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SPOTLIGHT

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HIGHLIGHTS & BRIEFINGS

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“Ever Given” In The Suez Canal: When Is A Binding Salvage Contract Concluded?

Case briefing of SMIT Salvage BV & Ors v Luster Maritime SA & Anr (The ‘Ever Given’) [2023] EWHC 697 (Admlty).

❖ Background And Disputes

- The Ultra Large Container Vessel “Ever Given” grounded in the Suez Canal on 23rd March 2021, blocking both direction of the canal. On the same day, the Owners of “Ever Given” sought assistance from SMIT Salvage BV (‘SMIT’) and the vessel was re-floated the vessel on 29th March.
- SMIT sent a written proposal regarding how they were prepared to offer assistance on 25th March 2021. Email exchanges on 26th March reached consensus to the basis of remuneration for SMIT’s services. The parties then continued to negotiate the terms of a draft written contract on an amended WRECKHIRE 2010 form. No resolution had been concluded by 28th March 2021 when vessel refloated and no written contract was ever signed.
- A dispute arose as to whether a binding contract has been concluded between SMIT and “Ever Given” Owners. SMIT’s argument is that no binding agreement has been concluded because the parties had not intended immediately to be bound by signing on the WRECKHIRE contract.
- Owners opined that by these email exchanges the parties had reached consensus as to all of the essential terms of a contract and intimated a mutual intention to be bound immediately, notwithstanding that they would agree and sign a more detailed written contract in future.
- A side note to the disputes is that, a contractual salvage service under WRECKHIRE 2010 will be paid in way of daily hire; while a salvage service under LOF or without contract (under common law or Salvage Convention 1989) will run risk of “no cure – no pay” but the award can be very different.

❖ The Admiralty Court’s Decision

The Admiralty Court found that the Owners of the vessel had not concluded a binding salvage contract with SMIT, therefore the salvors were entitled to claim salvage under common law or Salvage Convention 1989. The reasoning is as below:-

- Although the two parties had not used expression such as “subject to contract”, the effect of their exchange was that the consensus reached was still “sub details”, i.e. the parties had made it clear that they intended to be bound only by a more detailed or fuller set of contractual terms which are still to be negotiated.
- The fact that one party had performed or partially performed the service could be a strong indicator of a concluded contract, but was not of itself decisive and would depend on all circumstances of the facts. In this case, SMIT’s provision of salvage assistance could merely be salvors’ willingness to conclude the contract, and did not imply the existence of a contract.
- There was no authority which can demonstrate that it was customary practice in salvage industry for main terms to be agreed and then for a broader contract on WRECKHIRE to be agreed later.
- Although time was perceived to be of essence to get the vessel refloated, urgency was not to that extent that there was no time for a full agreement to be reached.

“Ever Given” In The Suez Canal: When Is A Binding Salvage Contract Concluded? (Cont'd)

❖ The Admiralty Court’s Decision (Cont’d)

- Owners submitted that there would be serious repercussions if a salvor could agree main terms and deliberately delay the finalizing of the formal contract until service had been completed, then making a common law salvage claim after assessment of the profits. The Court was not persuaded that such can be a problem – if the parties leave the position unclear or uncertain, then they would have to accept the risks of having salvage remuneration dealt with under the common law.

❖ Comments

- There is no special principle for salvage industry – the general law of contract applies and courts would not strain to impose on parties a binding contract for salvage cases if such is unclear.
- In the course of contractual negotiations it can be difficult to identify the negotiations have reached the point that a binding contract exists. Owners seeking commercial terms rather than LOF contract would be well advised to conclude negotiations quickly; lest they may end up facing a claim under common law or 1989 Convention.

