



**HFW**

**SHIPPING**

# **STEAMSHIP MUTUAL MEMBER TRAINING COURSE 2023**

**MAJOR CASUALTY CASE STUDY & WORK SHOP**

**WEDNESDAY, 5 JULY 2023**

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## ANDREW CHAMBERLAIN

### PARTNER & MARINER

- Andrew is a former Royal Navy officer and specialises in "wet" shipping cases, including salvage (acting for salvors, as well owners and their underwriters), collisions, fire and explosion, total loss and wreck removal. He also advises on both civil and criminal pollution liabilities, marine insurance coverage disputes and the full range of other shipping-related commercial and contractual disputes.
- Andrew served at sea with the Royal Navy and also had a stint with the Hong Kong Squadron. He left the Royal Navy in 1990 and joined HFW in 1994, having trained at Richards Butler (now Reed Smith). He was promoted to partner in 2003 and has been heavily involved in many of the largest casualties of recent years, including "ACONCAGUA" and "CMA DJAKARTA" (both 1999), "PRESTIGE" (2002), "PELICAN 1" (2003), "THUNDERHORSE" (2005) which remains the most valuable property subject to a Lloyds Open Form salvage agreement to date, "MSC NAPOLI" (2007), "MSC CHITRA" (2010), "COSTA CONCORDIA" (2012), "SMART" (2013), the "NORMAN ATLANTIC" (2014), "MAERSK SEOUL" (2016), "SANCHI" and "MAERSK HONAM" (both 2018), "YANTIAN EXPRESS" and "GOLDEN RAY" (both 2019), "STELLAR BANNER" (2020) and "EVER GIVEN" and "X-PRESS PEARL" (both 2021).
- Andrew is consistently ranked in the top tier for Shipping in Chambers and Legal 500 and is "particularly renowned for his expertise in salvage, collision and wreck removal matters." (Chambers UK 2023). A client confirmed that they were "impressed by his commercial thinking and great legal instincts."(Chambers UK 2023).
- Andrew is qualified in England and Wales.

## DANIEL O'CONNELL

### SENIOR ASSOCIATE

- Daniel is a senior associate in the London office and focuses mainly on wet shipping matters, including collisions, groundings, salvage, fires, piracy and limitation of liability. He has considerable experience in dealing with all aspects of damages / quantum, particularly arising out of collisions.
- Daniel also advises on dry shipping matters including charterparty, bill of lading, pool agreement and related contractual disputes.
- Daniel acts for owners, charterers, H&M underwriters, P&I Clubs and salvors in both arbitration and court related matters.
- Daniel has completed secondments at two IG P&I Clubs, including at Steamship in 2017.
- Daniel spent over 4 years in HFW's Singapore office between 2011 – 2016 as is very familiar with the jurisdiction and the surrounding jurisdictions.
- Daniel is qualified in England and Wales.



1. Introduction
2. Casualty Scenario – Nightmare in Ningbo!
3. Team Exercises
  - DME 1 - Identifying Priorities
  - DME 2 - Management and Control
  - DME 3 - Claims and Security
4. Summary / Conclusion

- Fewer casualties but usually larger and more complex – linked to ever larger and untested ships
- Depressed ship values relative to cargo has changed the dynamics of casualty management
- Criminalisation of seafarers, intrusive local authority intrusive investigations
- Zero tolerance from coastal states – port of refuge challenges and exponential rise in wreck removal costs
- Challenges of managing a casualty in era of social media – the public are interested!

