Newsletter 13

SEA VENTURE

1909 – 2009

STEAMSHIP MUTUAL

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A century of service to shipping

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HIGHLIGHTS

EDITORIAL TEAM

Naomi Cohen
Sue Watkins
Malcolm Shelmerdine

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CONTACT

For further information, please contact:

Steamship Insurance Management Services Limited
Aquatical House
39 Bell Lane
London E1 7LU
Telephone: +44 (0)20 7247 5490 and +44 (0)20 7895 8490

Website: www.simsl.com

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Cover photographs:

Jaladurga: Passenger/cargo steamer, built 1910, Scindia Steam Navigation.

Hirmand: VLCC, built 2008, National Iranian Tanker Co., longstanding Club Member

INTRODUCTION

Steamship Mutual was founded on the 16 October 1909. Accordingly, this year, 2009, marks the centenary of the Steamship Mutual and its century of service to shipping. Prior to the market downturn, a series of events had been planned to celebrate the anniversary. In view of the current financial and shipping markets, these will now be more restrained than originally planned. They will, however, include a book commemorating the centenary and the Club's history, to be published later this year, and the launch of a website dedicated to the Centenary featuring many aspects of the Club's development.

In this edition of Sea Venture there are the usual mix of reports on recent case law, loss prevention issues, and Member news. In particular there are two articles reflecting the dramatic downturn in most shipping and commodity markets and consequent commercial pressures over the last year. One discusses Forward Freight Agreements, which have been the cause of substantial, and in some cases terminal, losses suffered by some operators. The other discusses whether a charterer is able to bring to an end what may, in the current climate, have become an uneconomic charter.

Indeed the big story over the last two quarters of 2008 has been the recognition that most of the world's economies have slipped into recession, causing dramatic falls in the freight and hire rates, reduced cargo volumes and overcapacity on trades, with resultant increases in the numbers of laid up vessels and turbulence in the S&P markets. Not surprisingly, those owners and charterers who continue to operate in this market have become wary of their trading partners and have been forced to walk a tightrope, balancing the need to protect earnings against the risk of insolvency of their contractual partners. In these conditions the service provided by Steamship Mutual is vital, as the Club's Members increasingly have had to look to the Club for support and advice; on liening freights, hires, and cargoes, as well as attaching assets, and renegotiating charters; to assist them to protect their cash flows and trade through what, arguably, are the worst economic conditions since the 1930s. In this respect the Managers would like to emphasise the importance of the role played by the three syndicates that provide service to the Club's Membership, and cement the strong relationship that exists between the Club and its Members.

As a special feature, on page 4 of this issue of Sea Venture, there is a short commentary on the beginnings of Steamship Mutual, written by the author of the forthcoming centenary book, Dr Helen Doe of the University of Exeter. As ever, we welcome information and ideas from members and other friends of the Club for the book and the Club's centenary website, as well as for future editions of Sea Venture.

We are most grateful to all those who have contributed to this issue of Sea Venture.

Malcolm Shelmerdine

23 February 2009

Indian Success: General cargo, built 1958, India Steamship – one of the first non UK Members of the Club

Steamship Mutual: THE BEGINNING

The articles of association of the Steamship Mutual Underwriting Association Ltd were signed on the 16 October, 1909. There were seven signatories; two gave their status and occupation as gentleman, one was a merchant based in London, while the remaining signatories were to become closely linked to the Club and gave their occupations as surveyor (Herbert Pope), shipowner and shipbroker (Charles Henry Nurse), shipowner (Alexander Johns), and shipbroker (Lionel Clark Sage).

Sage was the manager to the new Association, and was based at 3 and 4 Lime Street Square which was also the address of the Club's solicitors, W&W Stocken. One of the witnesses was Alfred Stocken, who also gave his status as gentleman. He was the son of Walter Stocken, the solicitor, and would later follow Lionel Sage as the manager of the Club in 1917.

The new Club offered six classes of cover. There were three for Hull (all risks, total loss and total loss and general average), one covering Protection, Indemnity, Workmens' Compensation Act claims, Freight Demurrage and Defence, another for three fourths collision liabilities, and the sixth covering Freight.

Why was the Club set up? The origins of the Club lay in the Sailing Ship Mutual Insurance Association which had been incorporated on 14 February, 1906. This Club, as its name suggests, was founded to look after the interests of sailing ships. Its chairman was Charles Nurse, and it was managed by Lionel Sage. Also on the committee was Alexander Johns.

Before World War I sailing ships were still active despite the dominance of steam. Most of these vessels were involved in coastal trades carrying low value, non urgent bulk cargoes – coal, china clay and timber, and it made sense for these owners to mutually insure their common interests.

Nurse and Johns between them had a fleet of 28 sailing ships. There were plenty of other similar sailing ship clubs in existence but many were small very local clubs such as the Padstow Club and the Braunton Club, based on small ports in the South West of England. For steamships there were of course the large national clubs such as Shipowners and British Marine Mutual, Shipowners' Protection and Indemnity, Britannia and the UK Club.

The establishment of the new Steamship Mutual by Nurse, Sage, and Johns, none of whom owned a steamship, was a recognition of the realities of shipping. Even the most dedicated sailing ship owner could see where the future lay, and Steamship Mutual was designed to be a new competitor in an already well established market.

There are few early records for the Steamship Mutual and it would seem that it remained a reinsured subsidiary of the Sailing Ship Club, with the main committee business being conducted alongside that of the Sailing Ship Club until 1947.

We are grateful to Dr Helen Doe of University of Exeter (h.r.doe@exeter.ac.uk) for preparing this article. Dr Doe is currently researching the history of Steamship Mutual and will be publishing a book to commemorate the Club's centenary year in 2009.

CENTENARY YEAR:

Board Meeting Venues

1909 – 2009

STEAMSHIP MUTUAL

A century of service to shipping

The Club had planned to hold its January 2009 Directors' meetings in Mumbai. However, following the terrorist attacks which took place between 26 and 29 November 2008, the venue was changed to Amsterdam.

We would like to take this opportunity to extend our deepest sympathies to all those who suffered in any way as a consequence of those horrific attacks.

