



STEAMSHIP MUTUAL



newsletter
Sea Venture
issue 12

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Sea Venture is available in electronic format. If you would like to receive additional copies of this issue or future issues in electronic format only please send your name and email address to seaventure@simsl.com.

Feedback and suggestions for future topics should also be sent to this address.

Introduction

The world financial markets are currently facing unprecedented levels of turbulence. While it is generally accepted that high levels of market volatility will continue and that the impact of the credit crisis is likely to extend in to areas of the commercial world well beyond the banking sector, there is no consensus among commentators on how severe, longlasting, or widespread any resultant downturn in the world economy may be. This uncertainty carries with it warning signals for the continuing strength of the shipping markets, which could impact the operations of both owners and charterers and consequently their P&I exposures as operating margins narrow, and claims and disputes increase.

The importance of the Club's service is highlighted at such times, not only in claims handling and dispute resolution but also in loss prevention initiatives, advice on legal issues, and the provision of information about topical issues and legal developments that affect Members' trades. The Club's support is provided around the clock by the staff in the Managers' London, Hong Kong, and Rio de Janeiro offices as well as by the Club's worldwide network of correspondents. The publication of *Sea Venture*, and information on the Steamship Mutual website, are both key components of this service.

One of the issues affecting both owners and charterers in recent times has been *The "Achilleas"*. The High Court and Court of Appeal decisions, as well as a critique of the Court of Appeal decision, have been covered in recent editions of *Sea Venture*. The arguably novel approach of the House of Lords to the test of remoteness of damages in *The "Achilleas"* is discussed in this edition of *Sea Venture*.

An issue attracting attention at the current time is the upsurge in pirate attacks and their consequences. With 50 attacks reported in the Gulf of Aden and Indian Ocean alone this year and the IMB reporting seizures of ships and sailors at their highest level since 1991, there is an ever growing threat to human life. What are the issues if a vessel is seized? Does the vessel remain on hire, or can charterers be liable in damages for the delay? What are the consequences for cargo claims where cargo is delayed or damaged? All these issues and more are discussed in an article on the Steamship Mutual website at



www.simsl.com/Piracy0908.html

As ever, we are most grateful to all those that have contributed to this edition of *Sea Venture*.

Malcolm Shelmerdine

1st October 2008

Recoverable Damages and *The “Achilleas”* - A New Approach?


In its recent well publicised judgment, a unanimous House of Lords overruled Lord Justice Rix’s judgment in the Court of Appeal, in *Transfield Shipping Inc. v Mercator Shipping Inc. The “Achilleas”*, holding that an owner could not recover loss of profit under a subsequent fixture from a charterer who redelivered late.

In an arguably novel approach to remoteness, based on assessing assumption of risk by interpreting the contract as a whole against its commercial background, Lord Hoffmann and the rest of the House limited the damages the owner could recover for late redelivery to the difference between the contractual rate of hire and the prevailing market for the period of the overrun.

The impact of this judgment on earlier well-established decisions of lower courts remains uncertain, but it is probable that a greater number of arbitrations will be appealed as a result of this uncertainty. Furthermore, the likelihood of successfully applying for leave to appeal

could increase in light of Lord Hoffmann’s confirmation that the question of whether a given type of loss “*is one for which a party assumed contractual responsibility*” is “*like all questions of interpretation... a question of law*”.

In an article written for the Steamship Mutual website Rajeev Philip (rajeev.philip@simsl.com) reviews the approach of the House of Lords. Whilst it has a number of policy considerations for it, and whilst the approach itself may not turn out to be a radical change in the law, it is a sufficient deviation from established principles that it may prove a greater boost to legal practitioners than to the commercial market, whose interests commercial law should serve. The article can be found at:

 [www.simsl.com/
AchilleasHL0908.html](http://www.simsl.com/AchilleasHL0908.html)





Queen Mary 2 Reception

In Hamburg on Wednesday 30 July, the Club held a luncheon reception aboard Queen Mary 2 for its German Members and their brokers. A cocktail reception took place on the 8th deck of the 1,132 ft long world famous cruise liner followed by lunch in the celebrated Todd English restaurant.

During lunch Mr Otto Fritzner, Chairman of the Steamship Mutual Board, spoke to the guests about the Club's latest financial performance. He said the Board was pleased that over the last financial year, the Club had achieved a strong operating surplus and increased its free reserves by over 17% to a new all time high. At the same time the Club had increased its total entered tonnage by over 9%, to 72 million gross tons. Mr Fritzner noted that claims in prior years had continued to improve over the first five months of the 2008 policy year and, whilst it was still too early to be certain, the Club's retained claims pattern for 2008 seemed to fall somewhere between those experienced in 2006 and 2007. He advised the Members that the Board expected the Club's premium income for the year to exceed US\$ 300 million for the first time. But Mr Fritzner added a cautionary note stating that the level of free reserves would depend on the difficult investment markets.

The Club would like to express their gratitude to Cunard and Carnival Corporation for making the vessel available for the reception and also to their staff and crew who helped enormously to ensure the guests enjoyed the occasion.

Article by Rupert Harris
(rupert.harris@simsl.com)

From top to bottom, left to right:
 Otto Fritzner, Nikolaus W Schues,
 Markus Hempel, Capt. Bodo Franz,
 Christian Ross, Ian Beveridge, Janin Tibke,
 Klaus Bunnemann, Ulrich Kranich,
 Bernd Hansing,
 Nicola Gerdes, Thomas Kuehl,
 Annette Sabotke.



