in particular the closing process is more adequately dealt with. A general feature of the form is the use of blank spaces where the parties should insert agreed figures, such as the size of the deposit *etc*. These blank spaces are normally followed by a default provision setting out a figure that applies if the parties have not inserted an agreed figure.

Amendments have been made in order to clarify the position where cases before the courts have shown that there was room for disagreement as to the interpretation of various clauses. See, e.g., *PT Berlian Laju Tanker TBK v. Nuse Shipping Ltd (The "Aktor")* [2008] EWHC 1330 (Comm) and *Polestar Maritime Ltd v. YHM Shipping Co Ltd (The "Reva")* [2012] EWCA Civ 153.

The most notable changes are as follows:

Amendments to Clause 6 regarding diving inspection and dry docking, whereby diving inspection now applies by default if dry docking has not been specifically agreed. This reflects the most common commercial practice. The new wording of Clause 6 also provides more details regarding where and when diving inspection can take place and the consequences if the vessel nevertheless is put in dry dock.

Amendment to Clause 7 (Spares, bunkers and other items) whereby the Sellers now have an obligation to list in the MOA which items on board during inspection do not belong to the vessel, and therefore are not part of the sale. If the Sellers fail to list such items, the Sellers must either ensure that the title to these items is transferred to the Buyers or replace such items.

Extensive amendments to Clause 8, which deals with the closing procedure and documentation. The clause now better reflects common practice in respect of the closing procedure.

Slight amendments to Clause 11, which contains the "as is" provision, whereby the vessel is specified to be "free of cargo and free of stowaways". A requirement that the vessel shall be "free of cargo" is not the same as a requirement that the vessel's hull shall be clean – if the buyers wish to have the vessel in a clean state ready to receive new cargo, this must be specified in an additional clause.

Apart from these amendments, a new "Entire agreement" clause has been added, which states that "any terms implied into this Agreement by any applicable statute or law are hereby excluded….". This wording is intended to avoid the inclusion in the Saleform of implied terms under the UK Sale of Goods Act 1979 (or similar legislation in other countries) regarding the vessel's quality and fitness for purpose.

The Saleform is sometimes described as a seller-friendly document. The 2012 form, however, is probably more buyer-friendly than was the 1993 version. Examples of clauses that have been amended in favour of the Buyers include provisions that the deposit shall count as part of the purchase price on delivery; that no NOR can be given until completion of the diving inspection; that the vessel on delivery shall be free of cargo and stowaways; and that the vessel shall be free of administrative detentions.

On the other hand, "as is" is basically a seller-friendly concept. A slight change in this principle was introduced in Saleform 1987 whereby the sellers were required to notify class of any matter they became aware of prior to delivery that could lead to the imposition of a recommendation relating to the vessel's class. This change in Saleform resulted in a number of disputes, and was the main reason why the 1987 format was changed to an "as is" provision in the 1993 version. Particularly in relation to sales of older vessels, an undertaking from the sellers that the vessel will not have defects is burdensome. The "as is" provision to a large extent prevents disputes, and this in itself is important. In those (rather few) cases where an extended warranty from the sellers is desirable, the parties are of course free to add such a clause to the MOA.

We believe that the 2012 form will soon replace the 1993 form in new transactions. The 2012 form will probably require fewer additional clauses or amendments. We also hope that the amended wording in some clauses will improve clarity and avoid disputes.

OIL MAJOR APPROVALS: TBOOK AND BEYOND

By Michael Brooks

It is a fact of a tanker operator's life that it is not enough to have a seaworthy and cargoworthy vessel. A tanker operator must also deal with charterers' demands that vessels be acceptable to oil majors both as potential customers of the charterer and as the owners of the terminals at which the vessel may load or discharge. From the charterer's perspective, he wants to know that wherever he sends the vessel, or to whomsoever he tries to sell the cargo, the vessel will not be an obstacle. More recently, the advent of "Rightship" inspections in the dry cargo market has threatened to extend the concept of "oil major approvals" beyond the oil and chemical segments to shipping generally.

The concept of "oil major approvals" is beset with difficulties for the unwary owner, as the recent case of *The Rowan* illustrates.

