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***1** AN INTRODUCTION TO THE PROTECTION & INDEMNITY CLUBS AND THE MARINE INSURANCE THEY PROVIDE

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Introduction

Protection and Indemnity Associations, commonly called P&I Clubs, insure 90% of the world's merchant fleet against the inevitable risks a ship faces when it carries petroleum or triple-stacked containers through narrow straits, and into crowded ports. Each year, the 16 largest Clubs [FN2] receive premium income in excess of one billion dollars.

Despite P&I Clubs' almost monopolistic control of much of the marine insurance industry, few North Americans have any knowledge, much less understanding, about them. The Clubs, which are actually groups of vessel owners banded together to provide mutual insurance coverage, seem to exist ***2** in a backwater of their own making -- gentlemanly, non-competitive, and unchanging. The very name "Club" conveys the image of a rather sleepy association with Victorian values, and 200-year old business skills.

The Victorian image is misleading, however. The Clubs, although non-profit, are sophisticated businesses, with "hightech" communications networks, correspondents throughout the world, canny investment counselors, and knowledgeable underwriters and claims adjusters.

P&I Clubs started to attract unusual attention after the EXXON VALDEZ disaster, when the media noted that they were the only entities willing to insure against catastrophic, maritime oil spills. Even the Lloyds of London Syndicates, the traditional insurers of last resort, have shown little interest in being the primary insurer of ocean pollution risks.

Less positively, shipping commentators have begun to target the Clubs as being "part of the problem" in an increasingly accident-prone maritime industry. The Clubs stand accused of being so complacent, or hungry for premium income, that they have failed to properly monitor the industry they insure. They are faulted -- perhaps unfairly -- for allowing clearly unseaworthy vessels to sail with poorly trained or incompetent crews. [FN3]

Little of a non-technical nature has been written about P&I Clubs in recent years. Much of what has been written presupposes an intimate knowledge of the London insurance market. This short introduction to the Protection and Indemnity Clubs (and the insurance they provide) is presented ***3** to give interested observers some background information about the Clubs, and enough data to determine whether the Clubs are properly serving their own Members, as well as the wider maritime community. [FN4]

I. HISTORY OF THE P&I CLUBS

During the 17th and 18th centuries, English commercial vessels were repeatedly seized or destroyed by the enemy navies of France, Spain or the United States. During the American War of Independence, for example, fifty-five heavily-laden English merchant ships were seized at Cape St. Vincent, and their cargoes lost. According to one commentator, this was the heaviest single blow that British commerce had received in living memory. Most of the shipowners' losses were not covered by the private marine insurers operating in or about the Lloyds coffee house, who were unable or unwilling to underwrite such potentially catastrophic risks. Responding to the needs of the market, the first English Protection Associations were founded in the mid-19th Century to cover maritime risks which were otherwise uninsurable. [FN5] Initially, only "Protection" risks were insured against, that is: liability for death, personal injury, collision, dock damage and the removal of wrecks. Later, ***4** however, "Indemnity" risks (i.e. liability for loss or damage to cargo, and fines) were added. [FN6]

The P&I Associations were established by the shipowners themselves, upon the principle of mutuality - the joint, shared or reciprocal protection against losses. By collectively bearing the risks of inevitable maritime losses, they would be in less danger of individual business catastrophe.

Several Clubs, including the progenitors of today's Britannia and West of England Associations, were established in London and other ports of the United Kingdom by the last quarter of the 19th century. These and the remaining British P&I Associations have grown and prospered during this century because they have continuously been willing to expand the scope of coverage to include new and previously unforeseen risks.

The "American Club", the only P&I association in the Western Hemisphere, was created during World War I for foreign policy reasons. American shipowners feared that the established English Clubs were too closely tied to the British government, and thus threatened the United States' pre-1917 status as a neutral. In addition, as the size of the American merchant fleet increased, there were "patriotic" reasons for having a home-grown protection and indemnity insurer. [FN7]

There are currently three P&I Clubs in Scandinavia: GARD and SKULD in Norway, and The Swedish Club in Göteborg, Sweden. These three Clubs also trace their histories to the late 19th century, when they were created ***5** to serve the needs of their own nations' substantial and important merchant fleets. [FN8]

II. THE CLUBS' DEFINING CHARACTERISTICS:

A. Mutuality and Indemnity

American courts have recognized that "A protection and indemnity association is not a traditional insurance company..." [FN9] It differs from ordinary insurers in two major ways: first, a P&I Club is a "mutual association", i.e. "a group of shipowners who have agreed to insure one another's vessels for the mutual benefit of all." [FN10] For a shipowner to obtain coverage, he must become and remain a Member of the Club. [FN11]

Secondly, the coverage they provide is only for indemnity. It is not standard liability insurance. The Clubs are not ordinarily obligated to indemnify their members for covered losses unless and until the member has actually paid out a claim, judgment or settlement. [FN12] The Steamship Mutual Club Rule Book [FN13] states: "...it shall be a condition ***6** precedent of a Member's right to recover from the funds of the Club in respect of any liability, costs, or expenses that he shall first have paid same." This provision is generally known as the "pay to be paid" clause. [FN14]

III. THE CONTRACT OF INSURANCE

P&I Clubs do not issue insurance policies. [FN15] The "contract" for protection and indemnity insurance is evidenced and

created by a "Certificate of Entry" between the Club and the shipowner. [FN16] As a rule, the Certificate merely states the name of the shipowner/member, the vessel or vessels which have been entered with the Club, and makes general reference to the Club's rules or rulebook.

The Rule Book, which is provided to each Member, sets forth the scope of the coverage, exclusions, limitations and the Club and Member's respective obligations. These rules define the Club's liabilities and defenses, and establish the parameters of the insuring agreement between Member and ***7** Club. [FN17] At least under British law, knowledge of the rules will be imputed to every Member of the association. [FN18]

A. Scope of the P&I Cover

P&I policies "do not purport to cover all types of an insured's liability, but extend only to the liabilities specifically enumerated in the insuring agreement." [FN19] The "insuring agreement" is, of course, the Club's rulebook. [FN20]

"Standard" P&I coverage [FN21] generally includes (as set forth in the Swedish Club's 1990 rulebook) unlimited reimbursement for claims arising from:

1. Liabilities in Respect of Persons [FN22]
a) Injury, illness, repatriation or death of crewmembers;
b) Crew wages and maintenance and cure;
***8** c) Injury, illness or the death of passengers, and for the costs and liabilities arising when their luggage has been lost;
d) Injury, illness or death of third parties including longshoremen and harbor workers, vendors and visitors to a vessel.

2. Liabilities in Respect of Cargo [FN23]
a) losses or damage to cargo;
b) misdelivery of cargo;
c) cargo liabilities arising during specified, transshipment or lighterage.
d) General Average contributions. [FN24]

3. Collision with Ships, or with fixed and floating objects [FN25]

4. Salvage [FN26]

5. Compulsory Wreck Removal [FN27]

***9** 6. Fines Imposed by Government Agencies [FN28]

7. Quarantine Expenses [FN29]

8. Towage Liabilities [FN30]

9. "Sue and Labor and" Legal Costs [FN31]
These are the legal costs reasonably incurred by the Member to defend or protect himself from liabilities arising from covered risks.