U.S. - Emerging Maritime Law on Punitive Damages

No one could blame owners of ships trading to the United States for living in constant fear of the risk of punitive damages in the event of a serious maritime casualty. Over the years, the United States has gained notoriety for unpredictably large punitive damages awards aiming to punish bad actors and deter others from repeating their behaviour. The case of the “*Exxon Valdez*” is by far the most notorious punitive damages case in maritime circles.

In 1989, Exxon attained infamy when the “*Exxon Valdez*” ran aground and spilled 11 million gallons of crude oil in Prince William Sound, Alaska. Although Exxon already faced liability well in excess of \$3 billion for clean up costs, fines, restitution, natural resources restoration, and compensation to private parties for economic losses, an Alaskan jury decided that Exxon should also pay the staggering sum of \$5 billion in punitive damages. Presumably the jury was motivated to both punish Exxon and deter other shipowners from allowing such an event to develop ever again.

Not surprisingly, Exxon appealed the punitive damages award. After two successive appeals, the United States Court of Appeals for the Ninth Circuit cut the award to \$2.5 billion in 2007. Exxon sought further review by the United States Supreme Court, which accepted the appeal.

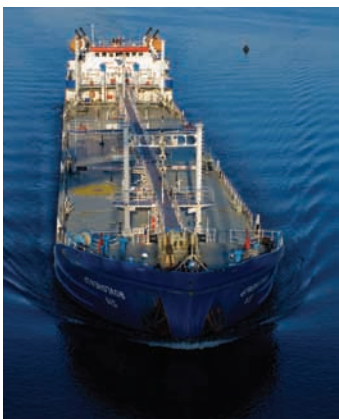
In late June 2008, the Supreme Court issued its complicated decision in the case, announcing a federal maritime law guideline for maximum punitive damages in circumstances like those presented in the “*Exxon Valdez*” incident and addressing two other issues which are likely to be the subject of further punitive damages litigation in other cases. The ruling offers some hope for reducing fears of punitive damages by making maximum awards somewhat more predictable and identifying arguments which could eventually limit the circumstances in which punitive damages are available in maritime cases.

Robert Bocko and Jon Zinke of Keesal Young & Logan review this important decision in an article written for the Steamship Mutual website at:

 [www.simsl.com/
ExxonSupremeCt0908.html](http://www.simsl.com/ExxonSupremeCt0908.html)



Due Diligence - Obligation to Maintain



Following on from the High Court judgment in *Golden Fleece v ST Shipping* last year, discussed in *Sea Venture* issue 9 and on the Club website at:



www.simsl.com/GoldenFleece0807.html

the Court of Appeal has now ruled on owners' appeal.

Readers will recall that the case focused on new MARPOL regulations which came into effect in April 2005 concerning the carriage of fuel oil. With effect from October 2003, heavy grades of oil could only be carried within the EU in double-hulled vessels. As of April 2005 MARPOL regulation 13H required, in tandem, that fuel oil cargoes be carried in double-hulled vessels only, save for an exemption which essentially allows for vessels with "double-sides not used for the carriage of oil and extending to the entire cargo tank length." A fully double-sided vessel is one where each cargo tank is protected on the outside by ballast tanks, forming a barrier to the cargo tanks in the event of a collision and thus reducing the likelihood of breach.

Both parties essentially presented the same case to the Court of Appeal, owners submitting that Cooke J had failed to refer to the background facts of the case when reaching his decision on construction of the contract. The Appeal Court declined to agree.

Sian Morris (sian.morris@simsl.com) reviews the Appeal Court decision in an article written for the Steamship Mutual website at:



www.simsl.com/GoldenFleece0908.html

Which Law Applies to My Contract? Rome Convention Replaced by New EU Regulation

Although not necessarily the first thought when drafting an agreement, it is important to give consideration to what may happen in the event of a dispute arising under the contract or difficulty in interpreting it. In such circumstances, and particularly where the parties are based in different countries, it is desirable to know which law shall apply. A particular governing law may give one of the parties a defence or a right of action which might not be available under the laws of another system. Businesses may also wish to ensure that a chosen law will apply uniformly to their standard agreements.

The English courts (and those of other signatory states) currently apply the Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention). This 1980 Convention was the product of work of the European Union aimed at establishing uniform rules in this area.

In 2003 the European Commission proposed that the Rome Convention 1980 should be converted into a community Regulation ("Rome 1"). Unlike an International Convention, which has to be ratified and adopted by states, a Regulation has the force of law throughout the EU, save where an opt out is permitted. That work is now complete and the Rome 1 Regulation entered into force in July 2008. It will apply to contracts concluded after 17 December 2009 (see Articles 28 and 29) and will have direct effect in all EU member states save for Denmark and the UK. The UK had opted out of the initial proposals in 2005 but is now seeking the consent of the European Commission to participate in the Regulation.

To a large extent the new Regulation has replicated the provisions of the existing

Rome Convention. Most importantly, the new Regulation preserves freedom of contract. Article 3 provides that contracts shall be governed by the law chosen by the parties. It is only where no choice of law is made, that the default provisions in the other Articles of the Regulation will apply. Article 4 (applicable law in the absence of choice) includes express provisions for certain types of contract. Thus a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; and a contract for the provision of services shall be governed by the law of a country where the service provider has his habitual residence. The habitual residence of companies and other bodies corporate or unincorporated is defined as the place of central administration, determined at the time of the conclusion of the contract (Article 19).

In other cases, Article 4 provides that the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. This requirement may be displaced where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with the law of another country, in which case the law of that other country shall apply. Finally, where the applicable law cannot be determined pursuant to these principles, the contract shall be governed by the law of the country with which it is most closely connected.