The background to what developed into a widely followed case was somewhat mundane. The vessel was under a voyage charter for the carriage of fuel oil from the Black Sea to Antwerp with an option for US discharge. Charterers exercised that option, having discharged part of the cargo at Antwerp, and reloaded further cargo. By the time the vessel reached Antwerp she was already on demurrage. The charterers were oil traders and the cargo had been bought on speculation. Charterers' intent was to sell the cargo when the market was favourable, possibly whilst the cargo was still aboard *The Rowan*. Alternatively, the charterers intended to discharge into storage facilities in the US and sell ex tank. In the event, the charterers were unable to sell in the course of the voyage and were let down by the storage facility in the US. It took several weeks to find alternative storage into which the cargo was finally discharged. The resulting demurrage claim by the owner was therefore quite large. In seeking to avoid that claim, the charterers sought to blame the

owners for not having a "tradable ship". Their argument was based on an assertion of a lost sale to Shell in the course of the voyage. Not only did they claim that the sale, if successful, would have avoided most of the demurrage in the US, they also claimed a loss on the final sale when compared to what (they said) Shell would have paid. It transpired that the market price for fuel oil was falling throughout the voyage. Instead of a simple case of collecting demurrage, the owners now faced a massive counterclaim of several million US dollars. In defence, the owners based their case on the charterparty provisions relating to oil major approvals.

The background for Shell not approving the vessel was an inspection under the SIRE system arranged at the request of the owners whilst the vessel discharged at Antwerp. The charterers claimed that this rejection constituted a breach of the owners' warranty of oil major approvals, even though Shell was not one of the oil majors named in the charter. In the Commercial Court, the charterers succeeded. On appeal, however, the decision was reversed in the owners' favour. The case gives rise to some reflections on the nature of warranties that a vessel is "oil major approved".

In the old days an owner would approach a particular oil major (such as Shell, BP, Exxon or Statoil to name a few) and request an inspection of a vessel to obtain that oil major's approval of the vessel for future carriage of the oil major's cargo or for calls at one of its operated terminals. The oil major would issue a letter in clear terms approving the vessel for a particular future period, often up to one year from the date of inspection. With that letter in hand, an owner could warrant to a prospective charterer that the vessel was so approved by that particular oil major. Collecting such approvals was seen as a way of making the vessel more attractive to prospective charterers, and holding five or more approval letters was not unusual.

Life rarely remains simple and two developments caused difficulties for owners.

Firstly, following the disasters of *The Erika* and *The Prestige*, where both vessels had held approval letters from several oil majors, these majors reacted to adverse publicity by becoming somewhat circumspect in the approvals they would now issue. The letters became vague, becoming no more than letters of comfort to an owner recording that an inspection had been carried out and that the major would not want to inspect for a specified future period (usually now no more than six months hence). Frequently these letters stated expressly that they were not approvals and that the vessel would only be approved if put forward for a specific piece of business, either for the carriage of an oil major's cargo or simply to call at a major's operated terminal. Even though the oil majors were now not willing actually to approve vessels for a specified period, nonetheless both voyage and time charterers continued to seek warranties from the owners that a vessel was, and (perhaps more dangerously for the owners) would continue to be throughout the charterparty, approved by one or more oil majors. In short, the charterer's demands were out of step with what the oil majors were prepared to grant. The owner was left uncomfortably stuck in the middle, commercially required to give a warranty that he possessed something that he did not actually have. Legally this left the owner greatly exposed to risk under the charterparty. To some extent the case of *The Rowan*, in which we represented a member, may have solved part of the owner's dilemma.

At first instance the judge ruled that the modern letters of comfort issued by oil majors were, despite the majors saying that they were not approvals at all, in fact approvals because that is how the industry understood them. On appeal, the Court of Appeal observed that this ruling was somewhat curious, but had stemmed from the fact that the judge in the lower court had accepted expert evidence from both the owner and the charterer that these letters were indeed what the industry called "approvals".

A word of caution however: this ruling might be seen simply as a finding of fact in the *Rowan* decision and not of general application (although it may be seen as persuasive). Thus it may allow a charterer in a future case yet to argue that these modern letters do not amount to approvals at all, and that an owner relying on such letters is immediately in breach of any warranty.

Whilst *The Rowan* may have solved one problem, it nonetheless left open the issue of the onerous nature of the warranty that charterers demand, *i.e.*, that the vessel holds approvals and will continue to do so throughout the charter period.