10. Any Other Liabilities Which the Club's Directors Deem Proper To Cover [FN32]

B. Pollution

The Club also offers "limited" coverage for oil pollution claims which arise from entered vessels. [FN33] At the present time, liability under P&I cover is capped at $500 million per each vessel, for any one accident or occurrence. [FN34]

***10** Needless to say, the individual Club does not bear the $500 million risk of loss by itself. It is only responsible for the first $1.2 million. After that, "the Pool," which is made up of the sixteen Clubs in the International Group [FN35] collectively covers claims up to $12 million, any one occurrence involving any one vessel. The Group's excess reinsurers, which are usually a part of the London market, are liable for the balance of the $500 million.

C. Excluded Risks

Certain risks are traditionally excluded from P&I coverage --- often for purely historical reasons. These include, but are not limited to:

1. Hull and war risks.
Risks giving rise to damage to the vessel itself, or which are triggered by warlike operations, are excluded on the basis that alternative markets provide adequate cover.

2. Damage to the owner/member's own property and the owners' own financial losses.

3. Risks subject to double insurance.

***11** 4. Claims arising out of unlawful or extraordinarily hazardous trades. [FN36]

Furthermore, Members are required to maintain their vessels "in Class" (i.e. in conformity with the construction and maintenance standards established by recognized vessel classification societies) and to act at all times as prudent uninsureds. Losses arising from a vessel's being "out of class" may not be covered.

D. The Omnibus Rule

Each of the International Group P&I Clubs has a coverage provision informally called the "Omnibus Rule", which allows (but does not compel) the Club's directors to extend coverage to an incident or event which might not otherwise be within the usual parameters of P&I coverage. For example, the Swedish Club Rule Book provides:
The Association shall have the absolute discretion to compensate the member for liabilities, costs or expenses . . . even where such compensation would not have been allowed under these Rules. [FN37]

In general, this rule will only be applied to claims or risks arising out of the operation of the Member's vessel, and it is designed to deal with new types of claims, or claims which "do not follow the established pattern." [FN38]

***12** The manager of one of the larger P&I Clubs contends that the Omnibus Rule is "one of the main advantages" of P&I Club membership for a shipowner. [FN39] The Club's Directors, all of whom are shipowners and thus the "peers" of the member seeking recovery for a risk not explicitly described in Rule Book, are granted wide discretion in allowing an Omnibus Rule claim. "The only guideline is can we help this member in this case." [FN40]

It must be emphasized, however, that so long as they act in good faith, the Club's directors have no legally binding duty to grant a Member recovery under the Omnibus clause. [FN41] And the interests of the Club as a whole may be placed above

those of the individual Member (or someone claiming through the Member) when the Club decides whether or not to grant a Member recovery for an otherwise uncovered risk. [FN42] The Member has no enforceable right to demand and receive omnibus coverage. Thus, the benefits, if any, provided by the Omnibus Rule cannot rightly be seen as a right or entitlement under the insuring agreement. [FN43]

E. The "Policy" Period

P&I coverage runs from noon of February 20, Greenwich time (or from noon of the date of entry) until noon of the following February 20. [FN44] The reason for this unusual ***13** date is historical. February 20th traditionally marks the date that the winter-frozen Baltic ports had opened, and the trading of merchant vessels had commenced.

F. Disputes Between Member and Club

Club rules ordinarily establish a three tier procedure for dealing with disputes between the Club and one of its shipowners:
1. First, the shipowner must refer the dispute in writing to the Club's Board of Directors. [FN45]
2. If the Board does not resolve the dispute to the shipowner's satisfaction, he is compelled to participate in an arbitration procedure, the mechanics of which are set forth in the rules. [FN46]
3. Only after the arbitration has been concluded, and a final arbitration award has been made, does the member have the right to seek recourse in a court of law. [FN47]

American courts have generally upheld the validity of similar Club dispute resolution procedures, and have insisted that shipowners (and persons claiming through them) must ***14** submit to arbitration before commencing legal action. [FN48] The courts have grounded their rulings on the federal public policy in favor of arbitration, rather than litigation, and the fact that "arbitration clauses are to be generously construed, and all doubts are to be resolved in favor of arbitration." [FN49]

IV. "PAY TO BE PAID"

Indemnity, as opposed to liability coverage, is characterized by the fact that the insured has no right of recovery against the insurer unless and until it has discharged its liability to a claimant. [FN50] In essence, the insured must pay in order to be paid by the P&I carrier. [FN51]
The chief difference between a liability policy and an indemnity policy is that under the former a cause of action accrues when the liability attaches, while under the latter there is no cause of action until the liability has been discharged, as by payment of judgment by the insured. That is under an indemnity policy, the insured must have suffered an actual money loss before the insurer is liable." [FN52]

***15** Britain's highest court and all but one U.S. court have found, as a matter of law, that P&I carriers are not liability insurers. They are only obliged to indemnify their members/policy holders for judgments, settlements or claims which have been actually paid out. [FN53]

The House of Lords, the highest judicial authority of the United Kingdom, recently confirmed that under British law the P&I Clubs' coverage responsibilities extend only to the "indemnification" of covered risks. The Club Rules are not to be construed as creating either ordinary liability obligations, or a duty to defend. [FN54] The overwhelming majority of U.S. courts have also found standard language P&I policies/rules to provide indemnity, rather than liability coverages. [FN55] For example, in Weeks v. Beryl Shipping Inc., [FN56] the court referred to the coverage language in the London ***16** Steamship Owners rulebook making actual payment by the member a "condition precedent" to the Association's reimbursement duties:
If this language does not make the policy an indemnity policy, we do not see how it would reasonably be possible for an in-

surer to write such a policy. [FN57]

A. No Duty to Defend

Absent a contrary agreement, the Club has no duty to defend claims asserted against its members. [FN58] However, if the shipowner retains a lawyer and defends the case, the Club must reimburse the owner for the expenses he has reasonably incurred in the defense. [FN59]

More commonly, however, the Club exercises its discretionary right (but not obligation) to provide a defense. Attorneys who are either selected or approved by the Club represent the assured's interest and are contemporaneously paid by the Club, subject to any deductible.

V. JUDICIAL ENFORCEMENT OF CLUB RULES

American courts will generally uphold and enforce Club rules, unless they are deemed to violate either state or ***17** federal public policy. [FN60] One court has explained that, at least as between corporations, it is "not the task of courts to reform or rewrite [P&I] insurance policies on the notion that under all circumstances, irrespective of plain policy provisions, the insured is entitled to indemnity." [FN61]

A. Jurisdiction

P&I policies are contracts of marine insurance. [FN62] Accordingly, the admiralty (or subject matter) jurisdiction of the federal courts is invoked whenever a party seeks to recover under protection and indemnity insurance. [FN63]

And although the issue is not completely settled, a federal court is probably entitled to exercise personal jurisdiction over a foreign P&I Club if it has a "cluster" of significant contacts with the forum. For example, in Psarianos, the Court held that the West of England P&I Club could reasonably and fairly expect to be haled into court in Texas because inter alia:
1) vessels entered as Members with the Club regularly called at Texas ports;
2) The Club had frequently posted security for vessels in Texas ports;
***18** 3) The Club had Texas members; and
4) The Club employed lawyers and/or claims personnel in Texas to deal with Texas claims. [FN64]

Since all of the major Clubs are likely to have the same "contacts" with most U.S. ports, they can anticipate being forced to appear in U.S. courts whenever a dispute arises concerning P&I coverage --- assuming, of course, that the compulsory arbitration procedures, which are a pre-condition to suit, have already taken place.

