

UK P&I CLUB



# Auf Kurs

DECEMBER 2011

## Strength and service

An update on financial progress and future prospects

## New Director on Board

UK Club welcomes another German shipowner to its Board

## Update on UK Defence Club

A landmark ruling favourable to shipowners

UK P&I CLUB  
IS MANAGED  
BY **THOMAS  
MILLER**

# Fröhliche Weihnachten

Merry Christmas and a happy and prosperous 2011 to all our Members and friends from all of us at Thomas Miller. As always, our best wishes and thoughts are particularly with the crews who keep watch on board ships at sea through this time.

We hope you will have the opportunity for a well-earned holiday at the end of a challenging year. Our offices follow local customs when taking holidays during the Christmas and New Year holiday period but maintain a roster of duty contacts throughout that time.

To ensure support for our German Members over the Christmas period both London Syndicate 2 and the Thomas Miller Americas team have a duty mobile number that is manned throughout the holiday period on a 24 hour basis.

## Team Mobile/Handy Numbers

London Syndicate 2  
+44 7768 143 884

Thomas Miller Americas Syndicate G7 – New Jersey  
+1 201 315 1755

Thomas Miller Americas Syndicate G7 – San Francisco  
+1 415 860 9712

Duty executives for the other area groups and local offices are listed in the **Emergency & AOH** contacts page of our website ([www.ukpandi.com](http://www.ukpandi.com)). This information is updated to ensure it is current throughout the holiday period. It can be found on the homepage of the website, or within the Making Contact section website menu.



# ...from your friends at Thomas Miller



**Philip Clacy**  
LS2 Syndicate Manager

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Germany has always been a very important area for both the UK Defence Club and the UK Club, which have included Members from Germany since the 1920s.

In fact, in tonnage terms, Germany now represents approximately 6 per cent of the UK Club's owned tonnage and 22 per cent of the chartered entry. It is also a very important area for the Defence Club, representing 9 per cent of owned and 6 per cent of chartered tonnage. Germany, of course, represents the most important single country in Europe to both Clubs.

Not surprisingly, at the present time, 75 per cent of the German owned entry with the UK P&I Club is made up of container vessels, whereas for the chartered tonnage 27 per cent are container ships and 66 per cent bulk carriers. For the UK Defence Club, 77 per cent of the German owned entry is made up of container ships, whilst 88 per cent of the chartered entry are container ships.

We are very pleased to say that the UK Club and the UK Defence Club value their relationship with all the German Members very highly. In turn, we have benefited from a very loyal membership over the years. We continue to maintain entries from prestigious German fleets such as Hapag-Lloyd, Hamburg-Süd, Bugsier, Oldendorff, Hansa Shipping, Döhle Assekuranzkontor, Reederei F Laiesz, Reederei Blue Star and BBC Chartering, to name but a few. The Board of UK P&I Club saw the retirement of Mr von Rantzau this year after twelve years. Mr Schües from Reederei F Laiesz has now joined Mr Gast from Hamburg-Süd on the Board.

Our aim is to offer an unparalleled scope of cover and service. The centre spread of this publication details the team supporting our German membership upon whom they can rely for advice and support.

Recent topics that have arisen provide some additional interest. As one of the largest contributors of chartered entries to the UK Club, we believe that our German membership would benefit from an overview of charterers' risks. Our Loss Prevention department has contributed an article related to problems concerning the refrigerant used in reefer containers. The UK Defence Club's success in the "RAINY SKY" decision is reported together with an update on their financial position and renewal. News items report the recent election of another German Director to the UK P&I Club Board and the successful visit of the Robin Travis scholar to London. Finally, the November reception at the Hanse Lounge in Hamburg provides some photographs, and we have included a summary of the presentation given by Hugo Wynn-Williams that evening.



**L-R: Nikolaus H Schües (Reederei F Laiesz), Hugo Wynn-Williams (UK Club), Winfried Elsan (Reederei F Laiesz) and Sven-Erik Braun (Döhle)**



**L-R: Falk Fischer (Harren & Partner), Thomas Barthel (Windsor Partners), Wiebke Harke (Hamburg Süd) Moritz Mittlbach (Mittelbach Shipping Advisors), Werner Gerdts (Peter Döhle Schifffahrts) and Ulrike Baum (Röhlig & Co.)**



**L-R: Daniela Quecke (Georg Duncker), Andreas Landgraf and Mathias Kroh of Reederei F Laiesz**

## Member Reception at the Hanse Lounge

We were pleased to meet so many of our Members and their brokers at our last annual Stammtisch at the Hanse Lounge in Hamburg on the 10th November.

Aside from the pleasure of catching-up with old friends and exchanging news on markets and other business experiences, it was an opportunity for Thomas Miller's chairman, Hugo Wynn-Williams, to present a financial and commercial update on the UK Club.