The development of owners' attempts to ameliorate the risks is still ongoing.

From an owner's perspective, the statement that a vessel holds various approvals and will do so throughout the service is best qualified by the words "without guarantee" or the acronym "WOG". This, if properly used, removes any warranty at all, merely carrying the obligation that the owners give that information in good faith.

As for the continuing warranty throughout the period of the charterparty, an owner should merely promise to endeavour to restore any lost approval. While commercial pressure frequently forces an owner to go further than this, we would strongly advise not doing so from a legal perspective.
A less effective device is the use of "TBOOK" or "to the best of owner's knowledge" that the vessel has approvals (and may continue to have them).

In *The Rowan*, the owners sought to use both "WOG" and "TBOOK" to ameliorate the risk of the oil major warranty.

The "WOG" appeared in the recap as "vessel approved by (certain oil majors) WOG". Further the recap incorporated the *Vitol* standard charter terms, which included an oil major clause. The recap referring to that clause read "TBOOK. TBOOK vessel approved by BP/Exxon/Lukoil/Statoil/MOH".

What were the consequences?

1. Because the WOG only appeared in the vessel's description clause, both the first instance court and the Court of Appeal determined that the WOG had no bearing on the oil major warranty; this was simply part of the vessel's attributes as described, in like manner to her deadweight or speed.

Note: Had the WOG been specifically incorporated into the *Vitol* oil major warranty, this would have knocked out any warranty at all and saved the owners a great deal of trouble. The owners' chartering department believed that it had achieved this, but the lawyers thought differently.

2. TBOOK

In the interests of understanding the debate, the standard *Vitol 1999* clause 18 is set out below:

"Oil company approval clause
Owner warrants that the vessel is approved by the following companies and will remain approved so throughout the duration of the charterparty. (Owner to advise including inspection date and expiry date.)"

Firstly, this *Vitol* clause is taken from a now outdated set of standard terms. The new clause is somewhat different. The clause used reflected the old system with oil majors actually issuing proper approvals. It would be better now to use a modern clause.

As we have seen, the first instance judge declared that the owners by holding "comfort" letters from the oil majors named in the recap did have approvals. But what did TBOOK add?

Owners contended that TBOOK simply went to the position at the date of the charterparty and that one could not warrant what one's knowledge might be in the future. Judge Mackie at first instance disagreed. He ruled that it was not enough to hold approvals at the date of the charterparty, but the warranty meant that during the course of the charterparty if the cargo was offered to buyers, at that time the vessel must not be in a state which to the knowledge of the owners would remove the comfort of the warranted approval (letters) to a potential purchaser. For example, there would be a breach of warranty if something occurred which to the knowledge of the owners, would, if known to the issuer of the approval letter, cause the issuer to withdraw or cancel the letter.

This was a curious ruling for it introduced issues relating to the physical condition of the vessel into what otherwise might be regarded as a clause demanding only the possession of documents (*i.e.* the letters of approval) and in doing so imposed by the back door an absolute obligation on the owners to maintain the physical condition of the vessel, in circumstances when other provisions in the charterparty relating to the physical state of the vessel were ones of due diligence only. The judge's ruling meant that if the vessel was damaged by another ship, the owners would be in breach of the oil major warranty clause. Similarly, if bad weather did the same.

The Court of Appeal took a more sensible approach. It held (on the decided facts) that the recap substituted the words "TBOOK vessel is approved by …" for the standard *Vitol* major approval clause, such that the obligation of the owner was that to the best of his knowledge it had the approvals at the date of the charterparty (which it had).

The Court of Appeal also observed (although this was not necessary for the owners to win), that it thought the oil major approvals clause was indeed only documentary in nature, *i.e.*, if an approval letter was held, that was enough, even if the physical state of the vessel didn't really deserve it.

However, somewhat curiously and from an owner's perspective unsatisfactorily, the Court of Appeal went further to suggest some futurity to a simple "TBOOK" warranty. It held that not only must the owner hold the warranties at the date of the charterparty, but at the same date the owner "knows of no facts which would cause the vessel to lose approval of those oil companies in the course of the duration of the charterparty".

