
SSM
STEAMSHIP MUTUAL
Sea Venture

Contents

Issue 1

Editorial team
Malcolm Shelmerdine
Naomi Cohen

Welcome to the first edition of the new look Sea Venture newsletter

The new Sea Venture will be published more frequently and in a more contemporary format.

Although I know that many of our Members, as well as many Owners and Charterers who are not members of the Steamship Mutual, have over the years enjoyed reading our old Sea Venture publication, it had grown in size and weight with the consequence that it was not published as frequently as we would have liked. There were 14 articles, totalling 27 pages, in the first publication in February, 1978. Twenty editions and 25 years later there were 39 articles, totalling 121 pages. All of those articles, as well as many earlier Sea Venture articles and a substantial amount of additional information of interest to our members are available on the Steamship Mutual website **(www.simsl.com)**.

The new Sea Venture will be published more frequently and in a more contemporary format. It will be mainly made up of brief summary articles on topics of current interest, with links to fuller more detailed articles on the Steamship Mutual website. There will also be details of other Steamship Mutual publications, links to articles on the website that are not summarised in Sea Venture, news items etc.

I do hope that you will enjoy this first edition of the new Sea Venture, and would welcome any feedback on the content, or suggestions for future topics to be covered, which can be sent to me at **seaventure@simsl.com**

Malcolm Shelmerdine

31st December 2004

This symbol indicates further reading on our website www.simsl.com

When your ship is

The Maritime Transportation Security Act and Potential Vessel Owner Liability to Third Parties Resulting from a Terrorist Attack.

The events of September 11th, and the resulting litigation have highlighted the possibility of liability for vessel Owners in the event that a vessel is used in the perpetration of a terrorist attack, such as the detonation of a weapon of mass destruction in an American port. Airlines are being sued for failing to prevent the attacks; if similar attacks occur using vessels, the vessel Owners may be sued for any damage caused to third parties arising out of the failure to ensure the security of the vessels against such incidents.

In response to the September 11th attacks, the IMO adopted the International Ship and Port Facility Security Code (ISPS Code), incorporated into SOLAS 1974. The U.S. Congress also passed the Maritime Transportation Security Act (MTSA), implementing the ISPS Code and setting forth numerous requirements to prevent terrorist acts against shipping. Owners must, among other requirements,

in the Bull's Eye

formulate vessel security plans, designate security officers both aboard the vessel and shore-side, and have their vessels certified compliant by the U.S. Coast Guard or the designated authority of their flag state.

Compliance with the MTSA and ISPS Code could prove a key factor in determining whether a vessel Owner was negligent under general maritime law in the event of a terrorist attack. In a paper presented to the Pacific Admiralty Seminar in San Francisco, California, on the 8th October 2004, Antonio J. Rodriguez, a partner in the New Orleans office of Fowler, Rodriguez & Chalos, discussed the potential liabilities a vessel owner may have to third parties in the context of the MTSA. He also addressed the potential for liability for the discharge of hazardous substances under the relevant U.S. environmental statute, CERCLA, and the possible discharge of oil under the Oil Pollution Act of 1990, which could result from the detonation of a weapon of mass destruction aboard a vessel. Given the continued threat of terrorist activity against the United States and other Western countries, particularly against vulnerable infrastructure, these issues could prove extremely important if a terrorist attack does occur.

The paper presented by Antonio J. Rodriguez is to be published in the University of San Francisco Maritime Law Journal. Articles on related issues are available in the Maritime Security section of the Steamship Mutual website at:

www.simsl.com/Articles/Contents/M_Contents.asp#MaritimeSecurity

Charterparty performance guarantees

Performance guarantees can play an important role in managing the risks involved in chartering out vessels, particularly where there are concerns about the creditworthiness of the Charterer. This is particularly so when Owners have no previous experience of the Charterer and/or where there is concern as to a Charterer's ability to meet its obligations under the charterparty. Nonetheless stories abound of Owners who have accepted guarantees which have been found to be unenforceable due to drafting errors, or for lack of consideration or for absence of a law and jurisdiction clause. There are even instances where the guarantee has been given by companies that do not exist.