These provisions are similar to those which appeared in the Rome Convention. In addition, special provisions apply to contracts of carriage (Article 5), consumer contracts (Article 6), insurance contracts

(Article 7) and individual employment contracts (Article 8).

So far as concerns contracts for the **carriage of goods**, Article 5 provides that to the extent that the applicable law has not been chosen by the parties, the law applicable shall be that of the country of the habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

To the extent that the law applicable to a contract for the **carriage of passengers** has not been chosen by the parties, the law applicable shall be that of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply. In the absence of a clear choice of law in the contract of carriage, these provisions might mean, for example, that a cruise operator could find that differing systems of law could apply to standard passage contracts, dependent on the country of domicile of the passengers embarked.

Unlike the Rome Convention, the new Regulation includes provisions regarding insurance contracts. The current law relating to insurance contracts is complex. For contracts of direct insurance relating to risks situated within the European Union, the provisions of the EU life and non life insurance Directives apply. For contracts of direct insurance relating to risks not situated in the member states of the European Union, and all reinsurance contracts (wherever the risk be situated) the provisions of the Rome Convention apply.

In its preparatory work for the new Regulation, the European Commission decided that it should provide a

comprehensive treatment to replace the choice of law rules both in the Rome Convention and the two European Directives. The new Regulation maintains the distinction in the European non life Directives between insurance contracts covering "large risks" and those which do not. "Large risks," as defined, include all liabilities arising out of the operation of ships, including carrier's liability.

The Regulation applies to insurance contracts covering a "large risk" whether or not the risk covered is situated in a member state, and to all other insurance contracts covering risks situated inside member states (see Article 7.1). Article 7 does not apply to reinsurance contracts, but these would appear to be covered by the general provisions of the Regulation since they are not excluded in Article 1.

The final text is broadly a consolidation of the current rules as contained in the existing EU Directives, and therefore a choice of law in insurance contracts is maintained where such a choice already exists under the current Directives. Accordingly, an insurance contract covering "large risks," which include all liabilities arising out of the operation of ships, will continue to be governed by the law chosen by the parties. In the absence of choice, then default provisions specified in Article 7 will apply.

Club Members should therefore ensure that they provide in their contracts for an express choice of applicable law, and in the EU, where the Rome Regulation will apply, this will have the additional benefit of avoiding any unwelcome impact of the default provisions in the Regulation.

Christine Gordon (**christine.gordon@simsl.com**) provides further comment, together with the full text of the Regulation, in an article written for the Steamship Mutual website at:

 [www.simsl.com/
Rome10808.html](http://www.simsl.com/Rome10808.html)

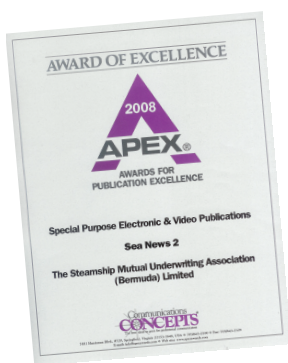
Steamship Mutual's Loss Prevention Materials

Sea News Volume 2

Following the earlier success of Volume 1 (reported in issue 9 of Sea Venture), Volume 2 of Sea News has received an Award for Publication Excellence in the APEX 2008 Competition. The APEX awards recognise achievement in graphic design, editorial content and overall communications excellence.

In the 20th annual competition Sea News 2 won an award in the Special Purpose Electronic & Video Publications category. Further details can be found on the Apex Awards website at:

 www.apexawards.com



Sea News has been designed to keep seafarers informed on matters of topical interest and to examine case studies of events giving rise to liability, loss or damage. The second edition focuses on environmental issues, for example the work of IMO on environmental matters, MARPOL violations involving Oily Water Separators, and also Seafarer safety within the dock area. It is produced by the Managers in association with Videotel Marine International, with the support of the Ship Safety Trust.

Engine Room Waste Management – Oily Water and Separators

Oily Water and Separators is one of the four components of the Engine Room Waste Management training package, a practical aid designed to assist with



MARPOL regulation compliance. Also produced in association with Videotel, this training program has received two awards:

- Apex Award for Publication Excellence in the category of Education & Training Electronic & Video Publications
- Cine Golden Eagle Award in the professional non-fiction division

The CINE Golden Eagle Award acknowledges high quality production in a variety of content categories for professional, independent and student filmmakers. Each year, hundreds of jurors judge nearly 1,000 entries in 27 categories. Further information about the competition, the awards and the winners is available on the CINE website at:

 www.cine.org/index.php

As published in Club circulars B.459 and B.460, Engine Room Waste Management and volumes 1 and 2 of Sea News can be obtained through Videotel. Members are entitled to special concessionary rates.

For further details about pricing and how to place orders contact:

Videotel Marine International
84 Newman Street, London W1P 3LD

Tel: +44 207 299 1800

Fax: +44 207 299 1818

Email: mail@videotelmail.com

Website: www.videotel.com



U.S. Criminal Jurisdiction over MARPOL Offences

The Fifth Circuit Court of Appeals (which covers Texas and Louisiana) recently upheld the right of the U.S. to prosecute a foreign-flagged ship owner (and its engineer) for falsification of an Oil Record Book ("ORB"), even when such falsification took place outside of U.S. ports or navigable waters, as a breach of the U.S. legal duty to maintain an ORB. It further held that international law did not prohibit such prosecution.