A summary of what Hugo said can be found overleaf on pages 6 and 7.



Hugo Wynn-Williams (UK Club)



L-R: Andreas Prange (Leonhardt & Blumberg), Meike Ziegler (UK Club) and Capt. Peter Ebert (Bugsier)



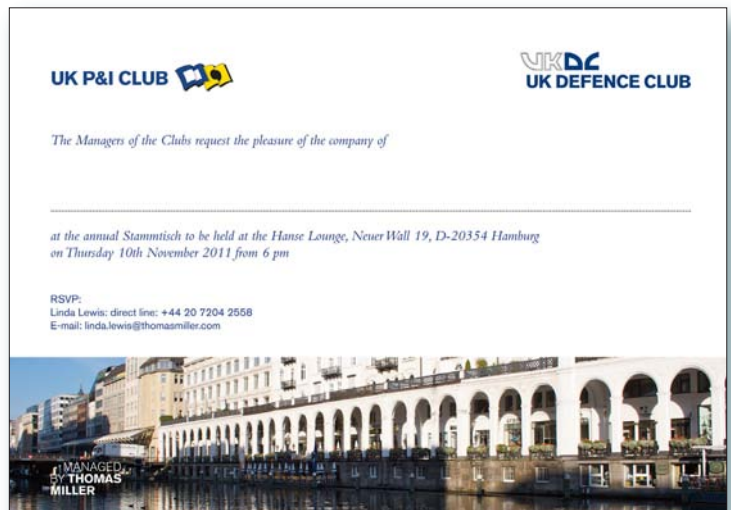
Christina Kettman (Reederei Blue Star) and Roland Hoeger (Komrowski)



Stephanie Müller and Katja Boltz of Hapag-Lloyd



Wiebke Harke (Hamburg Süd) and Jason Riley (UK Club)



## UK Club in Hamburg

The Club's traditional November reception for the German Members at the Hanse Lounge provided an opportunity for Thomas Miller P&I chief executive, Hugo Wynn-Williams, to update everyone on the Club's recent progress and future prospects.

### Finances restored

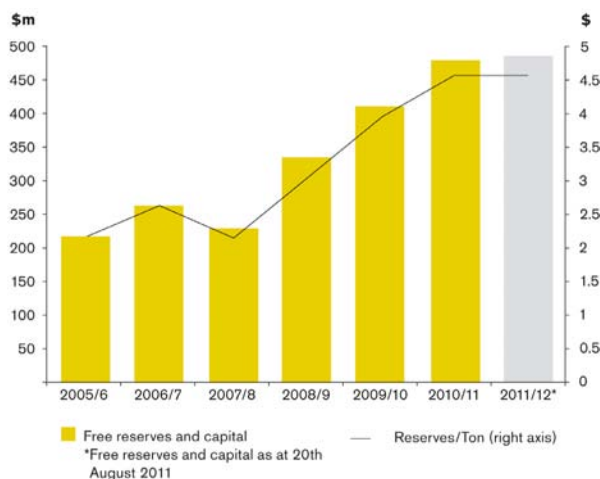
Today, our financial standing is greater than ever. The Club's free reserves and capital has further increased to \$486m from \$478m. Our total assets have increased by 15 per cent in just two years. The total funds ratio to total outstanding claims now stands at 161 per cent.

In Standard and Poor's capital model, the Club's capital adequacy is now in the AAA range. This combined with a free reserves and capital figure of over \$4.5 per gross ton puts the Club's financial strength at the top level of its peer group in the P&I sector.

Despite the improved free reserves and tough economic climate that our Members are facing, a resolute focus on our financial strength is the best way to serve our Members' interests now and in the future. Claims inflation is evident and the economic climate still uncertain. Hence, the three per cent general increase for 2012.

However, we have reduced release calls reflecting improvements in a number of recent past policy years claims performance. The call on 2009 and 2010 halved to five and ten per cent respectively. The 2011 policy year release call reduced from 20 per cent to 12.5 per cent.