2009:

26/27 January – Amsterdam

11/12 May – New York

27/28 July – Hamburg

26/27 October – London

2010:

25/26 January – Hong Kong

Luxury Yacht Liability Product Launched

Yacht Liability Cover for luxury super and mega yacht markets

In November the Club announced it was launching a new Yacht Liability insurance product for luxury super and mega yacht owners, operators, charterers and fleet managers. Given Steamship's already strong position in the passenger and cruise sector, this move into the Yacht Liability market was seen as a natural step.

The new liability product is tailored to meet the specific requirements of those operating in the luxury super and mega yacht market which has seen escalating growth in recent years. As yachts increase in size and are ever more subject to legislation growing numbers of yacht owners and operators require the service and capacity of an expert liability insurer at levels in excess of hull value.The Club believes it is uniquely well qualified and experienced to meet those specialist needs.

Underwritten on a fixed premium basis, coverage limits will be available from US$1 million increasing to US$500 million for the world's largest yachts. The new product offers enhanced coverage on terms much wider than generally available in the commercial market.

■ Further details are available on the Steamship Mutual website at: **www.simsl.com/yacht-facility.htm**

A brochure about the product can also be downloaded from this webpage. Alternatively, contact Rupert Harris (rupert.harris@simsl.com), Gary Field (gary.field@simsl.com) or Jonathan Andrews (jonathan.andrews@simsl.com).

COSCO's Capt. Wei Jiafu to Receive CMA Commodore Award

COSCO president and CEO, Capt. Wei Jiafu, has been named as the Connecticut Maritime Association (CMA) Commodore for the year 2009. Capt. Wei follows a long succession of influential maritime industry leaders as Commodore. The Award will be presented in March marking the conclusion of the annual CMA conference and trade exposition.

The award is given each year to a person in the international maritime industry who has contributed to the growth and development of the industry. Beth Wilson-Jordan, president of the CMA, stated: *"Today, as the world deals with unprecedented economic and trade challenges, the CMA is delighted to have as our Commodore someone actively involved in the growth and development of world trade. With the Board's choice this year of Capt. Wei we continue the tradition of recognizing excellence. It will be an honour to have the leader of one of the world's largest shipping companies accept the CMA Award".*

COSCO was founded in 1961 and now owns and operates more than 800 vessels. Capt. Wei has been a Director of Steamship Mutual since 2000. The Managers offer their congratulations to Capt. Wei on this award.

Capt. Wei Jiafu

OOCL Named "Best of the Best" Ocean Carrier

Orient Overseas Container Line (OOCL) has been named "Best of the Best" in *World Trade* magazine's "Performance Partners Awards of Excellence".

The award was based on a survey of more than 19,000 readers who ship products using ocean carriers. Those surveyed rated the five most important performance attributes as:

- port-to-port on-time performance
- worldwide price of services
- reliable partner in the global supply chain
- the provider that helps save money across the globe, and
- global customer service.

Based on these criteria OOCL was selected as one of the top companies.

OOCL is one of the world's largest integrated international container transportation, logistics and terminal companies and is a valued longstanding Member.

OOCL – Ningbo arrives in Hong Kong

Slot-Charterer's Right to Limit Comfirmed

The Commercial Court in London recently considered the question whether slot-charterers are entitled to limitation under the Convention on Limitation of Liability for Maritime Claims 1976 ("the Convention").

Teare J. concluded that a slot-charterer is so entitled. He went on to consider whether the slot-charterers are entitled to rely on a fund that has been set up by the owners. He held that slot-charterers do have that right. These were preliminary issues in the ongoing litigation following the beaching and wreck removal of the "MSC Napoli" in January 2007.

Article 1(2) of the Convention expressly includes charterers within the definition of shipowners. The Judge reasoned that the ordinary meaning of "charterer" was apt to include any type of charterer, whether demise, time, voyage or slot. He also expressed the view that inability to limit would not encourage international trade by sea, the aim of the Convention.

The Judge considered the second question, the right to rely on the fund constituted by the owners, as clearly determined by the terms of the Convention. This leaves open the interesting question of whether and on what basis owners can claim some form of contribution from slot-charterers towards the cost of establishing the fund.

This decision is discussed in more detail in an article produced by Dominic McAleer of MFB Solicitors for the Steamship Mutual website at:
www.simsl.com/napoli0109.html

Seminar in Korea

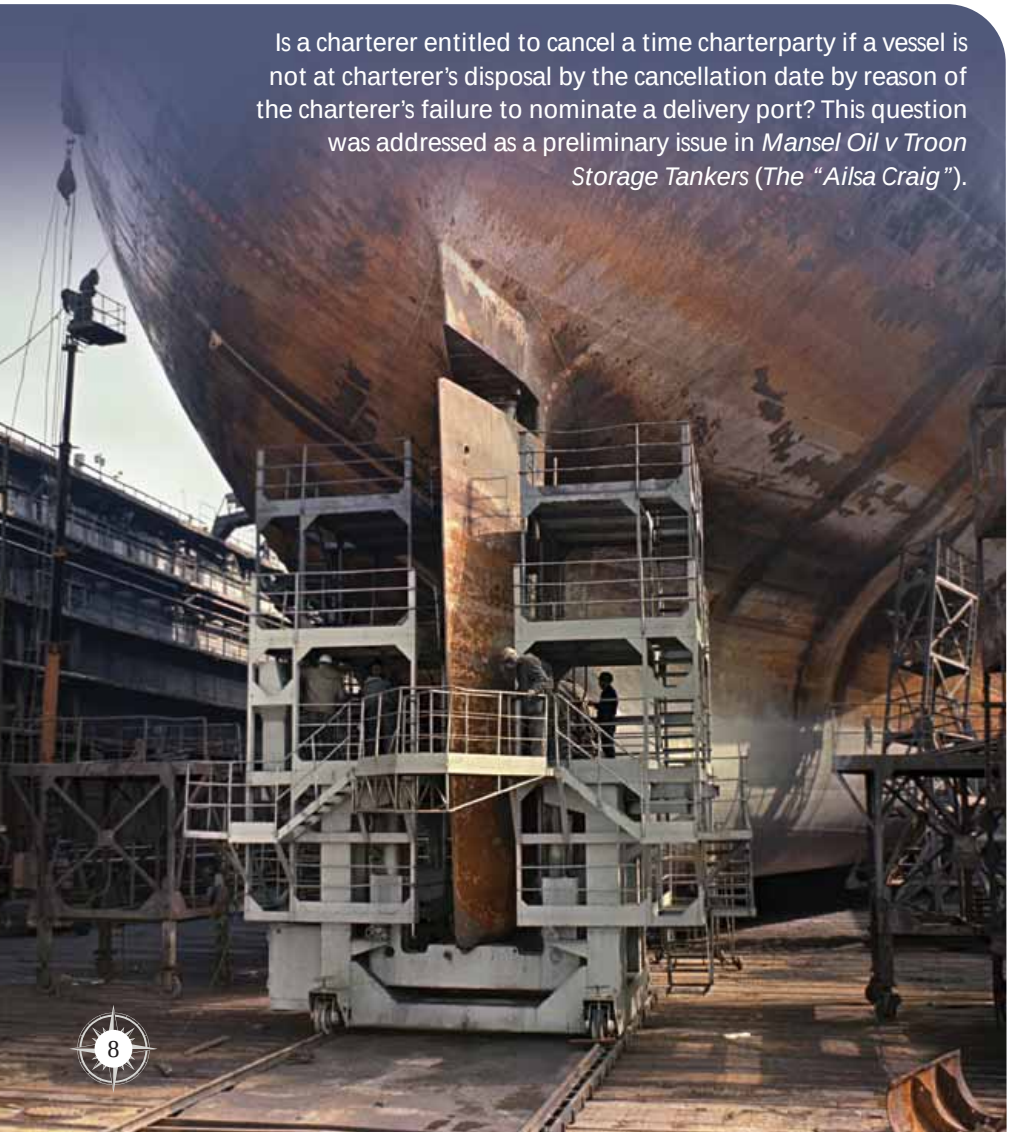
In November 2008 the Managers hosted a seminar and reception for the Korean Membership. The event was kindly opened by Club Board Member Mr C.S. Kim (Korea Line Corporation) who reflected on the difficult market conditions for the Membership and the Club. Underwriting issues and possible solutions to counter party risk were considered by the Managers' representatives present.

