PLUS ÇA CHANGE, PLUS C'EST LA MEME CHOSE

A Commercial Retrospective of P&I Insurance over the Last 25 Years and Some Thoughts About the Future

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USMLA Fall Meeting
Boca Raton, Florida
October 2003

Ladies and Gentlemen:

I am honored to be addressing such a distinguished gathering. I extend my warmest thanks to the organizers who have made such sterling efforts to rearrange this splendid event following the unhappy attention recently given to Bermuda by Hurricane Fabian. Congratulations to all those involved in the rescheduling!

Given the current state of Franco – American relations, it might be considered risky to use a French aphorism as the theme for an address to The Maritime Law Association of the United States! Some of you may be asking yourselves how the INS could have allowed a Francophile – worse, perhaps even a *closet* Francophile! – to have gained permanent residence here. Many of you, I suspect, will be demanding to be told!

Whatever one's feelings toward the French, it cannot be denied that their language is replete with *mots justes*, with *bons mots* and, of course, with the ever-provocative *double entendre*.

In a sense, *plus ça change…*etc. is a kind of *double entendre*, has a sort of double meaning, at least by implication. If you say that the more things change, the more they are the same, you may be using the expression in a negative, almost cynical, sense, lamenting the immutability of an imperfect world. On the other hand, you may be using the words positively, with the intention of celebrating the constancy of the best of an established order. Then again, you might be thinking – and intending to mean – ho hum, so what's new?

In my commercial retrospective of the P&I world over the past 25 years, which is about as long as I have been involved it – chiefly in the commercial sector of the business – I will seek to show how changes which have occurred within the International Group in particular have, I would suggest, shaped it for the better over the period without compromising the basic ethos which has always characterized the heart of the mutual principle from the very beginning of P&I club history.

La Même Chose

Taking our French aphorism, our *double entendre*, back-to-front, what can be said today to be the same as that which it was in the late 1970s?

Structure and Governance

At the most fundamental level, the structure and governance of P&I clubs remain essentially the same today as they were twenty-five years ago. The accountability of club managers to boards of directors representing shipowner interests is the same today – whether those managers are independently owned or not – as it was at the end of the 1970s or, indeed, as it always has been.

It is curious that, while scandals touching upon corporate governance in the United States and in Europe in recent years have prompted calls for a larger voice for non-executives, the supremacy of non-executive control of P&I club policy is as characteristic of this little part of global commercial enterprise now as it was 100 years ago – and continues to thrive as such!

The Cover

Moving from club governance, the cover which P&I clubs currently provide is essentially unchanged in its elements from that which it provided a quarter-century ago. There have, of course, been developments in certain areas – for example, in 1985 the clubs first began as a matter of ordinary practice to cover the 4/4ths proportion of running down clause liability, moving from a paradigm, up to that point, of only 1/4th cover. It is probably not an exaggeration to state that the growth of 4/4ths cover has been such that some 30% to 40% of all current P&I entries are now typically insured on these broader terms.

P&I cover responds, of course, to shipowner needs in a manner unlike that ordinarily seen in the commercial markets. In addition to the expansion of cover for collision liabilities, there have been developments in other areas too. Over the recent the past, P&I cover for war risks has also increased – at least as to the quantum of indemnity typically provided to club members – and remains generally a subject of continuing discussion within the International Group.

Club Funding

Turning to the mechanisms of mutuality, that is to say the manner in which club funding is achieved, in this sector too there have been relatively few changes over the period under review. The terminology used by different clubs in accounting for mutual premium has changed in certain cases as has, indeed, the proportion of advance funding as a part of estimated total premium requirements for given policy years. Many clubs now charge a larger proportion of estimated total premium by way of advance call during the currency of a policy year than was previously their practice. This, of course, has advantages from the point of view of a club's cash flow and brings clubs into – dare it be said? – an economic paradigm closer to that of the fixed premium market, at least so far as market perceptions are concerned, than before.

As to policy years themselves, these have for generations remained linked to a February 20 start and finish date, an annual preoccupation, to paraphrase the words of Mary Tudor, carved on the collective heart of all club managers!

The P&I Club Ethos

In the final analysis, however, the greatest constant over the years has, I think, been the abiding ethos of the P&I clubs.

At its core, this ethos perceives the member to be the shareholder – which, of course, is indeed the case – and where, as a matter of fundamental principle, there is a tendency, in gray areas, to lean toward assisting a member rather than standing back in a purely reactive posture as a claim develops.

At the risk of giving offense, I think it is probably fair to say that individual P&I club managements locate themselves at different places along a cultural continuum bounded by the instincts of the English barrister at one end and those of the insurance broker at the other. Balance is the key

and, I would suggest, International Group clubs have been successful in achieving this in a manner unique to the marine insurance industry as a whole.

Plus ça Change

So what has changed over the years since 1978 – and has it been for the better, or for the worse?