❖ Background And Disputes

- A Panamax bulk carrier (“the Vessel”) under time charter was ordered to discharge in Chaozhou Port, China. The fairway to enter the port was marked by buoys, but the Vessel with her laden draft had to proceed along the centre of the buoyed channel which was dredged deeper underwater.
- The electronic charts available onboard lacked important details to show the limits of the dredged deepwater channel due to improper scale, and the deck team prepared a rudimentary in-port-passage plan based on these charts.
- The Vessel entered the port with a compulsory pilot onboard, and three tugs were made fast to manoeuvre her onto the berth once inside the port basin. After proceeding along the approach channel, pilot failed to manoeuvre the Vessel to make a timely turn, and the Vessel grounded on a charted rocky shoal patch.
- Without knowing limits of the navigable water for the Vessel, the Master and the deck team took no active part during the navigation by pilot and appeared to be unaware that she was standing into danger.

- While Owners and Charterers commonly agreed the grounding was caused by pilot’s negligent navigation, the disputes arose:-
 - Owners argued that the port was unsafe due to the incompetent pilot, who should have deployed the tugs in “indirect” mode to keep vessel in deepwater channel. Failure to do so demonstrated a disabling lack of skills or knowledge amounting to incompetence. Therefore, Charterer breached the safe port warranty.
 - Charterers contended the Vessel was unseaworthy before and at the beginning of the voyage to Chaozhou due to lack of proper charts and passage plan. Therefore, Owners are in breach of the Article III.1 of the Hague Rules which had been incorporated in to the charterparty by a Paramount Clause.
 - A side note of Charterer’s contention is, according to the principle in previous case law, if the unseaworthiness of a vessel is an effective cause of the grounding, the Charterers would be able to rely on Owners’ breach of Article III.1 as a defence to Owners’ claim for breach of safe port warranty.

❖ Arbitration Tribunal's Finding And Award

The Tribunal including two experienced master mariners rejected Owners' contention :-

- Indirect towage is not a technique required at Chaozhou. There is no evidence which shows the pilot knew or should have known this technique. Without such knowledge would not amount to a disabling lack of skill or knowledge, as they had other techniques at their disposal to ensure that ships can safely enter Chaozhou Port.
- The pilot was able to control the Vessel and tugs in other aspects during this incident, and no other evidence showed the pilot was incompetent considering his working background and experience. His failure to execute the manoeuvre correctly is a one-off mistake, and such one-off mistake of an otherwise competent pilot is not a defect in the set-up of the port.
- The Tribunal found the Vessel was unseaworthy and in breach of Article III.1, but it held that such unseaworthiness was not an effective cause of the grounding.

❖ Comments

- From the tribunal decision, the highlight is that, to allege a port to be unsafe by judging competence of the pilot shall refer to that specific port, i.e., if a particular skill is not required at that specific port, then the pilot will not be condemned as incompetent without such skill, regardless of other pilot at other ports employ it routinely.
- If pilot makes a mistake in a task which he habitually performs efficiently, it is likely to be regarded as a one-off error rather than incompetence. Charge of incompetence is more likely to be inferred from a single incident where it is the first occasion to test such capability of the pilot.