A Sea Venture article written in 1997 (on the Steamship Mutual website at: www.simsl.com/Sea_Venture/Miscellaneous/SV_Mar97_14.asp) dealt with a number of issues, including the selection of law and forum, and consideration for performance guarantees. Sacha Patel **(sacha.patel@simsl.com)** has recently written further on the subject. His article sets out some additional general guidance on performance guarantees, as well as a draft agreement for use by an Owner and Charterer when fixing a vessel.

The article and a draft agreement can be found on the Steamship Mutual website at:

www.simsl.com/Articles/PerfGuarantees1104.asp

General Average – York-Antwerp Rules 2004

The York-Antwerp Rules (the Rules) were first agreed in 1890 with the intention of codifying the principles of General Average, which is a mechanism for allocating the costs of dealing with a maritime casualty among those parties who benefit from the ship and cargo being saved.

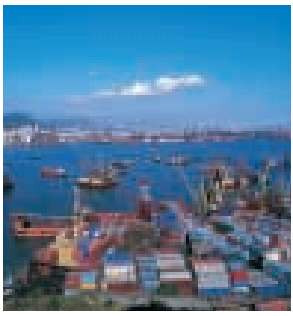
There have been numerous reviews and amendments to the Rules since they were first agreed. The most recent review was 1994. However, even before the 1994 Rules were agreed cargo underwriters had been pushing for a further review; in particular they were looking for a restriction of General Average to common safety issues and an exclusion of allowances for General Average in respect of the common benefit approach. If agreed, this would have represented a fundamental change and reallocation of the costs of a maritime casualty.

The 1994 Rules have been reformed and will be known as the York-Antwerp Rules 2004. They will take effect from 1st January 2005. The 2004 Rules are not mandatory but, if the 2004 Rules are simply an amendment to the earlier rules a carrier whose bills of lading incorporate, for example, a clause "…*York-Antwerp Rules 1994 and amendments thereto*…" will from 2005 be applying the new Rules. In contrast if the 2004 Rules are a new set of rules they will only apply if there is specific reference in the bill of lading to the 2004 Rules.

This latter point and further comment on the 2004 Rules are discussed in an article by Malcolm Shelmerdine **(malcolm.shelmerdine@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Articles/YAR2004.asp

China – straight bills – delivery without?



In recent years Chinese courts have taken the view that since the straight bill of lading is not a document of title, the named consignee under the straight bill is the party to whom the carrier undertakes to deliver the cargo and the shipper may thus not assign rights and obligations under the contract of carriage to any third party. Therefore, as long as the cargo is delivered to that named consignee, the undertaking of the carrier should be regarded as accomplished and discharged under the contract of carriage irrespective of whether or not the bill of lading is surrendered.

Despite this trend, it appears that proposed changes in Chinese legislation will make the carrier liable if the goods are delivered without surrender of the bill of lading. This change seems to be in line with the views expressed at a recent seminar on maritime adjudication attended by judges representing the Chinese Supreme Court and all maritime and higher Courts; it was concluded that where the Maritime Code of the People's Republic of China applies, delivery of cargo under straight bills of lading should be against surrender of the original bills, regardless of the nature and negotiability of straight bills.

With thanks to Wang Jing & Co for supplying this information.

This change reflects a similar approach already taken in other jurisdictions; The Singapore Court of Appeal decision in *APL Co. Pte Ltd v Peer Voss*, approved by the English Court of Appeal in "The Rafaela S", were reported in Sea Venture Volume 21 at page 20. This report can be viewed on the Steamship Mutual website at:

www.simsl.com/Sea_Venture/SeaVenture_Vol21/Section_2/03_StraightBills_DelivWOut.asp

Pilot liability

There are very few jurisdictions where it is possible for an Owner to make significant recoveries for loss incurred as a result of pilot error. Even where a right of recourse exists, to pursue a claim against a pilot, as an individual, is unlikely to be worthwhile. In a departure from this common theme, Owners with vessels calling at Californian ports are now able to buy "trip insurance" which provides the pilot with cover of over US$ 30 million.

Prevention is better than cure; pilots who are better trained should be involved in fewer incidents. In December 2003 IMO adopted Resolution A960(23) on Training, Qualifications and Operational Procedures for Maritime Pilots other than Deep Sea Pilots.

The resolution includes recommendations on:

- Establishment of competent pilotage authorities
- Standards for pilot training
- Certification and licensing
- Medical fitness
- Regular reviews of pilot proficiency and medical fitness

This resolution is a recommendation to IMO Member governments – it does not have the force of law in the way that a Convention would. However, it is a step in the right direction.