B. Choice of Law

1. Where choice of law is governed by contract.

Club rules almost always provide that the rules (i.e. contract of insurance) will be governed and construed in accordance with the laws of either England or Scandinavia. For example, the Britannia P&I Club Rule Book states:
These Rules and any contract of insurance between the Association and a Member shall be governed by and construed in accordance with English law. [FN65]

***19** This type of "choice of law" provision should be pre-sumptively valid, as between a shipowner and insurer. [FN66] The U.S. Supreme Court has specifically approved the application of English law to a marine insurance policy which contained an

express contractual stipulation in favor of the law of England. In London Assurance v. Companhia Moagens de Barreiro, [FN67] the Court explained:
[I]t is no injustice to the company to decide its rights according to the principles of the law of the country to which it has agreed to be bound by, so long as, in a case like this the foreign law is not in any way contrary to the policy of our own. [FN68]

Nonetheless, many courts strain to find a given "foreign" construction violative of public policy, or merely a "procedural" rule which need not be followed by an American court. Instead, they are tempted to look to the law of the forum in order to arrive at a result more favorable to the insured. [FN69]

2. Where no contractual choice of law provision is enforceable.

In the absence of an established federal rule on point, or an enforceable choice of law provision, policies of marine insurance are to be construed and governed by the ***20** insurance law of the individual states. [FN70] Because there are few "hard and fast" federal rules concerning the interpretation of P&I policies, [FN71] most courts are eventually compelled to review state precedent when ruling on P&I insurance issues. [FN72]

Determining which state's law is to be applied is often difficult. In Wilburn Boat, the Supreme Court said look to the state with the "most significant contacts" to the insurance agreement. [FN73] The contacts to be considered and weighed are generally: 1) where the insurance agreements were negotiated, issued and signed; 2) the situs or principal place of business of the insurance company; 3) where the plaintiffs reside; 4) where the contract was to be performed; and 5) where the casualty occurred. [FN74]

C. Rules of Construction

Under the usual principles of insurance policy construction, ambiguities or inconsistencies in the P&I policy (i.e. the rules) should be resolved in favor of the insured and against the Club. [FN75] When no ambiguity in the P&I rules can fairly be seen to exist, however, "it would be improper to construe... policy provisions in favor of the assured's ***21** position under the rubrics of affording him the benefit of resolving doubtful coverage against the insurer." [FN76]

The contra proferentum rule of construction is premised on the theory that an insurance policy is a contract of adhesion, which has not been bargained for at arm's length. Thus, its invocation seems inappropriate and improper when the insured (i.e. the shipowner) is a sophisticated consumer of insurance services. In Eagle Leasing v. Hartford Fire Ins., [FN77] Judge Minor Wisdom declined to apply the rule because the insured was "not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated businessmen and represented by counsel on the same professional level as counsel for the insurers." [FN78] Under such circumstances, the insured shipowner should not be entitled to any special treatment at the hands of the court reviewing the terms of the coverage. [FN79]

More pertinently, perhaps, vessel owners are not only "insureds", but also (as members of the Club), the "insurers". [FN80] Thus, the contra proferentum rule of construction may be inappropriate. The vessel owners are able to collectively change or amend the rules whenever they wish. They are also entitled to shift to another Club at any time. ***22** Although most Clubs have similar rules, there are enough idiosyncracies in each Club's rule book that a shipowner should always be able to find a Club with rules more to his liking. Under these circumstances, the P&I Club rulebook should not be seen as a contract of adhesion.

D. Who Is Covered Under the "Policy"

Unless a Club's rules provide to the contrary, only Club members (and not charterers or other third parties) are entitled to claim the benefits of a P&I policy. [FN81] However, many clubs now grant charterers and others (i.e. loss payees under mortgages) limited membership rights in the Clubs, in order to cover risks similar to those to which shipowners are exposed. [FN82] In any event, the benefits of coverage, in most instances, will only extend to a person or entity whose "entry" have been accepted by the Club. A member's rights of coverage may not be assigned without the Club's written consent. [FN83]

E. Only Casualties Arising From the Operation of the Vessel are Covered

The SKULD Club's Rule Book [FN84] provides that the Club will only reimburse losses which were:
***23** [I]ncurred by the member . . . in his capacity as owner or charterer of the entered vessel and that the loss was incurred in direct connection with the operation of the vessel. [FN85]

The other P&I Clubs have essentially similar rules. [FN86]

This type of rule has been interpreted by the courts to mean that the assured must be liable in his "capacity" as owner of an entered vessel to be compensated. "[L]iability in any other capacity is irrelevant." [FN87] Where the vessel and her crew are exonerated from blame, and the member bears liability under a separate contract, or in his capacity as (an uncovered) time charterer, the P&I Club has no obligation to indemnify the member for his losses. [FN88]

Similarly, not all casualties which arise on a vessel are deemed to arise out of the operation of a vessel. The vessel must be more than the "inert locale of the injury." For example, if an injury is caused by the negligence of a third party's employee aboard a member's vessel, there may be no coverage. [FN89]

***24 VI. MANAGING THE CLUBS**

Although Clubs are non-profit associations, [FN90] they are operated as businesses. Nonetheless, the mutuality of the relationship between insured and insurer -- the shipowner is both part-owner of the Club, and its "customer" -- colors the individual Club's management procedures, and results in recognizably similar managerial structures for all of them:

A. The Board of Directors or "Committee"

Each owner of a vessel entered with the Club becomes a "member". [FN91] As a member, he is entitled to elect from amongst the other shipowner-members 15- 30 individuals to serve on the Club's Board of Directors. [FN92] Per most Club rules, "the business of the Club shall be managed by the Board of Directors . . . . " [FN93]

Frequently the Board creates a smaller group, or executive committee, to be more directly involved in the daily activities of the Association. [FN94] The executive committee is expected to "administer the daily business of the Association, and make such decisions as are not within the province of any other . . . body." [FN95] Typically, it is the executive committee which promulgates amendments to the insurance ***25** agreement (the Rule Book) and determines premium levels. [FN96]

B. The Managers

Obviously, the members of the Club Board of Directors (and the executive committee) are all busy shipowners. Some of them live thousands of miles away from the Club's offices. As a result, each Club has managers who are responsible for underwriting, the handling of claims and for the administration of funds in accordance with the policies laid down by the Board. [FN97] The Managers direct a staff of underwriters, lawyers, analysts and claims adjusters. One commentator describes a manager's most important function as "to act as a trustee on behalf of the whole [shipowning] membership." [FN98]

C. Services Provided by the Club to its Members

1. Correspondents

Each Club provides a worldwide network of correspondents and representatives. They are charged with providing on-the-spot assistance to shipowners when required. If a crew member becomes ill, the correspondents will assist with repatriation. They will also arrange for the employment of skilled surveyors, naval architects, lawyers or physicians if ***26** necessary. Some Clubs have as many as 400 correspondents in over 100 countries.

