

SEA VENTURE



Pirates Thwarted as EU NAVFOR Supports NATO in Rescue Operation

Steamship Mutual receives Seatrade Award

“Seven Seas Mariner” to the Rescue

Damages for Early Termination

Himalaya Clauses - are Third Parties Hague Rules Carriers?

Loss Prevention Update



STEAMSHIP MUTUAL

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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.

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INTRODUCTION

Now that the 2010 renewal is behind us it is perhaps opportune to look back briefly on the year that has just closed. 2009 proved to be an important year for the Club. Not only did the year mark Steamship Mutual's centenary but, and largely as a result of support from the existing Membership, it was also memorable for the measured and steady growth of the Club's entered tonnage.

Underpinning this growth is the Club's financial strength. Steamship Mutual can now be counted as one of the strongest Clubs in the International Group. This was endorsed in January when Standard & Poor's updated the financial strength rating of Steamship Mutual to a positive outlook. The Club is projecting another year of solid underwriting results for 2009 / 2010 and a significant increase in free reserves at year end. Standard and Poor's positive outlook recognises these achievements, the underwriting discipline and strong competitive position of the Club and the importance of these factors when considering a rating upgrade as the Club enters the new decade.

Further details in this respect are set out in the Club's circular and Press release following the recent Board Meeting in Hong Kong:

www.simsl.com/Circulars-Bermuda/B.507.pdf
www.simsl.com/PressReleaseLookingToFuture0210.html

These results combined with the Club's commitment to the provision of an excellent level of service means Steamship Mutual is able to move forward with confidence. While service is key to the Club's continuing success it is important to recognise that the service provided by the Club is not limited to the defence of claims and advice on contractual or other disputes faced by the members on a daily basis. The problems encountered by the industry as a whole – criminalisation of seafarers, piracy, strict liability regimes when the proximate cause of an incident may lie elsewhere, for example compulsory pilotage, and the image of the industry in the eyes of politicians and law makers – are equally important to the Club's Members. These are areas where Steamship Mutual, together with other ship owner associations and P&I Clubs, can work to improve the position for the industry.

This edition of *Sea Venture* covers oil pollution, details of the Club's most recent loss prevention materials, a series of articles discussing recent decisions in an area of dispute that has, unfortunately, been all too frequent in recent times: repudiation by charterers and damages following the withdrawal of a vessel, as well as early termination. Related to these issues there are also articles covering the interpretation of contractual terms and when without prejudice communications are admissible. On a separate note there are also two articles covering the recent experiences of two Club Members; one involving the successful defence of a pirate attack in the Gulf of Aden and the other, a rescue at sea.

As ever we are grateful to those who have contributed to this edition of *Sea Venture*. Indeed, it is particularly pleasing that this edition is comprised almost exclusively of articles written by Steamship Mutual staff.

Malcolm Shelmerdine
26 February 2010



Malcolm Shelmerdine





Enforcement of Arbitration Awards – Limitation

The Court of Appeal in London has recently delivered an interesting judgment on the time limitations applicable to the enforcement of arbitration awards: *National Ability SA v Tinna Oils & Chemicals Ltd (The “Amazon Reefer”)*.

The matter dates back to 1995 when disputes arose under a Gencon charterparty. The “Amazon Reefer” had been fixed by the appellants owners to the respondent charterers for a voyage from Kandla to Novorossiysk. The charterparty incorporated a London arbitration clause. The owners obtained an award in their favour in 1998 but

waited nearly a decade to apply ex parte for an order to enforce the award as a judgment under s.26 and s.66 Arbitration Acts 1950 and 1996. Not surprisingly, the charterers’ application to the High Court to set aside the order succeeded. S.7 Limitation Act 1980 provides:

“Time limit for actions to enforce certain awards

An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

The owners appealed. They argued:

- (i) The application to convert the award into a judgment was not “an action to enforce an award” and was thus not caught by s.7, and

- (ii) Thereafter, any steps to recover the debt from the charterers would require enforcement of a judgment debt and not an award, and thus, again, should not be caught by s.7.



by Francis Vrettos

■ The Court of Appeal did not agree. The principal reason being that an arbitral award should maintain its identity as an arbitration award. In an article written for the Steamship Mutual website, Francis Vrettos (francis.vrettos@simsl.com) discusses this decision in further detail:

www.simsl.com/AmazonReefer0210.html



Oil Pollution in Brazil

Oil spills and other pollution emanating from ships are never easy problems to deal with no matter where they may occur in the world.

One of the areas where the Club has seen a change in attitude towards pollution from ships is Brazil. In the last few years there has been an increasing trend in the number of claims arising out of oil pollution incidents within Brazilian waters, with escalating financial demands being made including fines and compensation sought

by federal and state authorities. As a complex regulatory framework, which is still in the early stages of development and which does not follow internationally accepted regimes such as the CLC, the Brazilian regime creates complications when it comes to assessing a shipowner's liability for pollution.

■ The Club's recent experiences are discussed in more detail in an article

prepared by Bengi Ljubisavljevic (bengi.ljubisavljevic@simsl.com) on the Steamship Mutual website at: www.simsl.com/BrazilPollution0210.html

The purpose of the article is not to elaborate on Brazilian pollution laws but to increase awareness of the underlying problems associated with dealing with pollution incidents in Brazilian waters.



by Bengi Ljubisavljevic



Himalaya Clauses

– are Third Parties Hague Rules Carriers?

The recent judgment of the English Commercial Court in *Whitesea Shipping v El Paso* has brought welcome clarification, and very arguably business sense, to an issue left open by the House of Lords in the “*Starsin*”.

(See Steamship Mutual website article at: www.simsl.com/Articles/01_BoL_OwnChart_4.asp)

That is, whether a third party that was not a contractual carrier and could not be contractually deemed to be a party to a Himalaya clause could be a carrier under the Hague Rules based on the Himalaya clause. The significance being that if so, that third party might be prevented from relying on the Himalaya clause by Article III rule 8 of the Hague Rules.

The owners had issued bills of lading which specified exclusive English law and jurisdiction and included a Himalaya clause.

The vessel grounded and the owners sought to rely on the error of navigation and perils of the seas defences under the Hague Rules.

In an attempt to avoid these defences cargo interests commenced proceedings in Brazil against owners and others. The owners of the vessel applied in already extant English proceedings for an anti-suit injunction in respect of the Brazilian proceedings. In the London proceedings that followed, the owners sought to enforce the Himalaya clause covenant not to sue to



by Paul Brewer

prevent the cargo interests suing the owner and other third parties in Brazil.