Guest speaker, Mr Richard Johnson, a senior manager from ITOPF, spoke on the spill response in the aftermath of the "Heibei Spirit" pollution. Thanks to all those who attended the seminar and to the support received from the Club's local representatives in making the event such a success.

Mr C.S.Kim at the Korean Membership Seminar

Impossibility of Notifying Place of Delivery

Is a charterer entitled to cancel a time charterparty if a vessel is not at charterer's disposal by the cancellation date by reason of the charterer's failure to nominate a delivery port? This question was addressed as a preliminary issue in *Mansel Oil v Troon Storage Tankers* (*The "Ailsa Craig"*).



The fixture was negotiated with delivery between the 25 September and 31 October 2007, with the option for charterers to nominate a delivery port in WAF-Ghana/Nigeria range. The cancellation date was extended to the 15 November but, with the vessel in dry dock in Piraeus, when it became apparent that the extended cancellation date could not be met, charterers cancelled.

A dispute arose on the basis that charterers had not nominated a delivery port at the time of cancellation. Thus, owners argued that the right to cancel could not be exercised until charterers had communicated the port of delivery.

The Court decided that charterers, while indeed having an obligation to nominate the delivery port, should be allowed to exercise their right to cancel even when a delivery port has not been nominated because, in the circumstances of this case, i) the failure to do so was not causative of owners' inability to deliver the vessel and ii) the obvious futility of nominating a port would be enough to discharge any duty to nominate a delivery port.

■ The decision is discussed by Francis Vrettos (francis.vrettos@simsl.com) in an article on the Steamship Mutual website at: **www.simsl.com/Ailsa1208.html**

Steel Coils – Minimising the Risk of Cargo Rejection

With many commodity prices dropping and recent figures pointing to a slump in the price of steel an increase in the number of steel cargo claims is to be expected.

In a weak economy buyers tend to look for reasons to reject more cargo than usual. This is particularly so in the steel markets and if prices drop between purchase and delivery. One such reason is where there is a dispute as to the apparent condition of the cargo on loading as described in the bill of lading and any damage found on discharge alleged to be of a pre-shipment origin. The allegation is that the carrier under the bill of lading has misrepresented the apparent condition of the cargo on loading. If made out any such liability has nothing to do with the carriage of the cargo, is not a breach of contract, but a liability in deceit. The significance of this distinction is important.

■ This point, the role to be played by pre-load surveys, appropriate clausing of mate's receipts and bills of lading, and the risk of reliance on letters of indemnity if clean bills of lading are issued when they should not, are discussed in an article by Daniel Brand (daniel.brand@simsl.com) on the Steamship Mutual website at: **www.simsl.com/SteelClausing0109.html**

Steel products are particularly susceptible to damage. Owners involved in the carriage of this cargo can minimise the risk of claims by ensuring that their crew are properly trained in industry best practice.

■ The handling, loading, stowage, securing and carriage of steel sheet coils are discussed in an article written for the Steamship Mutual website by Capt. Simon Rapley (simon.rapley@simsl.com) of the Club's Loss Prevention Department: **www.simsl.com/Steel1208.html**

Carriage of Calcium Hypochlorite

The very first issue of the old style Sea Venture, published in February 1978, included an article on the carriage of calcium hypochlorite and, in particular, the proposed amendment to the IMCO Regulations. This cargo was causing particular concern at that time. In the six year period prior to 1978 there were at least twelve serious fire and explosion incidents involving the carriage of calcium hypochlorite.

Calcium hypochlorite is used for purifying water. It readily decomposes to release chlorine and oxygen, and reaction with combustible materials may lead to severe fires. Studies at the time showed that calcium hypochlorite could undergo self accelerating decomposition, initiated at about 70°C for drums of good quality material. It was classified under 3 headings: UN1748 (carriage on deck and away from heat sources), UN2880 and UN2208 (both could be carried under deck but UN2880 away from areas where heat sources of 55°C or more would be encountered for 24 hours or more).

During the 1990's the proportion of calcium hypochlorite carried in containers increased and the manufacturers increased the drum size of "bulk" packages. The cargo was sometimes declared under other names such as chloride of lime, lime chloride and hy-chlor.

Between 1997 and 1999 there were six very large incidents on container ships involving calcium hypochlorite. Studies found that self accelerating decomposition in a 40ft container could, in fact, start at temperatures as low as 37°C.

IMO recommended that all forms should be carried "On Deck Only". Furthermore this deck cargo should be shaded from direct sunlight, stowed away from any heat sources and should have adequate air circulation.