2. Letters of Undertaking

Although most Clubs disclaim an absolute duty to do so, [FN99] they will frequently provide their "creditworthy" members with Letters of Undertaking (or "bail") when members' vessels are arrested, and security must be posted in order to effect the vessel's release from custody.

Earlier cases suggested that only a bond or surety note from a recognized U.S. company would suffice to obtain the release of a vessel from arrest. It now appears, however, that a Letter of Undertaking, issued by one of the "prestigious" international group clubs will ordinarily be adequate security for the release of an arrested vessel from the custody of either the Marshall or the U.S. Coast Guard. [FN100] In one recent case, Judge Charles E. Haight, a federal judge and eminent admiralty jurist, willingly accepted a Britannia P&I Club letter as valid security under Rule F(1) of the Federal Admiralty Rules. Judge Haight explained that:

***27** It has been the practice for many years in the maritime industry to accept letters of undertaking given by underwriters, domestic or foreign, in order to avoid the detention of vessels and the expense of posting security in other forms . . . . In such a letter, the underwriter agrees on behalf of its shipowner-assured to appear and defend the claim of the other shipowner in a designated jurisdiction; to satisfy any judgment, usually up to a stipulated maximum amount; and to cause a surety company bond to be posted in the event of a subsequent demand to do so. Such underwriters' letters are almost routinely exchanged in litigation between shipowners or cargo interests and shipowners, because the marine insurance world is a relatively small one; the parties, counsel and their underwriters know each other well, and are prepared to enter into such consensual arrangements so as to minimize inconvenience and expense. [FN101]

3. Claims Handling

All of the Clubs employ experienced claims adjusters to review P&I claims (e.g. personal injury or cargo damage) which have been asserted against individual members. Some Clubs handle their claims in-house. Others employ independent or semi-independent maritime claims services in the United States (and other ports) to evaluate and, if appropriate, to settle smaller P&I claims.

4. Settlement of Claims

***28** The Club almost always has the right to approve or disapprove settlements arising from P&I claims against its members. [FN102] In fact, "no claim shall be settled nor any liability be admitted...without the prior consent in writing of the Club." [FN103]

In most Clubs, only the Board of Directors (or sometimes the shipowners' smaller executive committee) has unqualified authority to approve settlements. The United Kingdom P&I Rule Book states:

The Directors shall meet as often as they may consider necessary for the settlement of claims which shall be paid by the As-

sociation as the Directors may determine in accordance with these rules... [FN104]

American judges frequently demand that persons with "full" or "complete" settlement authority appear at settlement conferences on behalf of the insured defendant (i.e. the vessel owner). [FN105] While shoreside insurance companies can employ senior adjusters, or other individuals with ***29** apparently "full" authority, no such person usually exists within the P&I Club context. As noted above, only the Club Board or executive committee, which may meet only five times a year, has "complete" authority to compromise a P&I claim.

Since a vote must ordinarily be taken by the director/shipowners to approve a given "big" settlement, it is absolutely impossible for one individual to attend a settlement conference in a U.S. Court, and represent (in advance of a Board decision) that he or she has complete authority to bind the Club to a settlement which must still be approved by the Directors. This is the essence of mutuality. The shipowners are not only co-insureds, but co-managers of the Club's funds. The Board, as the representative of all of the members, quite naturally must exercise its delegated responsibility for scrutinizing and paying "big" settlements.

D. Calls/Premiums

Shipowners (or "members") do not pay "premiums" for vessel P&I coverage. Instead, they pay "advance calls" which are used to create a fund from which personal injury and other claims are paid, and from which the Club's day-to-day expenses are met. [FN106] The precise amount of each advance call will be based on the vessel owner's claims history, the size of his fleet, the Club's anticipated needs, and, of course, the strength or profitability of the insurance market. Competition between the Clubs for new business (i.e. by charging less for P&I coverage) is discouraged since, pursuant to an unusual agreement among International ***30** Group members, no group member is allowed to "unreasonably" undercut the advance call of another Club. [FN107]

Advance calls are usually invested to create additional income which is later added to the fund. If necessary -- if, for example, there are unexpectedly heavy claims made against the fund -- "supplementary calls" are made to the members. The supplementary calls are raised to meet the additional claims, and to ensure that "when the policy year is closed there is neither profit nor loss." [FN108]

Needless to say, supplementary calls are not popular with shipowners, many of whom have "closed their books" on the insurance year for which the supplementary call has been made. However, a dramatic increase in claims (particularly in the U.S.), and an apparent reduction in investment income, has compelled many of the P&I Clubs to make substantial supplementary calls during the last year or two. [FN109] But so long as the Directors act in good faith when implementing supplementary calls, individual members ***31** probably have no standing to enjoin or quash them in a court of law. [FN110]

VII. THIRD PARTIES' RIGHTS AGAINST THE CLUB

A. Direct Action

Club rules explicitly restrict the benefits derived from the rules (or the insurance coverage) to the entered member. [FN111] When a member is judgment-proof, however, and a third party has a valid or liquidated claim against that member, it is common to look for recourse against the P&I Club, by means of some sort of direct action.

In most jurisdictions, third parties (i.e. everyone other than Members) have no rights against a P&I Club for direct compensation for loss. [FN112] Neither the common law nor the law of admiralty [FN113] provide for direct actions against insurers.

In Britain, no third party direct action right exists against P&I associations. [FN114] And in most of the United States, direct action against the Clubs, at least in the absence of a liquidated judgment, is barred by the Club's typical "no action" clause, -- i.e. unless the member has paid ***32** out a claim, the Club has no duty to reimburse him or anyone else. [FN115]

Louisiana, however, has a Direct Action Statute, [FN116] which has been held to specifically allow direct actions to be maintained against the P&I "policy", when the shipowner/member has become insolvent, or is otherwise insulated from liability. [FN117] Contrary to the views of some commentators, this statute does not change the Club's "policy" from one of indemnity to one of liability. Instead, the statute:
[S]imply voids any policy clause which conditions the right of the injured person to enforce against the insurer its contractual obligation to pay the insured's debt upon, as prerequisite, the obtaining by the injured person of a judgment against the insured." [FN118]

The "no action" clause is, in effect, statutorily deleted from the P&I rules. [FN119]

B. When a Shipowner Becomes Insolvent

***33** Contrary to British practice, American courts have occasionally allowed third parties to reach insurance monies held by P&I Clubs when a shipowner has become insolvent. [FN120]

Under Britain's bankruptcy laws, the bankruptcy of a shipowner precludes any further indemnification obligations of a P&I Club. [FN121] Acknowledging the "unfairness" of this result (the Club has received premiums, but need never pay out any reimbursement), one of England's Law Lords tentatively suggested that the Club might "voluntarily" waive the condition of prior payment and agree to cover certain personal injury claims. [FN122]