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Further details on pilot liability and the IMO resolution are given in an article by Chris Adams **(chris.adams@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Articles/PilotLiability1104.asp

Increasing compensation for damage from oil pollution – sharing the burden

New limits under the CLC and Fund regime were agreed in October 2000 and came into force in November 2003. The framework for a third tier of compensation was introduced by IMO in May 2003 with the adoption of an International Oil Pollution Compensation Supplementary Fund to be funded by oil receiving states, thereby increasing the overall available compensation in the event of a spill to 750 million SDR (US$ 1,138 million). A number of Fund states and related interests have expressed their view that shipowners should take a share of the increased compensation burden.

Two alternative proposals have been put forward:

- The Small Tanker Oil Pollution Indemnification Agreement (STOPIA). Under this agreement the CLC liability for small tankers is increased to SDR 20 million (US$ 30.35 million).
- International Group Clubs enter into a contractually binding agreement with the IOPC Funds to share equally the burden of compensation imposed by the Supplementary Fund.

With six states having already ratified the Supplementary Fund Protocol and a further two indicating that they will do so shortly, the Protocol is also due to enter into force early next year. The terms of STOPIA have been agreed in principle by the International Group of P&I Clubs and are likely to be finalised and agreed by then. However, the issue of equal sharing is likely to remain on the agenda as an alternative to STOPIA as part of the long-term solution to the increased compensation regime.

Further details of the increased CLC and Fund limits, the Supplementary Fund, STOPIA and the sharing proposal are given in a Steamship Mutual website article by Colin Williams **(colin.williams@simsl.com)** at:

www.simsl.com/Articles/3rdTierUpdate1104.asp

Container claims in the U.A.E.

The U.A.E. Commercial Maritime Code imposes a regime of strict liability on a carrier in respect of containerised cargo. Recent cases have shown, however, that the U.A.E. Courts will not always hold the carrier liable, even in circumstances where strict liability would normally apply.

A Steamship Mutual website article reports on two recent decisions where carriers have been successful. In the first, the carriers persuaded the Court that they were innocent parties to a fraud on the receivers committed by the shippers. In the second, carriers were not held to be liable in respect of condensation-damaged cargo in a sealed container where the master had claused the bill of lading with the words "shipper's count, stow and seal".

This article, by Neil Watson **(neil.watson@simsl.com)**, can be seen at:

www.simsl.com/Articles/UAEContainer1104.asp

Appointment of arbitrators – don't miss the deadline

The importance of timely compliance with the provisions of an arbitration clause cannot be over-emphasised.

The case of *Minermet v Luckyfield* involved a claim for demurrage where the charterparty provisions on arbitration and appointment of arbitrators were clear. Owners notified Charterers of the appointment of their arbitrator. That notice expressly stated that Charterers now had 14 days within which to appoint their own arbitrator failing which Owners' arbitrator would be appointed as sole arbitrator. It was not disputed that the notice was valid and conformed to the terms of the arbitration clause.

Despite indicating that they would do so, Charterers failed to appoint their own arbitrator within the required 14 day period. When Owners subsequently sent notice that their arbitrator would, therefore, act as sole arbitrator Charterers immediately responded that they objected to the appointment and purported to appoint their own arbitrator.

Owners' arbitrator ruled that he had been properly appointed. Charterers then challenged the appointment in the High Court on grounds of serious irregularity. Charterers sought to persuade the Court that an extension of time should be granted to prevent a substantial injustice occurring.

The Court dismissed Charterers' application. Charterers had failed to establish that a substantial injustice would result in the Owners' choice acting as sole arbitrator.

The importance of timely compliance with the provisions of an arbitration clause cannot be over-emphasised. A party who fails to appoint an arbitrator within the time allowed without good reason is unlikely to be able to restore lost rights at a later stage.

A fuller report of this case by Sacha Patel **(sacha.patel@simsl.com)** is available on the Steamship Mutual website at:

www.simsl.com/Articles/Minermet0704.asp

Air pollution rules to enter into force in 2005

MARPOL Annex VI enters into force.

Regulations for the Prevention of Air Pollution from Ships are set to enter into force on 19th May 2005 following the ratification by Samoa of MARPOL Annex VI.