There has been a major reduction in the number of fire incidents involving calcium hypochlorite reported in recent years. This may be the result of the revised methods of carriage or possibly because many ship owners have excluded the cargo in their charterparties. The carriage of containerised cargo relies on the shippers' full and accurate description of the contents. Only with this information can proper carriage conditions and safe transport be provided.

■ The carriage of calcium hypochlorite is discussed in more detail in an article produced by Dr Geoffrey Bound of Minton Treharne & Davies for the Steamship Mutual website:
www.simsl.com/CalciumHypo0109.html

Ship's Doctor – Who is Responsible for Negligence?

The case of *Carlisle v Carnival Cruise Lines* was discussed in Sea Venture issue 9 (and on the Steamship Mutual website at:www.simsl.com/USMedMalpractise 0907.html). At that stage, the 3rd District Court of Appeal had held that, in essence, a ship's doctor is held out as the agent of the owner and the owner can be held liable for his acts. The Florida Supreme Court then reversed that decision on the basis that it went against previous authority.

The principles guiding this issue were established in 1988 by the U.S. Court of Appeals, 5th circuit, in *Barbetta v S/S Bermuda Star*:

1. The doctor-patient relationship is under the control of the patient, not the shipowner, as neither the master nor owner of the ship can interfere in the treatment of the medical officer when he attends a passenger.

2. A shipowner is not in the business of providing medical services to passengers. It does not possess the relevant expertise to supervise a physician or surgeon carried on board a ship as a convenience to passengers.

Nonetheless, a court may hold an owner liable for the acts of a ship's doctor if a passenger can show that an "apparent agency" existed. Those seeking to pursue such a claim face a heavy burden of proof.

■ In an article written for the Steamship Mutual website Paul Brewer (paul.brewer@simsl.com) reviews the *Carlisle* case and considers these issues in further detail: **www.simsl.com/Carlisle1208.html**

George Greenwood Shipwrights' Prime Warden

The Managers are pleased to offer their congratulations to George Greenwood, pictured with his wife Fiona, as he approaches the completion of his year at the helm of the Worshipful Company of Shipwrights www.shipwrights.co.uk/index.htm.

George Greenwood was Senior Partner of the Club's Managers from 1986 to 2003. He was elected Prime Warden of the Worshipful Company of Shipwrights from the 1 May 2008 and in this new role has been leading the charitable and training activities of the Shipwrights. As a Livery Company in the City of London, the Shipwrights' main focus is on maritime projects and activities.

Demurrage Timebars – The Tide is Turning on "*Sabrewing*"

On 21 October 2008, Mr. Justice David Steel handed down Judgment on three preliminary issues in *The "Eternity"*. One of those preliminary issues concerned the operation of the demurrage provisions in the BPVoy 4 Form ("the Form").

Pursuant to a charterparty on an amended version of the Form, the defendant owners carried cargoes of mogas and high speed diesel to Mossel Bay in South Africa on board the M/T "Eternity".

The total amount of laytime allowed under the charterparty was 84 hours. The owners alleged that, largely as a result of the above operations, the total amount of time spent on laytime and demurrage was 754 hours and 37 minutes. Accordingly, the owners submitted a significant claim for demurrage.

Clause 19.7 of the charter provided, inter alia, that an owner should submit a pumping log signed by both a senior officer of the vessel and a "terminal representative" in support of any claim "in respect of additional time used in the cargo operations". It was common ground that the pumping logs furnished by the owners in respect of the cargo operations at Mossel Bay and at Cape Town had not been signed by a terminal representative. The charterers contended that, as a consequence of this omission, the entirety of the owners' claim for demurrage was now timebarred under Clause 20.

The Judge found in favour of the owners, holding, inter alia, that on the true construction of the Form, a failure to provide contractually compliant documents in support of one element of a claim for demurrage is not fatal to the entire claim.

In so holding, the Judge declined to follow the decision in *The "Sabrewing"* where a failure to provide signed pumping logs was held to be fatal to the entirety of a claim for demurrage.

The decision in *The "Eternity"* is contrasted with that of *The "Sabrewing"* in an article by Mark Seward of MFB solicitors on the Steamship Mutual website at: **www.simsl.com/Eternity0109.html**

Automatic Heeling System Maintenance

Recently the Club has encountered a number of cargo damage claims arising from Automatic Heeling System component failure. These systems are usually fitted on the tanktop in a hold (either under the hold walkways or in their own space adjacent to a cargo hold) on container ships or multi-purpose general cargo vessels to ensure that the vessel remains upright during cargo operations by automatically pumping ballast from wing tank to wing tank to correct any list that may develop.

Whilst automatic heeling systems are wonderful tools for easing the burden on Deck Officers during busy cargo operations, their location tends to leave them out of sight and out of mind, as long as they are working. In three recent cases problems occurred due to component failure during the automatic transfer of ballast from one side of the vessel to another.

In an article written for the Steamship Mutual website, Capt. Simon Rapley (simon.rapley@simsl.com) of the Club's Loss Prevention department discusses these cases in further detail and reminds owners and managers of the good practice measures that should be adopted to minimise the risk of such incidents occurring: **www.simsl.com/AHS1008.html**

Due Diligence – Obligation to Maintain

Following on from Mr Justice Cooke's judgment in *Golden Fleece Maritime v ST Shipping ("Elli"/"Frixos")* in August last year and the Court of Appeal judgment in May 2008, discussed in issues 9 and 12 of Sea Venture (see also: www.simsl.com/GoldenFleece 0908.html) the House of Lords has now rejected owners' application for leave to appeal.

It will be recalled that the case focused on new MARPOL regulations concerning the carriage of fuel oil which came into effect in April 2005. As at October 2003, heavy grades of oil could only be carried within the EU in double-hulled vessels. MARPOL regulation 13H in tandem required, as of April 2005, that fuel oil cargoes be carried in double-hulled vessels only, save for an exemption 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.

The vessels had been described in the charters as "double-sided" but a small part of two slop tanks, aft of the cargo tanks, was bordered by bunker tanks rather than ballast tanks and Class had subsequently determined the vessels to be only "partially double-sided." Accordingly, the vessels did not fall within the MARPOL exemption and, as at April 2005, could not lawfully carry fuel oil cargoes. The issue between owners and charterers was which of them should bear the risk of a change in international regulations which have the effect of restricting the cargoes which can be carried during the currency of a long term charter.