Munich Re Economic Outlook 2023: High Inflation And Low Growth

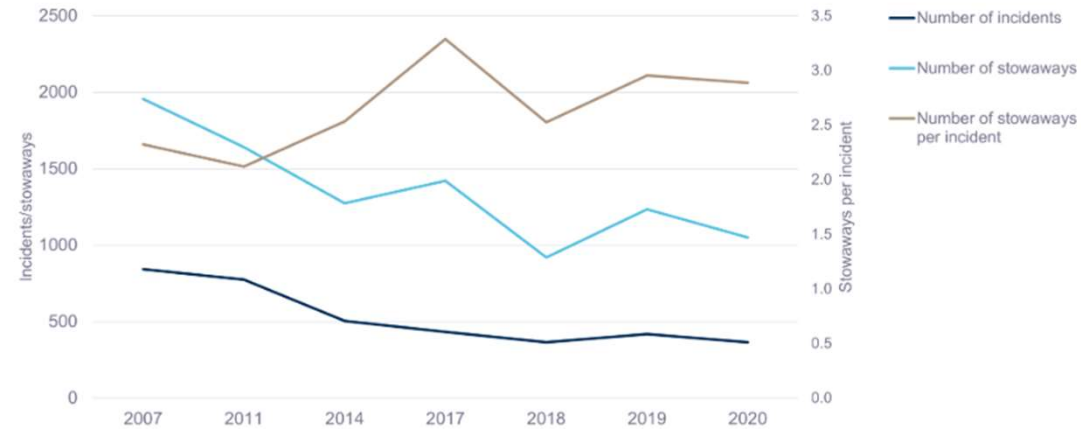
- In industrialized countries in particular, high inflation and falling incomes are putting a noticeable strain on demand for consumer goods. In addition, the strong recovery experienced in consumption following 2020's COVID-19-induced recession is now slowing to a stop.
- Europe and the USA will likely experience stagflation, such will create a credibility dilemma for central banks: whether the central banks will raise interest rates further, and whether they can successfully combat inflation without triggering a recession. The effects of 2022's record energy prices continue to leave their mark on growth and inflation rates in 2023, especially in Europe. However, relatively robust labour markets should prevent the economy from slipping into an actual recession. It is estimated that real growth in the USA and the Eurozone could then rise again to above 1% in 2024.
- China will resume its role as the driver of the global growth, however the consequences of the intense COVID-19 wave and problems in the real estate market will likely hamper economic development. The economic growth is expected to recover somewhat compared to 2022 (3%), at around 4 - 5%.
- While inflation will remain high in advanced economies, in most cases it is now falling again and this trend is expected to continue in the course of 2023. Nevertheless, the price increase may still remain above the target set by major central banks in 2024.
- The outlook can be influenced by other significant risks or uncertainties, such as a further escalation of the Russia-Ukraine war affecting energy prices, supply of LNG for Europe in winter of 2023/24 which is by no means guaranteed, or increased tension within the Middle East posing geopolitical risks.

IG P&I Data: 2018-2022 Trend Of Stowaways

- The number of stowaway incidents has remained fairly level over the past five years.
- The total number of stowaways involved has decreased, but not at the same decrease rate as the incident figures. This means that the number of stowaways per incident has been growing, and the current average is close to three stowaways per incident.

Overall incident trends (Source IGP&I)

Number of incidents and stowaways



Cost of incidents and stowaways



- The cost per incident and stowaway has risen. It is also important to note that the cost to Owners is higher than that incurred by the Clubs as, in addition to their deductible, Owners are likely to incur other costs, which are not within the insurance coverage.

IG P&I Data: 2018-2022 Trend Of Stowaways (Cont'd)

- Ports on the African continent continued to be the main hot spots for stowaway embarkations. More than half of the African stowaways embark in ports of Nigeria, Morocco, Guinea, Tunisia and Senegal.
- There is an upward trend in the number of incidents reported from the Maghreb region of North Africa, particularly from the port of Casablanca in Morocco and Rades/Tunis in Tunisia.
- The majority of stowaway embarkations in Europe were reported from ports in Greece and Turkey, but also ports in France and Belgium that are facing the English Channel were popular spots for persons attempting to stowaway.

❖ Risk Awareness In Stowaway

- Ensure that no unauthorized persons are able to gain access to the ship and all those who have been authorized to board, disembark before sailing.
- Proper access control relies on crew members who are adequately briefed about how the ship's trading patterns affect the stowaway risk and the relevant security measures to be implemented.
- Some stowaways qualify for refugee status while others are economic migrants. Starting from 2023 policy year, cover provided by IG Clubs has been amended and will no longer make difference for costs relating to a refugee and an economic migrant.