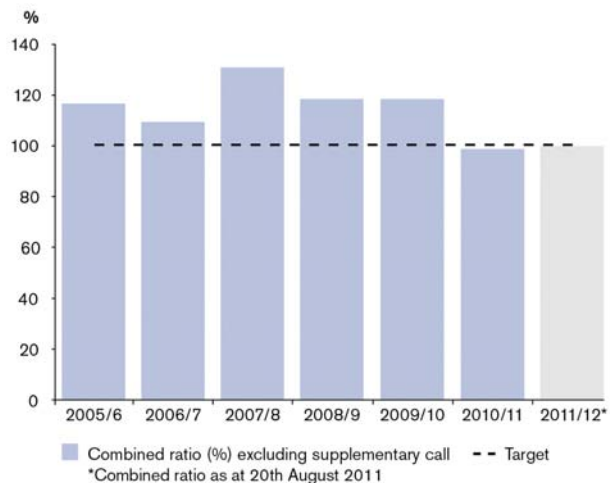
### Capital & reserves for financial years 2006-2012



### Underwriting in balance

The Club is continuing to meet its long term target of 100 per cent combined ratio. The expected combined ratio for 2011/12 year is below 100 per cent. If achieved at the year end, the Club will have had two successive financial years of balanced underwriting. The combined ratio picture is even more encouraging on a policy year basis with policy years 2008, 2009 and 2010 all now at 100 per cent or below.

### Combined ratio for financial years 2006-2012



In the short term, it is expected that the total cost of claims will be lower than previous years. While world trade and the shipping market remains depressed we are experiencing a reduced frequency of claims.

However, underlying claims inflation has been a feature running at about five per cent each year, with some categories of claim inflating at rates of up to 15 per cent. It is important, therefore, that the overall premium does not fall back.

The measures we have taken are not limited to matching inflation.

Our comprehensive reinsurance programme provides protection from a run of substantial

claims, as experienced a few years ago, either within the Club's retention or the Pool. It also offers protection from a major event claim. This is part of a sound risk management strategy, meeting the needs of our Members and the increasing demands of regulators and ratings agencies.

Our hybrid capital programme, established in 2008, continues to provide significant benefits to the Club and its Members. It counts under the current UK FSA regulatory regime towards the Club's regulatory capital and will continue to do so under the grandfathering arrangements for Solvency 2.

Most importantly for our Members, this means that the Club does not need to hold as much of their funds for regulatory purposes. The cost of the hybrid capital is mitigated by the income derived from those funds being invested along with the Club's other assets.

Investments returned \$14.5 million for the six months to August, equivalent to two per cent on funds. Since market conditions have been exceptionally volatile, the Club has adopted a more conservative investment stance in the shorter term. It reduced the proportion of equities from 15 per cent to nine per cent of its portfolio. Fixed interest holdings have increased further to 72 per cent of the portfolio. 99 per cent of all bonds invested in by the Club are A grade or better.

### Future developments

We are making significant and substantial progress in preparations for the implementation of Solvency 2. The Club's application to the UK Financial Services Authority (FSA) for clearance to develop its own internal model for Solvency 2 was successful and that model is currently under development. The internal model will be submitted to the FSA for validation in line with the Solvency 2 timetable.

Along with many others in the insurance industry, the Club has been reviewing its corporate structure. It recently announced a reduction in the number of regulated entities would deliver a number of benefits including streamlined governance, reduced compliance costs and efficient management of the Club's solvency capital requirements. More comprehensive details on the planned reorganisation will be published shortly, both on the Club website and directly addressed to Members individually.

### Listening to our Members

However important such financial strength may be, for Members, the priority is to be there with solutions. Not just close geographically, but understand our Members' business, devise solutions to match their needs and remain committed to our service promise. That includes underwriting, claims and loss prevention, as well as each member's overall relationship with us.

This year a Member Survey conducted a series of one to one interviews with key Members, influential brokers and ex-Members. A total of over 280 individuals from 140 Member companies and 34 brokers responded concerning questions of member satisfaction with the UK P&I Club and the service offered by Thomas Miller.

The full report is on the Publications section of our website, but below are just some of the highlights.

# 72%

**of members gave the Club a score of 8, 9 or 10 out of 10 for overall satisfaction.**

# 57%

**of brokers gave the Club scores of 8 or above for overall satisfaction.**

# 90%

**of members said they believed the Club's performance was either the same or better than last year.**

# 70+%

**of members scored the UK Club higher than any of the other clubs on global coverage, quality of people and expertise and industry leadership.**

## Management



Hugo Wynn-Williams, chairman of Thomas Miller, maintains a continuing and close concern for our German Members' interests. He travels regularly to Germany to represent UK

Club's management and liaise with Members at the highest level as chief executive of Thomas Miller P&I. After successful completion of the Bar Finals examination, Hugo worked initially at the UK P&I and Defence Clubs as a Syndicate Manager. A member of the Thomas Miller Holdings Board since incorporation in 1999, he was elected Chairman in 2009.



The claims handling and advisory services team for all Members based in Germany is led by Philip Clacy. A team of nine executives in London and four executives in America specialise in German

Member service. They are able to call on other colleagues for specific areas of technical and legal expertise where necessary. Philip has a degree in nautical studies and an MBA. He joined in 1986 and was an Area Director before managing our Greek office for six years and returning in 2008 to lead LS2.