U.S. courts do not expect P&I insurers to be so altruistic. They worry that strict interpretation of the "pay to be paid" rule within the bankruptcy context would result in a windfall for the Club at the expense of the intended beneficiaries. Thus, the court in Liman v. American SS Owners Mutual Protection and Indemnity Assoc., [FN123] determined that justice would best be served by allowing the bankruptcy trustee to step into the shoes of the member, and pay the settlement on the member's behalf out of the funds of the estate. With the "pay first" condition thus satisfied, the Club's coverage obligations came into play. Liman has proved to be the model used by other courts in reaching insurance monies which are ostensibly owed to ***34** bankrupt vessel owners by one or more of the P&I Clubs. [FN124]

C. The Impact of Club Rules on Non-members

In Wells Fargo v. London SS Owners Mutual, [FN125] the court held that a loss payee under a mortgage (who was in roughly in the same position as a direct action claimant against an insolvent shipowner) had no greater rights under a P&I policy than the shipowner/assured. The loss payee was equally bound by the general terms of the P&I Club Rule Book, including a London arbitration clause. [FN126] But see Matter of Talbott Big Foot Inc., [FN127] where the court ruled that if an arbitration clause would act to diminish the rights of a claimant under the Louisiana Direct Action Statute, it is not binding upon the third party and may not be enforced.

Outside of Louisiana, with its idiosyncratic direct action rights, the Wells Fargo case, would appear to be the correct statement of American law. For it seems clear that any third party (or direct action) plaintiff must always stand in the shoes of the assured. [FN128] If the assured (the member) has breached his own duties to the Club, thus invalidating the insurance coverage, the third party claiming through the assured will also lose the benefit of the P&I coverage. [FN129] For example, if the shipowner had not paid his premium or ***35** calls, or if he had failed to give timely notice of a claim as required by the rules,

[FN130] an excellent argument can be made, that the third party has no better right of recovery against the Club than the entered shipowner would have had. As against a third party, the Club should be fully entitled to claim all of the defenses and rights contained in the "policy" or rules. [FN131] One British jurist explained, when confronted by a third party's demand for all of the benefits but none of the detriments under the policy, you cannot "pick out the plums, but leave the duff behind." [FN132]

Conclusion

This article is, by necessity, a very limited overview of a very large topic area. Protection and Indemnity insurance covers literally thousands of discrete maritime risks, ranging from Jones Act slip-and-fall cases to multi-million dollar oil pollution catastrophes. Given the broad scope of P&I cover, the inevitable choice of law disputes, and the fertile imaginations of Anglo-American maritime lawyers, new and important marine insurance disputes arise every day. Because of space constraints, many key P&I issues have only been alluded to here, or not discussed at all. For further information about Protection and Indemnity Clubs coverage, ***36** it is suggested that the materials noted below be reviewed. [FN133]

[FN1]. J.D., University of California at Berkeley, Diploma in International Maritime Law, University of Oslo, Norway; Partner, Rice, Fowler, Kingsmill, Flint, Vance & Booth (San Francisco).

[FN2]. Informally known as "The International Group," the sixteen largest clubs are Assuranceforeningen GARD, Assuranceforeningen SKULD, The Britannia Steam Ship Insurance Association Limited, Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam Ship Owners' Mutual Insurance Association Limited, Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, Sveriges Angfartygs Assurans Forening (The Swedish Club), The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, The West of England Ship Owners Mutual Insurance Association (Luxembourg). The two most recent members are The Japan Ship Owners' Mutual Protection and Indemnity Association and American Steamship Owners Mutual Protection & Indemnity Association, Inc.

[FN3]. For a short overview of the safety-related criticisms directed against the Clubs, as well as suggested means for reducing maritime risks, see, Wallerius and Lind, Ships and Crews: Raising Standards, Reducing Risks, Lloyds List, Jan. 3, 1991 at 11.

[FN4]. For more detailed, albeit somewhat dated, information about P&I insurance and the Associations which offer it, see, Admiralty Law Institute: A Symposium on the P & I Policy, 43 Tul. L. Rev. 457-696 (1969). It should be noted that many "for profit" insurance carriers offer various forms of P&I insurance, similar to that provided by the Clubs. Although this article is only directed toward the P&I Clubs, much of the discussion below will be applicable to those non-mutual companies which provide fixed-premium P&I cover.

[FN5]. Reynardson, History and Development of P&I Insurance: The British Scene, 43 Tul. L. Rev. 457, 467 (April 1969). The Reynardson article provides an exhaustive and well-written exposition of P&I Club history.

[FN6]. Id. at 464-469.

[FN7]. Kipp, The History & Development of P&I Insurance: The American Scene, 43 Tul. L. Rev. 475, 477 (1969).

[FN8]. For a more complete history of the Scandinavian Clubs, see Braekhus and Rein, Handbook on P&I Insurance 30-34 (J. Kingsley 3rd ed. 1988).

[FN9]. See Psarianos v. Standard Marine Ltd. Inc., 728 F.Supp. 438, 441 (E.D.Tex. 1989).

[FN10]. Id.

[FN11]. Ahmed v. American S.S. Owners Mut. Protection, 444 F.Supp. 569, 571 (N.D. Cal. 1978), aff'd. as modified 640 F.2d 993 (1981). (hereinafter Ahmed I).

[FN12]. Weeks v. Beryl Shipping, Inc., 845 F.2d 304, 306 (11th Cir. 1988). See also, Continental Oil Co. v. Bonanza Corp., 677 F.2d 455, 459- 460 (5th Cir. 1982), vacated on other grounds at 706 F.2nd 1365 (5th Cir. 1983).

[FN13]. In light of the fact that all P&I Clubs are comprised of vessel owners whose ships travel throughout the world, and who prize commercial uniformity, it should be no surprise that the rules (or coverage provisions) of the various Clubs are substantially identical. Therefore, when this article cites to a provision found in the Rule Book of one Club, the reader can generally assume that most, if not all, of the other Clubs have a corresponding rule. A relatively up-to-date compilation of the rules of many of the P&I Clubs can be found in 7A Benedict on Admiralty, (7th ed. Supp. 1990).

[FN14]. See The Steamship Mutual Underwriting Association (Bermuda) Ltd. 1990/91 Rulebook 30 (1990)(hereinafter The Steamship Mutual Club Rulebook).

[FN15]. 1 Arnould's Law of Marine Insurance and Average, 85 (Mustill and Gilman 16th ed. 1981).

[FN16]. Psarianos v. Standard Marine Ltd. Inc., 728 F. Supp. 438, 441 (E.D. Tex. 1989).

[FN17]. Crown Zellerbach Corp. v. Ingram Indus., 783 F.2d 1296, 1300 (5th Cir. 1986).

[FN18]. Turnball v. Woolfe, 7 L.T.N.S. 483 (1862). Presumably, this principle will also govern in the United States. See generally, Rachford v. Indemnity Ins. Co. of N. Am., 183 F. Supp. 875, 879 (C.D.Cal. 1960) [the court commented that members of non-profit associations are charged with knowledge of the association's charter, constitution and by-laws, and are subject to them].