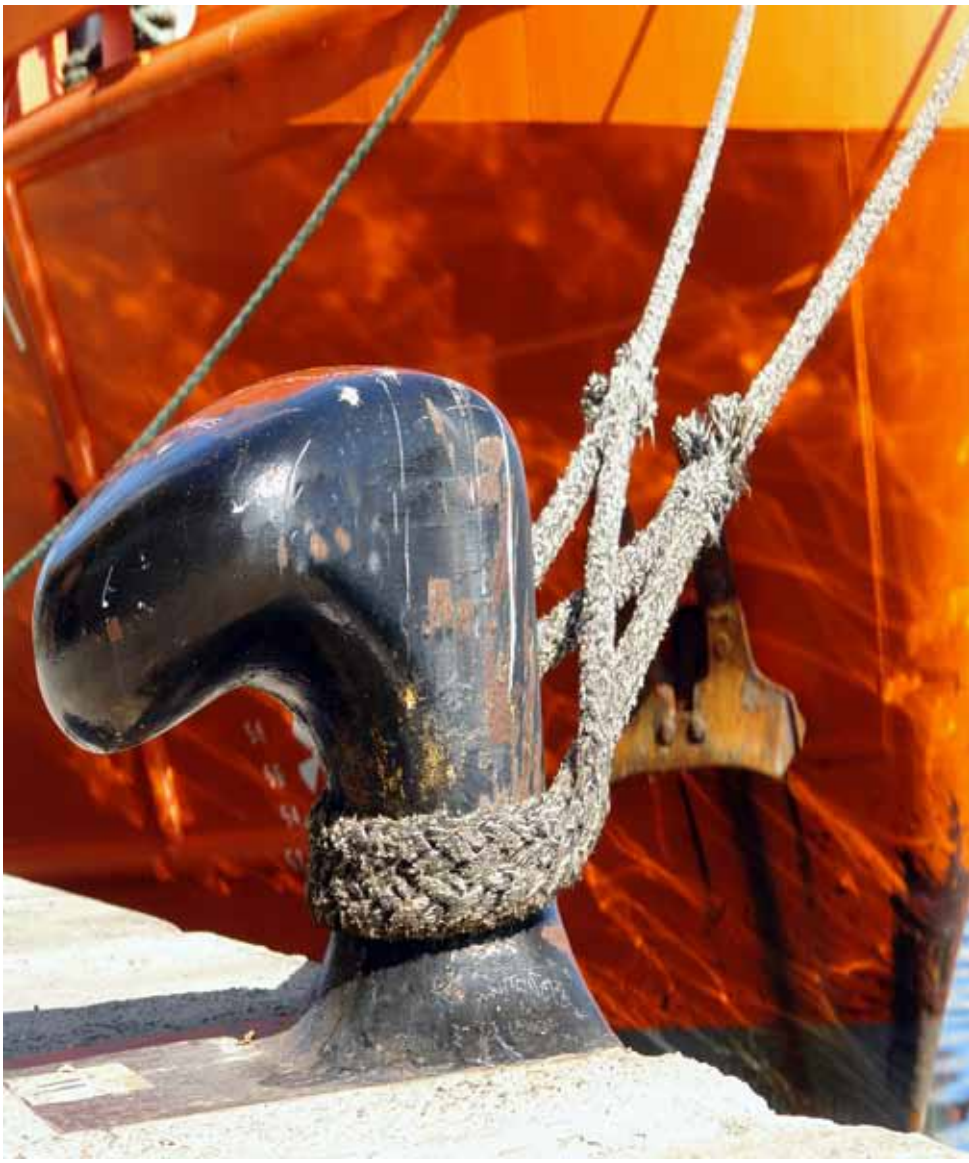
There seems to be no basis for adding this promise save perhaps where a continuing warranty is given. This promise raises a series of traps for the owner. It is fair enough to note that an approval letter may expire in the course of the charterparty, but if another vetting has been or will be arranged in time, is the owner in breach of warranty? Who within the owner's organisation must possess the relevant knowledge of some deficiency? Chartering departments rarely have the technical reports required to give the necessary warranty. Knowledge of class inspections and the maintenance state of the vessel is held in the technical department. What if there is a future change in management or problems arise with other vessels within the fleet, both of which may have an effect on a major's approval of a particular vessel?