Annex VI sets limits on sulphur oxide and nitrogen oxide emissions from ship exhausts and prohibits deliberate emissions of ozone-depleting substances. The regulations include a global cap of 4.5% m/m on the sulphur content of fuel oil and calls on IMO to monitor the world-wide average sulphur content of fuel once the Protocol comes into force.

It also contains provisions allowing for special "SO_x Emission Control Areas" to be established with more stringent controls on sulphur emissions. In these areas, the sulphur content of fuel oil used on board ships must

not exceed 1.5% m/m. Alternatively, ships must fit an exhaust gas cleaning system or use any other technological method to limit SO_x emissions. The Baltic Sea Area is designated as a SO_x Emission Control Area in the Protocol. In March 2000, the MEPC approved a proposed amendment to Annex VI to also include the North Sea as a SO_x Emission Control Area. The aim is to adopt the amendment once MARPOL Annex VI enters into force.

Annex VI prohibits deliberate emissions of ozone depleting substances, which include halons and chlorofluorocarbons (CFCs). New installations containing ozone-depleting substances are prohibited on all ships, but new installations containing hydrochlorofluorocarbons (HCFCs) are permitted until 1st January 2020.

The Annex also sets limits on emissions of nitrogen oxides (NO_x) from diesel engines, and prohibits the incineration on board ships of certain products, such as contaminated packaging materials and polychlorinated biphenyls (PCBs).

The ratification by Samoa on 18th May 2004 of MARPOL Annex VI means the Annex has now met its entry-into-force criteria and will enter into force 12 months after that date.

Survey, Inspection and Certification

The Regulations impose a regime of survey, inspection and certification for vessels of 400GT or above and every fixed and floating drilling rig and other platform. Flag states must ensure that equipment, systems, fittings, arrangements and material all comply with the relevant requirements.

Surveys are required:

- For new vessels – before entry into service
- For existing vessels – at the first scheduled dry docking after entry into force of the Regulations, i.e. 19th May 2005, but in no case later than three years after entry into force
  and
  at least every five years thereafter with at least one intermediate survey during that period.

Assuming the survey shows compliance, vessels will be issued with an International Air Pollution Prevention Certificate by the flag state administration. The certificate shall be valid for a period not exceeding five years from the date of issue. (An extension of this period by five months is available only in limited circumstances.) The certificate ceases to be valid if:

- Inspections and surveys have not been carried out as required
- Significant alterations have been made to the vessel's equipment, systems, fittings, arrangements or material
- The vessel is transferred to a different flag state

Source: IMO. The IMO webpage on Prevention of Air Pollution from Ships is at:

www.imo.org/Environment/mainframe.asp?topic_id=233

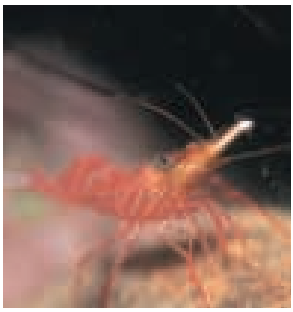
The Club has produced a training package on the new air pollution regulations in association with Videotel. Details of this package are given in the "Selection of recent and forthcoming publications" section below.

Note: The European Union is working on its own sulphur emission standards. Council Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquids and fuels has yet to complete the legislative process. If implemented as it currently stands the Directive will follow the IMO regime but impose tighter controls in certain areas including passenger ships operating regular services to and from Community ports and inland waterway vessels and ships at berth in Community ports.

Directive 1999/32/EC can be found at:

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999L0032&model=guicheti

Ballast water management – developments



“Ballast water is carried by ships to provide balance and stability. Although essential to the safe operation of ships, ballast water can contain thousands of species of marine plants and animals. When discharged into new environments, these species may become invasive, with potentially devastating effects on the local ecology, economy and human health. Unlike an oil spill, which can be cleaned up, the effects of marine species introductions are usually irreversible.

Ballast water transfers and invasive marine species are perhaps the biggest environmental challenge facing the global shipping industry this century.”

Source: IMO Global Ballast Water Management Programme – GloBallast

IMO

After many years of debate the International Convention for the Control and Management of Ship's Ballast Water and Sediments was adopted by IMO in February 2004.