The cargo interests argued that the covenant not to sue offended Article III rule 8 of the Hague Rules and was therefore invalid.

Mr. Justice Flaux considered three main points:

1. Whether the owners could show sufficient practical interest, as opposed to merely academic, in having the covenant not to sue enforced,
2. Whether the parties who were not actually involved in the carriage of the goods could be considered to be party to the contract of carriage, and
3. Whether the enforcement of the covenant not to sue is contrary to Article III rule 8.

The owners were successful and entitled to the anti-suit injunction. Mr. Justice Flaux concluded that the covenant not to sue in the Himalaya clause was for the benefit of the owners only, the third parties sued were not parties to the contract of carriage so as to attract the application of the Hague Rules and, therefore, the protection afforded by the Himalaya clause to those third parties was not caught by Article III rule 8 of the Hague Rules.

■ Paul Brewer’s (paul.brewer@simsl.com) full analysis of this decision and its implications can be found on the Steamship Mutual website at: www.simsl.com/Whitesea0210.html

Without Prejudice

– Admissibility of Exchanges as an Aid to Interpretation

Oceanbulk and TMT entered into several freight forward swap agreements. In June 2008, Oceanbulk invoiced TMT for a sum in excess of US\$40million which TMT failed to pay. Without prejudice discussions ensued resulting in a settlement agreement.



Subsequently, Oceanbulk brought a claim against TMT for breach of the settlement agreement. In its defence TMT sought to rely on those without prejudice communications which had resulted in settlement on the grounds that they were relevant to the interpretation of the settlement reached.

Whilst Mr Justice Andrew Smith noted there were public policy considerations in

encouraging settlement short of litigation and thus making without prejudice communications privileged, he held they were admissible as evidence not only to actually identify the terms of a settlement reached but also to explain the meaning of those terms.

To many, the possibility that any communication headed without prejudice is not for all time and all purposes automatically privileged and inadmissible as evidence may be surprising.

■ An application for leave to appeal is pending but the present decision is discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at: www.simsl.com/Oceanbulk0210.html



by Sian Morris



Salvage Remuneration

– Limits to the Principle of Encouragement

by Edward Daggett



The “no cure-no pay” element to salvage makes it an inherently uncertain business to enter into.

Salvors therefore need to be encouraged. In assessing the salvage award, an arbitrator must adhere to the parameters set out in Article 13.1 of the London Salvage Convention 1989 which were designed to provide that encouragement.

In the recent Admiralty Court case of The “Ocean Crown” the limits of the Article

13.1 provisions were tested following a dispute in the arbitration process.

It was held that the principle of encouragement does not warrant raising the award in order to provide salvors with a cushion for future economic turbulence. Gross J held that not only would such a provision lead to double counting, as the reward would not be reduced during an economic boom, but also, crucially, it is not one of the Article 13.1 criteria. It is therefore clear that the courts consider the list to be comprehensive.

The appeal arbitrator had also suggested that the principle in the “*Amerique*”, whereby an award must not be disproportionate to the services rendered, did not apply to complex cases such as this. This reasoning was respectfully dismissed and the appeal on this point was upheld.

■ This decision is discussed in more detail in an article by Edward Daggett (edward.daggett@simsl.com) on the Steamship Mutual website at: www.simsl.com/SalvageEncouragement0210.html

Steamship Mutual receives Seatrade Award



The Club is delighted to announce that it has received the Marine Insurance Award at the annual Seatrade Middle East and Indian Subcontinent Awards.

The Award recognises the Club's longstanding commitment to the region and the award-winning loss prevention initiatives the Club has undertaken in recent years. It is heartening that the Club should win such an award in its Centenary year and in the region from which the Club's first international Members hailed.

The award was presented by Richard Crump of Holman Fenwick & Willan and received by the Chairman of Steamship Mutual (London), Mr. Mohammad Souri, with Rajeev Philip, SIMSL Director, all

pictured (below) with Christopher Hayman, Chairman of Seatrade.

The awards, recognising maritime safety and the environment, ship and port operations and efficiency, security and financing, were presented at a gala dinner attended by around 600 senior executives of the region's maritime and related industries at Al Johara Ballroom, Madinat Jumeirah, Dubai, on Thursday 8 October 2009. More than 60 companies and organisations were short-listed for the awards.

"These prestigious awards celebrate and reward excellence and innovation in the maritime sector across the region and are much anticipated throughout the industry," said Christopher Hayman, Chairman of Seatrade. For more than 20 years Seatrade has presented awards championing high standards and quality in shipping.



Pirates Thwarted

as EU NAVFOR Supports NATO in Rescue Operation

Two recent piracy incidents off the Somali Coast involving vessels entered with the Club have highlighted the importance of adhering to anti-piracy best management practices and using the Internationally Recommended Transit Corridor in the Gulf of Aden.



Early on the morning of 5 February, the 21,195 GT bulk carrier "Ariella", owned by Splosna Plovba d.o.o. came under attack from Somali pirates who were able to board the vessel and attempt to take control of the ship.

The "Ariella" was sailing in a Group Transit within the Internationally Recommended Transit Corridor (IRTC) under the protection of Coalition navies. An alert was transmitted and picked up by an Indian warship TABAR which then sent out a general message on the Mercury communication system. An EU NAVFOR French Maritime Patrol Aircraft (MPA) was quickly on the scene and confirmed a sighting of armed pirates on the deck of the "Ariella". The MPA made contact with battle watch officers from the NATO Danish warship "Absalon".

Having determined that the full crew of the "Ariella" were safe in a secure location on the vessel the decision was made to send in specialist teams which resulted in the pirates fleeing from the vessel. At the same time as



NATO forces approach pirate mother ship with 3 skiffs

personnel from the NATO ship "Absalon" boarded "Ariella", sailors from the Russian warship "Neustrashimyy", which was operating nearby, successfully boarded and detained a second pirate skiff. The ongoing co-operation between the EU Naval Force (EU NAVFOR) and NATO Combined Maritime Force 151 (CMF 151), together with various maritime nations, such as Russia and India led to the successful release of the "Ariella".

The "Ariella" has a crew of 24 of mixed nationalities, (18 Filipino, 2 Indian and 4 Ukrainian including the Master). All were unharmed in this incident. The ship's passage was registered with MSC HOA, the vessel was in contact with UKMTO and was part of a Group Transit when she was attacked and the crew had implemented recommendations from the Industry Best Management Practices to Deter Piracy.