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MSC NAPOLI



### THE “HAPPY BULKER”



**Vessel:** Chinese owned Capesize, chartered by Australian miner

**Cargo:** Iron ore (ex Australia) for a steel mill in Ningbo, China

### THE “BOX MASTER”



**Vessel:** Danish owned container vessel, chartered by US liner company

**Cargo:** 10,000 TEU (various)

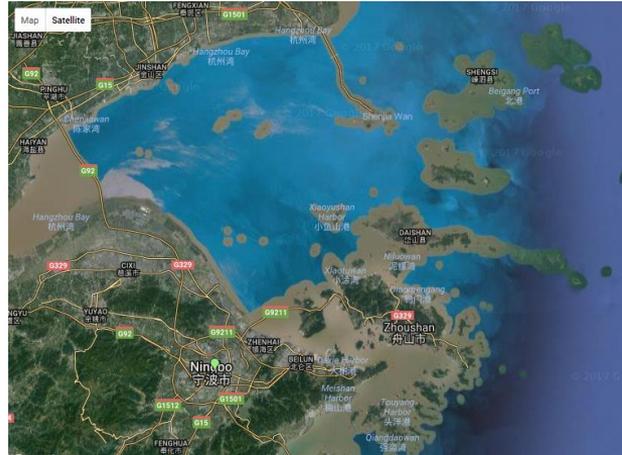
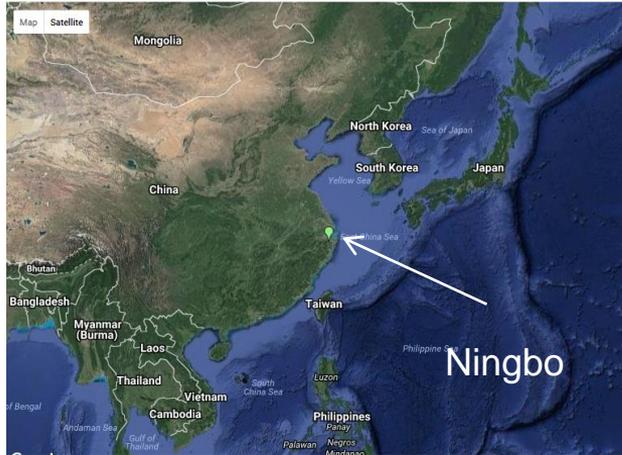


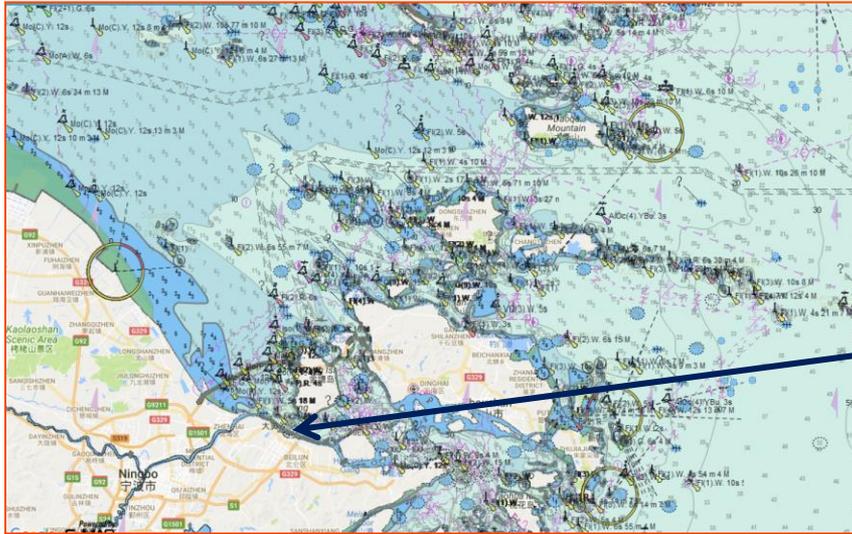
- Chinese-owned Capesize the HAPPY BULKER is time-chartered by a Korean time charterer then voyage chartered by an Australian mining company to carry iron ore from Australia for a steel mill in Ningbo, China;
- The HAPPY BULKER picks up a pilot for the Ningbo approach channel then allegedly suffers both steering gear failure on approach and pilot negligence;
- The HAPPY BULKER sheers towards departing 10,000 TEU container ship the BOX MASTER owned by a Danish shipowner and chartered in by a US liner company;
- The HAPPY BULKER and the BOX MASTER collide;
- The HAPPY BULKER then allides with a berth and knocks down two container cranes beneficially owned by a Hong Kong terminal operator;



- The HAPPY BULKER is arrested by the terminal resulting in delays in discharging and claims by the Chinese buyer against the Australian miner;
- The BOX MASTER is holed and takes on water causing stability issues;
- Containers are lost overboard;
- The BOX MASTER is in danger of sinking so Chinese salvors mobilised under LOF; and
- There are dangerous goods boxes on the BOX MASTER's deck and dangerous (mis-declared) cargo and as a result fire breaks out and General Average is declared.