The Convention will require all ships to implement a ballast water and sediments management plan, to carry a ballast water record book and to carry out ballast water management practices to a given standard.

The Convention enters into force 12 months after ratification by 30 states representing 35% of the world merchant shipping tonnage.

Due to the delay in adopting an international convention and the further delay before it comes into effect, several countries, most notably the United States, have already adopted their own regime.

Details about the Convention can be found in a Steamship Mutual website article at:

www.simsl.com/Articles/Ballast_Convention0304.asp

United States

The current ballast water management program has been in force since 1999.

Apart from vessels entering the Great Lakes and Hudson River from outside the exclusive economic zone, ballast water management (BWM) was voluntary while reporting was mandatory.

Monitoring of this regime showed that an insufficient number of vessels were implementing BWM practices while they remained optional. Since 27th September 2004 BWM has been mandatory for all vessels entering U.S. waters. In addition, from 13th August 2004 failure to submit a BWM report can give rise to US$ 27,000 civil penalty per day per violation.

Details of the U.S. mandatory regime are given in a Steamship Mutual website article at:

www.simsl.com/Articles/US_BallastMandat_0804.asp

Other articles on ballast water management by Naomi Cohen **(naomi.cohen@simsl.com)** can be found in the Pollution section of the Steamship Mutual website at:

www.simsl.com/Articles/Contents/P_Contents.asp#Pollution

The costs implications of failing to mediate

It is now clear that there is no presumption in favour of mediation and that the burden is on the losing party to prove that the successful party acted unreasonably in refusing to agree to ADR.

Alternative Dispute Resolution (ADR) is at the heart of today's civil justice system. The Civil Procedure Rules, practice directions and pre-action protocols all bear witness to this. The Commercial Court routinely makes ADR orders in accordance with Appendix 7 of the Commercial Court Guide in terms which only just fall short of compelling the parties to undertake ADR. Prior to the landmark decision in *Halsey* (CA, May 2004), the Courts had shown their willingness to penalise successful parties by depriving them of costs in cases where the winning party had refused to mediate. The previous policy is illustrated by *Dunnett v Railtrack* (CA, 2002) and *Hurst v Leeming* (Lightman J, 2002). *Halsey* represents a distinct shift away from the policy exemplified by these earlier decisions. Dyson LJ, who delivered the judgment of the Court, gave important guidance on the approach to be adopted in considering the costs consequences of failing to mediate. It is now clear that there is no presumption in favour of mediation and that the burden is on the losing party to prove that the successful party acted unreasonably in refusing to agree to ADR. It was also recognised that ADR processes were not suitable for every case.

A detailed discussion on this important issue by Vasanti Selvaratnam QC of Stone Chambers can be found on the Steamship Mutual website at:

www.simsl.com/Articles/MediationCosts1104.asp

Full or half demurrage or demurrage at all?

The maxim "once on demurrage always on demurrage" is not an entirely accurate statement but one that is often quoted as authoritative. Therefore, this begs the question in what circumstances is the maxim accurate and when might a vessel on demurrage only earn a reduced rate of demurrage or no demurrage at all? A review and comment on the decision in the "Agios Dimitrios" on the former can be found in a Steamship Mutual website article by Philip Burns **(philip.burns@simsl.com)** at:

www.simsl.com/Articles/AgiosDimitrios1104.asp

while an article by Duncan Howard **(duncan.howard@simsl.com)** at:

www.simsl.com/Articles/Afrapearl1104.asp

comments on the decision in the "Afrapearl" and the circumstances in which Clause 8 of the "Asbatankvoy" charterparty can reduce demurrage to one half of the charterparty rate.

Steamship Mutual Directors win top industry awards

Tung Chee Chen, Chairman of Orient Overseas International and a Director of the Corporate Trustee of The Steamship Mutual Trust, was named as "The Business Person of the Year" at the annual DHL/South China Morning Post Hong Kong Business Awards on 2nd December 2004. Orient Overseas has for many years been one of Steamship Mutual's most important Members and Mr CC Tung is a past-chairman of the Club.

