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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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Cover photographs:
"Ocean Titan": Western Towboat Company
"Marina": Oceania Cruises

INTRODUCTION

2011 Renewal

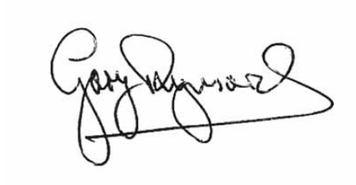
by Gary Rynsard

The Club concluded a successful renewal. Due to the strong financial position, the Board set a zero standard increase. Given the difficulties in the freight markets this was a very welcome relief to our hard-pressed Members. Naturally, adjustments to ratings for individual Members were made depending on record. In the event, taking into account change of terms, there was an overall reduction in premium for owned P&I business of 0.69%. Premium overall has increased due to new business.

At the renewal just excess of 3 million tons of new business joined the Club with approximately 600,000 tons deciding not to renew. Unfortunately, in addition the Club was not able to offer renewal terms to Iranian owned business due to political issues and international sanctions. This was a sadness to all concerned, the Members involved were longstanding, excellent Members and the Club fervently hopes that one day it will be possible to renew ties with the Iranian shipping community. There were notable new entries from Hong Kong, India, Italy, South Korea, Taiwan and the United States. We hope the new Members will be happy with the level of service they receive from the Club and that we will enjoy a long and mutually beneficial relationship.

The world is experiencing a period of great uncertainty; added to the upheaval in the financial markets and the disjuncts in supply and demand within the shipping markets we now have the dramatic political events in the Middle East. Against this challenging background it is the aim of the Club to provide its Members with P&I insurance based on a strong resilient financial position and excellent levels of service.

We wish all of our Members a successful and prosperous 2011.



Gary Rynsard

16 March 2011

As ever, the editors are grateful to all who have contributed to this issue of Sea Venture. In particular, it is pleasing to note a number of new in-house contributors.

The dedicated Sea Venture page on the Club website, where this and earlier issues with links to articles can be found, is at: ***www.simsl.com//SeaVenture.html***

Delay – Who is Responsible?

In a recent arbitration the tribunal was asked to determine a dispute arising from a period charter on an amended NYPE 1946 form.

The dispute related to responsibility for delays following wet damage, caused by sea water ingress, to approximately 72 MT of grain cargo located in the areas immediately below the hatch covers in two of the vessel's seven holds.

On arrival at the discharge port anchorage, the port authorities were alerted to the wetting of the cargo. Samples were taken for analysis. Results indicated "fungal growth and foul odour" and although it appeared that inadequate sampling and/or analysis of cargo had been carried out, all of the cargo on board was deemed not to conform to local standards. Customs authorities denied permission for the vessel to commence discharging and refused requests for further sampling or analysis.

Attempts to negotiate with the customs authorities were unsuccessful and, ultimately, an application was made to the local court in an attempt to compel the local authorities to conduct further sampling and analysis to show that the cargo was predominantly sound and to secure permission for the cargo to be landed.

by Andrew Hawkins

Charterers claimed damages, including for hire they had paid during the period of delay, or, alternatively, that they were entitled to place the vessel off-hire. The key questions for the tribunal were:

1. Had owners' breach remained an effective cause of the charterers' loss due to the delay? Or
2. Had the unreasonable actions by the customs/port authorities, in refusing to permit the cargo to be discharged, rendered insignificant the effect of the sea water ingress so that owners' breach had not been an effective cause of charterers' loss?