A Brief Introduction To The High Seas Treaty

While the UN Convention on Law of the Sea ('UNCLOS') established a general obligation on member states to protect the marine environment, it is perceived that there were still various gaps in its provisions. The Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction Treaty ('BBNJ', or alternatively referred as the High Sea Treaty), as agreed on 4th March 2023, is a legally binding instrument under UNCLOS seeking to fill in the gaps and set a framework for the protection of our oceans and equitable sharing of their resources.

Although BBNJ is a derivative of UNCLOS, signatories of UNCLOS are not automatically bound by BBNJ. Before it can enter into force, it must be ratified by 60 UN members.

❖ Main Principle

Except for the overarching principles laid down in UNCLOS, the key principles underlying the Treaty include:-

- The polluter has the responsibility to manage and bear the costs of their pollution;
- Fair and equitable benefit-sharing from marine genetic resources and digital sequence information;
- States should not let the lack of scientific certainty hold them back from responding to threats of serious, irreversible damage to the high seas;
- An ecosystem and integrated approach to ocean management, together with the building of the resilience, maintenance and restoration of ecosystem integrity;
- The use of knowledge from indigenous peoples and local communities, and the protection of their rights.

A Brief Introduction To The High Seas Treaty (Cont'd)

❖ Main Provisions And Themes

- Collection and sharing of marine generic resources, including setting up a global fund. But there is still ambiguity around who should pay and how the benefits will be distributed.
- Area-based management tools, in order to balance the marine environment protection with the food security and other socioeconomic objectives such as cultural values. These measures include establishment of marine protected areas.
- Environment impact assessment, which means the Treaty's standards might impact existing national processes.
- Capacity building and technology transfer, to support developing states in marine scientific and technological capacity.

❖ Relevance Of The High Sea Treaty To Shipping Industry

At this stage the Treaty is of limited relevance to marine and offshore insurers, but in future, the impact may include:-

- The establishment of marine protected area will result in greater environmental protections including substance and noise pollution. Vessels may be required to navigate at lower speed through or deviate from these areas. This may also give rise to different approach of salvage work or higher costs of remedial clean-up activities.
- The Treaty introduced the environmental impact assessment in two instances: for projects within national jurisdiction that may cause substantial harm to marine environment in areas beyond national jurisdiction; and also for projects within areas under jurisdiction of member states. During negotiations, the delegations understood that this covers activities such as those taking place in a State's national territory and activities beyond national jurisdiction by ships flying their flags.



Market Snapshot

Ukraine Grain Is Snarled Again With Blockages On Two Fronts

- In mid-April, Hungary, Poland and Slovakia have imposed bans to protect their markets from an influx of cheaper supply from Ukraine, and Bulgaria and Romania have said they could also take action.
- EU has criticized the member states in putting up their unilateral bans, and considered resolution including a second package of farmer compensation payments following an initial 56- million-euro package agreed for Bulgaria, Poland, Romania at the end of March.
- In the meantime, the Black Sea deal is under threat as Russia said its commitment to the grain initiative is only until May 18, and complained a separate deal meant to ease its own agricultural and fertilizer exports has not been upheld.
- Port-export and EU transit issues would make it much harder for Ukraine to supply developing nations and threatening to push up global crop prices. For now, traders don't appear to be hugely concerned, with supplies from the new season several months away.

Navigating Change: RoRo Sector Adapts To Decarbonization, BREXIT And Crisis

- China Merchants Energy Shipping (CMES) recently firmed up a contract for the two firm 9,300 CEU RoRo vessels planned to deliver in 2026 includes options for an additional four ships of the same size, totaling a potential price of USD384 million.
- This order is placed in response to the IMO decarbonization requirements and the growing demand for car transport vessels, particularly in China, where automobile exports are expanding rapidly.
- The European RoRo cargo vessel sector finds itself grappling with the challenges of fluctuating costs, trade disruptions, BREXIT, and changing shipping routes.
- CLdN RoRo, the world's second-largest operator of shortsea ro-ro cargo ships, has adapted to the changing landscape by expanding its services and acquiring Clipper Group's Seatruck Ferries. Other developments include transition from accompanied trailers on passenger ferries to unaccompanied trailers on ro-ro cargo vessels, bypassing congested ports like Dover.