At the inaugural Dubai International Maritime Awards on the 6th December 2004 organised by Seatrade two other senior Directors of the Steamship Mutual, representing major Club Members, were presented with awards. Mr Mohammed Souri, Chairman of the National Iranian Tanker Co. and Chairman of the Steamship Mutual Underwriting Association Limited, won the "Seatrade Personality of the Year" award, while Mr Ali Ashraf Afkhami, Chairman and Managing Director of Islamic Republic of Iran Shipping Lines collected the awards for Education and Training on behalf of the Islamic Republic of Iran Shipping Lines and Port Operations on behalf of South Shipping Iran.

All of us at Steamship Mutual would like to offer Mr Tung, Mr Souri and Mr Afkhami our sincere congratulations on winning these prestigious awards.

Legitimate last voyage orders

In the "Kriti Akti" the Court of Appeal recently considered the legitimacy of final voyage orders that had been given when the vessel remained on charter only by virtue of the addition of off-hire periods and a 15 day redelivery margin to the basic charter period and when the vessel would, as a consequence, be redelivered after the final termination date of the particular charterparty. In a decision of which Owners chartering their vessels on the Shelltime 3 form charter should be aware, the Court of Appeal decided in Charterers' favour and held that there was no restriction on Charterers giving voyage directions other than the final termination date of the charter. The voyage directions in the "Kriti Akti" were legitimate but this decision will not apply to all final voyage instructions. An article on the decision in the "Kriti Akti" by Sacha Patel **(sacha.patel@simsl.com)** can be found on the Steamship Mutual website at:

www.simsl.com/Articles/KritiAkti1104.asp

Supplying bunkers – implied contractual terms

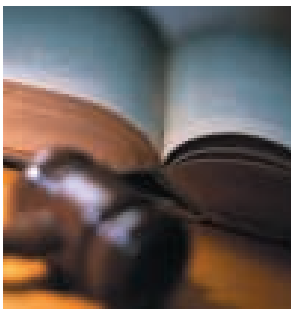
Recent London arbitration awards show that terms will be implied into a charterparty in respect of the supply of bunkers in the same way as for any contract for sale of goods and supply of services.

- Bunkers should be fit for their purpose. This means that in addition to complying with contractual specifications, bunkers must bit fit to be burned in the particular engine on the particular vessel.
- The supply of bunkers must be lawful. In a case involving fuel subject to Iraq embargo provisions arbitrators determined that Charterers should have ensured that the bunkers supplied had received the required authorisations. Their failure to do so rendered them liable to compensate Owners for certain losses related to the vessel's detention by Maritime Interception Forces.

These decisions and their implications are discussed in greater detail in a Steamship Mutual website article by Pushpa Pandya **(pushpa.pandya@simsl.com)** which can be found at:

www.simsl.com/Articles/BunkersImplied1104.asp

Costs recovery in charterparty chain arbitrations



In this case it had been the spurious litigation commenced by the Owners, and not the seaworthiness, that had caused the loss.

Are the costs of related secondary litigation recoverable as damages in a claim for breach of contract?

The High Court had recently to consider this very issue in *Vrinera Marine v. Eastern Rich Operations* – "The Vakis T". This was an appeal from an arbitration award in which the Charterers had been awarded their costs in the corresponding sub-arbitration as damages for Owners breach.

The Owners, who had commenced proceedings against the Charterers in respect of damage to the bottom of the vessel which they alleged had been due to Charterers' failure to nominate a safe port, discontinued their claim once it became clear that the damage had in fact been due to seaworthiness. The Charterers, who had commenced corresponding proceedings against the Sub-charterers, then amended their counterclaim and successfully pleaded breach of the Owners seaworthiness obligations with the damages being Charterers' costs, and Sub-charterers' recovered costs, in the sub-arbitration.

Reversing the award Langley J, sitting in the High Court, held that the right tests for causation and remoteness had not been applied. Whilst costs in related proceedings could be claimed as damages for breach of contract, following the Court of Appeal decision in the 19th century case of *Hammond v Bussey* , causation was a difficult hurdle to overcome. In this case it had been the spurious litigation commenced by the Owners, and not the seaworthiness, that had caused the loss.

For a more detailed discussion of the case and its implications please see the Steamship Mutual website article by Rajeev Philip **(rajeev.philip@simsl.com)** at:

www.simsl.com/Articles/ArbCosts_CharterChain0804.asp

Victory for Owners in House of Lords decision in the "Jordan II"

On the 25th November, 2004, The House of Lords confirmed that a carrier is not required to, nor responsible for, the operations of loading, handling, stowing, carrying, keeping, caring for and discharging the goods carried if they have not contracted to undertake these services.