*“The busiest port in the world for cargo tonnage - 888.96 million tons in 2015”*





## Approaches

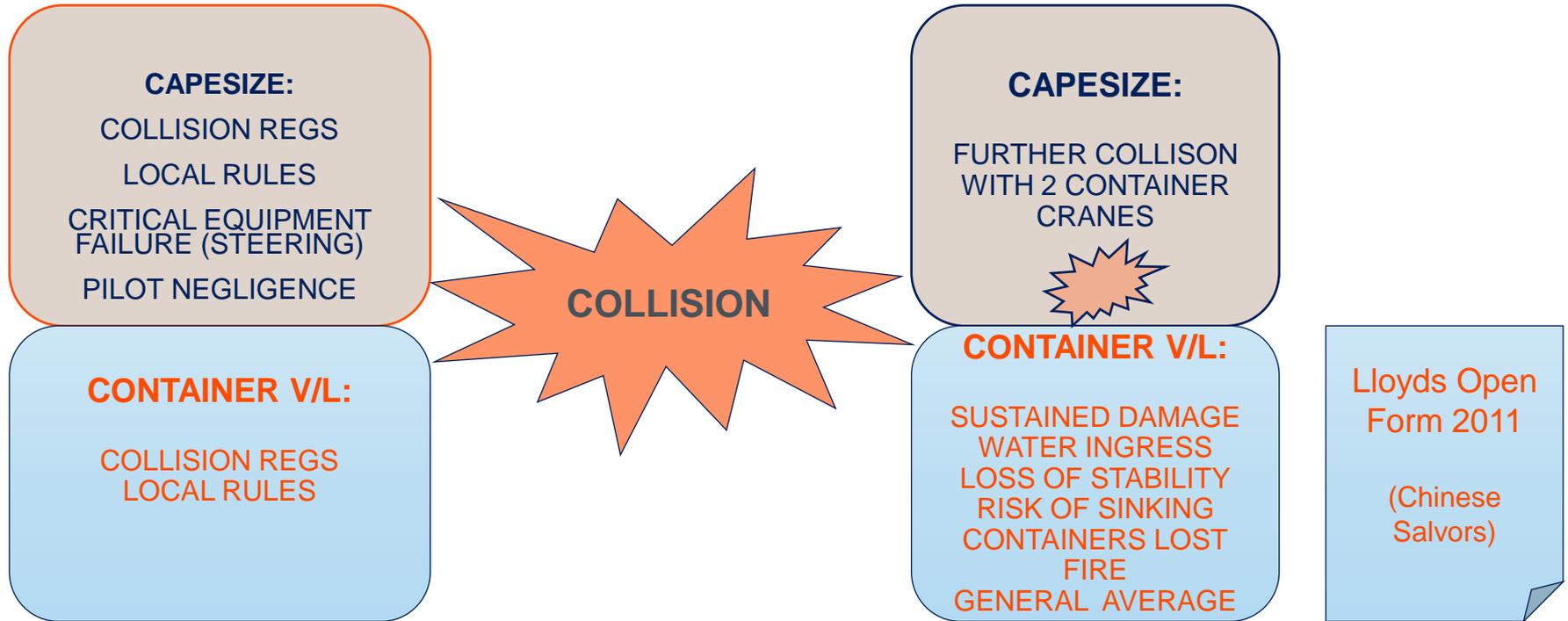




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## CASUALTY SCENARIO – WHAT TO DO?







- **What are your priorities?**
- **What information do you need at this time?**
- **Who are your team?**



## DME 1 – IDENTIFYING PRIORITIES

### MODEL ANSWER

1. **People** – are there any injuries?
2. **Environment** – pollution? *Containers lost overboard*
3. **Property** – what is the vessel's situation? Salvage? *Container vessel agrees LOF*
4. **Reputation** – *high profile casualty*
5. **P&I Club** – informed; their local correspondent mobilised?
6. **Hull Brokers** – informed?
7. **HFW** – Mariners/lawyers to the scene to take evidence, protect/advise the Master and manage matters on board including preservation of all contemporaneous evidence including VDR & ECDIS data; witness statements; preliminary view on liability and quantum
8. **Local lawyers** – advise on jurisdiction issues and assist with Port State/Harbour Master enquiries
9. **Media** – Social media policies, press intrusions





## DME 2 – MANAGEMENT AND CONTROL

- The situation on “BOX MASTER” becomes more critical as the fire takes hold and more explosions are sighted;
- Port authorities suspend shipping for a number of hours whilst they assess the incident;
- Chinese MSA commence investigations, boarding “HAPPY BULKER” to interview crew and restricting access to the voyage data recorder. The Master is taken ashore by the Chinese Police, for questioning; and
- A containers hospital is required.