While it is always a matter of construing the particular charter as a whole the *"Elli"/"Frixos"* is now authority that this burden will most likely fall on owners where the change concerns due diligence obligations and warranties as to the vessel complying with international conventions.

In light of the current market conditions, it is likely charterparty provisions will come under greater scrutiny than may otherwise have been the case. In a market where charterers seek to avail themselves of any opportunity to escape from an unfavourable fixture owners need beware of the need to comply with all necessary obligations.

■ Article by Sian Morris (sian.morris@simsl.com)

Forward Freight Agreements and Financial Woes

Forward Freight Agreements ("FFAs") are often in the news at present with Armada of Singapore being the latest major operator to blame them for its financial woes.

There are currently two available forms of FFA, the 2005 and 2007 terms. Generally the consequences of a default will depend on the type of default and whether the 2005 or 2007 terms apply. In the event of non-payment, the non-defaulting party has the option to terminate or maintain the outstanding or "live" trades. In the event of insolvency under the 2007 terms, all trades are automatically terminated. The 2005 terms do not provide for automatic termination following insolvency and this can have very significant advantages for the non-defaulting party.

At first blush an FFA, whether on 2005 or 2007 terms, can appear simple, but lurking behind this façade is a more complex document known as "ISDA" which sets out in detail the parties' rights and obligations with regard to payment, interest, events of default, early termination and its consequences, notices etc.

■ Jeb Clulow and Eurof Lloyd-Lewis of Barlow Lyde & Gilbert discuss some of the problems which commonly arise in this regard in an article on the Steamship Mutual website at:
www.simsl.com/FFA0109.html

Enforcement of Arbitration Award – New York Convention

In *National Nigerian Petroleum Corp. v IPCO* the Court of Appeal recently ruled that English courts have the power to enforce parts of an arbitration award under the New York Convention 1958 and the Arbitration Act 1996. The Convention obliges contracting states to recognise foreign arbitration awards as binding and to enforce them in accordance with their own procedure.

IPCO is a Nigerian subsidiary of a Hong Kong company which entered into a contract with NNPC for the design and construction of a petroleum export terminal.

The project was delayed because, IPCO contended, NNPC sought substantial variations to the works. IPCO's claims to be paid more than the contract price were the subject of arbitration in Lagos under Nigerian law. IPCO's claims succeeded in a sum in excess of US$152 million. NNPC sought to set aside the award before the Federal High Court of Nigeria whilst IPCO applied to the English High Court to enforce the award.

IPCO's initial ex parte application was granted but then enforcement adjourned on NNPC's application, subject to NNPC lodging security of US$50 million and making payment to IPCO of US$13 million. That was in April 2005. By February 2008, when it became apparent NNPC's challenge in Nigeria was taking significantly longer than anticipated, IPCO appeared before Mr Justice Tomlinson and renewed the application for enforcement. It was that order of Tomlinson J that was the subject of appeal.

■ Both judgments are discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at:
www.simsl.com/IPCO0109.html

US East Coast Ship Speed Restrictions – Right Whales

Since early December 2008 the 'Ship Strike Reduction Rule' has been in force to protect the dwindling number of North Atlantic Right Whales from being hit by vessels off the East Coast of the United States.

This regulation requires vessels of 65 feet (19.8m) or longer to reduce speed to 10 knots in areas where Right Whales gather to feed and give birth. They also apply on the approaches to ports situated on the whales' migration route, the speed restriction applying in the various areas at various times and places dependent on Right Whale occurrence. (There are exemptions in the event of poor sea or weather conditions to ensure safe vessel manoeuvreability.)

The regulation came into force in early December 2008 and will only be in place for 5 years unless the U.S. National Marine Fisheries Service can show that it is having a positive affect on East Coast Right Whale population.

■ For further details on the areas affected and the dates when the speed restriction will be in force visit the Steamship Mutual website at:
www.simsl.com/USRightWhale1008.html

"Knock for Knock" Clauses – England v US

A recent challenge to the scope and effect of the "knock-for-knock" provisions contained within the BIMCO TOWCON form was heard before the English Admiralty Court in the case of "*A Turtle*".

A semi-submersible rig under tow in the South Atlantic was lost when the tug ran dangerously low on fuel and released the tow, allowing the rig to drift of its own accord. It took some 17 days before another tug arrived to refuel the towing tug by which time all contact with the rig had been lost. Both tugs spent a further week searching for the rig without success and eventually the tug owners gave notice that they considered themselves released of any further obligations under the TOWCON contract.

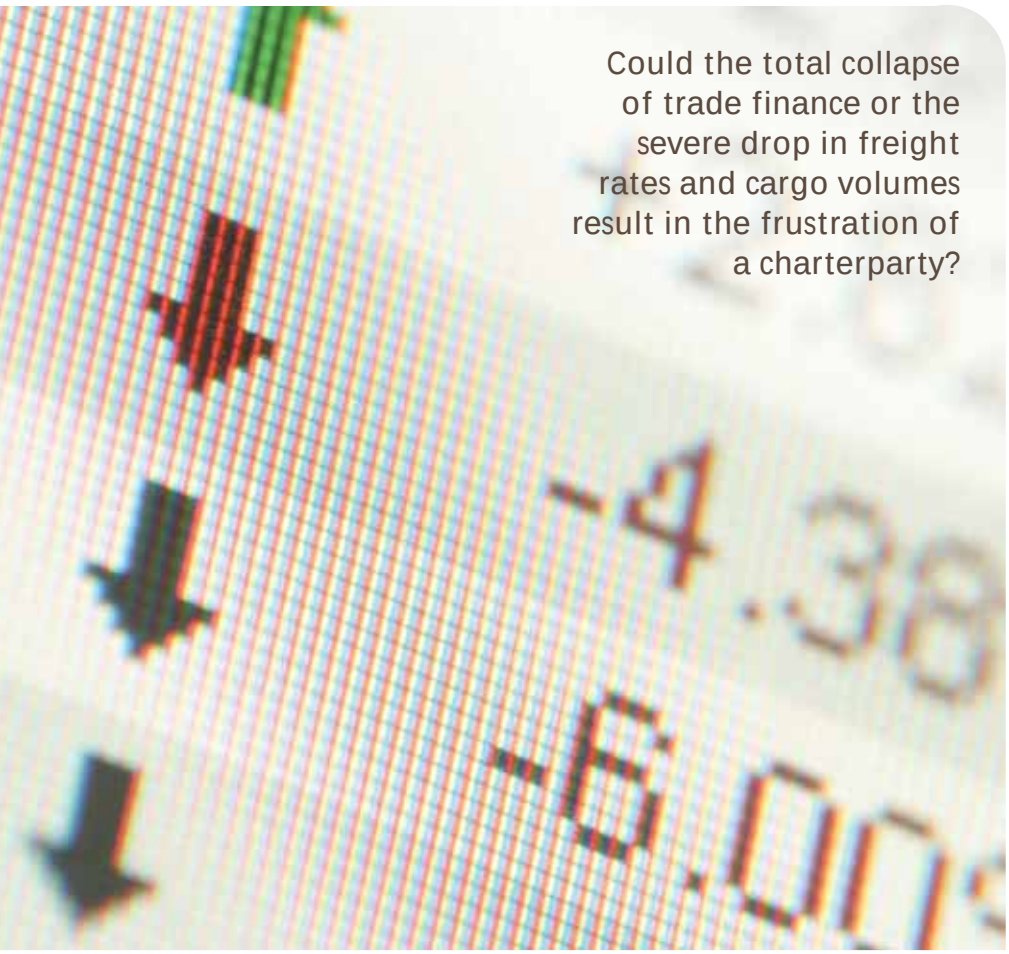
The Court found tug owners to be in breach of their TOWCON obligation to exercise due diligence in making the tug seaworthy. However, the tug owners were still able to rely on the knock-for-knock provisions in clause 18 and the rig owners' claims were dismissed. The Court considered that the nature of the loss claimed fell within the type of loss rig owners had agreed to accept.