It had been argued by cargo interests that Article III rule 2 of the Hague/Hague-Visby Rules imposed a non-delegable duty on the carrier to perform (and therefore to be responsible for) these operations. The House of Lords has now upheld the previous decisions in *Pyrene v Scindia* (Devlin J.) and of a majority in the House of Lords itself in *Renton v Palmyra*. These decisions upheld the view that Article III rule 2 regulated the manner in which these services are to be performed ("properly and carefully"), but left it to the parties themselves to determine the extent to which loading and discharging are to be carried out by Owners.

Had the decision gone against the Owners it would have meant that they would have been responsible for damage caused by improper loading, stowage or discharge, even where these operations were carried out by cargo interests themselves (as is routinely the case where goods are carried on FIOST terms). The decision represents a victory for the principle of freedom of contract.

The decision by the House of Lords in this case, in which the Owners of the vessel is a member of the Steamship Mutual, is reviewed in detail in an article by Stuart Blaxell, a partner at solicitors More Fisher Brown, on the Steamship Mutual website at:

www.simsl.com/Articles/Jordan1204.asp

Hatchcovers – testing for watertight integrity

The annual claims analysis undertaken by the Club continues to feature leaking hatchcovers as a cause of major cargo claims. Many smaller claims also continue to arise from the same cause. Water ingress is often the result of poor maintenance of hatchcovers and coamings, or due to the failure to secure hatchcovers effectively.

One of the key areas for loss prevention in the scope of the Club's condition surveys is the testing of hatchcovers for watertight integrity. The most common methods of leak detection are water hose test and ultrasonic test. Although both methods are widely used, ultrasonic testing, when the necessary equipment is available, is the Club's preferred method. This is because the hose test only indicates the existence of contact between compression bars and rubber packing, whereas the ultrasonic test provides a measure of the degree of compression that exists. As such the ultrasonic test is a more reliable indicator of watertight integrity in the dynamic conditions that will exist when the vessel is at sea. In an article by Chris Adams **(chris.adams@simsl.com)** and David Powell **(shipsurveys@simsl.com)** the two methods are reviewed. The article can be found at:

www.simsl.com/Articles/hatchcovers1104.asp

U.S. Courts unlikely to hear crew claims subject to Philippine arbitration clauses

Recent years have seen a gradual sea change as far as the U.S. Courts' approach to Filipino seaman claims are concerned. Last month a number of Filipino death claims arising from a boiler explosion on the "Norway" in the Port of Miami were dismissed by the U.S. Courts on the basis of the Philippine Arbitration clauses in the seamen's contracts. While this case is on appeal, one of the catalysts for the first instance decision was the 2002 case of *Francisco v "Stolt Achievement"*.

An article by Gary Field **(gary.field@simsl.com)** discussing the rationale behind the decision in this case can be read on the Steamship Mutual website at:

www.simsl.com/Articles/USFilipino1104.asp

The Pennsylvania Rule – shifting the burden of proof in Jones Act cases

Reports of the U.S. Second Circuit Court of Appeals decision in *Wills v Amerada Hess Corp*. might lead the reader to conclude that the Pennsylvania Rule cannot apply in Jones Act cases.

The Pennsylvania Rule applies in cases where a vessel is in violation of statutory regulation. Plaintiffs are keen to invoke the Rule to shift the burden of proof to the defendant; If the Rule applies, it is for the defendant to prove that the breach of regulation is not the cause of the harm in respect of which the claim is brought.

As always, each case is determined on its own facts and in *Wills* the Court held that the Rule did not apply. The plaintiff failed to establish a causal connection between the incident which constituted the alleged regulatory violation and the damage suffered by her husband. Without this causal link the Pennsylvania Rule could not be invoked. However, the Court confirmed that there could be incidents where the Rule could be applied in Jones Act cases and, indeed, there have been in the past.