- What decisions need to be taken now? Prioritise and consider:
  - The continued management and control of the casualty including salvage and pollution issues?
  - How would you go about getting and protecting evidence?
  - Try to estimate quantum of the various headings of claims between the colliding ships based on liability 75% “HAPPY BULKER” and 25% “BOX MASTER”?
  - Can you see any difficulties with upholding a negligent navigation defence with regard to cargo indemnity claims?



- **Crew must remain priority until all taken care of and accounted for**
- **Organise crew in one hotel (with security) with orders not to speak to anybody external**
- **Lawyers – Instruct London lawyers to do the following:**
  - *send a Mariner(s) to gather evidence and interview the crew*
  - *check the ownership position of both vessels*
  - *get rough sound valuations for both vessels*
  - *ascertain the extent of any local and/or Port State enquiry and/or criminal proceedings*
  - *sit in on interviews with Chinese MSA*
  - *ascertain the local position on limitation*
  - *provide advice on salvage/other contracts*
- **Make a decision on salvage/wreck removal**



## DME 2 – MANAGEMENT AND CONTROL MODEL ANSWER

- **Engage Salvors on Lloyds Open Form (“LOF”) (if possible)**

*This allows you to hide behind salvors as they take over looking after the casualty. Vessel total loss but high value cargo. Clause E of LOF – sweeps up services by other contractors before LOF, avoiding separate common law salvage claims.*

- **Assist Salvors identifying location of bunkers and dangerous cargo**
- **In consultation with Chinese Authorities engage other contractors for recovery of containers.**

*Requires demarcation of responsibility between them and Salvors.*

- **How can you best maintain contact with all relevant parties?**

*Set up/organise a regular conference call BUT one a day usually enough! Must be clear channels of communication.*

- **Consider with Owners/P&I Club whether media consultants are appointed**



## DME 2 – MANAGEMENT AND CONTROL MODEL ANSWER

- **Surveys**

In conjunction with Club, H&M and lawyers consider appointment of (or just retain) expert consultants / surveyors for Ship damage survey, WP survey, Cargo survey, Environment

- **Preservation of Ship's Evidence**

Instruct Master to save Voyage Data Recorder (VDR) data, documents, notes of protest. Strict email and social media discipline - ensure control over what is being sent out in the way of Notes of Protest, accident reports, control access to the vessel

- **External Evidence**

Investigate whether collision recorded by AIS receiver station and/or VTIS

- **Contact vessel's Class Society**

Inform them of the incident and confirm that they are able to attend the vessel

- **Organise local HQ and hotel for attending Consultants, Class Surveyor & Lawyers**

## DME 2 – MANAGEMENT AND CONTROL CHINESE MSA

- MSA investigates marine casualty accidents in PRC coastal and inland waters, as well as accidents involving China-flagged ships in international waters, in accordance with the Maritime Traffic Safety Law of PRC, the Regulations of PRC on the Investigation and Handling of Maritime Traffic Accidents, the Regulations of PRC Concerning the Administration of Traffic Safety on Inland Waters, and SOLAS Chapter XI.
- MSA will attend and take statements and retrieve contemporaneous evidence;
- MSA issue a final report, normally only disclosed if the relevant PRC Maritime Court direct them to do so;
- May include ‘factors effecting.....lookout, judgement, improper action etc’
- They will not apportion liability but may conclude:
  - "Both ships share the blame in this case"*
  - "Ship A shares more blame than Ship B"*
  - "Ship A is considerably more to blame than Ship B"*
- Some published reports online, tends to be those in the public domain

Shanghai MSA  
Tianjin MSA  
Liaoning MSA  
Hebei MSA  
Shandong MSA  
Jiangsu MSA  
Zhejiang MSA  
Fujian MSA  
Guangdong MSA  
Guangxi MSA  
Hainan MSA  
Changjiang MSA  
Heilongjiang MSA  
Shenzhen MSA





- **Declare General Average?**
- **Consider claims from other vessel?**
- **Collision - who is likely to be the paying party?**
- **How can you start thinking about maximising your recovery, or minimising your loss by limitation of liability?**
- **Jurisdiction – is forum shopping applicable?**
- **Mitigation of Loss**



## ***APPLICABLE LAW***

### **CONTRACTS OF CARRIAGE**

Charterparty / Bills of Lading – often include law and jurisdiction clause for English law and High Court/Arbitration.