In a separate incident, the 11,731GT general cargo vessel "Andinet", owned by Ethiopian shipping Lines SC, managed to evade capture by pirates who failed to board the vessel thanks to the crew's adherence to the Industry Best Management Practices.

Commander John Harbour, EU NAVFOR spokesman, commented to *Sea Venture*:

"There is no doubt that application of best management practice and quick action by the crew of the "Ariella" helped to save the day in this attempted hijacking. EU NAVFOR played its part but it was excellent cooperation between all the players, military and civilian, that saved the ship and the crew from being pirated."

Mr. Egon Bandelj, president of Splosna Plovba d.o.o, owners of the "Ariella", also commented:

"The military action of liberating the hijacked vessel "Ariella" from the Somali pirates represents a precedent in the fight against pirates. The intervention is proof that by strict adherence to instructions and the professional application of same by all participants, it is possible to safeguard property without civilian casualties. Unfortunately, it is not always possible to avoid mortal danger to which military forces are exposed during such actions. I would like to congratulate and thank all participants: the naval forces in the Gulf of Aden, especially the crew of the Danish warship "Absalon", communication centres, the Captain and crew of our vessel "Ariella" and the emergency response team at our head office assigned for the safe management of our fleet."



EU NAVFOR French Maritime Patrol Aircraft hovers over the "Ariella"

EU NAVFOR strongly recommends that all vessels that transit through the high risk areas, namely Gulf of Aden, Somali Basin and Indian Ocean ensure that the ship's security plan implements all guidance and advice that is set out and contained in the Best Management Practices (BMP). The BMP can be found at the following link on the Club's website:

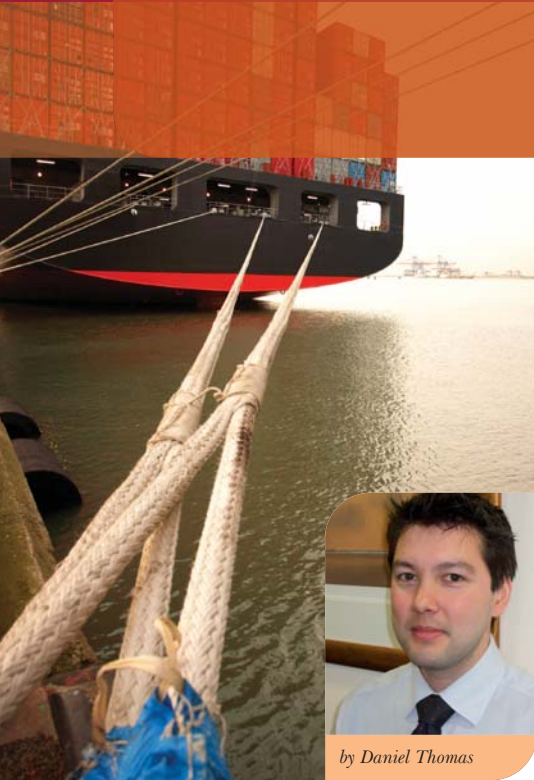
<http://www.simsl.com/Loss-Prevention/IndustryBMPPiracy0809.pdf>

Reference should also be made to MSC HOA website www.mschoa.org.

The main tasks of EU NAVFOR SOMALIA Operation ATALANTA are to escort merchant vessels carrying humanitarian aid of the 'World Food Program' (WFP), to protect vulnerable ships in the Gulf of Aden and Indian Ocean and to deter and disrupt piracy.

The report of the attack and rescue of the "Ariella" is based on the MSC HOA report of the event and has been used here with their kind permission.

Berth or Port Charter?



by Daniel Thomas

Although always a matter of construction of the particular charterparty, the recent English High Court decision in *Novologistics SARL v Five Ocean Corporation (The "Merida")*, which was an appeal from an arbitration decided on documents alone, has provided helpful guidance in determining when a voyage charterparty, in this case incorporating both safe berth and safe port provisions, is a berth or port charter.

The issue in dispute was whether the vessel was an arrived vessel for the purposes of calculating laytime and if under the charterparty the owners or charterers had agreed to the risk of congestion in the port. The arbitrators had focused on the provision that laytime was to count when shifting from anchorage to the berth which, they decided, must have been on the basis that, as in fact happened, the Master was able to tender a valid NOR upon arrival. Thus the charter was a port charterparty and owners' claim for demurrage succeeded. On appeal the court disagreed with the arbitrators' decision.

■ The reasons for the decision are discussed in an article by Daniel Thomas (daniel.thomas@simsl.com) on the Steamship Mutual website at: www.simsl.com/Merida0210.html

Interpretation of Contractual Terms

That contracting parties are free to agree terms is the essence of an agreement. Most contracts would appear to confer benefits so that each party considers it has a "bargain".

Others could, on the face of it, appear to be weighted in favour of a particular party. But, whatever the reasoning behind the terms, the contracting parties must ensure, as far as possible, that the intentions of each party are clear and that such intentions are accurately reflected in the language used.

The requirement of clear drafting is important for the efficacy of the contract but perhaps more so in the event of a

dispute. The courts have demonstrated a reluctance to reformulate certain provisions, tending rather to accept that the parties had intended exactly what was said, whether or not this leads to an apparently harsh result.

In *BP Exploration Operating Company Limited v Dolphin Drilling Limited (the "Byford Dolphin")* the two parties agreed a drilling rig charter "for the provision and operation of the Byford Dolphin, semi-submersible drilling rig", whereby Dolphin Drilling Limited would carry out drilling operations in return for which BP would pay the contract price.

BP sought a declaration that it was entitled to terminate the agreement at any time on

the basis of a clause which stated that notice to terminate may be given "at the convenience of the Company [BP]". Dolphin argued that there was no such entitlement until after the commencement date for work, as defined by the agreement, failing which BP would be in repudiatory breach.

In his judgment, Mr Justice David Steel considered the construction of the agreement, queried what a reasonable person would have considered the intention of the parties to be and questioned whether that intention made sense in the context of the contract as a whole.

■ The decision has been appealed but the court's approach in this respect is discussed in an article by Sarah McGuire (sarah.mcguire@simsl.com) on the Steamship Mutual website at: www.simsl.com/Dolphin0210.html



by Sarah McGuire



Safe Transportation of Coal by Sea

A recent coal fire aboard a vessel loading in Indonesia has highlighted the need to ensure that the provisions of the Code of Safe Practice for Solid Bulk Cargoes ("BC Code") are strictly adhered to in order to ensure, as far as possible, the safe carriage of coal cargoes.