A full report on *Wills* by Patrick Jordan **(patrick.jordan@simsl.com)** is available on the Steamship Mutual website at:

www.simsl.com/Articles/PennJones1104.asp

Selection of recent and forthcoming publications

The Mid Year Review

– The Steamship Mutual Mid Year Review for 2004
This new publication provides an up-to-date picture of the Club's progress in the current financial year, covering developments in underwriting, claims, investments and regulatory issues and provides an insight into the rationale for the recently announced 12.5% standard increase for the forthcoming renewal. A copy is available on the Steamship Mutual website:
www.simsl.com/Publications/MidYearReview/MYR.asp

Loss Prevention Materials

– "A Team effort" – A Guide to Casualty Investigation and Claims Handling
Members have recently received the Club's new claims handling guidance tool "A Team Effort" in CD-ROM format. In addition to the information previously only available in hard copy, the Guide also contains further information on issues such as documentary evidence and guarantees. The Club's Rules and List of Correspondents are also included and each claims-specific section of text is linked to the relevant Club Rule for that particular area of cover. Additional specimen documents, reference materials and hyperlinks to useful internet resources including the Steamship Mutual website are also provided.

In a highly versatile and user-friendly format for use onboard and ashore, "A Team Effort" gives the viewer access to resources which will assist him in dealing with the wide variety of situations that can affect an Owner and his vessel. Further information about the CD can be found on the Steamship Mutual website at:
http://www.simsl.com/Publications/ClaimsHandling/Claims_Handling.asp

– Intertanko Oil Record Book Guide For Steamship Mutual Members
The proper treatment of ship's oily waste and maintaining the relevant records has always been important. The recent and much publicised prosecution of oily waste offences in the United States and the substantial penalties that can result serve as a salutary reminder of these obligations under MARPOL and the Clean Water Act.

Intertanko's "A Guide for Correct Entries in the Oil Record Book" provides detailed instructions on how to complete the Oil Record Book in accordance with the MARPOL 73/78 regulations. In view of the importance of the information that it contains, the Club provided copies of this publication to its Members in November 2004.

– Air Pollution – Marpol Annex VI (produced in association with Videotel)
This training package, consisting of a CD-ROM or video and support book, is designed to help ship operators, officers and crew understand the complexities of the legislation. The package explains the additional documentation that a ship must carry and the restrictions on modifying and servicing engines. It outlines the changes in operating incinerators and the new controls for ozone-depleting substances.

The package offers a comprehensive overview of the new regulations. Although it will be of specific interest to engineering staff, such is the importance of the subject, that it has been designed with a much wider audience in mind.

– Safe Mooring series (produced in association with Vidoetel)
The updated series on mooring comprises three video programmes and an accompanying booklet. Each video deals with a separate aspect of mooring.
– Theory of Mooring
– Safe Mooring Practice
– Maintenance of Mooring Systems

Circulars

–Panama Canal Oil Spill Contingency Planning Regulations
From 1st January 2005 vessels of 400 GT and above must have on board a Panama Canal Shipboard Oil Pollution Emergency Plan (PCSOPEP) before transiting the Canal. Club Circular B.414 of November 2004 alerts Members to the new requirements and, in particular, issues relating to plan writing, the need for an Authorised Person and guarantee requirements. The Circular can been viewed on the Steamship Mutual website at:
www.simsl.com/Publications/Circulars/2004/B414.asp

Selection of other articles recently published on the Steamship Mutual website

– India: Import Of Scrap Metal
www.simsl.com/Articles/India_Scrap1104.asp

– Japan: Compulsory Insurance For Non-Tankers From March 2005
www.simsl.com/Articles/Japan_CompIns1104.asp

– Noxious Liquids In Bulk, Vegetable Oils And Amendments To The IBC Code
www.simsl.com/Articles/MEPC52_1004.asp

– Viña Del Mar – Concentrated Inspection Campaign On ISPS Code Compliance
www.simsl.com/Articles/VinaDelMar_CIC_ISPS1104.asp

– Paris MOU: Concentrated Inspection Campaign On Working And Living Conditions
www.simsl.com/Articles/ParisMOU_CICWorkLive1004.asp

– New Zealand: Electronic Submission Of Quarantine Declarations For Imported Containers
www.simsl.com/Articles/NZ_ElecQuarantine1004.asp

– An AU$ 85,000 Fine For Oil Spill in Great Barrier Reef Waters
www.simsl.com/Articles/Australia_Fines.asp

– California: New Pollution Legislation For Cruise Ships
www.simsl.com/Articles/California_Cruise1004.asp

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