Also representing senior management on the team is Alan Mackinnon who, having concentrated on FD&D claims for a period of three years, is currently the Claims Director for P&I,

acting as a consultant for the rest of the claims team as necessary.

## Underwriting



With almost twenty years underwriting experience, Jason joined Thomas Miller in 2002. As the Senior Underwriting Director within the European/ Middle East team, he has been the lead underwriter for Germany for almost ten years and a regular visitor to the region.



Senior underwriting technician Sarah Green also has some twenty years experience in the department and provides direct assistance to Jason on underwriting matters.

## London (Syndicate LS2)



Tarja Saikkonen joined Thomas Miller in 2000 from the claims department of a liner company where she was a claims adjuster. She has an MSc from the Helsinki School of Economics and Business Administration.



Alison McClure is a qualified South African solicitor having specialised in maritime law for four years in a major South African practice. She has assisted our German Members on both P&I and Defence claims since May 2008.



Alan Speed is a qualified solicitor with 20 years experience at an international law firm specialising in shipping. He has a degree in Maritime Business and Law, and 14 years experience at sea, working on a wide variety of ship types.



# Member team



Peter Steele joined Thomas Miller in 2011. Previous work with both a shipping law firm and another P&I club provides wide experience in all aspects of maritime claims with a particular emphasis on FD&D disputes. He is qualified as both a barrister and solicitor.



Meike Ziegler joined Thomas Miller in 2010 from a maritime law firm. She has a degree in law and European Studies, and speaks fluent German and French as well as English.



Domenico Ferrara joined Thomas Miller in 2010 from another P&I club. Experienced in both P&I and Defence claims, he is a qualified lawyer in both Italy and England. He holds a Master's degree in Maritime Law from the University of Southampton.



Cécile Bailleul joined Thomas Miller in 2011 with previous experience in a liner operator and another P&I club. She has a Master's degree in law, specialising in maritime and port activities.



Richard Offord joined Thomas Miller in 1997 and deals primarily with P&I claims. He brings previous experience of supporting Members in France, Italy and Croatia to the team.

## Personal Injury



Ursula Elsdén is the specialist claims handler for German Members needing support with personal injury, passenger and crew claims. A member of 'people' claims Syndicate LS3, she previously worked with two other P&I clubs, joining Thomas Miller in 1988. Ursula speaks fluent German.

## America (Thomas Miller Americas)



Colin Snell is a qualified barrister. He joined in 2010 after ten years with another P&I club handling P&I and FD&D claims in both North and South America.



Amy Lovseth joined in 2004 as a claims executive. She handles P&I and Defence claims. Amy has an LLM from the University of Oslo and deals with general claims on the east coast.



Dee O'Leary joined after 17 years of practicing maritime law in New York. She handles all P&I claims including bodily injury claims in the US east coast area.



Louise Livingston is an attorney specializing in bodily injury claims. She leads the US Bodily Injury Team but deals with all types of claims on the US west coast. Before joining Thomas Miller in March 2002, Louise was a partner in a San Francisco maritime law firm.

# Understanding charterers' liabilities

Despite their apparent detachment from the daily operation of a merchant ship, charterers can find themselves exposed to a surprisingly wide range of liabilities. Our German membership is one of the largest contributors of chartered tonnage to the UK Club representing nearly a quarter of the total chartered fleet.

We insure the entire range of charterer types, from owners chartering in tonnage to compliment their owned fleet, to trading houses, oil refiners and banks. Whether they are based in Germany or elsewhere, what are the risks which charterers face?

## Charterer's direct liability to third parties

### Pollution

Under the Civil Liability Convention (CLC), tanker pollution claims are channelled solely to the registered shipowner and their P&I cover should react. However, not all jurisdictions have ratified the CLC, eg in the United States and Japan where the charterers can incur direct and even strict liability for pollution caused by a ship, liability can be unlimited.

### Cargo

Claims can be made against charterers by the owners of damaged or lost cargo in a number of ways: under bills of lading (either theirs or the shipowners'), in tort, and under the Inter-Club agreement. Cargo claims are the most common type of claim made against charterers who are not transporting their own cargo.

### Fines

Charterers may be directly subject to fines, for example, if there is non-compliance with local regulations concerning the cargo manifest.