In an article written for the Steamship Mutual website Jeremy Harwood of Blank Rome reviews the important decision in *United States v Jho And Overseas Shipholding Group Inc* from one of the United States' leading appellate courts.



www.simsl.com/OSG0908.html

Maritime London Officer Cadet Scholarship Scheme



Gregory Taylor (left) and Chris Adams at Aquatical House, the London office of Steamship Mutual



With finance from the Ship Safety Trust, Steamship Mutual is currently sponsoring the training of a navigating officer cadet under the administration of the Maritime London Officer Cadet Scholarship Scheme (MLOCS). The purpose of this support is two-fold: First, it is a positive move to address, albeit in a small way, the current shortage of officers in the industry. Second, there has always been a requirement for the staff of Steamship Mutual to include individuals with the skills and experience gained from time served at sea and this sponsorship helps to preserve that pool of resources for the future.

Steamship Mutual's cadet, Gregory Taylor, has just successfully completed his latest spell of shore based training at Warsash and recently visited Aquatical House prior to embarking upon the next sea-going phase of his training. We hope to hear news of Gregory's experiences at sea over the coming months and we wish him every success with his future training.

Further details of the MLOCS scheme can be found on the following link:

www.maritimelondoncadet.com/train.html

EU Directive on Criminal Sanctions in Respect of Ship Source Pollution

The Advocate General's opinion and European Court of Justice (ECJ) judgment relating to the EU Directive on Ship Source Pollution (2005/35/EC) and the EU Framework Decision (2005/667/JHA) respectively were discussed in Sea Venture issue 10 and in further detail at:

 [www.simsl.com/
EUPollution1207.html](http://www.simsl.com/EUPollution1207.html)

The ECJ recently issued a decision in which it ruled that the validity of the Directive cannot be assessed by reference to MARPOL as the EU itself (unlike its member states) is not a party to MARPOL and is therefore not bound by the Convention. Moreover, in its view there is nothing in the Directive, and in particular the term “*serious negligence*”, that is in conflict with the general principle of legal certainty under EU law. Accordingly, this EU Directive will remain in force, albeit subject to the interpretation provided by the Advocate General. The coalition, comprising INTERTANKO and others in the shipping

industry, which instituted proceedings is currently considering its position in the light of the ruling.

At the same time, the European Commission applied successfully to the ECJ to annul the Framework Decision, arguing that it was adopted on the wrong legal basis. As a consequence the European Commission has issued a new Ship-Sourced Pollution Directive, amending the existing Directive in order to strengthen the obligation on member states to introduce criminal penalties for ship-source pollution committed either intentionally or as a result of gross negligence. In line with the ECJ ruling that it was not within Community competence, the new text will not set common levels of sanctions. However, implementation of the new text will require member states to introduce “*effective, dissuasive and proportionate*” criminal sanctions against offenders.

Article by Colin Williams
(colin.williams@simsl.com)


Arbitration Clauses in U.S. Crew Contracts

In *Freudensprung v Offshore Technical Services Inc* the U.S. Court of Appeals for the Fifth Circuit gave useful guidance on the question of whether arbitration clauses in employment contracts providing for arbitration outside the U.S. are enforceable for U.S. crew.

The plaintiff in *Freudensprung* used various tactics in his attempt to avoid the arbitration provision in his contract with OTSI. In reaching its decision the court had to consider the interplay between the U.S. Federal Arbitration Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the impact of neither party being “not American” and the relevance of a foreign element to the contract.

Plaintiffs in general may be motivated to argue that such arbitration clauses in the contracts of U.S. nationals are unenforceable because they remove a crewmember's right to a jury trial. However, as evidenced in *Freudensprung*, the U.S. courts will not undermine contractual terms unless there is good reason to do so.

In an article written for the Steamship Mutual website Paul Brewer (**paul.brewer@simsl.com**) looks at the various factors considered by the court in *Freudensprung* in reaching its decision that the arbitration provision was enforceable:

 [www.simsl.com/
Freudensprung0908.html](http://www.simsl.com/Freudensprung0908.html)



U.S. - Detention of Crew in MARPOL Violations

*“It is extremely difficult
to avoid a Security
Agreement or to seek
judicial relief...”*

When a vessel is detained in a U.S. port on suspicion of a MARPOL violation the U.S. Coast Guard generally require the owner to “retain” crew members who may be material witnesses in the U.S., at the owner’s expense, pending conclusion of the investigation and possible prosecution.

The Coast Guard’s power comes from several sources and includes the authority to grant clearance to a vessel being detained upon the posting of a bond or “*other satisfactory security*”. In this way the Coast Guard typically requires the vessel owner to enter into a Security Agreement whereby, as a condition for the release of the vessel, the owner agrees to:

- post a surety bond
- cooperate with the ongoing criminal investigation and
- maintain the employment of certain crew members considered to be either persons of interest or material witnesses while they are “retained” in the U.S at the owner’s expense pending completion of the investigation and then to repatriate them at the conclusion.

This crew “retention” policy imposes economic burdens on the owner and even more substantial burdens on the individual crew members themselves. It is extremely difficult to avoid a Security Agreement or to seek judicial relief if the period of crew detention is extended, particularly if the owner wishes to challenge the government’s allegations.

In an article written for the Steamship Mutual website, Patrick Cooney of Royston Razor discusses the sources of the Coast Guard’s authority, possible ways to seek relief and some of the tactical and strategic considerations:



www.simsl.com/USCrewDetMARPOL0908.html

Bourbon Dolphin - a Case History

On Friday 12 April 2007 the Anchor Handling Tug Supply (AHTS) vessel "Bourbon Dolphin" was engaged in anchor handling operations for the semi-submersible drilling rig "Transocean Rather" in the Rosebank oilfield to the west of the Shetland Islands.