The answer must surely be, a bit of both. But that, of course, in and of itself, depends upon an observer's viewpoint. Let us begin by enumerating some relatively uncontroversial areas in which significant changes have occurred.

International Group Organization

Turning first to the organization of the International Group clubs collectively, the basic relationships between the clubs contained in the Pooling Agreement and the International Group Agreement are now in a "codified" format which has twice obtained the approval of the European Commission – being the civil service, so to speak, of the European Union based in Brussels.

Twenty-five years ago, what is now the IGA was a much more informal "gentlemen's agreement". The need to put these earlier arrangements into a more structured form was created by a realization in the early 1980s that International Group practices might, absent the approval of the then EEC authorities, place the clubs in breach of regulations pursuant to Articles 85 and 86 of the Treaty of Rome.

The original IGA was given European Commission approval in late 1984, and this was – with certain changes – reaffirmed for the year commencing February 20, 1998. The current arrangements, which were preceded by a vigorous debate on the overall limit which should apply to International Group club cover, have a ten-year life and will therefore expire – subject, of course, to renegotiation for further clearance – toward the end of the current decade.

Limits of Club Cover

In this context, the limits of cover over the period since the end of the 1970s have much increased as to specific monetary figures where applicable (for example, in regard to claims for oil pollution). However, it might be said that for non-oil pollution claims the overall limit of liability available to club members has actually reduced – at least in theory.

In 1978 cover for non-oil pollution claims was said to be "unlimited" – by which was really meant that cover was given without a prescribed, specific limit. During the period in which renewal of what is now the current Pooling Agreement and IGA were being negotiated with Brussels, the overall limit for non-oil pollution claims was given a defined "overspill" ceiling calculated by reference to a proportion (2.5%) of the collective value of all insured vessels' total limitation funds under the 1976 London Convention.

At current values, this is usually said to be in the order of $4.25 to $4.5 billion overall, taking into account the current market reinsurance limit of $2 billion per claim for non-oil pollution matters. Most people would say that, to all intents and purposes, this is essentially no different from the regime which applied in the late 1970s, although – at least in theory – there has been a change.

The Scope of Exposure

While there have been changes in the quanta of cover available among Group clubs, and – concomitantly – the availability of high-level reinsurance protection, the scope of shipowner exposure has grown substantially over the last twenty-five years. Describing the manner and extent to which this has occurred is a subject deserving of a lengthy address in its own right.

The scope of liability in cases of oil pollution and criminal fines has gained perhaps the broadest attention from the shipping community, particularly here in the United States. Irrespective of the "controlled" expansion of liability inherent in the development of international conventions in various areas, there has been, more recently, an increasing incidence of more "wildcat" reactions to maritime accidents generated for the most part by political pressure often linked to interest groups across the world. I will return later to this phenomenon – and its implications – in looking to the future.

Claims volumes in other areas have also grown – and not, I fear, as a result of simple inflationary pressure. It is depressing to note that certain parts of the world have exhibited little, if any, improvement in the jurisprudential standards applying to claims brought against shipowners, even in areas of the globe thought to be showing progress in other spheres of economic development.

The Scrutiny of Club Activity

If shipowners can consider themselves to have been under attack through the growing insistence of third parties to hold them accountable for any and all operational misfortunes, then the clubs themselves have also been subject to increasing scrutiny over the past quarter-century.

Not that this is necessarily a bad thing. Speaking at this juncture for the American Club, the demands of the New York State Insurance Department, while from time to time administratively tiresome, have nonetheless provided a constant guarantee of the integrity – and transparency – of the Club's day-to-day operations.

Growing regulatory demands are being seen across the insurance industry and are affecting all clubs. Although there is a temptation to regard this interference as the function of a burgeoning bureaucracy with time on its hands, the disciplines which such oversight engenders are not to be criticized lightly and, in any event, are something with which our industry as a whole must continue to live.

Transparency

In this context, the clubs collectively have become much more transparent in their operations – particularly in regard to their financial accounting – than was the case in the late 1970s. Much of this, despite the regulatory interests described above, has been generated within the clubs themselves as a result of higher member expectations.

For example, the level of detail provided in a typical International Group club's annual report and accounts is exponentially greater than it was in the late 1970s. This is as much a function of internal self-regulation – and that implied through the joint venturing arrangements within the International Group itself – as anything stipulated by outside regulators. In this, the Group can collectively take credit for doing much to enhance reporting levels among their members at large.

The Rating Agencies

This leads on to the interest which rating agencies – notably Standard & Poor's and AM Best – have shown in International Group clubs over the past decade. The phenomenon is relatively new. It began in the early 1990s at which time many commentators – particularly those ensconced in the major marine insurance broking houses – thought that it would be short-lived phenomenon. That it has proved not to be, notwithstanding the frequent doubts expressed within the P&I industry as to the real insightfulness of the rating agencies in this highly specialized industry – must be a matter of some credit to them. Again, this is a subject worthy of an address in its own right and it is not unreasonable to assume that, in the hope that you will forgive the weakness of the pun, the agencies will, like the Poor's, always be with us!