### **LLOYD'S OPEN FORM 2011**

Standard form salvage contract – agreed verbally by the master acting as agent. Standard clauses. English law and London Arbitration.

### **AGREEMENT TO ENGLISH LAW**



## **ENGLISH LAW BY AGREEMENT**

Collisions are a tort – general rule is that the natural forum is the place that the damage or the event giving rise to the damage occurred.  
Domicile of Registered Owners/Demise Charterers?

ASG Collision Undertaking - intended to allow claims arising from a collision to be dealt with by the English High Court by reference to English law.

In practice claims will be dealt with by the Admiralty Court, a specialist Court which forms part of the High Court – providing transparency, experience, expertise and certainty.

### Key terms:

- Provides for English law / Jurisdiction (open to agree different limitation regime)
- Acceptance of service provisions (practical requirement)
- Agreement to exchange security in a form "reasonably satisfactory"
- Confirmation on Bareboat charter position
- Agreement itself governed by English Law and jurisdiction

**LIMITATION CONCEPT**

**Right to limit arises from the convention on limitation of liability for maritime claims 1976 (LLMC 1976)**

**A shipowner is entitled to limit its liability in respect of certain claims (article 1 LLMC 1976)**

**Two separate limitation funds (article 6 LLMC 1976):**

- claims for loss of life or personal injury***
- any other claims (physical damage)***

**More than one "occurrence" could lead to more than one fund**

**Claims are aggregated in a fund (or funds)**

**LIMITABLE CLAIMS SET OUT IN ARTICLE 2 LLMC:**

- a) **Loss of life or personal injury or loss of or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;**
- b) **Loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;**
- c) **Other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;**
- d) **Raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;**
- e) **Removal, destruction or the rendering harmless of the cargo of the ship;**
- f) **Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this convention, and further loss caused by such measures.**

NB: ARTICLE 18 LLMC 1976 ALLOWS FOR DEROGATION:

*“Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude the application of Article 2 paragraph 1(d) and (e). No other reservations shall be admissible to the substantive provisions of this Convention.”*



**POTENTIAL JURISDICTIONS**

- **PLACE OF THE TORT: INTERNATIONAL WATERS**
- **BY AGREEMENT: ENGLISH LAW**
- **PORT OF REFUGE: CHINA**
- **CHARTERERS: VARIOUS**
- **DOMICILE OF REGISTERED / BENEFICIAL OWNERS: VARIOUS**
- **FLAG OF VESSELS INVOLVED: VARIOUS**
- **SISTER / ASSOCIATED SHIPS PORT CALLS: VARIOUS**
- **NATIONALITY OF THE CREW: VARIOUS**



**Consider Privilege:**

**All written communications and attendance notes are at risk of being disclosable unless:**

- The primary purpose for their preparation is in contemplation of litigation
- They are communications between a lawyer and client team

**Simply 'copying in' internal legal counsel is no longer sufficient to preserve legal privilege**



**Beware waiving privilege by the following:-**

- Emails
- Data storage
- Disclosure to third parties (including opponents in litigation)
- Otherwise undermining a communication's confidentiality
- Disclosure of parts of documents
- Addition of comments to privileged documents or creation of new documents summarising privileged advice



## **DME 3 – CLAIMS AND SECURITY**

### **MODEL ANSWER – SAFEGUARDING PRIVILEGE**

- When engaged in incident related correspondence write "IN CONTEMPLATION OF LITIGATION" clearly on the front page of any documents which flow between you (including initial instructions, emails, reports etc)
- Mark communications as "privileged and confidential"
- Do not circulate confidential documents too widely (beware of forwarding emails!) Restrict access to internal documents (using passwords, for example)
- Third party advisers to address all reports to the Owner's lawyers, care of the Club, or care of correspondents
- If there is no dispute in prospect and if you may want to assert legal advice privilege, consider obtaining advice via an external lawyer
- Avoid annotation on privileged documents; or creating summaries of privileged documents

*HFW*

**IF IN DOUBT....**

**INSTRUCT OUT!**





THANK YOU!



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