Due to the prevailing environmental factors the "Bourbon Dolphin" had drifted considerably away from the planned track for mooring and the tension in the mooring system limited manoeuvrability. The AHTS "Highland Valour" was dispatched to assist but the "Bourbon Dolphin" was found to be still drifting away from the planned anchor track. There then followed a tragic sequence of events leading ultimately to

the capsizing of the "Bourbon Dolphin". Of the crew of 14, only 7 were saved. Those who were lost included the Master and his 14 year old son.

The possible impact of vessel unsuitability, lack of vessel stability, limited personnel experience, lack of planning and attention to detail in the rig move procedure, and human error in this incident are discussed in an article by Captain Simon Rapley (**simon.rapley@simsl.com**) of the Club's Loss Prevention Department on the Steamship Mutual website at:

 [www.simsl.com/
BourbonDolphin0908.html](http://www.simsl.com/BourbonDolphin0908.html)

Nomination Notices under Contracts of Affreightment

A recent decision in the English High Court has upheld the ruling in *The "Jasmine B"* that once a charterer has made his nomination for loading or discharging under a Contract of Affreightment those terms are effectively incorporated into the charterparty as though they had been original terms and the charterer has no right to change the nomination.

The case was an appeal from an arbitration award by claimant charterers who attempted to change the terms of their nomination for loading a cargo of coal. The tribunal found charterers to be in repudiatory breach, thereby releasing the owners from any further duties under the charterparty. The charterers had sought to delay the laycan period due to the unavailability of cargo.

The appeal was dismissed. Steele J held that once the laycan notice was given, it could not be changed save by agreement. The nomination notice was either revocable or irrevocable. There was no room for charterers to pick and choose the terms of the nomination which were irrevocable, this being the only method of achieving a commercially certain outcome.

This decision is discussed in more detail in an article by Sarah McGuire (**sarah.mcguire@simsl.com**) on the Steamship Mutual website at:

 [www.simsl.com/
Nomination0908.html](http://www.simsl.com/Nomination0908.html)



Shipbuilding Contract - Ability to Claim Damages at Common Law

In *Stocznia Gdynia SA v Gearbulk Holdings Ltd* the shipyard had contracted with Gearbulk to build three bulk carriers but the hulls were not delivered at all. The arbitrator had found that the shipyard was in repudiatory breach of contract. Gearbulk had terminated the contracts under contractual provisions and enforced the Refund Guarantees, recovering the pre-delivery instalments it had paid. Gearbulk also sought damages at large and were initially awarded them by the arbitrator.

On appeal to the Commercial Court, Burton J overturned the arbitration award.

The contract provided for price reductions for delay in delivery, but after a delay of 150 days Gearbulk had the right to terminate the contract and upon such termination the shipyard were to repay all the contractual instalments paid to date by Gearbulk with interest thereon.

Three questions were addressed by the Court, which Gearbulk needed to overcome to maintain their award of damages:

1. Did the contractual termination provisions constitute a complete code thus excluding common law rights of termination for these events?
2. Did the contract exclude a claim for damages in respect of these events?
3. Whether Gearbulk were precluded from claiming to having terminated at common law given its reliance on the contractual termination provisions?

The decision in is discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at:



www.simsl.com/Gearbulk0908.html

Asbatankvoy - an Insight into the Interpretation of Clause 4(c)

The recent judgment in *Antiparos Ene v SK Shipping Co Ltd and Others (The "Antiparos")* concerned a dispute as to whether owners were entitled, under clause 4(c) of the Asbatankvoy Form, to recover extra costs incurred as a direct consequence of charterers' change in load port nomination where those extra costs arose in relation to bunkering arrangements.

On 9 March 2007, the owners of the "Antiparos" fixed the vessel for a voyage from the Arabian Gulf to either South Korea or Japan on the Asbatankvoy Form. Clause 4(c) provided that "any extra expense incurred in connection with any change in loading or discharging ports (so named) shall be paid for by the charterer and any time thereby lost to the vessel shall count as used lay-time".

The charterers ordered the vessel to proceed for loading at Ras Laffan and Mina Al-Ahmadi. The owners made arrangements to stem bunkers for the voyage at Mina Al-Ahmadi at US\$ 301 per mt. Some days later, the charterers changed the nomination and ordered

the vessel to proceed to Ras Laffan and Ras Tanura. The owners had already placed a bunker stem at Mina Al-Ahmadi and held the charterers liable for any additional costs they would have to incur arising from this charge, pursuant to clause 4(c) of the charterparty.

The owners managed to find bunkers at Ras Tanura, but at US\$ 355 per mt, which would make overall bunkers US\$ 217,721.52 more expensive than at Mina Al-Ahmadi. Owners claimed for this difference under clause 4(c).

The court ruled in favour of the owners and judged that (a) there was no clear basis on which to allow an implied option to charterers for changing a nomination and (b) that, on the true construction of clause 4(c), the additional costs incurred in having to purchase the more expensive bunkers would be regarded as an expense under the said clause.

This decision is discussed in more detail by Francis Vrettos (francis.vrettos@simsl.com) in an article written for the Steamship Mutual website at:

 [www.simsl.com/
Antiparos0908.html](http://www.simsl.com/Antiparos0908.html)

Cargo Claims for Economic Loss

The English courts have recently handed down two important decisions which may impact on claims by cargo owners for economic loss.

The "Limnos" considers the extent to which carriers may limit their liability under Article IV Rule 5(a) of the Hague-Visby Rules in circumstances where the cargo has been both physically and economically damaged.

Of relevance to the latter head of claim is the recent House of Lords decision in

The "Achilleas", which is discussed at page 4 of this issue of *Sea Venture* and concerns the test for remoteness in contractual claims.

