

**CIRCULAR REF: 2013/010**

**CIRCULATED TO ALL MEMBERS, BROKERS AND DIRECTORS  
ATTENTION INSURANCE DEPARTMENT**

**18 FEBRUARY 2013  
SSR/MA**

## **FD&D COVER FOR MOA RISKS – WRIT SEARCH FACILITY – AND MARITIME LIEN INSURANCE FOR SECOND-HAND SHIPS**

The purpose of this Circular is once again to draw Members' attention to the "Writ Search Facility" which North has arranged on Members' behalf, as well as to advise Members of the availability of "Maritime Lien Insurance for Second-Hand Ships" for the 2013/2014 policy year.

The "Writ Search Facility" has been designed to reduce the risk of Members buying vessels which turn out to be subject to claims relating to the vessel's previous ownership. The "Maritime Lien Insurance for Second-Hand Ships" is intended to provide Members with some further protection against the financial losses which may flow from claims being made against second-hand vessels purchased by Members. Members should note that the insurance cover is provided under a Lloyd's insurance policy which North has arranged on Members' behalf acting purely "as agents only". Accordingly, North shall be under no liability whatsoever in relation to any claims which may be made against the Maritime Lien Insurance Policy.

Before going on to explain in more detail how these products may benefit Members, it is perhaps helpful to recap on the types of claims that can be made against vessels relating to their previous ownership. Broadly speaking such claims fall into two categories:

1. Maritime Liens
2. Statutory Rights of Action in rem

### **1. MARITIME LIENS**

A maritime lien is a claim which entitles the Claimant to arrest the ship in connection with which the claim arises, which right of arrest survives a sale other than a judicial sale, despite the fact that the buyer has bought the vessel in good faith and without notice of the claim. Under English law only a small number of claims have been granted "maritime lien" status, the most important of which are as follows:

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1. Damage done by a vessel
2. Salvage
3. Wages of masters and seamen
4. Masters disbursements

Unfortunately for the buyers of second-hand vessels, there are other jurisdictions which grant many other claims "maritime lien" status which greatly increases the risk that a vessel may be subjected to some such claim. For example, in the United States of America, any person furnishing "necessaries" in the United States to a vessel shall have a maritime lien on that vessel. "Necessaries" has been interpreted by the US Courts very widely to include repair services, supplies (including bunker supplies), towage, the use of dry-dock facilities, pilotage, stevedoring services and even P&I insurance premiums.

Furthermore, the US Court of Appeals 9<sup>th</sup> Circuit has upheld the claim of a foreign supplier of bunkers to a foreign ship in a foreign port to a maritime lien in respect of that supply on the basis of incorporation in the Supply Contract of a lien clause and a US Choice of Law clause. The extension of US jurisdiction in this manner has also recently influenced the Canadian Federal Court of Appeal to uphold the claim by non-US bunker suppliers to the protection afforded by maritime lien status in respect of non-US supplies of bunkers by virtue of a US Choice of Law provision in their Supply Contracts.

In addition to the categories of claims which, under English law, have been granted "maritime lien" status, the International Convention on Maritime Liens and Mortgages 1993 extends the categories of claims granted "maritime lien" status to include claims in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel as well as claims for port, canal and other waterway dues and pilotage dues amongst others. This Convention has been ratified by a number of countries including China, Denmark, Finland, Germany, Guinea, Morocco, Nigeria, Norway, Paraguay, Peru, Russian Federation, Spain, Sweden, Tunisia and the Ukraine.

As a matter of English law, the question of whether or not a claim against a vessel has "maritime lien" status will be determined according to the law of the forum. The law of the flag state of the vessel may however be applied in other countries, which may (as has been seen in the Canadian Federal Court of Appeals case referred to above) apply the laws of the Choice of Law clause in the contract.

## 2. STATUTORY RIGHTS OF ACTION IN REM

Even in England where the category of claims attracting "maritime lien" status is small, all maritime claims listed in the 1952 Arrest Convention may be enforced in rem by arresting the vessel. Such claims cause a particular problem for Members purchasing vessels because providing a writ has been issued prior to a change of ownership, the writ may be served and the vessel arrested perfectly validly even after a change of ownership. The same applies to a number of other jurisdictions such as Australia, Canada, Hong Kong, New Zealand, Singapore and arguably South Africa. The risk of a vessel being arrested pursuant to a writ issued in rem against the vessel prior to a sale can however be significantly diminished by carrying out a search of the Admiralty Registry in London as well as in these other important maritime jurisdictions.