The Court agreed a limit does apply to the protection afforded by clause 18 but only to the extent a party seeking to rely upon the clause has (i) completely abandoned its obligations under the TOWCON contract, and (ii) the loss flowed from that abandonment. At the time of the release of the tow the intention was to re-fuel and resume the voyage.

The position is significantly different in the United States where *The* "*Bisso*", a 1955 decision, remains the leading case and exculpatory clauses in towage contracts are given no effect.

■ The decision in "*A Turtle*" and a comparison with the position in the United States is discussed in more detail in an article by Ian Freeman (ian.freeman @ simsl.com) on the Steamship Mutual website at:
www.simsl.com/Turtle0109.html

Financial Crises and Frustration



Could the total collapse of trade finance or the severe drop in freight rates and cargo volumes result in the frustration of a charterparty?

The sharp corrections in the freight markets following the well-publicised credit crisis and its effect on trade finance have placed a number of charterers under financial stress, with some having gone into administration as a result. Those charterers in long term time charters and shippers in contracts of affreightment are now in uneconomical bargains and are, perhaps understandably, looking to renegotiate terms or to walk away from their contracts.

Case law suggests that the maritime adventure is commercial in nature and the contracting parties anticipate making profits and losses from the contracts; whether the loss is greater than initially anticipated does not negate the fact it is nonetheless contemplated – such losses are business risks and cannot amount to a legally frustrating event.

Reviewing the case law on frustration Mahtab Khan (mahtab.khan@simsl.com) looks at whether certain contracts, which contemplate a specific trade, could arguably be discharged because post-formation events have occurred that make the originally contemplated performance effectively impossible.

■ The article can be found on the Steamship Mutual website at: **www.simsl.com/Frustration0109.html**

Negligent Pilots and Liability for Losses Caused

Although dependent on the jurisdiction, if a vessel is damaged or causes damage to third party property as a consequence of pilot negligence the pilot is, as a general rule, either immune from prosecution, or is able to limit liability in respect of claims by the vessel or from third parties, or has insufficient assets to justify proceedings. The basis of the protection afforded to a pilot can arise by statute, contract or, and more controversially, by custom or implied notice.

The justification for the protection afforded pilots in this way is a matter of debate, particularly when (i) the training, supervision and licensing of pilots may be the responsibility of the port authority or state regulatory bodies and (ii) pilotage is compulsory.

In this respect, a recent Mississippi case, in which the pilot was ordered to contribute 50% of the cost of repairs and loss of use of a vessel during repairs, is of interest.

■ The case is discussed in an article by Jamie Taylor (jamie.taylor@simsl.com) on the Steamship Mutual website at: **www.simsl.com/Pilot0109.html**

Wilful Concealment of Pre-Exisitng Injury – Defence to a Jones Act Claim

A basic premise of the Jones Act is to ensure that the rights and needs of an injured or sick seaman are protected.

A Jones Act employer is obliged to pay maintenance and cure expenses to an employee with Jones Act status should that employee suffer injury or illness while in the service of a vessel. One defence to the payment of such benefits is the wilful concealment of a disabling condtion by a seaman at the time of his or her employment. The defence is often referred to as the *McCorpen* rule (*McCorpen v Central Gulf*).

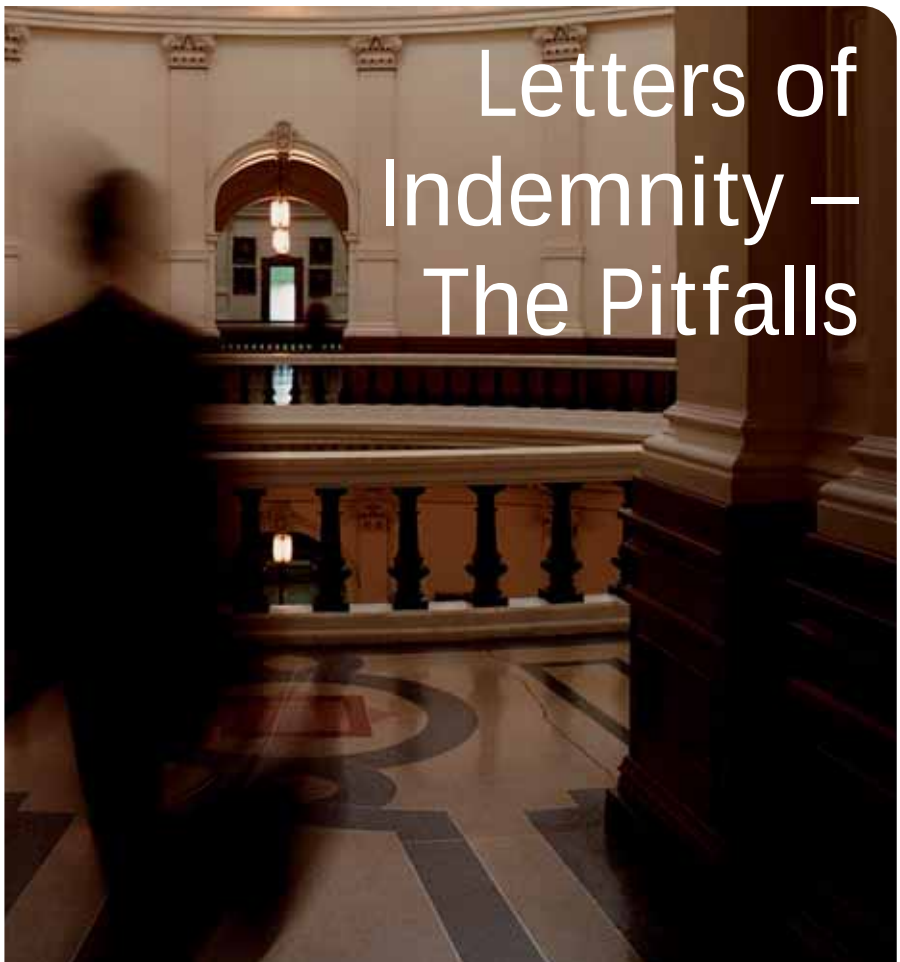
In order to establish a defence of "wilful concealment", an employer must show that:

1. An intentional concealment or misrepresentation of medical facts concerning a prior injury or condition occurred.
2. The non-disclosed facts were material to the employer's decision to hire the employee.
3. A connection existed between the witheld information and the injury complained.

The 5th Circuit extended the application of the *McCorpen* defence in a recent decision; *Johnson v Cenac Towing Inc.* Counsel for Cenac argued that Johnson's intentional misrepresentation of a prior injury not only negated his eligibility for Jones Act benefits but also acted as an affirmative defence of contributory negligence on Johnson's part and that any damages awarded by the court should be reduced accordingly. On appeal, the Fifth Circuit ruled that the wilful misrepresentation of a pre-existing injury could indeed be used as an affirmitive defence for contributory negligence purposes in certain circumstances.

■ This decision, together with the importance of a pre-employment medical examination (PEME), is considered in further detail by Richard Allen (richard.allen@simsl.com) in an article written for the Steamship Mutual website at: **www.simsl.com/Cenac1208.html.**

A separate article featuring the Steamship Mutual's new PEME scheme can also be found on page 19 of this issue.



Letters of Indemnity – The Pitfalls

The recent English High Court decision in *Farenco Shipping Co. Ltd v Daebo Shipping Co Ltd (The "Bremen Max")* dealing with a Letter of Indemnity (LOI) for delivery of cargo without production of bills of lading has again highlighted some of the potential pitfalls of what is no doubt a relatively widespread practice albeit one for which there is no as of right P&I cover.

The dispute turned on a number of points of construction in relation to the LOI in circumstances where, notwithstanding that under the LOI charterers had undertaken to provide on demand bail or other security to avoid the threatened arrest or release the vessel from arrest, the owners had provided security of US$11m to the cargo claimants. The charterers sought to avoid their LOI undertaking because (i) owners had already provided security to release the vessel from arrest, and (ii) they alleged the cargo had not been delivered to the party identified in the LOI.

■ These issues are discussed in an article by Dan Thomas (daniel.thomas@simsl.com) on the Steamship Mutual website at: **www.simsl.com/LOI1208.html**

Enforcing Contractual Jurisdiction Clauses

It is not unusual for cargo receivers to attempt to displace contractual law and jurisdiction clauses when they consider that their local jurisdiction may be more favourable to them.

However, two recent cases in the English High Court, *Kallang Shipping* v *AXA* and *Comptoir Commercial* and *Sotrade v Amadou*, have confirmed that, where a contract provides for English jurisdiction (whether it is High Court or arbitration) the Court will not allow the arrest of a vessel in a different jurisdiction to displace the jurisdiction agreed in the contract.

The Court held that arrest does not confer jurisdiction on the arresting court to hear the substantive dispute where the parties have agreed that another court or tribunal has jurisdiction to hear the dispute. On the facts of both cases, the court also held that it was unlawful for a third party to attempt to procure a breach of the terms of the contract by attempting to displace the contractually agreed jurisdiction.

The decisions in these cases are discussed in an article by Nick Barber of Reed Smith on the Steamship Mutual website at:
www.simsl.com/KallangComptoir0109.html

Philippines – 120 Becomes 240 Days

As reported in issue 12 and earlier issues of Sea Venture (see also: www.simsl.com/Filipino120Day0808.html) the Philippine Labor Code provides that disability lasting continuously for more than 120 days is 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. In both cases the claimants, unable to perform their customary work for more than 120 days, were awarded the maximum compensation of US$ 60,000.

However, two recent decisions of the Philippine Supreme Court can give owners cause for hope. In *Vergara v Hammonia* (8 October 2008) the Court reconciled the Labour Code provisions with the POEA standard contract and ruled that the 120 day period for determining degree of disability can be extended to up to 240 days, depending on the circumstances. On a similar positive note, in *Masangkay v Trans Global* (17 October 2008), the Court ruled that it is the crewmember's contract that should determine any right to compensation.

In this case the 2000 POEA contact specified that to qualify for compensation illness must be work-related. The claimant failed to prove this and his disability claim was denied. *Crystal Shipping* was distinguished on the basis that in that case it was the degree of disability that was in issue whereas in this case the question was whether the crewmember's illness was work-related or aggravated.

These cases are discussed in greater detail in an article written by Jean Patmore (jean.patmore@simsl.com) for the Steamship Mutual website:
www.simsl.com/Filipino240day1208.html

Crew PEME Scheme Launched

The Club recently announced it is launching a structured Pre-Employment Medical Examination (PEME) scheme. The PEME scheme will provide enhanced medical test and screenings to Members' crew and forms part of the Club's overall loss prevention initiative.

Initially based in the Philippines and using only pre-approved, recommended clinics to conduct the high quality PEMEs, the scheme is designed to ensure that crew are fit to serve at sea and to protect shipowners and the Club against the risk of unnecessary loss and liability arising from crew illness.