Pirate Attack In Gulf Of Guinea, Tanker And Crew Safely Recovered Off Abidjan Coast

- The ‘Success 9’, a Singapore-registered oil tanker, was boarded by unidentified persons at about 300 nautical miles off the Abidjan Coast, Cote d’Ivoire on Monday, April 10.
- On 15th April, the vessel was found off the coast of Abidjan, Ivory Coast and the crew was reported safe, according to a statement from the government of Singapore, where the vessel is registered.
- A commercial ship passing by had picked up and reported a distress call from the tanker, which has since safely arrived in Abidjan port.
- This attack is only weeks after another recent incident. In late March, the Dutch-owned tanker ‘Monjasa Reformer’ was hijacked by pirates 140nm west of the Republic of Congo’s Port Pointe-Noire. The vessel was eventually located four days later approximately 90nm south of Bonny, Nigeria, with six crew members missing.

War In Yemen And Risks To Shipping

- Although piracy incidents decreased, Indian Ocean high-risk area remained a concern affecting maritime security due to the civil war in Yemen with the conflict between the Saudi-led coalition and the Shia Houthi minority.
- In May 2022, a sailing vessel ‘S.V. Lakota’ was attacked, which was suspected to be carried out by opportunistic rebels, although it is yet to confirm who led such actions.
- In November 2022, the Al-Dhabba oil terminal was attacked with missiles, being a significant case of missile attacks on ports and oil terminals; whilst it is also reported ships have been held illegally over concerns of arms smuggling.
- In early 2023, 23 fishermen, captured by the coalition, were sent back to the Houthi-controlled Hodeida province in Yemen, followed by the Houthis’s statement that it was an act of state piracy.
- It is reported that protests and complaints have consistently towards the collation for stealing marine resources including oil, and it is now estimated that the conflict and the blockade of Yemen resulted to losses of USD12 billion for the Yemen fishing industry.

FSO 'Safer': Salvage Agreement For Reached To Avert Looming Disaster Off Yemen's Coast

- The FSO 'Safer' is a floating oil storage and offloading vessel moored off Yemen's Red Sea coast. It has been in lack of maintenance due to the conflicts in Yemen, and deteriorated at risks of explosion or rupture, putting the region's environment and people in danger.
- UN estimated a major spill could devastate regional fishing communities and impact livelihoods of some 200,000; whilst cleanup cost alone would reach USD20 billion, together with disruptions to shipping through the Bab al-Mandab strait to the Suez Canal costing billions more in daily losses.
- Boskalis, a Dutch company, through its subsidiary SMIT Salvage, has reached an agreement with the United Nations Development Programme (UNDP) to transfer over 1 million barrels of oil from the Safer to a UN-purchased VLCC for responsible disposal.
- The Netherlands authority acknowledged they would raise funds for the operation, while UNDP also urged governments and corporations to help raise the remaining \$29 million needed for the complex rescue operation.
- It may take 2 months to transfer and clean the oil from 'Safer' before towing her to a green scrapping yard under UN supervision.

US Retail Sales 'Moderated' In March But 'Positive Growth' Expected In 2023

- According to the US National Retail Federation (NRF), in March 2023 retail sales in the US slowed down but witnessed a growth compared to the same period last year, with figures of its core retail sales down 0.5% from February but up 4.6% year over year.
- Pursuant to the NRF, product mix, competitive pricing and convenience become priorities of retailers, who recognize consumers' pressure due to increased prices and higher interest rates, to help consumer stretch their budget.
- As per the NRF, who estimates 2023 retail sales will increase between 4% and 6% over 2022, the fundamentals of the consumer economy have been facilitated by the continued easing of inflation, the overall strength of the job market and wages, which benefit consumers to spend on household priorities through 2023.
- Latest data on US container imports shows the expectation of its gradual increase through the first half of 2023 before a more normal peak shipping season, but might not exceed the pandemic surge volumes.