Thus whilst in *The Rowan* the Court of Appeal ruling was sufficient to cancel the owner's obligation to pay considerable damages to the charterer for a lost lucrative cargo sale to Shell, and restored the owners' claim for demurrage, it has left in our view a futurity within the meaning of "TBOOK" which should not be there. It also should be noted that the charterers have now sought leave to appeal to the Supreme Court (or the House of Lords as we older lawyers still think of it).

In conclusion, an owner must be wary of giving any warranty that the vessel has or will continue to have oil major approvals. It is better to use phrases such as

"TBOOK the vessel is not unacceptable to [named oil majors] and in the event of any non-approval in the course of the charterparty the owner shall endeavour to obtain or restore it."

This is really the most that an owner can control. Anything more is taking a risk of exposure to the charterer's trading losses, a concept that most owners would shy from.



LEGAL STAFF

Georg Scheel
Managing Director
Born 1950, graduated from the University of Oslo in 1974, where he was assistant professor from 1973 until 1975, when he joined the Office of the Attorney General. In 1975 Mr. Scheel received the King's gold medal for his book on legal questions concerning drilling rigs. In 1977 he was admitted to the Bar of the Supreme Court of Norway. He has extensive experience as a litigator and arbitrator.
Mr. Scheel joined Nordisk in 1980, becoming Deputy Managing Director in 1986 and Managing Director in 2000.

Frode Grotmol
Deputy General Manager
Born 1949, graduated from the University of Oslo in 1976.
Mr. Grotmol was a deputy judge before joining the Office of the Attorney General in 1977. He was admitted to the Bar of the Supreme Court of Norway in 1981. Mr. Grotmol is a member of Intertanko's Documentary Committee and was formerly Vice Chairman of the IBA's Maritime and Transport Law Committee. Mr. Grotmol has extensive experience as a litigator and arbitrator. He joined Nordisk in 1981 and was appointed Deputy General Manager in 2000.

Knut Erling Øyehaug
Born 1959, graduated from the University of Oslo in 1985. He holds a Licentiatus Juris degree for his thesis on legal issues pertaining to drilling rigs.
Mr. Øyehaug is an experienced litigator who has handled large-scale offshore and shipping disputes. He joined Nordisk in 1986, serving as a deputy judge from 1988 to 1989. In 1997 he left Nordisk to become a partner in a major Oslo law firm, but returned to Nordisk the following year.

Lasse Brautaset
Born 1957, graduated from Princeton University in 1980 and the University of Oregon School of Law in 1985. After completing the Washington State bar examination he moved back to Norway and took up an assistant professorship at the Scandinavian Institute of Maritime Law, later becoming an in-house lawyer at Den norske Creditbank.
Mr. Brautaset joined Nordisk in 1989. In 2002 he obtained a Norwegian law degree. He is co-author of the 2004 edition of the standard textbook "Scandinavian Maritime Law".

Susan Clark
Born 1957, graduated from the George Washington University in 1984. She also holds a BA in Political Science from Pennsylvania State University.
Ms Clark is admitted to the bar in Washington, D.C. and New York and worked as a litigation attorney before accepting a research fellowship at the Max Planck Institute in Germany.
In 1992 Ms Clark moved to Norway, joining Nordisk the same year. Ms Clark is an experienced litigator, has lectured at the University of Oslo in contracts law and has served on a BIMCO documentary committee concerning U.S. security measures.










Egil André Berglund
Born 1970, graduated from the University of Oslo in 1996, where he has since served as an external examiner and lectured in tort/contract law. Mr. Berglund joined Nordisk in 1997.
Mr. Berglund has extensive litigation experience and his field of expertise includes the negotiation and litigation of repair and conversion contracts, marine insurance, ship brokerage and CoAs.
In January 2007 he became head of Nordisk's new Singapore office. After two successful years in Singapore, he moved back to the Oslo office in January 2009.

Bernard Glicksman
Born 1949, graduated from the University of Cambridge in 1970. He joined Sinclair, Roche and Temperley in 1976, becoming a partner in 1982. As a partner of Sinclairs, he worked at Nordisk's office from 1992 to 1995 and 1996 to 1998. He joined Nordisk's staff in 2002. An experienced litigator, Mr. Glicksman served on the Committee of the Norwegian Shipbrokers' Association engaged in drafting Saleform 1993. His areas of special expertise include ship sale and purchase and jurisdictional disputes.