### Other third parties

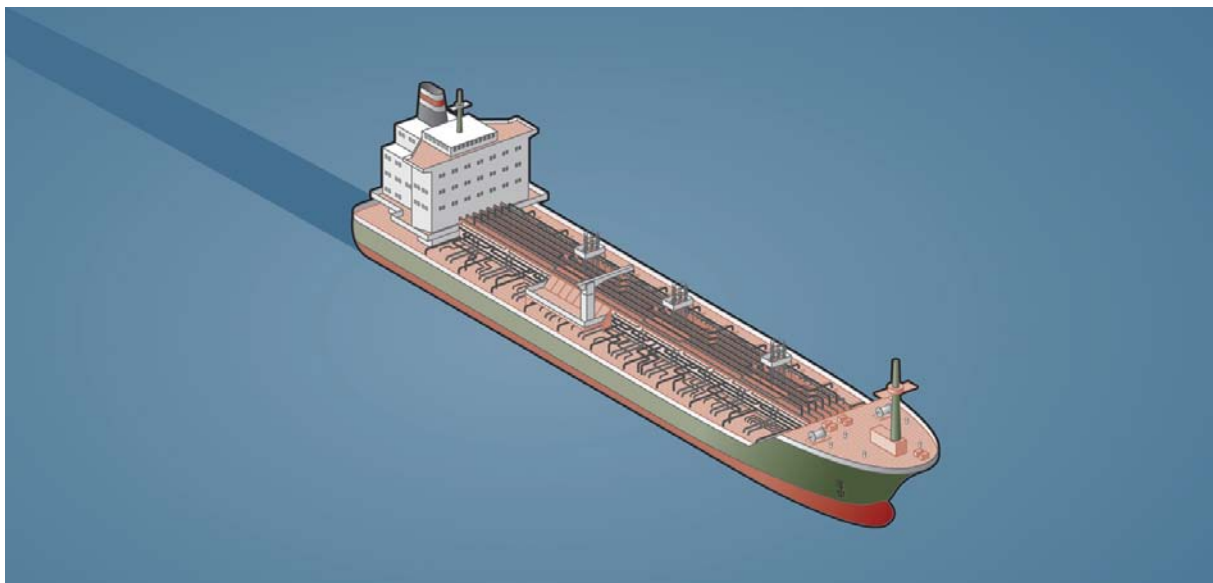
Charterers may incur liability directly to stevedores, or any third party, who suffers personal injury or property damage as a result of the charterers' negligence. In some US circuits, the NYPE clause 8 has been held to shift responsibility for negligence during loading and discharging from the owner to the charterer.

### Damage to Hull

This is one of the main differences from standard shipowners' P&I cover: claims from owners against charterers for loss of or damage to the chartered vessel can be covered under a charterers' P&I policy.

### Safe port

Damage to the ship can arise from the failure to provide a safe port or berth. There is a provision to this effect in most charterparties and the shipowner would sue the charterer for this breach of charterparty.



### Cargo

Charterers frequently assume cargo responsibility: claims can be made against such a charterer if the ship incurs damage caused by the nature of the cargo itself.

### Bunkers

Most time charters require charterers to supply bunkers to agreed specifications. Charterers can be liable for off-spec bunkers even if the ship's machinery is not damaged. Claims can involve the costs of removing, replacing and disposing of the bunkers, cleaning the ship's tanks and engines, and off-hire costs.

### Stevedores and other charterers' servants

Time charterparties generally include provision that the charterers provide stevedores and other parties for operational services. The charterer is responsible for the actions of these contractors.

### General average and salvage liability

Charterers are exposed in proportion to the amount of freight at risk if it is a voyage charter, and the value of his bunkers on board if it is a timecharter.

### Other claims from shipowners

Charterers have an obligation to indemnify shipowners for P&I liabilities if they result from a breach of the charterparty by the charterer, or arise out of activities which are charterers' responsibility.

### Unsafe port

As well as potential DTH claims (see above), sending the ship to an unsafe port in breach of the charterparty provision could result in P&I liabilities such as cargo loss or damage, personal injury, pollution, or even wreck.

### Dangerous goods

Charterers will be liable to indemnify the owner for any property damage or personal injury arising from loading or carriage of dangerous cargo. If the cargo has not been properly declared by the shipper, the charterer can nevertheless remain strictly liable to the owner for the consequences, which can be enormous.

### Bunker quality

As well as claims for damage to the ship's engine, charterers can face claims from shipowners for fines which the owner has had to pay, for example, under

Marpol Annex VI, if the sulphur content of the bunkers supplied by the charterers was too high.

### Pollution

If a pollution incident involves a country which has ratified the Civil Liability Convention (see above), the shipowner may seek indemnity from the charterer if the incident has resulted from something for which the charterer is responsible.

### Our Website

A new section is now on our website to emphasise the liability exposure faced by charterers and to provide guidance on dealing with those risks through specialist cover, loss prevention and other guidance from both the Club and its business partners. The guidance relates to both specific areas of liability mentioned above, for example claims from the shipowners, as well as wider issues, for example, the Bribery Act.

## UK Club charterers' cover

Even though a shipowner will have its own P&I cover, the charterers can face huge liabilities themselves. The UK Club charterers' product provides high levels of cover to react to both operational and catastrophe liabilities.