[FN19]. St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co., 500 F.Supp. 1365, 1373 (N.D. Miss. 1980), aff'd. 666 F.2d 932 (5th Cir. 1982) (per curiam affirmance on basis of district court's opinion).

[FN20]. Crown Zellerbach, 783 F.2d at 1300.

[FN21]. A number of Clubs also provide freight, demurrage and defense (f.d. & d.) and war risk coverage, subjects which are not dealt with in this paper. It should be noted, however, that f.d.& d. cover protects Club members against certain legal expenses they may incur in legal disputes which arise out of the operation of an entered ship, but which do not fall within their P&I cover.

[FN22]. Sveriges Angfartygs Assurans Forening, 1990 Rulebook, Rule 3 (1990) (hereinafter The Swedish Club Rulebook).

[FN23]. Id. Rule 4.

[FN24]. A "General Average" situation exists when the vessel intentionally and non-negligently damages or jettisons a por-

tion of the cargo when both the vessel and total cargo are confronted by a common peril, and action must be taken to save the voyage and commercial adventure. If all of the technical pre-requisites are met, the loss sustained by the owners of the "sacrificed" cargo will be transferred to the owners of the "saved" cargo and apportioned among all cargo interests. See generally, The Star of Hope, 76 U.S. (9 Wall) 203, 228 (1869); Gilmore & Black, The Law of Admiralty, 244 (2d ed.) (1975).

[FN25]. The Swedish Club Rulebook, Rule 7, §§ 2 and 3 [N.B: This only covers reimbursement for collision losses not covered by other insurance --- typically and historically 1/4 of any collision liability.].

[FN26]. Id. Rule 7, § 4.

[FN27]. Id. Rule 7, § 5.

[FN28]. Id. Rule 7, § 6.

[FN29]. Id. Rule 7, § 7

[FN30]. Id. Rule 7, § 8

[FN31]. Id. Rule 8, § 1.

[FN32]. Id. Rule 19. This last provision, popularly known as the "Omnibus Clause", see infra, grants the Association's directors absolute discretion to compensate the member for other, non-specified liabilities, which arise from the operation of the Member's vessel.

[FN33]. Id. Rule 6.

[FN34]. See, The Steamship Mutual Club Rulebook, Rule 30. As a result of the passage of the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990), which amends and supplements the U.S. Clean Water Act, 33 U.S.C. § 1521 et seq. (1988). All Club rules are being amended to cope with the vastly increased pollution liabilities imposed by the new legislation. For example, surcharges are likely to be imposed upon tanker owners and pollution limits changed. Readers are advised to check the most recent editions of the Club Rules for the current status of pollution coverage.

[FN35]. See supra note 1.

[FN36]. The Steamship Mutual Club Rule Book, Rules 17, 21 and 23B.

[FN37]. The Swedish Club Rulebook, Rule 19.

[FN38]. K. A. C. Patteson, partner, Tindall, Riley & Co., speech delivered at San Francisco (Oct. 3, 1979) [transcript on file at Rice, Fowler, Kingsmill, Vance, Flint and Booth, San Francisco, CA], 54.

[FN39]. Id.

[FN40]. Id.

[FN41]. Tilley, Protection and Indemnity Club Rules and Direct Actions by Third Parties, 17 J. Mar. L. & Com., 427, 438-441 (1986).

[FN42]. The Vainqueur Jose, 1 Lloyds Rep. 557 (1979).

[FN43]. 2 Arnould's Law of Marine Insurance and Average, 1356-1357 (Mustill and Gilman 16th ed. 1981).

[FN44]. Id. at 87.

[FN45]. See The Standard Steamship Owner's Protection and & Indemnity Association, Ltd., Rule Book, Rule 32(2) (hereinafter Standard Steamship Rule Book).

[FN46]. Id. at Rule 32(3).

[FN47]. Id. at Rule 32(4).

[FN48]. See, Psarianos, 728 F.Supp. at 449-453; Consolidated Bathurst v. Rederi Aktiebolaget, etc., 645 F. Supp. 884, 887 (S.D. Fla. 1986); Interpool Ltd. v. Through Transp. Mut. Ins., 635 F. Supp. 1503, 1504-1505 (S.D. Fla. 1985); Wells Fargo Bank v. London S.S. Owners' Mut. Ins., 408 F. Supp. 626, 628-630 (S.D.N.Y. 1976).

[FN49]. Consolidated Bathurst, 645 F.Supp. at 886.

[FN50]. Ahmed v. American S.S. Mut. Protection and Indem. Assn., 640 F.2d 993, 995 (9th Cir. 1981) (hereinafter Ahmed II).

[FN51]. Miller v. American S.S. Owner's Mut. Protection, 509 F.Supp. 1047, 1048 (S.D.N.Y. 1981).

[FN52]. 7 Appleman, Insurance Law & Practice §4261 (1962) (footnote omitted).

[FN53]. See infra notes 49-50. The only U.S. court which has held a P&I policy to provide liability coverage is, naturally enough in California. In Orion Ins. Co. & Fireman's Fund Ins. Co., 46 Cal. App. 3d 374, 120 Cal. Rptr. 222 (1975) a Court of Appeal "stretched" to find an ambiguity in a standard form non-Club P&I policy. The Clubs have answered the California court by tightening up the language of their own rules. It is this writer's opinion that even a California court would now be required to hold that P&I Club rules are so precise and unqualified that they cannot be construed to provide liability insurance. See also Reliance Ins. Co. v. Alan 222 Cal. App. 3d 702, 706-707 (1990) where another California Court of Appeal recently ignored Orion, and approvingly noted the "limited nature" of P&I insurance, and the fact that it does not provide general liability coverage.

[FN54]. Firma C - Trade S.A. v. Newcastle Protection & Indem. Ass'n, et al., 2 All ER 705, 2 Lloyds Rep. 191 (1990), (hereinafter Firma C).

[FN55]. See, Ahmed II, 640 F.2d 993 [New York]; Psarianos, 728 F. Supp. at 451; Itrich v. Huron Cement Div., 670 F. Supp. 199, 204 (E.D. Mich. 1987) [Mich.]; Miller v. American S.S. Owners Mut. Protection & Indem. Co., 509 F. Supp. 1047 (S.D.N.Y. 1981)[New York]; Liman v. American S.S. Owners, 299 F. Supp. 106 (S.D.N.Y. 1969) aff'd. 417 F.2d 627 (2nd Cir. 1969) cert. denied 397 U.S. 936 (1970)[New York]; Healey Tibbits v. Foremost Ins. Co., 1980 AMC 1600, 1606 (N.D.Cal. 1979); Willer v. Twin City Barge & Towing, 1978 AMC 2008 (N.Y. Sup. Ct. 1978); Haun v. Guaranty Sec. Ins. Co., 1969 AMC 2068, 2083 (Tenn. App. 1969)[Tenn.]. Cf. St. Paul Fire and Marine Ins. Co., 500 F. Supp at 1365.

[FN56]. 845 F.2d 304, 306 (11th Cir. 1988) [applying Florida law].