Michael Brooks
Born 1956, graduated from the University of Bristol in 1978. In 1981 he joined Sinclair Roche & Temperley in London and in 1989 moved to their Hong Kong office, where he became Head of Litigation. Mr. Brooks is a Fellow of the Chartered Institute of Arbitrators, is on its panel of approved arbitrators in London and on that of the Hong Kong International Arbitration Centre. He is visiting professor at Dalian Maritime University and an external examiner for the University of Oslo.
He joined Nordisk in 1999.

Henrik Aadnesen
Born 1975, graduated from the University of Oslo in 2000. Before joining Nordisk in 2001, he was a research assistant at the Scandinavian Institute of Maritime Law. Mr. Aadnesen has extensive experience of contentious and non-contentious offshore work, as well as other non-contentious areas and is head of our transactions and finance group. Mr. Aadnesen is the author of commentaries (in the volume *Norsk Lovkommentar*) on the chapters on shipowners' liability in the Maritime Code. He is also co-editor of *Nordiske Domme* (the Scandinavian transport law report journal).

Joanna Evje
Born 1978, graduated from the University of Cambridge in 2001. After studying for a Master's in International Development at the London School of Economics, she completed her legal studies in 2003 and went on to attend Bar School in London, being called to the Bar of England and Wales in 2004. She subsequently completed a year's experience at 20 Essex Street chambers (one of the leading commercial and maritime law barristers' chambers in London) before moving to Norway and joining Nordisk in 2006.

LEGAL STAFF

Karl Even Rygh
Born 1975, graduated from the University of Oslo in 2000. Mr. Rygh also holds an LLM in maritime law from the University of London. After seven years at the Bergen office of leading Norwegian law firm Thommessen, he joined Nordisk in 2007. Mr. Rygh has considerable experience in newbuilding contracts, ship financing, sale and purchase and offshore matters. He has also assisted with several M&As and IPOs within the Norwegian shipping sector.

Joanne Conway
Born 1978, graduated in 2001 from the University of Bristol, winning the Sinclair, Roche & Temperley Prize for Best Performance in Shipping Law in her final year. After completing her legal studies at Cardiff Law School, Ms Conway joined Stephenson Harwood as a trainee solicitor, qualifying into the Shipping Litigation department in 2006. She has significant experience of both High Court litigation and London arbitration and specialises in dry shipping and offshore contracts, including charterparty, bill of lading, saleform and shipbuilding contract disputes. Ms Conway joined Nordisk in 2009.

Camilla Bråfelt
Born 1976, graduated from the University of Oslo in 2002. Ms Bråfelt holds a doctorate from the University of Oslo for her thesis on flexibility in time charters. Ms Bråfelt was a research fellow at the Scandinavian Institute of Maritime Law from 2002 to 2006, during which period she was also a visiting scholar at Columbia University in New York. Before joining Nordisk in 2009, Ms Bråfelt held a position as an assistant attorney at the Norwegian law firm Thommessen.

Norman Hansen Meyer
Born 1980, graduated from the University of Oslo in 2006. Mr. Meyer held a research assistant post at the Scandinavian Institute of Maritime Law during the final year of his studies. Mr. Meyer also holds an LLM (MJur) degree from the University of Oxford. Before joining Nordisk in 2011, Mr. Meyer held positions at Wallenius Wilhelmsen Logistics and Wilh. Wilhelmsen Investments in Australia, and worked for two years as an associate in the leading Norwegian law firm Thommessen. Mr. Meyer has also served as a deputy judge, and lectures at the law faculty at the University of Oslo.

Paige Young
Born 1982, Ms Young received her BA from SOAS in 2004, her JD from Northeastern in 2010 and her LLM in Admiralty from Tulane in 2011, where she was the Harry F. Stiles Scholar. Her thesis won the 2011 Bell, Ryniker & Letourneau Admiralty Writing Competition. Prior to joining Nordisk, Ms Young gained work experience in the maritime practices of Frilot LLC in New Orleans, and Ehlermann Rindfleisch Gadow in Hamburg. Ms Young is admitted to the New York Bar and is a member the Maritime Law Society of the United States.