The UK P&I Club charterers' product includes both those risks which are covered by conventional P&I insurance, and additional risks which are specific to charterers.

#### P&I risks include:      Additional risks include:

- |                    |  |
|--------------------|--|
| 1. Pollution       | 1. Damage to hull                            |
| 2. Cargo           | 2. Detention                                 |
| 3. Personal injury | 3. Contribution to General Average & Salvage |
| 4. Fines           | 4. War & Terrorism                           |
| 5. Wreck removal   |  |

Liabilities can be to cargo interests, other third-parties and the shipowner. They can be either contractual (eg breach of the charterparty) or non-contractual (eg pollution).

For more information on the Club's charterers cover and the service provided to its Members, please contact Christopher Arnold  
Tel: +44 20 7204 2126 or  
Email: [christopher.arnold@thomasmiller.com](mailto:christopher.arnold@thomasmiller.com)

# Wrong refrigerant causes container explosions

In October, liner companies were alerted to an incident of reefer containers exploding at different locations around the world.

Initial evidence suggested that the problem originated with containers maintained or repaired in Vietnam in March and April of this year. Although these explosions have all occurred on the quayside and not onboard ships, there were three fatalities recorded.

Both the UK Club and the TT Club have been investigating these incidents and have published advisory information via their websites for Members.

The UK Club's most recent loss prevention bulletin (793) reports that analysis by refrigeration experts has concluded with near certainty that the problems are due to counterfeit refrigerant containing chloromethane. This compound reacts with the aluminium components in the reefer compressor to form trimethyl aluminium, a liquid that burns on contact with air.

The Club's bulletin provides useful analysis from Cambridge Refrigeration Technology who have permitted us to publish their initial findings. As well as checking existing refrigerant stock for contamination, they recommend that a refrigeration certification scheme needs to be put in place for future purchases. In addition, a method for checking the withdrawn reefer units for contamination and safely removing compressors from those contaminated units needs to be identified.

The TT Club's contribution to the issue has been to publish a set of 'frequently asked questions' (FAQs) that give guidance on various aspects surrounding the potential risk of exploding reefer units. Although largely focusing on questions of TT cover, it does advise on the risk exposure and suggests some actions that can be taken.

Apart from the loss of property, cargo – and life – which can result from an explosion, the need to take containers at risk out of service will be costly and disruptive to operations. Laden units will

require the cargoes to be discharged and cross-loaded, or otherwise risk deterioration. Special arrangements have to be made to offload and store suspect containers. Inevitably, increased costs will result from actions that are taken to mitigate the potential for further injury, or damage to property or cargo.

For example, in the port of Seattle about eighty suspect containers were isolated within a restricted area to prevent possible injury or damage arising from any explosion.

CMA CGM has quarantined 82 containers that were repaired in Vietnam after an explosion in China. Maersk has temporarily withdrawn over 800 reefer containers from service to check for potential failure. Since initially withdrawing over a hundred containers for inspection, APL has announced that all its refrigerated containers are now safe to operate.

Members are recommended to refer to the UK Club and TT Club websites for further information on this problem. Additional loss prevention bulletins and other UK Club advices are circulated through the weekly email "Latest Updates".

## Latest Updates

Members can subscribe for free to this email automatically by being registered to use the Club's online services, or by contacting Jenny Whitehead ([jenny.whitehead@thomasmiller.com](mailto:jenny.whitehead@thomasmiller.com)) or Nick Whitear ([nick.whitear@thomasmiller.com](mailto:nick.whitear@thomasmiller.com)) at the London office.

## New German Director joins UK Club Board

Nikolaus Schües, CEO of Reederei F Laeisz GmbH, in Hamburg, was one of the seven directors elected to the Board of the UK P&I Club at its AGM in Athens on the 27th October.

Nikolaus H Schües, aged 46, joined Reederei F Laeisz in 1993. After an apprenticeship as a shipbroker, he gained a BSc in Economics from the University of Buckingham in the UK and an MBA from Instituto de Empresa in Madrid. The Joint Managing Partner, with his father Nikolaus W Schües, Mr Schües also sits on the board of the German Shipowners' Defence Association, the administrative board of the German Shipowners' Association, advisory board of Germanischer Lloyd and the advisory board of Deutsche Schiffsbank.

He is the second current German director to join the Club Board with Hamburg Süd chairman Dr Ottmar Gast, who joined the Board in 2003.

A graduate mechanical engineer, Dr Gast is the chairman of the executive board of shipping group Hamburg Süd of Germany. He is also a deputy chairman of the UK Club together with Alan Olivier of Grindrod (South Africa) and Eric André of Suisse Atlantique.