[FN57]. Id. at 307.

[FN58]. Psarianos, 728 F. Supp at 451; Board of Comm'rs. of Port of New Orleans v. Guidry, 425 F. Supp. 661, 663-664 (E.D.La. 1977), aff'd. 564 F.2d 95 (5th Cir. 1977); Healey-Tibbits, 1980 AMC at 1606.

[FN59]. Guidry, 425 F. Supp. at 664.

[FN60]. See, Crown-Zellerbach, 783 F.2d at 1300-1303; Wells Fargo Bank, 408 F. Supp. at 628-630; Psarianos, 728 F. Supp. at 453; Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500, 504-505 (2nd Cir. 1972).

[FN61]. St. Paul Fire & Marine Ins. Co., 666 F.2d at 945.

[FN62]. Morewitz v. West of England Ship Owners Mut., 896 F.2d 495, 498- 499 (11th Cir. 1990).

[FN63]. Id. It should be noted, however, that the Morewitz court probably misinterpreted British statutory authority when it concluded that English law gives direct action litigation rights to third party plaintiffs. See Firma C, 2 All ER at 705.

[FN64]. Psarianos, 728 F. Supp. at 444-446. See also, Puerto Rico v. S/S ZOE COLCOTRANIS, 628 F.2d 652 (1st Cir. 1980), cert.denied, 450 U.S. 912 (1982); McKeithen v. M/T FROSTA, 435 F. Supp. 572 (E.D.La. 1977).

[FN65]. The Britannia Steamship Insurance Association, Ltd., Rulebook, Rule 46.

[FN66]. See The Pacific Queen, 1962 A.M.C. 574, 595 (W.D. Wa. 1961), aff'd. sub nom Pacific Queen Fisheries v. Symes, 307 F.2d 700 (9th Cir. 1962), Landry v. Steamship Mut. Underwriting Assoc., 177 F. Supp. 142 (D.Mass 1959), aff'd. 1960 AMC 1650 (1st Cir. 1960).

[FN67]. 167 U.S. 149 (1897).

[FN68]. Id. at 161.

[FN69]. C.F. Morewitz, supra, 896 F.2d at 499, fn. 5.

[FN70]. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316 (1958).

[FN71]. For a practitioner's guide to those "established federal admiralty rules", which may pre-empt the application of State law, see generally, Comment, Established Federal Admiralty Rules in Marine Insurance Cases and the Wilburn Boat Case, 1 U.S.F. Mar. L.J. 149 (1989).

[FN72]. Wilburn Boat, 348 U.S. at 316, Healey Tibbits, 1980 A.M.C. at 1606.

[FN73]. Ahmed I, 444 F. Supp. at 571. As a general rule, the federal choice of law rules are to be applied when determining which state's law is to govern the policy. Id.

[FN74]. Id. at 571-572.

[FN75]. American Motorists Ins. Co. v. American Employers Ins. Co., 447 F. Supp. 1314 (W.D. La. 1978).

[FN76]. St. Paul Fire & Marine, 666 F.2d at 941.

[FN77]. 540 F.2d 1257 (5th. Cir. 1976).

[FN78]. Id. at 1261.

[FN79]. Id. But see AIU Ins. Co. v. Superior Court, 51 Cal.3d 807, 821-824 (1990). [Even though the assured possessed both legal sophistication and substantial bargaining power, the usual rule requiring ambiguous policy provisions to be interpreted against the insurer was upheld by the California Supreme Court.].

[FN80]. See, Lion Mut. Marine Ins. Assoc. v. Tucker (1883) 12 Q.B. 176 (C.A.)(Brett, L.J.): ["Therefore (the shipowner) is not only a member, but also an insurer and an insured; he is all three;"]; Psarianos, 728 F.Supp. at 451: ["(the shipowner) is a member of the Club, not simply an insured..."].

[FN81]. Court Line v. Canadian Transp. Co., 62 Lloyd's Rep. 123; 64 Lloyds Rep. 57 (1940). [N.B: Bareboat charterers, or owners pro hac vice, are ordinarily treated in the same manner as member shipowners. See, Assuranceforeningen GARD, Rulebook, Rule 26.8. (hereinafter GARD Rulebook).].

[FN82]. Palmer, Liability as Owner of the Vessel Named Herein: Coverage Liability of Non-Owners, 43 Tul. L. Rev. 481, 482-483 (1969).

[FN83]. The London Steamship Owners' Mutual Insurance Association Ltd., Rulebook, Rule 25 (hereinafter The London Steamship Rulebook).

[FN84]. Assuranceforeningen SKULD, Rulebook (hereinafter The SKULD Rulebook).

[FN85]. Id., Rule 5.1.1.

[FN86]. See, St. Paul Fire & Ins. Co. v. Vest Transp. Co., 500 F. Supp. at 1374 (D.Miss. 1980), aff'd. 666 F.2d 932 (1982).

[FN87]. Id. at 1375.

[FN88]. Lanasse V. Travelers Ins. Co., 450 F.2d 580, 584 (5th Cir. 1972) cert. denied, 406 U.S. 921 (1972).

[FN89]. Id. See also American Motorists Ins. Co. v. American Employers Inc., 447 F. Supp. 1314 (W.D.La. 1978) remanded on other grounds 600 F.2d 15 (5th Cir. 1979), [where claimant was shot aboard the vessel by a crew member, the P&I policy-holder was being sued in his capacity as employer, rather than as vessel owner (the shooting was not connected to the vessel's operation). The P&I insurer, therefore, owed no indemnification duties to the assured.]; Reliance Ins. Co. v. Alan, 222 Cal. App. 3d 702, 707 (1990) and cases cited therein.

[FN90]. Ahmed II, 640 F.2d at 994.

[FN91]. The Steamship Mutual Club Rulebook, Rule 4.

[FN92]. See, Assuranceforeningen SKULD, Statutes, §§ 1.2 - 1.8.5 (hereinafter SKULD Statutes).

[FN93]. Id. at Rule 3(i).

[FN94]. See, Assuranceforeningen GARD, Statutes, Art. IV (hereinafter GARD Statutes).

[FN95]. Id.

[FN96]. SKULD Statutes, § 1.5.

[FN97]. In some instances, particularly in Scandinavia, the managers are direct employees of the Club itself. More commonly, the Club is managed by an "independent" company which frequently has the Club as its exclusive client and which, for decades, has managed the Club's affairs.

[FN98]. Robert Seward, partner in Britannia Steamship Assurance Association, quoted in Lloyds List, 8 (Jan. 3, 1991).

[FN99]. See, London Steamship Protection and Indemnity Association, Ltd., Rulebook, Rule 19.1 ["The Association may, but shall in no case be obligated to, provide on behalf of a member, security to prevent arrest or obtain release from arrest or otherwise in respect of an entered ship . . . . "].

[FN100]. See, In Re Slobodna Plovidba, 1987 A.M.C. 2209 (W.D. Mich. 1987); Matter of Compania Naviera, S.A. Atlantico, 466 F. Supp. 900 (SDNY 1979). See also, Meredith, Fines, Penalties and Other Miscellaneous Liabilities, etc., 43 Tul. L. Rev. 602, 612-614 (1969) [where it was noted that "even the United States Navy will usually accept such a letter as security for its claim when a merchant vessel entered with one of these Clubs has been in collision with a Naval vessel."].