The incident arose in circumstances where the vessel was scheduled to load two parcels of cargo in the same hold. The first parcel of approx 5,500m/t was loaded and left in a cone formation. The vessel's hatches were left open pending delivery of the second parcel. Delivery had still not taken place some three days later when smoke was seen coming from the cargo.

Although the fire was swiftly extinguished by the crew, significant costs were incurred discharging and replacing the entire parcel.

■ The incident highlights particular issues of cargo management including stowage and cargo monitoring. These issues are considered in more detail in an article by Darren Heppel (darren.heppel@simsl.com) on the Steamship Mutual website at: www.simsl.com/Coal0210.html



by Darren Heppel



Liquidated Damages Clause – Penal or Compensatory?



The High Court decision in "The Paragon" was discussed in Sea Venture issue 14 and in further detail on the Steamship Mutual website at: www.simsl.com/LiquidatedDamages0909.html

Mr Justice Blair had found that the clause was penal as it provided for compensation for a loss that was not recoverable and the loss of a chance an owner chose not to take. Owners appealed and the Court of Appeal's decision was published in early January 2010.

The vessel was time chartered for three to five months at \$29,500 per day. The

relevant clause, rider clause 101 of the charter, provided:

"The Charterers hereby undertake the obligation/responsibility to make thorough investigations and every arrangement in order to ensure that the last voyage of this Charter will in no way exceed the maximum period under this Charter Party. If, however, Charterers fail to comply with this obligation and the last voyage will exceed the maximum period, should the market rise above the Charter Party rate in the meantime, it is hereby agreed that the charter hire will be adjusted to reflect the prevailing market level from the 30th day prior to the maximum period [d]ate until actual redelivery of the vessel to the Owners."

The vessel was redelivered some six days late and charterers paid hire at the charter rate to the maximum date of redelivery and at market rate for the 6 day overrun. However in reliance on clause 101, owners claimed hire at market rate for the 30 day

period prior to the latest date for redelivery. With increasing rates at that time owner's claim was for a sum of US\$471,603 above the charter rate paid by charterers.

Lord Clarke of Stone-Cum-Ebony (then Master of the Rolls) delivered a judgment with which both his fellow Lord Justices concurred. The judgment is concise, addressed the principles supporting claims for late redelivery and upheld both the Tribunal and High Court decisions that the clause was penal.

■ The principles supporting claims for late redelivery are discussed in an article by Anna Yudaeva (anna.yudaeva@simsl.com) on the Steamship Mutual website at: www.simsl.com/LiquidatedDamages0210.html



by Anna Yudaeva

Centenary Dinner Hits High Note



*Vice Admiral & Mrs Naqvi I.Grimaldi
Mr & Mrs Abraha U.Jejurikar C.Adams*

The fourth board meeting of the Club's centenary year took place in London. Members attended from Australia, Hong Kong, China, India and Ethiopia as well as a good representation from Europe, the United States and the Middle East.

This meeting saw the retirement of Director Michael Valmas who had served on the London Club Board since 1985 and also on the Bermuda Club Board from 1986 to 2000 (and as an alternate for his father even before 1986). Buckley McAllister of McAllister Towing and Armand Pohan of New York Waterways were both appointed to the Board in July and attended their first meeting in London.

The Chairman and Directors of the Club hosted a cocktail reception and dinner to celebrate the Club's centenary (on 16 October 2009) and this took place at the Jumeirah Carlton Tower Hotel. SIMSL staff



*P.Gurton D.Gurton P.Williams
D.McDonnell K.O'Keefe*



Y.G. Wang Mr and Mrs C.K.Ong

and a number of retired staff were invited to attend.

Club Chairman, Mr. Otto Fritzner, addressed the guests and referred to the fact that as an organisation which is celebrating its centenary, the Club owes much to the loyalty and dedication of its staff. On behalf of the board he thanked all the staff: "Steamship Mutual has been blessed by the number of people who have dedicated most of their working lives to the Club." He went on to explain that several employees had completed 25 years service with the Club. Special mention was given to



A.Bowman P.Barclay N.Rissbrook
C.Reynolds R.Harrison M.Parr V.Holt



G. Field S.Watkins D.Christie C.Williams N.Jermyn S.Patel B.McAllister



Opera on the Run diva with G.Rynsard

David Gurton, Carol Acott and Doreen McDonnell who all attended the event and had all given 40 years' service.

Dr. Helen Doe, who has written a history of the Club in the recently published book *From Coastal Sail to Global Shipping*, described to the guests some of the interesting discoveries she made while carrying out her research. These included the dangers of chocolate éclairs, exploding cocktails and some rather fishy deliveries, a significant horse race, the art of racing boats on the Thames, an opera written about a notorious hijack and some



Dr Helen Doe

interesting people. Included among the last group was a rather swashbuckling character involved in the Spanish Civil War and a mystery woman who appears to have been an early partner in the managers, Alfred Stocken, in 1940.

To find out more about these and the rest of the story of the Club's transformation from its origins as a small local British Club insuring some of the last sailing ships visit the Club's centenary website at:

<http://centenary.simsl.com/centenary-book.htm>

Two of the attending waiters provided surprise additional entertainment when they began to sing. They serenaded the guests, danced with them and then invited a lady guest to sing. The lady in question had spent the earlier part of the evening with the rest of the guests and had told fellow diners she had been involved in proof-reading the centenary book. In fact, she and the waiters were part of the group *Opera on the Run*. They sang a selection of classical arias and popular show tunes. CEO Gary Rynsard proved to be in good voice when he was invited to join the group's diva in a song from *My Fair Lady*.

Mr Fritzner pointed out that a grander dinner, including the broader insurance industry, had been planned to celebrate the Club's centennial but that the recession and the very difficult market for many Members simply made this inappropriate. The event was, therefore, on a smaller scale than had been originally intended but it was, nonetheless, a very enjoyable evening.

■ Article by Naomi Cohen (naomi.cohen@simsl.com).