Whilst many crew already undergo medical screenings prior to employment, the Club believes that the quality and range of tests conducted can be variable. It is evident from prior claims experience that it is not uncommon for symptoms of serious illness to manifest themselves within just a few days of a crew member joining a ship, with inevitable and expensive consequences.

The Steamship PEME will be more rigorous in order to detect unfit crew and reduce the potential for unnecessary claims. The scheme aims to reduce the likelihood that individuals who are medically unfit are given clearance to serve at sea. The cost of a PEME will range between US$75-US$120 according to age, and will be paid by the shipowner or manning agent in the normal manner.


Jeanne Maddern

Many of the Club's recent crew claims have involved unfit crewmembers with serious medical conditions that should have been detected had a rigorous PEME been conducted prior to employment. Vessels have been forced to make deviations, incurring significant voyage delays which are costly and highly disruptive, and represent an unnecessary and avoidable loss.

■ For more information contact Rupert Harris (rupert.harris@simsl.com), Gary Field (gary.field@simsl.com), Jonathan Andrews (jonathan.andrews@simsl.com), or Jeanne Maddern (jeanne.maddern@simsl.com), pictured above, who will be Co-ordinator of the Club's PEME scheme.

Safe Berth – Implied Warranty?

Mediterranean Salvage & Towage v Seamar Trading (*The "Reborn"*) was the hearing of an appeal to the Commercial Court under s.69 Arbitration Act 1996 on a point of law arising out of an arbitration award of three very experienced LMAA arbitrators. Just one of the four issues identified by arbitrators was the subject of appeal. That issue was formulated by Mr Justice Aikens as:

"If a specific load port is named in a voyage charterparty and there are several possible berths within that port to which a vessel could be directed to load by the Charterers and there is no express warranty in the charterparty for the "safety" of either the port or the berth to which the vessel is to be directed by the Charterers, is the charterparty subject to an implied term that the Charterers must nominate a "safe" berth at the load port?"

Aikens J held that in the absence of an express warranty as to the safety of either the port or any berth nominated within the port, owners must demonstrate that business efficacy required such a warranty to be implied into the charter.

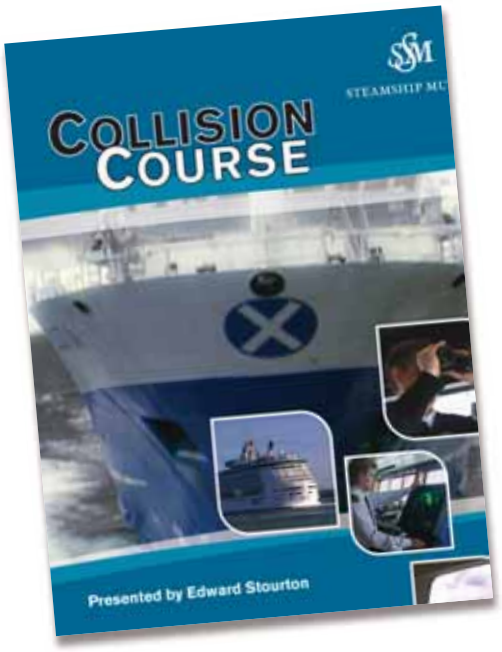
However, in the case of *The "Reborn"* there was no need to imply a warranty of safety.

■ The reasoning of the Court is discussed by Domenico Ferrara (domenico.ferrara@simsl.com) and Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at:
www.simsl.com/Reborn1208.html

Recent Publications

Collision Avoidance DVD "Collision Course"

This Loss Prevention DVD, produced by Steamship Mutual with the support of The Ship Safety Trust, aims to raise the awareness of watchkeeping officers of the important obligations imposed by Section I of the COLREGS with the objective of reducing collision risk for the future.



Further details together with a trailer from the DVD can be found on the Steamship Mutual website at:
www.simsl.com/CollisionCourse1108.html

2008 Mid Year Review

The Mid Year Review provides an up-to-date picture of the Club's progress in the current financial year, covering developments in underwriting, claims and investments. Members received the Review in December. It can also be found on the website at:
www.simsl.com/MidYearReview.html

Circulars

Circulars published on the Steamship Mutual website are available at:
www.simsl.com/Club-Circulars.htm

Website Articles

Articles are published on the Steamship Mutual website on a regular basis. For a full list of the latest articles go to:
www.simsl.com/publications-articles.html

New Steamship Mutual Directors

In the Club's centenary year the Managers are pleased to announce that Mr. Carlos Juan Madinabeitia, Mr. Sven Edye, and Mr. Antonia Zacchello, all of whom represent longstanding European Members of the Club, were appointed Directors of the Steamship Mutual Underwriting Association (Bermuda) Ltd at the Club's January Board meeting.

Mr. Madinabeitia is the Managing Director of Tradewind Tankers (formerly Maritima Aragua). Tradewind Tankers has been entered with the Club for over 40 years.

Mr. Edye is a Member of the Managing Board of Sloman Neptun Schiffahrts-Aktiengesellschaft, and a Managing Partner of Rob. M. Sloman & Co. oHG. The Sloman Neptun fleet has been a member of the Club for approximately 60 years.

Mr. Zacchello is the Chief Executive officer of Seaarland Shipping Management B.V. and Motia Compagnia di Navigazione S.p.a. These fleets have been entered in the Club for 32 and 34 years respectively.

Centenary Website – Send Us Your Pictures!

As mentioned earlier in this edition of Sea Venture, a book to commemorate the Club's centenary will be published later this year. In addition, a website dedicated to this landmark will soon be launched.

The website will feature several sections including Club history, news & events and publications. In the history section, in particular, the aim is to publish a pictorial record of the Club by means of an online gallery of images. We are looking for interesting, good quality images of vessels, people and events that have featured in the life of the Club over the past 100 years. Old documents relevant to the Club's history would also be welcome.

Any Sea Venture readers who may have access to such images or documents are encouraged to send them to our website editor, Naomi Cohen. Digital images can either be emailed, or copied to CD and posted. Documents and hard copy images can be posted; these will be scanned and can then be returned (if requested). Please supply your contact details and as much information as possible about the images or documents.

Suitable images will appear on the website during the course of the next few months. They may also be featured in the centenary book.

Email to:
naomi.cohen@simsl.com

Post to:
Naomi Cohen
Steamship Insurance Management Services Limited
Aquatical House
39 Bell Lane
London E1 7LU

The centenary website will be live from the end of February at:
www.simsl.com/centenary