In one case involving North and one of its Members, the Member purchased a vessel in relation to which a writ had been issued prior to the sale but not served until some time after the sale for a claim of approximately US\$250,000. As no "Writ Search" had been carried out at the Registry in Singapore where the writ had been issued, this was not discovered until the vessel was arrested.

## 3. "WRIT SEARCHES" (IN REM CLAIM FORM SEARCHES)

As explained above, in relation to statutory rights of action in rem it is possible in Australia, Canada, England, Hong Kong, New Zealand, Singapore and South Africa to check prior to purchasing a ship whether any writs have been issued which have yet to be served on the ship. In order to assist Members in identifying such claims, North has entered into arrangements with the following law firms whereby Members of North wanting to purchase FD&D cover for disputes

arising under sale and purchase contracts will be entitled to have a search of the Admiralty Registry concerned carried out free of charge:-

Australia and New Zealand - Norton White

Canada - Borden Ladner Gervais

England, Hong Kong and Singapore - Ince and Co

South Africa – Edward Nathan Sonnerbergs (Durban) and Bowman Gilfillan (Cape Town)

It should also be noted that where a Member wishes to take the insurance referred to at 4 below, the conduct of this writ search (revealing no lien, encumbrance, or cause of action) is a condition of cover.

Ideally, Members wishing to gain maximum value from this writ search facility will give North as much notice as possible prior to delivery of the vessel (possibly even prior to concluding the MOA) in order to enable a proper search of each Registry to be carried out. Furthermore, it is a condition of cover of the insurance referred to at 4 below that this writ search is carried out not more than one week prior to the intended delivery of the vessel, and not more than 30 days before actual delivery.

Upon an application for entry of a vessel in the FD&D Class being accepted, and if requested by Members, North will instruct the above lawyers to carry out a writ search at the appropriate time.

The writ search will be carried out on the terms set out in the draft letter attached to this Circular which shall be deemed to have been sent to the Member, with logical insertions/amendments, upon receipt of the Members' request for a writ search to be carried out.

In the event that the Members wish to conduct a writ search more than once or before making an application for entry of the vessel in the FD&D Class, the Writ Search facility will be made available but North reserves the right to pass on the charges (if any) to the Members, particularly in the event that an application for entry is not made or is withdrawn.

North hopes that Members will take full advantage of this facility, thereby reducing the risk of suffering unforeseen financial losses as a result of claims being made against vessels purchased by them relating to vessels' prior ownership. Since this facility was introduced in 1999, a number of Members have been assisted in identifying claims which, when brought to the attention of the sellers concerned, were sorted out. As most vessels are owned by single purpose companies whose sole asset is the vessel, once the vessel has been sold and the sale proceeds distributed, it is usually extremely difficult getting the sellers to honour their usual obligation under the MOA to indemnify the buyers in respect of such claims. It is no surprise therefore that some Members view the "Writ Search Facility" as an integral part of their management of uninsured risks when buying second-hand ships.

#### 4. MARITIME LIEN INSURANCE FOR SECOND-HAND SHIPS

Unfortunately, however, there are many jurisdictions other than those referred to in paragraph 3 above which grant various categories of claims "maritime lien" status and where it is not possible to discover the existence of such claims before a vessel has been arrested. In order to assist Members in insuring against the risk of claims being made against a vessel relating to its previous ownership, North has arranged a Lloyd's Insurance Open Policy to which declarations can be made. Members wanting to purchase FD&D cover for disputes arising under sale and purchase contracts are thereby enabled also to cover the risk of liabilities being incurred by them in relation to claims being made against vessels relating to their previous ownership. Such claims brought against Members' vessels will of course continue to be handled by North's FD&D Department in the usual manner. To the extent, however, that financial losses are incurred by Members arising directly from a "maritime lien" type claim being made, such losses will be covered by the Maritime Lien Insurance for Second-Hand Ships up to a limit of US\$1.0 million per vessel, subject to a deductible of US\$5,000 at a premium for the

2013/2014 policy year of US\$8,500 per vessel. Alternatively, Members wishing only to purchase cover up to a limit of US\$500,000 any one vessel can pay a reduced premium of US\$5,175 per vessel declared. As will be seen from the terms of the policy attached, the cover purchased will continue for 12 months from the date of the declaration.

North hopes that this Maritime Lien Insurance Policy for Second-Hand Ships will continue to provide Members with a useful additional cover to protect them against unforeseen financial losses.

Members wishing to discuss any aspect of this Circular are welcome to contact the North's Underwriting or FD&D Departments.

STEPHEN REBAIR

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As Managers on behalf of the North of England P&I Association Limited