Ylva MacDowall Hayler
Born 1973, graduated from the University of Uppsala with a LLM in 1997, including studies in maritime law at the University of Oslo in 1996. Ms Hayler supplemented her legal education by studying micro- and macro economics and financial reporting and analysis at the Norwegian Business School BI.
Before joining Nordisk in 2012, Ms Hayler worked for five years at the Norwegian law firm Schjødt and thereafter for six years as an in-house lawyer at Nordea Bank Norge ASA, where her responsibilities included the provision of legal services to the shipping department.

SINGAPORE OFFICE:

Magne Andersen
Born 1973, graduated from the University of Oslo in 2000. He held a research assistant post at the Scandinavian Institute of Maritime Law during the final year of his studies. In 2001 he joined the Oslo firm of Bugge, Arentz-Hansen & Rasmussen as an assistant attorney, before joining Nordisk in 2002. Mr Andersen has considerable experience drafting and negotiating contracts, as well as in litigation in several jurisdictions. He is also co-editor of *Nordiske Domme* (the Scandinavian transport law report journal). In early 2009 Mr Andersen moved to Nordisk's Singapore office where he is now Managing Director.

Kumarason Thangaratnam
Born 1975, graduated from Bond University, Queensland, Australia in 1998. Mr Kumar was called to the Malaysian Bar in 1999 and spent five years practising insurance law with a leading law firm in Malaysia. In 2007 he obtained a Master's degree with Merit in maritime law from the University of Southampton. He is also a qualified solicitor in England and an associate member of the Chartered Institute of Arbitrators. Mr Kumar joined Nordisk's Singapore office in 2008 and has a particular interest in all aspects of shipping disputes and international arbitration.

Jude McWilliams
Graduated in 2004 from the University of Manchester with a BA (Hons) degree in law. She completed the Legal Practice Course at BPP School of Law, Manchester in 2006. Ms McWilliams has particular expertise in LMAA, SIAC and ICC arbitration/litigation having been involved in several major international trade disputes in various jurisdictions. Specialising in commercial dispute resolution with a focus on charterparties, bills of lading and contracts of affreightment, before joining Nordisk she was employed as an associate solicitor at Holman Fenwick Willan Singapore.

FINANCIAL STATEMENT 2011

Summary of Audited Accounts

All amounts in 1000 NOK	2011	2010
PROFIT AND LOSS ACCOUNT		
OPERATING REVENUES		
Total operating revenues	109 375	105 557
OPERATING EXPENSES		
Legal fees	9 246	13 070
Personnel expenses	70 079	64 445
Depreciation of fixed asssets	2 379	1 318
Other operating expenses	16 524	18 008
Total operating expenses	98 227	96 842
OPERATING PROFIT	11 148	8 715
Net financial income	390	2 372
PROFIT BEFORE TAX	11 538	11 087
Tax expense	3 680	3 055
Profit for the year	7 858	8 033
ASSETS		
Intangible assets	436	-
Fixed assets	21 397	19 183
Financial assets	7 748	9 508
Total non-current assets	29 581	28 691
CURRENT ASSETS		
Debtors	13 594	8 976
Shares in money market and mutual funds	28 469	21 268
Deposits	24 692	23 523
Total current assets	66 755	53 767
Total assets	96 336	82 458
EQUITY AND LIABILITIES		
Total equity	43 100	35 243
LIABILITIES		
Total long-term provisions	8 326	7 786
Current liabilities		
Outstanding legal fees	-360	9 501
Northern Shipowners' Defence Club Ltd.	9 797	7 515
Other current liabilities	35 473	22 413
Total current liabilities	44 909	39 429
Total equity and liabilities	96 336	82 458

CASH FLOW STATEMENT

All amounts in 1000 NOK	2011	2010
Cash flow from operating activities		
Operating profit before tax	11 538	11 087
Tax paid	-2 957	-1 171
Depreciation	2 379	1 318
Profit/loss from sale of assets	0	-211
Difference between pensions expense and premiums and pensions paid	2 179	1 303
Changes in debtors	-4 303	-4 404
Changes in liabilities	4 127	-8 198
Net cash from operating activities	12 963	-276
Cash flow from investment activities		
Investments in fixed assets	-4 593	-4 588
Proceeds from sales of fixed assets	0	735
Changes in other investments	-7 201	2 536
Total cash flow from investment activities	-11 794	-1 318
Cash flow from financing activities		
Net change in cash	1 169	-1 594
Cash and bank deposits 01.01	23 523	25 117
Cash and bank deposits 31.12	24 692	23 523

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