[FN101]. Compania Naviera, 466 F. Supp. at 902.

[FN102]. See United Kingdom Mutual Steamship Assurance Association, Rulebook, Rule 37 (hereinafter United Kingdom P&I Rulebook).

[FN103]. Steamship Mutual Club Rulebook, Rule 26(iii).

[FN104]. United Kingdom P&I Rulebook, Rule 38.

[FN105]. See, San Diego County Sup. Ct. Local R. 1.8, which mandates the appearance of claims adjusters "with complete authority to settle the case." In Swan v. Shelby Fine Arts, 222 Cal. App. 3d 964 (1990)(ordered depub. Dec. 13, 1990), a California Court of Appeals upheld the right of a local court to demand the presence of persons with "complete" settlement authority at local settlement conferences, and authorized the granting of sanctions against the insurer for breaching this rule of court. Although the Swan opinion was subsequently decertified and may not be cited as precedent, it offers a graphic illustration of the perils which may be encountered by P&I Clubs at settlement conferences in U.S. courts.

[FN106]. See generally, Tilley, Protection and Indemnity Club Rules and Direct Actions by Third Parties, 17 J. Mar. L. & Com. at 531.

[FN107]. See 7A Benedict on Admiralty, at 1-941 to 1-944 (Mathew Bender 7th Ed. 1990).

[FN108]. Tilley, supra, 17 J. Mar. L. & Com. at 532, where it is further explained:
[c]alls plus investment earnings should be so managed as to be equal to claims plus expenses . . . what this means in practice is that at the beginning of each policy year the Club's directors will fix the level of advance calls. Some time after the end of the policy year, when it is possible to assess the level of claims and earnings on investments, the directors decide whether a supplementary call will be needed, and, if so, what the amount should be. The rate of supplementary call is usually expressed as a percentage of the advance call. Id.
See also, Columbia S.S. Co. v. American S.S. Owners, 1974 A.M.C. 982, 983 (D.Ore. 1973).

[FN109]. For a recent commentary on the increase in supplementary calls triggered by an increasingly litigious claims environment, see Lloyds List, Jan. 3, 1991, at 7.

[FN110]. See **Turner v. American S.S. Owners Mut. Protection & Indem. Assoc., 16 F.2d 707 (5th Cir. 1927)**; Columbia S.S. Co., 1974 AMC at 982; and Arnould's Law of Marine Insurance and Average at 89, citing Wood v. Wood, 9 L.R.-Ex. 190 (1874)(Kelly, C.B.).

[FN111]. The Steamship Mutual Club Rulebook, Rule 30, states: "No assignment or subrogation by a Member of any interest under these Rules shall be deemed to bind the Club to any extent whatsoever."

[FN112]. Continental Oil Co. v. Bonanza Corp., 677 F.2d 455; 459-60 (5th Cir. 1982), rev'd. in part, aff'd. in part on rehearing 706 F.2d 1365 (5th Cir. 1983). See also, Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 75 (1954)-(Frankfurter, J., concurring).

[FN113]. Miller, 509 F.Supp at 1051.

[FN114]. Firma C, 2 All ER at 705 (1990)(Brandon,J.)

[FN115]. See, Ahmed II, 640 F.2d at 995-996, and Miller, 609 F. Supp. at 1051.

[FN116]. La. Rev. Stat. Ann., §22:655 (West Supp. 1991). Several other states, as well as Puerto Rico, have direct action laws, which arguably apply to some types of marine insurance. See, Dougherty, The Impact of a Member's Insolvency or Bankruptcy on a Protection and Indemnity Club, 59 Tul. L. Rev. 1466, 1478-1481 (1985) and Kierr, The Effect of Direct Action Statutes on P&I Insurance 43 Tul. L. Rev. 638, 650-657 (1969). However, it is only the Louisiana statute which has been used with any significant success against P&I Clubs.

[FN117]. Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954).

[FN118]. Hidalgo v. Dupay, 122 So.2d 639 (La.Ct.App. 1st Cir. 1960). See also Morewitz, 896 F.2d at 499, n. 4.

[FN119]. Comment, Crown Zellerbach Dethrones Nebel Towing: Shipowner's Limitation of Liability is Available to Insurers, 62 Tul. L. Rev. 615, 617 (1988).

[FN120]. See infra notes 123 and 124.

[FN121]. See, Firma C, 2 All ER 705 [1990] at opinion of Lord Brandon of Oakbrook.

[FN122]. Id. at Opinion of Lord Goff of Chieveley.

[FN123]. 299 F. Supp. 106, 108-110 (S.D.N.Y. 1966), aff'd. 417 F.2d 627 (2nd Cir. 1969), cert. denied, 397 U.S. 936 (1970).

[FN124]. In re Waterman S.S. Co., No. 83B 11732 (Bankr. S.D.N.Y. filed 11/30/84); In re Seatrain Lines Inc., 32 Bankr. 669 (Bankr. S.D.N.Y. 1983).

[FN125]. 408 F.Supp. 626, 629-630 (S.D.N.Y. 1976).

[FN126]. Id. See also, Psarianos, 728 F.Supp. at 449.

[FN127]. 887 F.2d 611, 613 (5th Cir. 1989).

[FN128]. See Morewitz 896 F.2d at 499; Crown Zellerbach, 783 F.2d at 1301, n. 12.

[FN129]. Crown Zellerbach, 783 F.2d at 1300-1304.

[FN130]. See The Steamship Mutual Club Rulebook, Rule 26.

[FN131]. Crown-Zellerbach, 783 F.2d at 1300-1304; 2 Arnould's Law of Marine Insurance and Average, 1135. See also, Consolidated Bathurst, 645 F. Supp. at 887; Interpool Ltd., 635 F. Supp. at 1504-1505 [third parties were held subject to the compulsory arbitration requirement found in most Club rulebooks, even when they were not in privity with the insuring contract.]

[FN132]. Post Office v. Norwich Union Fire Ins. Soc'y, 2 Q.B. 363 (1976)(Harman, L.J.).

[FN133]. Interested readers will find the following articles helpful:
1. Admiralty Law Institute: A Symposium on the P&I Policy, 43 Tul. L. Rev. 457-696 (1969);
2. Mark Tilley's Articles in the Journal of Maritime Law & Commerce:
a) The Origin and Development of the Mutual Shipowner Protection & Indemnity Associations, 17 J. Mar. L. & Com. 261 (1986);
b) Protection & Indemnity Club Rules and Direct Actions by Third Parties, 17 J. Mar. L. & Com. 427 (1986), and;
c) The Protection & Indemnity Clubs and Bankruptcy, 17 J. Mar. L. & Com. 531 (1986);
3. 1 Arnould's Law of Marine Insurance and Average, 83-135 (Mustill and Gilman 16th Ed. 1981);
4. 7A Benedict on Admiralty, (Matthew Bender 7th Ed. 1990).

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