UK Club Chairman Dino Caroussis welcomes Nikolaus Schües to the UK Club Board

## Robin Travis Scholarship

Mr Yik S. Yan has completed his three month Robin Travis scholarship. His programme has included secondments with the UK P&I Club, TT Club, UK War Risks Club and ITIC. Visits outside Thomas Miller included: Braemar Seacope, Falmouth Shipyard Aquaint Course, Reed Smith LLP, Miller Insurance, TMC Marine, Willis, SSL Insurance Brokers, Lloyd's Register of Shipping and the IMO. He also participated in a variety of seminars on the Incoterms 2010, Inter-Club Agreement amendments and German maritime law.

Hamburg based Mr Yan has been a broker with Döhle Assekuranzkontor for the past three and a half years. Prior to joining the Peter Döhle Group, he had earned his broking qualifications with Allianz Versicherungs AG in Hamburg.

Thomas Miller established the Robin Travis Scholarship programme in 1992 in memory of Robin Travis, a former Director of Thomas Miller who died suddenly and prematurely in 1991. He had a long association with the German Members of the transport clubs managed by Thomas Miller, correspondents and brokers.



### 2012 Applications

It is intended that an invitation to apply for the RT Scholarship 2012 will be posted on the UK Club website in March 2012. Thomas Miller looks forward again to receiving applications from persons employed in Germany in the shipping, transport or in the insurance sector.

# Sun comes out on the Rainy Sky

Ambiguous contracts should always be avoided. But this encouraging judgement means Courts are more willing to apply a commercial interpretations and seek to be consistent with common sense in business.

The Association's Member entered into shipbuilding contracts with the JINSE Shipbuilding Co., Korea for the construction of six ships. As is normal practice, refund guarantees were provided to secure the pre-delivery instalments. The refund guarantees were issued by Kookmin Bank. The yard subsequently encountered financial difficulties and entered into a debt workout procedure, and the Member claimed under the refund guarantees for the return of the advance instalments of US\$45 million.

The key provisions of the guarantees were as follows:

*(2) Pursuant to the terms of the Contract, you are entitled, upon your rejection of the Vessel in accordance with the terms of the Contract, your termination, cancellation or rescission of the Contract or upon a Total Loss of the Vessel, to repayment of the pre-delivery instalments of the Contract Price paid by you prior to such termination...*

*(3) In consideration of your agreement to make the pre-delivery instalments under the contract... we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you... on your first written demand, all such sums due to you under the Contract...*

The key issue raised by the case was whether the words "all such sums due to you under the Contract" in paragraph (3) of the refund guarantees referred back to the words "the pre-delivery instalments" at the beginning of that paragraph or to the specific repayments or payments referred to in paragraph (2).

Essentially, the Bank argued that the terms of paragraph 3 and the phrase "all such sums due to you" referred to amounts set out in paragraph 2 and therefore only to repayments due upon rejection or total loss of the ship, or termination, cancellation or rescission of the contract and payments due for buyer's supplies. As Article 12.3 of the contract did not refer to the yard's insolvency, the Bank argued that this did not give rise to a liability under the refund guarantee.

The Member's claim was first heard in the English Commercial Court where the Court found for the Member. It held that the terms used in paragraph 3 of the refund guarantees were clear and it considered that one of the main purposes of refund guarantees was to protect a buyer from the insolvency of a yard.

## Court of Appeal judgment

The Bank was given permission to appeal and the case was considered by the Court of Appeal before Sir Simon Tuckey, Lord Justice Patten and Lord Justice Thorpe. Sir Simon Tuckey found for the Member:

"On the Bank's construction the bonds covered each of the situations in which the Buyers were entitled to a return or refund of the advance payments which they had made under the contracts apart from the insolvency of the Builder. No credible commercial reason has been advanced as to why the parties (or the Buyers' financiers) should have agreed to this. On the contrary, it makes no commercial sense."

However, Lord Justice Patten considered that the wording of the relevant provisions was clear and that payment under the refund guarantees was not triggered by the insolvency of the yard. He went on to say:

"...that it is impermissible to speculate on the reasons for omitting repayments in the event of insolvency from the bond. Although the judge is right to say that cover for such event was, objectively speaking, desirable, that is not sufficient in itself to justify a departure from what would otherwise be the natural and obvious construction of the bond. There may be any number of reasons why the Builder was unable or unwilling to provide bank cover in the event of its insolvency and why the Buyer was prepared to take the risk."

Lord Justice Thorpe concurred with Lord Justice Patten. The Bank's appeal was therefore successful.