Further pictures from this event, as well as pictures from the other board meetings for the centenary year, can be found on the Club's centenary website at:

<http://centenary.simsl.com/news.htm>



by Naomi Cohen

Pro Forma Charterparty

– Printed Terms v Negotiated Terms

Cobelfret as owners and Swiss Marine as charterers entered into a voyage charter for the carriage of coal in bulk from Richards Bay to Rotterdam and Immingham. Cobelfret claimed demurrage and Swiss Marine claimed despatch in relation to discharge at Immingham.

The charter was contained in a fixture recap which stated "Scale load / 25,000 MT SHINC" (i.e. Sundays and holidays included) and "otherwise as per Eurosailor – CP dated 2 March 2004 logically amended to reflect main terms agreed as above..." The printed charter form provided for a discharge rate of 25,000 MT SHINC "excluding Super Holidays".

The issue was whether laytime ran on the "Super Holidays" during the Christmas period, because the words "excluding Super Holidays" in the printed charter form were inconsistent with the words "25,000 MT SHINC" in the fixture recap.

The Commercial Court held that the fixture recap and the words in the printed form were not inconsistent. Thus time would count during holidays unless they were "Super Holidays".

■ The decision in *Cobelfret Bulk Carriers v Swissmarine Services* is discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at: www.simsl.com/Cobelfret0210.html



by Richard Allen



U.S. – Indemnity Agreements in Offshore Energy Contracts

Contracts between companies providing services to the owners of offshore platforms in the Gulf of Mexico will often contain indemnity provisions designed to create reciprocal defence and indemnity agreements between and among the various contractors.

In *Grand Isle Shipyards v Seacor Marine*, the U.S District Court for the Eastern District of Louisiana ruled that as the contracts between the parties called for work to be carried out on an offshore platform, the contracts focussed on an Outer Continental Shelf Lands Act ("OCSLA") situs (location) so that the adjacent state's law therefore applied as surrogate federal law. The result was that the indemnity provisions within the contracts were barred by the effect of the Louisiana Oilfield Anti-Indemnity Act ("LOIA").

On appeal, U.S. Court of Appeals for the Fifth Circuit reversed this decision, holding that because the incident which gave rise to the dispute occurred on a vessel that was not adjacent to an OCSLA situs, General Maritime Law rather than Louisiana state law applied.

Grand Isle successfully moved for a reconsideration and the Fifth Circuit sitting en banc issued a new standard for determining when an indemnity clause in an offshore energy contract is triggered, ruling that the courts should look to the "focus of the contract" or where "the majority of the work" would occur rather than the location of the particular occurrence which led to the claim.

■ Arguably, this decision will create more uncertainty in what is already a confusing area of the law. Richard Allen (richard.allen@simsl.com) considers its implications in an article on the Steamship Mutual website at: www.simsl.com/GrandIsle0210.html

Loss Prevention Update

Onboard Training Materials

Three new programmes have recently been added to the Club's onboard training series produced in association with Videotel:

- *Offshore Supply Safety* is aimed at improving the safety of vessels involved in offshore supply operations by keeping to proper procedures and working calmly and carefully.
- *Vessel General Permit* is designed to give practical guidance to assist in interpreting and complying with the latest environmental regulation requirements for vessels operating in U.S. waters.
- *The Mooring Series (Edition 4)* incorporates three programmes covering Theory of Mooring, Safe Mooring Practice and the Maintenance of Mooring Systems.

All three programmes are available as either VHS/DVD with support booklet or interactive CD-ROM. Members wishing to hire or purchase any of the videos are entitled to concessionary rates. Further

details on pricing and ordering can be obtained from Videotel:
www.videotel.co.uk

Posters

Following the first four posters in the *Collision Avoidance* series (mentioned in the last issue of *Sea Venture*) a second set of posters in the same series has now been published addressing the following COLREG rules:

- *Rule 13 – Overtaking*
- *Rule 14 – Head-on Situation*
- *Rule 15 – Crossing Situation*
- *Rule 19 – Conduct of Vessels in Restricted Visibility*

Like the other loss prevention poster series – *Work Safely* and *Stay Shipshape* – the Collision Avoidance posters are intended for use onboard Members' vessels. This particular series is also designed to complement the *Collision Course* DVD:
www.simsl.com/CollisionCourse1108.html

All posters are available for download and printing via the Steamship Mutual website at: www.simsl.com/loss-prevention-posters.html

Risk Alerts

Since the publication of *Sea Venture* issue 14 the Club continues to issue *Risk Alerts* on a variety of subjects on a regular basis. The latest Alerts have featured:

- *Australian Maritime Safety Authority Focused Inspection Campaign on Container Securing Equipment*
- *Securing of RORO Cargo*
- *Safe Mooring Practice*
- *Mooring Line Care and Maintenance*
- *The Problem of Sweat*
- *Guidelines for the Laying up of Vessels*
- *Indian Iron Ore – Excessive Moisture Content*

The Loss Prevention homepage is at: www.simsl.com/loss-prevention-and-safety-training.html



"Seven Seas Mariner"

to the

It was a seemingly perfect late spring evening in November 2009 as "Seven Seas Mariner" slipped her moorings in Hobart sailing serenely towards the open ocean and a passage across the Tasman Sea to New Zealand. Captain Stanislas Mercier de Lacombe was undoubtedly looking forward to an uneventful passage across the southern oceans.

However, for lone German yachtsman, Bernt Luchtenborg, aboard his 52-foot aluminum yacht "Horizons" the story was very different: Bernt had set sail in June that year from his home port of Cuxhaven on the Baltic coast of Germany on an ambitious voyage, to sail around the world twice, once sailing with prevailing winds and once in the opposite direction (a total distance of 65,000 miles).

On that Sunday evening, 22 November 2009, about 750 kilometres west of Stewart Island off the South Island of New Zealand and in heavy weather, "Horizons" struck an underwater object, most likely a whale, damaging the rudder and making it impossible to steer or motor the vessel. Bernt made an emergency call that was picked up by the New Zealand Rescue Co-ordination Centre which dispatched an Orion search aircraft to the area to assess the situation.

Having established what vessels were in the area, the Rescue Co-ordination Centre tasked "Seven Seas Mariner" to make all possible speed to the last known position of "Horizons". This area of the Tasman Sea is little traveled by commercial shipping and until the arrival of "Seven Seas Mariner" Bernt had little choice but to stream out his sea anchor and ride out the rolling seas.

On receiving the news from the Rescue Co-ordination Centre Captain Stan, as he is universally known on board, assigned his Navigation Officer to plot a new course directly towards "Horizons" which, at that point, was still over 325 miles away, helpless and at the mercy of the elements.