These issues, and in particular the decision in *The "Limnos"*, are discussed in an article by Wagner Mesquita (wagner.mesquita@simsl.com) on the Steamship Mutual Website at:

 [www.simsl.com/
EconomicLoss0908.html](http://www.simsl.com/EconomicLoss0908.html)



Filipino Crew Claims - 120 Day Update

“...the Supreme Court issued a resolution which clarified that the degree of disability in POEA claims should be measured by medical assessment...”



As previously reported in earlier issues of Sea Venture the Philippine Labor Code states that a disability lasting continuously for more than 120 days should be considered “total and permanent disability”. In the *Crystal Shipping* (October 2005) and *Remigio* (April 2006) cases, the Philippine Supreme Court ruled that seafarers are subject to the Labor Code concept of permanent disability. Hence in both cases seafarers who were unable to perform their customary work for more than 120 days were awarded the maximum compensation for permanent disability of US\$ 60,000.

However, shipowner interests argued that the Labor Code “120 day rule” should not apply to seafarers’ claims which are governed by the Philippines Overseas Employment Agency (POEA) Standard Employment Contract. Fortunately, in February 2007, the Supreme Court issued a resolution which clarified that the degree of disability in POEA claims should be measured by medical assessment, rather than number of days of incapacity. Further background information is available on the Steamship Mutual website at:

www.simsl.com/120Philippines1107.html

Nevertheless, the clarifying ruling had not been fairly applied by the National Labor Relations Commission (NLRC), the arbitration forum for determining seafarers’ claims. As a result, owners were at risk of unfavourable rulings that the maximum compensation was payable even where there was expert medical advice that the seafarer was not permanently disabled.

However, three recent NLRC decisions handled by Del Rosario & Del Rosario have correctly followed the Supreme Court’s resolution, which indicates that owners have reason to hope that future arbitration awards will respect the disability gradings evaluated based on the POEA contract.

Article by Del Rosario & Del Rosario, Manila.

Demurrage and Laytime - Who is Responsible for Delay?

In a recent London arbitration (6/08) the tribunal considered issues of bad stowage and stevedores' incompetence when considering an owner's claim for demurrage and deadfreight. The charter was on an amended Gencon form and was fixed for the carriage of 6,500 mt flyash, 5% more or less in charterer's option, stowed in jumbo bags, each weighing between 1.0-1.5 mt. 5,350 jumbo bags weighing a total of 5,977 mt were loaded.

The charterer's allegations were mainly based on the inefficiency of the vessel's gear, which they alleged reduced the loading rate, and on the master's interference with loading, after he ordered the stevedores to shift and drag the jumbo bags in the holds so as to fill up the spaces that were difficult to access from the hatch squares. This, they alleged, also caused delay at the disport. The charterers also contended that there

was no scope for the vessel to load the full quantity of 6,500 mt.

The tribunal found that on the balance of probabilities, notwithstanding the inefficiency of the vessel's gear, there was insufficient evidence to show that inefficiency caused the relevant delay. The tribunal further found that the stevedores had been incompetent in not loading efficiently or using the proper equipment.

The dispute also raised questions regarding the reversibility of laytime and when laytime/demurrage may be considered to end where the charter provided for two loadports and no cargo or insufficient cargo was available at the first port.

This award is discussed in more detail by Effie Koureta (effie.koureta@simsl.com) on the Steamship Mutual website at:

 [www.simsl.com/
JumboStow0908.html](http://www.simsl.com/JumboStow0908.html)

Setting Aside English Default Judgment

The recent case of *Shandong Chenming Paper Holding Ltd v Saga Forest Carriers* considered the circumstances in which a defendant is entitled to set aside a default judgment entered against him.

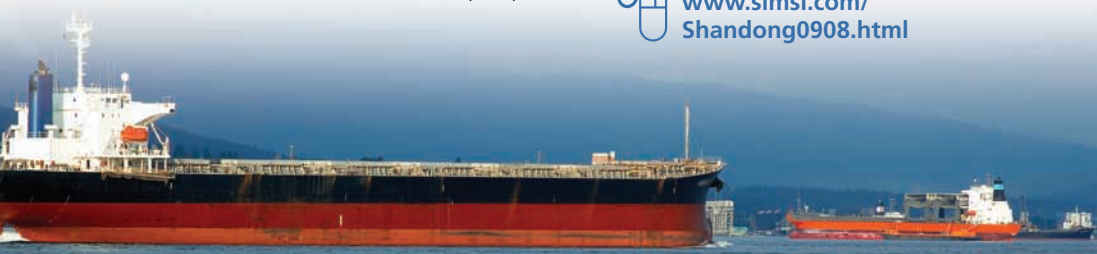
Under Civil Procedure Rule 13.3 the court has the power to set aside a default judgment if the defendant has a real prospect of successfully defending the claim and if his application to set aside the default judgment has been made promptly.

On the facts of the case, the court held that the defendants had a real prospect

of successfully defending the claim on the basis of time bar and as they had made their application promptly, ordered that the default judgment be set aside. In coming to their decision, the court considered not only the defendants' promptness in applying to set aside the default judgment but also the claimants' own promptness in issuing proceedings.

The decision is discussed in further detail in an article written by Laura Alston of Hill Dickinson for the Steamship Mutual Website at:

 [www.simsl.com/
Shandong0908.html](http://www.simsl.com/Shandong0908.html)



The Museum at the Top of the World



From left to right: Chris Adams, Sarah Chase and Neil Gibbons

During a recent visit to Murmansk Shipping Co., Steamship Mutual's Chris Adams, Sarah Chase and Neil Gibbons had the opportunity to visit the Murmansk Shipping Museum.