Concerns Of Global Ports Facing Cyber Attacks

- Two recent cyber attack incidents raised concerns of cyber security in global ports. Successful attacks will cause loss of port data as well as significant disruption to port operations.
- On Christmas Day of 2022, the Port of Lisbon was attacked by a ransomware called “LockBit”. The hackers alleged that the vital port-related documents such as financial reports, contracts, cargo information and ship logs were stolen, and would be published if ransom demands of USD1.5 million could not be met. The port’s official website had remained inoperable for a period, though media said that no operational activity was compromised.
- Security analysts have reported that LockBit is among the most prolific widespread ransomware gangs of 2022, accounting for a third of all cyber attack claims in 2022.
- The second incident is in Mid-April 2023, when 3 ports in Canada, i.e. Halifax in Nova Scotia, Montreal and Quebec, were targeted by a “denial-of-service attack”, which crashed their external websites. Fortunately, as per their spokespersons, there has been no data breach, and port operations have not been affected.

EU The Fifth Largest Importer Of Coal, During First Quarter 2023

- In 1st quarter of 2023, total global seaborne coal loadings increased by 20.5% to 310.8 million tonnes (excluding cabotage), which is higher than 2020-2022 year on year and in similar level with the pre-Covid time in 2019.
- From January to March 2023 and by looking at a year-on-year basis, exports from Indonesia increased by 61.3% to 106.5 million tonnes, from the USA increased by 28.8%, and from Russia were up 23.8% to 44.5 million tonnes. Decrease of export is observed from Australia as the coal loading is down by 5.0% to 80.7 million tonnes.
- During this period, seaborne coal imports into Mainland China surged by 101.4% to 77.9 million tonnes, imports to India increased by 14.9% to 47.7 million tonnes, and imports to Japan increased by 0.9% to 44.5 million tonnes.
- European Union is currently the fifth largest seaborne importer of coal in the world after China, India, Japan and South Korea. In 2022, EU accounted for 9.8% of global seaborne coal shipments.
- Back in 2021, as much as 44% of the EU’s seaborne coal imports were sourced from Russia, but as a result of the war in Ukraine, this proportion declined to only 3.6% by 1st quarter of 2023. Now EU mainly source coal from US, Australia, Colombia and South Africa.

Tanker Market Improved in March

- VLCC spot rates experienced an accelerated recovery in March, rising by 43% on average month on month as renewed buying from China strengthened rates. The routes of Middle East-to-East, Middle East-to-West and West Africa-to-East have been rising by 45%, 38% and 41% respectively.
- Suezmax rates saw a further recovery in March, increasing by 17% month on month, supported by ongoing trade dislocations. Spot freight rates on the West Africa-to-USGC and USGC-to-Europe routes have increased by 14% and 20% respectively.
- Aframax rates rebounded from the previous month's decline with an average increase of 32% in March. The sharpest surge appears in the spots rates on the Caribbean-to-US East route, increasing by 81% month on month.
- Clean spot freight rates also improved on average of 14% month on month, as strong gains in the West of Suez outpaced losses to the East. West of Suez rates rose by 29%, supported by a strong performance in the Mediterranean. East of Suez rates fell 10% amid a winding down of winter product demand in the Far East.