The moment "Seven Seas Mariner" altered course Captain Stan assembled his senior officers and most experienced seamen to work out a strategy for dealing with whatever circumstances they might find on arrival at the scene. In altering course Captain Stan was not simply following an instinctive humanitarian response to help a

fellow seafarer in distress but fulfilling his obligations under international maritime law.

Regent Seven Seas Cruises has as a prime directive the safety and comfort of all guests and crew on board and, as a consequence, the officers and crew, under the diligent direction of the Captain, Staff Captain and Safety Officer, are meticulously drilled to deal with any and all emergencies. The "Seven Seas Mariner" was heading directly towards a situation which was fraught with possible hazards.

At first light on Tuesday 24 November the officer on watch on the bridge caught sight of the distressed yacht. There were clear blue skies overhead but this was the Tasman Sea, the "Terrible Tasman" as it has become known by generations of seafarers, and the seas were anything but placid.

Captain Stan's first and immediate action was to establish the physical condition of the stricken yachtsman and the seaworthiness of his craft. Through VHF radio contact Captain Stan ascertained that Bernt, thankfully, was in good shape physically. There could be no thought of putting his own crew's lives in harm's way if there was no immediate threat to Luchtenborg's safety. "Horizons" was not taking on water and there was enough food and water on board for a sustained period but without any means of steering the yacht it seemed obvious that it would have to be abandoned at some stage.

The prospect of sending "Seven Seas Mariner's" rescue boat over to "Horizons" had been a distinct possibility from the moment Captain Stan altered course on Sunday evening. What was going to influence his ultimate decision whether or not to do so was the height of the waves that the 20-foot rescue boat would face on the short but perilous journey across to the yacht. Another consideration was the comfort and safety of guests on board; in order to lower and raise the rescue boat "Seven Seas Mariner" would have to come to an almost complete stop and take in her



The rescue boat is lowered

Rescue!



stabilizers. To do this would result in "Seven Seas Mariner" rolling significantly unless Captain Stan brought to bear all of his navigational skill by bringing "Seven Seas Mariner" carefully around to the lee side.

The rescue boat was to be manned by a volunteer crew: Staff Captain Alain Mistre, who would take the helm, First Engineer, Antonino Ercolano, to deal with any technical problems, and Bosun Ildefonso Donan whose critical role was to release the hook at the precise moment to allow the rescue boat to catch the swell and drop accurately in the water. Also, on the return journey, Ildefonso would be responsible for re-attaching the hook so that the boat could be winched back on board. A heavy steel hook not caught at absolutely the right time could have fatal consequences were it to strike one of the rescuers.

The three volunteer rescuers, clad in immersion suits, boarded the rescue boat and were ready to be lowered into the water. Captain Stan gave his order to go as he delicately manoeuvred "Seven Seas Mariner" into position, with a lee side protection, for the launch of the rescue boat. Under the keen eye of Safety Officer, Mario Grammatica, the rescue boat was lowered. Bosun Ildefonso released the hook perfectly and the rescue boat sped off towards the waiting Bernt Lüchtenborg.

These were anxious moments, not merely for Captain Stan on the bridge, but for the assembled guests on board who had packed the open decks and observation lounge since early light watching the drama unfold. As the rescue boat arrived perfectly alongside "Horizons" in 6-metre swells it seemed to take little time for Bernt to take what few items he could salvage from his yacht and jump on board.

Almost immediately Staff Captain Alain headed back to "Seven Seas Mariner" but this time taking a safer and less direct course. In constant contact with Captain Stan on the bridge Alain was waiting for

that perfect combination of circumstances to bring the rescue boat back alongside "Seven Seas Mariner". There was an intuitive level of understanding between the two longtime colleagues and bringing the rescue boat back was an expert one-pass manoeuvre perfectly executed by Alain. Bosun Ildefonso successfully grabbed the descending hook and attached it to the shackle. To the palpable relief of Captain Stan, and indeed everyone on board, the rescue had been successfully executed.

As Bernt and the rescue team were winched up and stepped on to the embarkation deck the entire ship broke out in spontaneous and sustained applause.

The entire operation had been text book perfect and had taken less than 40 minutes. Years of training had paid off handsomely. In a masterpiece of understatement the New Zealand Rescue Mission Coordinator, Dave Wilson, thanked the Master, officers and crew of "Seven Seas Mariner" for their professionalism and skill which were instrumental in a successful rescue mission.



Rescuers reach the stricken "Horizons"

■ This is an edited version of an article published in the "Seven Seas Mariner" onboard newspaper and is published here with kind permission of Regent Seven Seas.

Regent Seven Seas have their three cruise vessels entered with Steamship. The Seven Seas Voyager, Seven Seas Mariner and Seven Seas Navigator joined the Club in February 2009. Regent and Oceania Cruises are owned by parent company, Prestige Cruise Holdings.



Bernt Lüchtenborg is welcomed on board

The images of the descending rescue boat, the rescuers at the yacht and of Bernt Lüchtenborg being welcomed onboard are reproduced here with kind permission of Susan Atkins and Kevin LaGraff, passengers on the Seven Seas Mariner who witnessed and recorded the rescue.



Hong Kong Misdelivery – *Limitation v Exclusion*

Judicial hostility in Hong Kong towards the exclusion of liability in cases of misdelivery is well known and has been made clear in recent cases, particularly in the Hong Kong Court of Final Appeal case of *Carewins Development v Bright Fortune*.

(This decision was discussed in Sea Venture issue 15 and in further detail on the Steamship Mutual website at: www.simsl.com/BrightFortune0909.html)

What is the Court's stance then, where limitation (instead of exclusion) of liability is concerned? The Court of First Instance case of *Mau Wing Industrial Ltd v Ensign Freight Pte Ltd*, handed down on 9 September 2009, is a contemporary illustration of this point.

The questions of whether delivery without an original bill of lading is a breach of contract by the carrier and whether a carrier can exclude its liability arising therefrom were quickly answered by a "yes" and a "no" in view of the law settled in *Carewins*. This left the Court to focus on whether the carrier could rely on a clause limiting liability on the reverse of the bill of lading.

The case also raises the interesting point of whether the limitation of liability clause can be invalidated by the provisions of the Control of Exemption Clauses Ordinance, Cap 71.