Murmansk is the biggest city in the Arctic circle and despite its northerly location remains ice free throughout the year owing to the effect of the gulf stream. The life of the city is closely linked with shipping.

The Murmansk Shipping Museum charts the history of the company from its foundation in 1939 to the present day. Originally the company was concerned principally with transportation in the Arctic regions and many of the exhibits show the difficulties encountered by seafarers in the climatic extremes found in such latitudes. Nowadays the company trades worldwide but still retains a significant presence and expertise in its home region.

The museum, housed in a building in central Murmansk, has many exhibits of ship and crew equipment, ship models and photographs of various senior political and royal visitors. The visit was made all the more enjoyable by the evident pride and enthusiasm shown by our guide Valentina Karepova. We would like to thank her and Mr Roman Arbuzov of Murmansk Shipping for their hospitality.

Article by Neil Gibbons (neil.gibbons@simsl.com)

The "Unsafe Port" Dilemma - Who is at Fault?

Picture the scene: A vessel makes contact with a berth resulting in damage and pollution. Who is at fault? Was no one at fault? Was it an error of navigation by the Pilot or Master? Was it a mistake to order the vessel to the port because of dangers that could not have been avoided by the exercise of good navigation and seamanship? The answers to these questions will help determine whether the owners or the charterers are liable for the significant financial consequences that may arise out of the incident, such as salvage, general average, hull damage, pollution, loss of use and cargo claims.

The arguments are likely to centre on whether, by ordering the vessel to the port, the charterers were in breach of any "safe port warranty" in the charterparty. In an article written for the Steamship Mutual website, Richard Neylon of Holman Fenwick Willan examines why litigation frequently arises under this warranty, considers how the actions of owners, charterers and third parties, both before and after the incident, help determine who is at fault and highlights what practical steps can be taken to help minimise liability:

www.simsl.com/SafePort0908.html



Contractual Terms - Be Careful

What You Sign

The recent English High Court decision in *PT Berlian Laju v Nuse Shipping* highlights the importance of drafting a contract on precise terms and the importance of checking carefully that the drafted terms reflect those agreed, in a recap or otherwise, before signing.

The case concerned a dispute relating to the sale of a ship on the amended Norwegian Saleform 1993 terms. The sale fell through because the sellers claimed the buyers had repudiated the contract by failing to remit the full purchase price to the correct account by the closing date. The buyers claimed damages alleging they had complied with their obligations and it was, in fact, the sellers who were in repudiatory breach. The dispute was

arbitrated with the tribunal deciding in favour of the seller.

On appeal the High Court looked at the principles of construction, the availability of rectification as a remedy and the final contract Aikens J found that the arbitrators had erred in law in key parts of their decision. Nevertheless, bound by their arguably unusual findings of fact, he had to dismiss the appeal and uphold the award in favour of the sellers. His reasons for doing so, and the impact of the judgment are considered in an article by Bengi Ljubisavljevic (**bengi.ljubisavljevic@simsl.com**) on the Steamship Mutual website at:

 [www.simsl.com/
Berlian0908.html](http://www.simsl.com/Berlian0908.html)

Requirement to Obtain Rightship Approval

Rightship is a ship approval system maintained by three of the major operators in the coal and iron ore market - BHP, Cargill and Rio Tinto. Its aim is to identify suitable vessels for that trade. Significant dry bulk operators in, for example, Australia and Brazil, require vessels to be approved by Rightship. Rightship rate vessels in three categories:

- Three, four or five star rating means the ship is an acceptable risk
- Two star rating means Rightship must be contacted for further review and
- One star rating means a more detailed investigation is required.

The rating is compiled on algorithm software which takes account of 50 factors. Of those factors that are known, these include such things as yard, owner, PSC history and ISP certificates. Vessels over 18 years of age are automatically downgraded to a two star rating and require a physical inspection.

Steel J recently gave judgment on appeal from a London arbitration award on the requirement to obtain that approval. The charter made no mention expressly of a requirement to have Rightship approval. However, the charter did contain the usual NYPE obligations as to keeping the vessel in a thoroughly efficient state in terms of *“hull, machinery and equipment, with all certificates necessary to comply with current requirements of all ports of call.”*

The decision in *Seagate Shipping Ltd v Glencore International AG “The Silver Constellation”* is reviewed by Sian Morris (**sian.morris@simsl.com**) in an article on the Steamship Mutual website at:

 [www.simsl.com/
Silver0908.html](http://www.simsl.com/Silver0908.html)

U.S. - Enforcement of Nontank Vessel Response Plan Requirements



The U.S. Coast Guard (USCG) has given notice that with effect from 22 August 2008 it will enforce the requirement for the owner and operator of U.S. or foreign flag nontank vessels of 400 GT and above operating in U.S. waters to prepare and submit a nontank vessel response plan (NTVRP). Plans must be submitted no less than 30 days prior to operating in U.S. waters.

An email alert sent to Members in July gave notice about the commencement of the enforcement regime. Operational controls exercised by the USCG may include: denial of port entry until the NTVRP is submitted, requirements for additional prevention measures, a penalty for non-compliance.

Further information, including background to the regulations and recommendations to ensure compliance, is available on the Steamship Mutual website at:

www.simsl.com/USNontankEnforce0708.html

Anti-Suit Injunctions Contrary to EU Law



In an article in issue 8 of *Sea Venture* of May 2007, the implications of the House of Lords referral of the *Front Comor* to the European Court of Justice ("ECJ") to decide whether English courts can issue anti-suit injunctions ("ASIs") preventing a party to an arbitration agreement from submitting a dispute to a court in another EU member state were discussed;

www.simsl.com/FrontComor0407.html

The English courts continue to issue ASIs to protect arbitration despite their obligation under the EC Judgments Regulation to allow EU courts seized earlier to determine their jurisdiction first. English Judges say arbitration proceedings are expressly excluded from the Judgments Regulation and so court proceedings to protect arbitration are also excluded.