Safety and Loss Prevention

Along with enhanced levels of financial transparency, the last twenty-five years have seen an extraordinary growth in the development of ancillary activity by Group clubs – particularly in the sphere of safety and loss prevention.

Not only are clubs much more proactive in the supply of ship surveying expertise – a function promoted on a relatively limited scale at the end of the 1970s – but the level of outreach in regard to loss prevention, particularly as to the human element, has grown dramatically. Seminars, publications, the recruitment of dedicated loss prevention personnel – all have added massively to the capabilities of clubs both large and small.

To some extent, this reflects growing pressure on shipowners across a range of IMO-generated regulation – for example, in regard to the ISM Code and the more recent ISPS provisions – but it also is part of the clubs' more general desire to enshrine best practice as a means of limiting their own exposure to loss.

Learning from the Past and Looking to the Future

The claims environment in which shipowners currently find themselves is now much more hostile than it was a quarter-century ago. The increased hostility of this environment is a function of two major *offensive* phenomena and the lack of countervailing *defensive* initiatives by the maritime community at large.

The Offense

Turning first to the offensive phenomena with which the shipping community has had to deal, two major trends are evident.

The first is the politicization of ascribing blame and punishing fault, particularly in respect of accidents which affect the environment. The trend began here in the United States, but has spread to other parts of the world – most recently Europe.

Driven largely by special interest groups, the trend has led to the criminalization of people who – in a less rabidly retributivist world – would in the past have been regarded as the unfortunate victims of accident as opposed to the despised authors thereof.

This mindset – to which cheerful adherence is often given by those who would ordinarily regard themselves as enlightened and tolerant people – has created circumstances, and not just in the US, where ships' captains and crew are thrown into jail or otherwise denied decent treatment, as the sacrificial cannon-fodder of doctrinaire forces driven by political ambition or seeking to cover-up official incompetence. Recent cases of this are disgraceful examples of the abuse of administrative – and sometimes judicial – power.

This phenomenon, I fear, is now becoming as much of an issue in Europe as elsewhere in the world. The PRESTIGE casualty – and the appalling treatment of Captain Mangouras by the Spanish authorities – is a case in point. Perhaps the day will come when someone invokes the International Convention on Human Rights in defense of those, lacking a political voice, who are victimized by irresponsible officials goaded into intemperate action by an hysterical media response to maritime accidents. Only then, perhaps, will the worst excesses of these trends be curbed.

The second trend reflects the continuing pressure placed on shipowners in areas in which problems have long existed. It features in those areas of the world where – to put it charitably –the

rule of maritime law is not maintained to the highest standards. The usual suspects prevail. Claimants in these regions inspire an unsatisfactory, but often sadly effective, venal approach to the settlement of claims.

It is a source of depression to those compelled to continue to do business with such regimes – particularly those that have ambitions of joining, or have actually joined, the WTO – that no substantive progress seems to have been made in years and that, in some places, things appear to be getting worse! Can the IMO do anything about such iniquities? Perhaps, but it will certainly take a huge effort of political and lobbying will to make things happen.

The Lack of Defense

This implies, as is indeed the case, a lack of defensive strategy on the part of global shipping to deal with these adverse conditions. Simply put, the shipowning community has a negative image in the public domain. This is, of course, insofar as its image impinges upon the collective consciousness of the world at all!

Subscribers to the ***Atlantic Monthly*** may recently have read an interesting article entitled *Anarchy at Sea* by William Langewiesche which, while falling short of excoriating the global shipowning community in *every* sense, nonetheless reflects a widely held perception that

> *"The sea is a domain increasingly beyond government control, vast and wild, where laws of nations mean little and secretive shipowners do as they please – and where the resilient pathogens of piracy and terrorism flourish….."*

Coruscating prose indeed – but what has the global community done to counter this view? INTERTANKO has undertaken certain initiatives but while the industry at large remains so fragmented, difficulties in promoting a more realistic – and more positive – view will remain.

Current circumstances necessarily elicit a reaction that "something must be done". The problem is who, and how, should this "something" be done? There has, again, been discussion within the International Group about trying to promote the lobbying – for want of a better word – interest of the shipping community, but, there are, of course, issues as to whether the clubs themselves are really, despite the respect which they collectively engender, the correct means of promoting these interests.

Doctor Pangloss Speaks

Despite the challenges which the clubs have faced over the past twenty-five years and which continue to characterize the industry as a whole, the reaction which they have made to changing circumstances speaks well, I would suggest, of the system as a whole and its continuing relevance to the shipping community at large.

If, the view of Voltaire's Doctor Pangloss that "everything is for the best in the best of all possible worlds" cannot be held to be true of recent history or the future of the market, this commentator nevertheless remains confident that the underlying club ethos referred to above will continue to provide relevant answers to the many changes which will inevitably occur as the years progress guided by an uncompromising commitment to the interest of shipowners at large.