■ These issues are discussed in detail by Sam Tsui of Tsui & Co solicitors, Hong Kong, in an article on the Steamship Mutual website at: www.simsl.com/MauWing0210.html

Withdrawal of Vessel from Charter – Damages

In a recent case before the English High Court the owners of the "Kos", chartered under a Shelltime 3 form, claimed US\$ 450,689 in respect of the charterers' use of the vessel and the consumption of bunkers following withdrawal of the vessel from the charter due to non-payment of hire.

When the owners withdrew the vessel she was loading cargo. The sum claimed covered the period between withdrawal and the completion of discharge of the cargo that had loaded at the load port. Owners also claimed the costs of providing security in the sum of US\$18 million to prevent charterers from arresting for the alleged wrongful withdrawal of the vessel.

The claim under the charterparty was brought on various grounds including damages, an indemnity and an implied term of the charter, but only succeeded on the basis of owners' continuing obligations as bailees of the cargo. The vessel had remained at the load port in order to make the cargo available to the charterers and had cooperated in the discharge of the cargo. Owners' claim to recover the costs of providing security failed as a claim for damages but was allowed to the extent that these costs were costs of the proceedings.

■ The issues raised in the case of *ENE Kos v Petroleo Brasileiro SA* are discussed by Jamie Taylor (jamie.taylor@simsl.com) in an article on the Steamship Mutual website at: www.simsl.com/Kos0210.html

by Jamie Taylor



EU – Competition Law & Shipping



The maritime transport industry is one of the last economic sectors to face the strict reform process of the European Commission.

The application of EC Competition law aims to promote the fair process of competition and to catch cartel-like anti-competitive activities through the application of Articles 81 and 82 of the EC Treaty. The reform came with the European Council's decision to repeal Council Regulation 4056/86 that permitted liner-shiping conferences, through Regulation 1419/2006 which came into effect in October 2008.

The reform continued with the Commission's *Guidelines on the Application of Article 81 (EC) to the Maritime Transport* (the "Guidelines") in July 2008, as a means of guidance to all market participants including

shipowners, P&I Clubs, ports, etc on how compliance with Article 81 of the EC Treaty in both liner and tramp sectors of the industry.

■ In an article prepared for the Steamship Mutual website, Milena Dramicanin (milena.dramicanin@simsl.com) will review the Commission's Guidelines with particular focus on the new concept of self-assessment and the issues of information exchange and assessment of shipping pools. The article will also touch on what options and opportunities shipowners have for cooperation under the new regime, such as by entering into Consortia Services which are permitted under the Consortia Block Exemption Regulation 823/2000: www.simsl.com/Competition0210.html

by Milena Dramicanin



Inherent Vice & Perils of the Seas

While being towed from USA to Malaysia under an "all risks" cargo policy which expressly excluded "inherent vice", three of the legs of a jack-up rig were lost when fatigue cracking, caused by the repeated bending of the legs under the motion of the barge as it was towed, caused first the starboard leg and then the other two legs to break and be lost.

The method of carriage had been approved by a marine surveyor prior to the voyage and the weather conditions were no worse than had been foreseen. The owners of the rig claimed under their policy of insurance but, at first instance, the proximate cause of the loss was held to be inherent vice

rather than perils of the sea.

On appeal the insurers continued to argue that if the actions of the sea were no more than would reasonably be contemplated on that particular voyage, then the cause of the loss had to be inherent vice or the nature of the subject matter. The Court of Appeal did not agree that simply because

the weather was such as might reasonably be anticipated there could be no peril of the seas, and thus the burden was on the insurers to establish inherent vice as the proximate cause. In this respect, and because of the finding at first instance that the accident was not a certainty, and thus a leg-breaking wave, not bound to occur in the way it did on any normal voyage, coupled with metal fatigue, caused the legs to break off, the appeal was allowed.

■ In an article written for the Steamship website at: www.simsl.com/ViceandPeril0210.html, Captain Vishal Khosla (vishal.khosla@simsl.com) discusses the scope of the perils of the sea and inherent vice defences.

by Captain Vishal Khosla



Damages for Early Termination

In what could prove a highly controversial decision, the Commercial Court in London appears to have extended, or arguably overstretched, the logic that underlined the House of Lords majority decision in the *“Golden Victory”* to the issues of mitigation and the calculation of damages in the absence of an available market.

The Commercial Court, hearing an appeal from a LMAA arbitration award, was faced with the question of whether, following the wrongful early redelivery of the *“Elbrus”*, all the profit earned under a substitute fixture which overran the original charter period should be taken into account in calculating the damages due to the owners, or whether only the profit earned under the

substitute fixture up to the point when the original fixture would have ended should be considered.

In a judgment which is difficult to reconcile with a number of key decisions on damages, including the *“Elena D’Amico”*, the *“Achilleas”* and indeed the *“Golden Victory”*, Mr. Justice Teare held that all the profits under the substitute fixture, even

those arising after the vessel should have been redelivered under the original fixture, should count – with the effect that the owners suffered no loss. It was so held even though it was not entirely clear what specific benefit the owner had received from entering the substitute fixture at a particular point in time.

■ Whilst the *“Elbrus”* is an unusual case with a distinct set of facts and arbitral findings, Mr. Justice Teare’s *obiter* comments on damages and on the approach arbitrators are entitled to take in assessing the same could have far-reaching implications. These are examined in detail in an article by Rajeev Philip (rajeev.philip@simsl.com) on the Steamship Mutual website at: www.simsl.com/Elbrus0210.html

Tendering NOR before Free Pratique is Granted – When Does Time Begin to Run?

The *“Eagle Valencia”* was chartered on a Shellvoy 5 form, clause 13 (1) (a) of which stated that time would commence to run 6 hours after tender of notice of readiness (“NOR”).

Also incorporated were the Shell Additional Clauses, clause 22(1) of which provided that the grant of free pratique within six hours of tender of NOR was essential to the validity of the NOR. Clause 22(5) further provided that NOR would not be invalid “where the authorities do not grant free pratique at the anchorage or other place but clear the vessel when she berths”.

The vessel tendered NOR while at anchorage at Escravos at 11.48 on 15

January but free pratique was not granted until 08.30 on 16 January. When the owners subsequently presented their claim for demurrage, the charterers disputed it on the basis that, although they accepted that a valid NOR had been tendered, it had been rendered invalid by the failure to obtain free pratique within 6 hours. Walker J, finding in favour of the owners, held that clause 22 was poorly drafted, and the charterers’ strict interpretation resulted in a blameless delay setting running time back two days, and was commercially unreasonable.