Record High Container Order Book Of 7.54 Million TEUs Signals Significant Change

- Despite the drop in containership freight rates, the TEU capacity of the contracted orders in the past 10 quarters matched the level contracted during the preceding 30 quarters. Currently, the order book of container ships has reached a new record high at 7.54 million TEUs, which equals 28.9% of the global existing fleet.
- Newbuilds accounting for 5.03 million TEU capacity are to be delivered in the remainder of 2023 and 2024. It is estimated that the recycling will hit nearly 1 million TEUs during this period and the fleet could therefore soon exceed 30 million TEUs for the first time.
- Compared to 10% in the current fleet, 57% of TEU capacity in the order book involves ships with alternative fuels preparation such as LNG, methanol, and ammonia. It will become difficult to establish a single relevant rate benchmark for the time charter and asset markets as the use of alternative fuels increases.
- The operators' ownership share of order book represents 65%, which has increased from 50% in a decade ago. The increasing ownership share may indicate that operators' ability to use the time charter market to quickly adjust fleet capacity is decreasing, as many of the non-operating owners usually put their largest ships on long-term charter, leaving the smaller ships operating in short-term market.

Panama Canal - Green Vessel Classification System

- At the end of March 2023, The Panama Canal Authority (“ACP”) issued an Advisory to Shipping No. A-12-2023, implementing the Green Vessel Classification System, which will be part of the Panama Canal Green Route Plan 2050 and the Carbon Neutrality Commitment by the year 2030.
- Following the advisory, from 1st May 2023, the ACP will require the following documents from vessels over 38.1m (125 feet) intending to transit the canal, except for warships, dead tows, small crafts, and vessels less than 1,000PC/UMS tons or 1,000 tons of displacement: -
 - ❑ International Energy Efficiency Certificate (IEEC) and its supplementary Record of Construction relating to Energy Efficiency issued by a Classification Society and Submitted through the Maritime Single Window Application, and it shall be verified.
 - ❑ Bow thruster (horsepower) / Arrival displacement ratio, which must be submitted before the vessel’s first transit; and the operational status shall be confirmed for each transit thereafter.
 - ❑ Fuel declaration: the bunker delivery note (BDN) for the utilized fuel during transit must be provided, and is to be submitted through the same application done for the IEEC information.
- Data collected from above submission will be used to create a database enabling the ACP to identify and analyze the technical and environmental issues, which would affect the concentration and operation of ships at proposed levels in the Green Connection Environmental Recognition Program.



IG P&I Clubs: 2023/24 Post Renewal Update

● American Club

While the Club renewed about 95% of its expiring tonnage over the renewal itself, its renewing premium for 2023 was almost exactly the same as the expiring volume.

● Gard

- During 2022 policy year, the total tonnage entered Gard has reached 277 million GT, and Gard renewed with 99.4% of the existing tonnage in 2023 renewal.
- Gard agreed to give a 5% Owners' General Discount (OGD) to mutual entries that renewed with Gard for the 2023 policy year.

● Japan P&I Club

After collecting 25% additional calls from ocean-going vessels' P&I entries for 2020 and 2021 policy year, Japan P&I also applied a general increase of 10% for the policy year 2023. A total ocean-going tonnage of 87.8 million GT renewed with Japan P&I.

● Skuld

Skuld has met its renewal targets and mutual P&I gross tonnage increased by 7.8%, reaching a record high of 103.3 million GT. For 2023 policy year, total premium income is to be over USD500 million.

● The London P&I Club

The Club announced the renewal result is in line with their objectives and the renewal retention rate is over 90%, with its mutual entry following the renewal stands at 40.5 million GT in 2023. The comparative position in 2022 was 44.1 million GT.

● The Swedish Club

The Swedish Club announced they had a solid renewal performance, but the concrete renewal figures on premium or tonnage have not yet been published.

● UK P&I Club

With 99% members remained for renewal, the combined mutual owned and chartered tonnage stands in excess of 260 million GT, following an increase in mutual owned tonnage to 153 million GT.

● West P&I Club

- For mutual P&I renewal, there is a premium increase of 9%. 99% of tonnage renewed with the Club, and existing Members contributed a further 1.6 million GT of tonnage. The total entered mutual tonnage stands at 96 million GT.
- For FD&D premium, there is an increase of 4.26% on renewing tonnage.

Happy Reading, See You In May!

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