Subsequent to the referral of the *Front Comor* the ECJ asked its Advocate General to prepare an opinion. This was published on 4 September 2008.

The view of the Advocate General is that an EU court, which would otherwise have jurisdiction over a dispute, has the right to decide whether it should decline jurisdiction in favour of arbitration. An ASI granted by the court of another member state is an interference with that right, notwithstanding the fact that ASIs are designed to protect arbitration proceedings. They are therefore impermissible.

Although the ECJ is not bound to follow the opinion of the Advocate General it is probable it will do so when the judgment is issued in a few months. If so, and while the English courts may retain power to issue an ASI against conflicting proceedings outside the EU, there will be consequences for contractually agreed dispute resolution clauses providing for arbitration if proceedings are commenced in another member state of the EU.

Article by David Semark of Reed Smith.



Structure under Construction - a Jones Act Vessel?

In *Rocky Cain v Transocean Offshore USA Inc.* the question as to what constitutes a vessel and, in turn, whether an injured individual can pursue a Jones Act claim for damages in tort when working on a structure under construction was considered.

Rocky Cain, a toolpusher, was assigned to the construction of a semi-submersible rig called the "Cajun Express". He worked on the structure whilst it was under construction, under tow and while moored in a floating shipyard.

Cain allegedly suffered injury when he hit his head on a light fixture and sued Transocean under the Jones Act. He claimed that the "Cajun Express" should be deemed a vessel under the Jones Act. Transocean countered that it could not be considered to be a vessel as, while it

could perform its intended function under limited conditions, it was not fit for its purpose of drilling a deepwater well in the Gulf of Mexico.

The District Court for the Western District of Louisiana held that the "Dutra" definition of a "vessel" applied to the "Cajun Express" and that Cain could therefore maintain his claim as a Jones Act seaman. The Fifth Circuit reversed the District Court's decision upon appeal from Transocean.

In an article written for the Club's website Richard Allen (**richard.allen@simsl.com**) reflects upon this important Fifth Circuit ruling, the earlier rulings in "Dutra" and "Holmes", a further relevant authority, and the ongoing consideration of what constitutes a Jones Act vessel:

 [www.simsl.com/
Cain0908.html](http://www.simsl.com/Cain0908.html)

Dubai Court of Cassation Confirms Application of 1976 Convention

The UAE ratified the Convention on the Limitation of Liability for Maritime Claims ("the 1976 Convention") in 1997 (Federal Decree No. 118 of 1997). For that reason it might not be expected that it would be contentious as to whether or not the UAE courts would enforce a carrier's right to limit under the 1976 Convention.

Traditionally, however, the UAE courts have been reluctant to uphold the concept of limitation, which runs contrary to well established religious, moral and legal customs that require harm to be compensated in full. In addition, separate limitation provisions already exist in the UAE Maritime Code.

For these reasons it was uncertain whether the local courts would apply the 1976 Convention at all. However, a recent

judgment of the Dubai Court of Cassation has now confirmed that the 1976 Convention has the force of law in the UAE and accordingly must be applied by the lower courts. The judgment has also acknowledged a defendant's right to limit liability, subject to a claimant advancing evidence to defeat that right.

Issues remain, however, and it has yet to be seen whether the lower courts will give full effect to the meaning and intent of the 1976 Convention.

The position is discussed in more detail in an article written by Simon Cartwright and Ann Mazucco of Holman Fenwick & Willan for the Steamship Mutual website at:

 [www.simsl.com/
UAELimit0908.html](http://www.simsl.com/UAELimit0908.html)

Recent Publications



Circulars

- Entry into force of the Bunker Convention – State Certification

The Club recently issued circular B.475 giving guidance to owners of vessels registered in non-party states as to the circumstances in which state parties to the Convention are prepared to issue certificates for such vessels. In order to ease the administrative burden on state parties, Members who own or operate such vessels are encouraged to contact the Club as soon as possible to assist in determining the most appropriate issuing state and to allow the Club to issue the Blue Cards. In addition, a revised "Financial Responsibility in Respect of Pollution" pollution charterparty clause, amended to reflect the Bunker Convention coming into force, was annexed to the circular. Members should ensure that the necessary certification is in place before the clause is used. Further details, including a list of contracting states, can be found in the circular at:

www.simsl.com/Circulars-Bermuda/B.475.pdf

In addition, the International Group Secretariat has produced a list with contact details for all state parties for the purposes of obtaining certificates. This can be found at:



www.simsl.com/BunkerCerts0808.html

Website Articles

- U.S. - Rule B Prevails
www.simsl.com/RuleBConsub0908.html
- Georgia - War Risks
www.simsl.com/GeorgiaWR0808.html
- California - New Low-Sulphur Fuel Regulation
www.simsl.com/CARBNewRegs0708.html
- South Africa – Repatriating Stowaways
www.simsl.com/SASTowaway0708.html
- U.S. NVMC – New eNOA/D Website Address
www.simsl.com/USeNOAD0708.html
- Chittagong – Indian White Sugar Testing
www.simsl.com/IndianWhiteSugar0708.html
- U.S. Coast Guard Requirements for Hydrostatic Testing of Bunker Lines
www.simsl.com/USBunkerLineTest0708.html



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