■ The issues raised in this case and reasoning of the court are discussed by Caro Fraser (caro.fraser@simsl.com) in an article on the Steamship Mutual website at: www.simsl.com/Eagle0210.html

by Caro Fraser



Charterparty Repudiation – An Intention not to Perform

The case concerned the disputed termination of a voyage charterparty. The “Pro Victor” was fixed to the defendant charterer on the Asbatankvoy form for the carriage of a clean petroleum product cargo from Karachi, Pakistan, for discharge at either Taiwan, Korea or Japan.

by Andrew Hawkins



terminate for anticipatory repudiatory breach and charterers counterclaimed, alleging that the purported termination was itself a wrongful repudiation of the charterparty.

Mr Justice Flaux held that at the relevant time the appropriate person on behalf of the owners did in fact believe that charterers had demonstrated an intention not to perform their obligations under the charterparty. While individual actions or communications may not have amounted to a renunciation of the contract, taking charterers' communications and conduct as a whole, and considering all relevant circumstances (including the history of the contractual relationship), a reasonable person would have considered that charterers had demonstrated an intention not to perform. Owners were therefore entitled to accept charterers' repudiatory breach of contract.

■ There was also no failure to mitigate when owners refused charterers' alternative proposals. This decision is discussed in more detail in an article prepared by Andrew Hawkins (andrew.hawkins@simsl.com) for the Steamship Mutual website at: www.simsl.com/ProVictor0210.html

The charterers also agreed to purchase a cargo of naphtha in Karachi for export. However, they encountered difficulties in securing a buyer for the Naptha, and therefore sought owners' agreement to re-fix the vessel for discharge at a different port or, alternatively, for a time charter. These proposals were not ultimately accepted.

As the vessel approached Karachi, no buyer

had been found for the proposed cargo and charterers were in no position to load a cargo upon the vessel's arrival. A series of communications passed between the parties culminating in a request by owners for confirmation that charterers would perform their obligations under the charterparty. The charterers failed to provide such confirmation. Owners purported to

SIMSL News

■ Since the last publication of Sea Venture in September, 2009, seminars have been given by Steamship Mutual to Members in Athens, Singapore, and Mumbai, covering piracy, bunker disputes and emission control regulations, as well as showcasing the Club's innovations in Loss Prevention.

We will continue to focus our seminars on topical issues and, where required, can tailor presentations to particular issues that have caused specific concern to Members in a specific trade, operation or geographic region. We also like to involve our local representatives and correspondents in seminars as this

emphasises the team-orientated approach we follow in finding the best solutions for the



Members. As plans are presentably being made for visits to Members during the course of the year any requests for subjects to be covered in seminars would be appreciated by your Syndicate contacts.

■ In keeping with Club chairman's comment, reported on page 10, that the Steamship Mutual owes much to the loyalty and dedication of its staff, we are happy congratulate Christine Parker on recently completing 20 years' service with company.

Board Member Mr S. Hajava (Chairman & Managing Director SCI) talks to James Stockdale and Mr B.J. Boda (Chairman J.B. Boda Group) at the Mumbai seminar in November.

Shipping & The Environment: Law & Practice



The latest edition of Colin de la Rue's seminal textbook on all matters pollution related was published last year.

Including new chapters on offshore craft, the Bunkers Convention, recourse actions following collisions, limitation of liability, and the liability of pilots and maritime authorities, this book is an essential resource for Clubs and lawyers alike.

The book looks in some detail at the decision of the Paris High Court in the *Erika*, handed down in January 2008, and its potentially far-reaching consequences for companies involved in the chartering of vessels. In an article looking at some of the more difficult pollution claims the Club has dealt with in recent years, Rajeev Philip (rajeev.philip@simsl.com) reviews the guidance provided by authors.

■ Rajeev's article can be found on the Steamship Mutual website at: www.simsl.com/DeLaRue0210.html



Club Circulars

Members received copies of the following circulars in the last few months. These circulars can also be downloaded from the Steamship Mutual website via the links below:

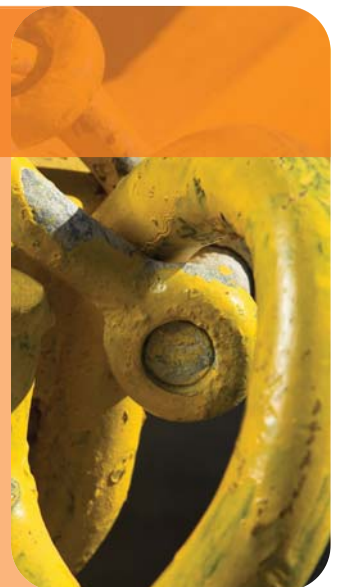
- EU Insurance Directive 2009/20/EC (B.504 of December 2009)
www.simsl.com/Circulars-Bermuda/B.504.pdf
- Extension of the Club's Enhanced PEME Scheme to Russia and Ukraine (B.500 and B.503 of October and December 2009):

www.simsl.com/Circulars-Bermuda/B.500.pdf

www.simsl.com/Circulars-Bermuda/B.503.pdf

- Regulations of the PRC on the Prevention and Control of Marine Pollution from Ships (B.502 of November 2009 and B.506 of January 2010):

www.simsl.com/Circulars-Bermuda/B.502.pdf
www.simsl.com/Circulars-Bermuda/B.506.pdf



Website News • Website News • Website News •

As reported on page 7 of this issue of Sea Venture, recent months have seen yet further pirate activity off Somalia with vessels being attacked at increasing distances from the coast and, in at least one case, more than 1000 nm away.

Steamship Mutual's dedicated Piracy webpage continues to give news of piracy activity in different regions from various sources. Recent publications include a report from Chatham House on Piracy and Legal Issues, U.S. Coast Guard advisories on Anti-Piracy Defensive Measures and Firearms, and updates courtesy of ICC International Maritime Bureau. The piracy webpage can be found at: www.simsl.com/piracy.htm

Other recent website articles include:

- Mariupol Port – Ice Campaign Winter 2009/10:
www.simsl.com/MariupolIce0110.html
- ICS/WSC Industry Guidance for Shippers and Container Stuffers:
www.simsl.com/ICSContainerGuidance1209.html
- Loss of Propulsion – Reporting Requirements:
www.simsl.com/LossPropulsionReport1009.html
- Tank Vessel and Facility Response Plan Changes Adopted by the Coast Guard:
www.simsl.com/TankVRP1009.html