■ In an article prepared for the Steamship Mutual website, Andrew Hawkins (andrew.hawkins@simsl.com) reports on the arbitration and the tribunal's findings in further detail:
www.simsl.com/DelayWetCargo0211.htm

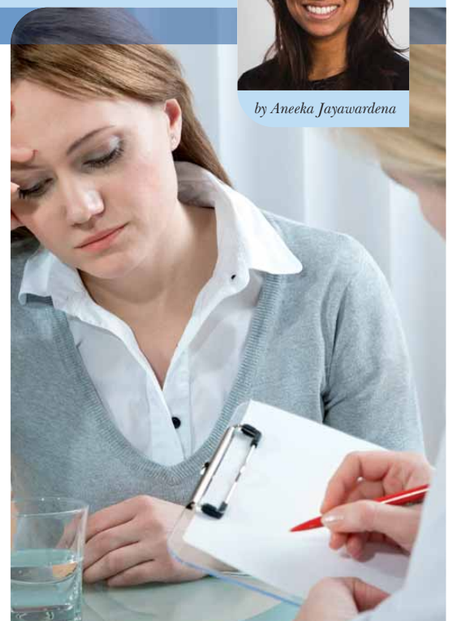
New Legislation for Cruise Ships Visiting U.S. Ports

by Aneeka Jayawardena

The Cruise Vessel Security and Safety Act of 2010 was passed by the United States Congress and came in to force on 27 July 2010.

This Act was canvassed by Senator John Kerry together with the International Cruise Victims Association, an association for victims of crime on board cruise ships and their families. The intention of the Act is to increase security, law enforcement and accountability on cruise ships in international waters on certain voyages. In essence it can be viewed as a way in which to ensure victims have access to trained first responders and a confidential means of communication with law enforcement as well as legal and victim advocacy professionals. The Act applies to all cruise ships that carry 250 passengers or more, has overnight passenger/crew accommodations and embarks or disembarks in the United States.

■ The provisions considered to have the greatest impact on cruise ships, their implementation dates and the likely effect of the Act on the cruising industry as a whole are considered in an article by (aneeka.jayawardena@simsl.com) on the Steamship Mutual website at:
www.simsl.com/CVSSA0111.htm



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Residential Training Course for Members

This summer the Managers will be conducting the Club's inaugural residential training course for Members.

The course will run from 13th to 17th June 2011 and will be based principally in the port of Southampton. An outline of the course programme can be found at:
www.simsl.com/Loss-Prevention/MemberTrainingCourse2011.pdf

The aim of the course is to provide an opportunity for representatives of the Club's Members who are involved with P&I insurance and risk management to spend time with the Managers' London Representatives to explore P&I issues in greater detail than is otherwise usually possible during the course of business visits. A morning will be spent using the bridge simulator at the Warsash Maritime Academy in order to undertake a collision exercise that will be the subject of a later workshop. There will also be talks on topical P&I issues by a number of guest speakers. The social events that are planned outside the course hours will take advantage of the maritime heritage of the course venue and provide an opportunity for delegates to experience the English countryside outside the constraints of London.

The maximum capacity of the course is 30 delegates and it is possible that places will not be available for all applicants. However, if the event is as successful as the Managers intend it to be, the course will become a regular event in the Club's calendar for future years when further opportunities for participation will arise. Applications for participation should be submitted as directed in the brochure (see link in the opening paragraph of this article) and we look forward to welcoming delegates in June.

Delegates will enjoy a private tour of HMS "Victory"

Recent Developments in Shore Excursion Liability

When an accident takes place during a shoreside excursion a claimant cruise passenger will often allege that the cruise line is either vicariously liable for the acts of the shoreside tour operator or directly liable on general negligence principles.

by Paul Brewer

The industry has seen this type of claim for many years. However, as a relatively recent development a growing number of claimants are attempting to attribute liability to the cruise line on the basis of negligent hiring and retention of a shoreside tour operator.

The exact duty of a cruise line when it hires and retains tour operators to provide shore excursions for passengers has not yet been expressly defined. There are no statutes or regulations that discuss what is required of the cruise line when selecting a tour operator although common law provides some guidance on the matter.

■ In a collaborative article written for the Steamship Mutual website, Paul Brewer (paul.brewer@simsl.com) and Jerry D. Hamilton of Hamilton, Miller & Birthisel LLP discuss what guidance is available and the extent to which cruise lines are required to make enquiry and investigation of the tour operators they propose to retain. The article can be found at:
www.simsl.com/ShoreExcursion0111.htm

"Free In Stowed" – Free of Risk?

by Mark Underhill

In accordance with Article III rule 2 of the Hague/Hague-Visby Rules an owner has the obligation to *"properly and carefully load, handle, stow… and discharge"* the goods carried.