## Supreme Court judgment

The Supreme Court granted leave to appeal and a hearing took place on 27th July, 2011 before Lords Phillips, Mance, Clarke, Kerr and Wilson. The positions of the parties remained essentially unchanged with the Bank's position being that the contract should be interpreted strictly in accordance with the words used, and that commercial considerations should not be taken into account unless it was not possible to construe the contractual terms without them being put into a commercial context.

The Member's position was that the proper approach is to regard considerations of business common sense as forming part of a single interpretative process, the aim of which is to attribute a sensible commercial meaning to the language used by the parties. The Member further contended that the majority in the Court of Appeal gave insufficient weight to the assessment of the Commercial Court as to the business common sense of the transaction.

In a judgment handed down on 2nd November, 2011, the Supreme Court upheld the Member's appeal.

Lord Clarke gave judgment which was unanimously agreed by the other Lords. He considered the role that 'business or commercial common sense' should apply to construction. He said:

"...the language used by the parties will often have more than one potential meaning... the exercise of the construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".

Lord Clarke disagreed with Lord Justice Patten (in the Court of Appeal) and considered that there were two arguable constructions of paragraph 3 of the guarantees, as argued by the parties. Of the two, Lord Clarke preferred the Member's construction because he said it was consistent with

the commercial purpose of the guarantees in a way in which the Bank's construction was not.

He therefore agreed with the Commercial Court judge and Sir Simon Tuckey who dissented in the Court of Appeal.

In relation to the Bank's case, Lord Clarke found that the Bank had put forward no credible reason for excluding repayment to the Member in the event of the builder's insolvency and concluded:

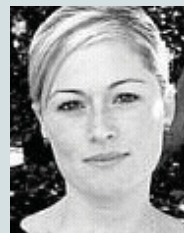
"...I would if necessary, go so far as to say that the omission of the obligation to make such repayments from the bond would flout common sense..."

The Member's appeal was allowed.

## Conclusion

The decision of the Supreme Court is one to be welcomed not only in terms of the case itself but for shipping generally. A common sense commercial interpretation has been applied to the construction of these guarantees. This is precisely why the Commercial Court was established in the first place to reflect business practice.

## Defence support for German Members



since May 2008.

Alison McClure is a qualified South African solicitor having specialised in maritime law for four years in a major South African practice. She has assisted our German Members on Defence claims



FD&D disputes. He is qualified as both a barrister and solicitor.

Peter Steele joined Thomas Miller in 2011. Previous work with both a shipping law firm and another P&I club provides wide experience in all aspects of maritime claims with a particular emphasis on

The UK Defence Club provides insurance for legal and other costs relating to disputes concerning ship operation, for claims which are uninsured.

It covers a wide range of claims and the limit of cover provided is \$15m any one dispute or series of disputes.

The UK Defence Club continues to be the largest provider of this type of cover, insuring over 3,300 ships / 103.8 million gt.

The UK Defence Club is an independent Association. Its Directors are separate and independent from the Board of the UK P&I Club and this differs from the majority of other associations where FD&D is a 'class' of P&I cover. Membership is not conditional on an entry with the UK P&I Club although 72 per cent of the UK Defence Club's Members also have an entry with the UK P&I Club.

## UK Defence Club financial highlights

### Why a 5% general increase?

At a time of uncertainty in the shipping markets future claims trends are difficult to predict. The average cost per claim has increased and is not expected to significantly decrease.

Disputes are more complex and there are often significant sums at stake leading to increased levels of expenditure.

The UK Defence Club's capital position means that it has been well placed to cushion the impact of the claims deterioration however it is necessary to maintain sufficient capital to meet future solvency requirements.

### Claims experience

Although the number of claims has abated from the high levels experienced in 2008 and 2009 it has not returned to historical pre-2008 levels.

### What has caused an increase in claims frequency and cost?

In 2008 and 2009 the increase in claims was clearly driven by the worldwide economic collapse. Shipping markets are yet to recover and there remains considerable uncertainty as to what the future holds.

Notwithstanding this, the UK Defence Club has become involved in many more cases that have ended up in litigation. LMAA arbitrations and English High Court hearings are more prevalent than was historically the case and this has contributed to the increase in the average cost of claims.

Claims levels are driven by market nervousness. When claims arise Members are tending to want to take protective steps at an early stage to secure their position. Between February and October, 2011 1026 new files have been opened compared to 888 for the same period in 2010.

## Financial forecast

Based on current projections the UK Defence Club's financial position as at 20th February, 2012 is currently forecast to be:

<b>Premium income:</b>	<b>£16.8 million</b>
<b>Free reserves:</b>	<b>£21.1 million</b>
<b>Net claims incurred:</b>	<b>£14.6 million</b>
<b>Investment return:</b>	<b>£0.8 million equating to 1.5%</b>
<b>Assets:</b>	<b>£50.9 million – an asset to liability ratio of 171%</b>