As a matter of English law an owner may, nonetheless, limit the scope of this obligation – see "*The Jordan II*" (featured in issue 1 of Sea Venture and on the website at: **www.simsl.com/Jordan1204.asp**) .

However, does the limitation of an obligation or responsibility for loading or discharge operations carry with it a corresponding transfer of risk? This issue was again considered in the Singapore case of *Subiaco Pte Ltd v Baker Hughes Singapore Pte (the "Achilles")*. The vessel in this case was damaged while loading, allegedly at the hands of the stevedores. As in the "*Jordan II*" the fixture was on "*free in stowed*" terms and, therefore, the owner claimed the repair costs. Unlike the "*Jordan II*", while responsibility for loading had been transferred to the shippers in the "*Achilles*" the risk of loading operations had not.

■ These decisions are not inconsistent and illustrate that parties remain free to allocate responsibility contractually as well as the risk of cargo handling operations. How the two decisions are distinguished, and how both responsibility and risk of loading operations can be transferred is considered in an article by Mark Underhill (mark.underhill@simsl.com) on the Steamship Mutual website at: **www.simsl.com/Achilles0211.htm**

Court of Appeal warns against Hasty Acceptance of Repudiatory Conduct

The English Court of Appeal has given guidance on the test for repudiatory breach.

by Sacha Patel

Although the case concerned contracts for the sale of property it has relevance to repudiation in the context of commercial contracts at large; it is likely to make any party wishing to terminate a contract based on repudiatory breach by their counter party think twice before doing so.

The buyer of the properties in question failed to complete the purchases on the date agreed under the contracts. The seller served a notice through their solicitors making time of the essence. When the buyer had still not completed upon the expiry of the time set out in the seller's notice, the seller accepted the buyer's conduct as repudiatory and put them on notice of a claim for damages. The buyer in turn alleged that the notice from the seller terminating the contracts was in itself a repudiation.

The Court of Appeal decision emphasises the need for caution before concluding that a counter party's behaviour is, in fact, repudiatory; had the buyer, through its conduct, clearly indicated an intention to abandon and altogether refuse to perform the contracts? If not, then that conduct cannot be accepted as being repudiatory.

■ In an article written for the Steamship Mutual website Sacha Patel (sacha.patel@simsl.com) discusses the reasons why the Court of Appeal preferred the seller's evidence and the implications of the judgment for parties to commercial contracts: **www.simsl.com/Eminence0211.htm**

(Similar issues in the context of a contract of affreighment were considered in issue 16 of Sea Venture – *Termination of Consecutive Voyage Charter – Measure of Damage* – which reported on the "*Kildare*", also on the Club website at: **www.simsl.com/Zodiac0810.html**

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Oil Major Approvals

There is surprisingly little authority on the application and interpretation of oil major approvals clauses in charterparties.

However, two recent decisions of the Commercial Court have changed that.

The first followed an arbitration award in which the tribunal upheld charterers' termination of a time charter on the ground that owners had failed to maintain oil major approvals.

The charter provided that: "... should [the] vessel be failed on three (3) consecutive oil major vetting reviews/inspections due to Owners'/vessel's reason, the Charterer's (sic) shall have the option to the put the vessel immediately off-hire until the vessel next passes a vetting inspection ... and shall have the option to cancel the charter ... A vetting review/inspection is defined as a nomination by the Charterer's (sic) to an oil major and the oil major reviewing the vessel by either a physical inspection or latest SIRE inspection report...".

Three questions were considered:

1. What was the definition of an "oil major"?
2. Did the clause allow owners to initiate the vetting process?
3. The significance of SIRE reports.

Having done so, the court duly confirmed the termination as lawful.

The second concerned a claim for damages by charterers following owners' alleged breach of the oil major approvals warranty clause in the charter. The clause provided:

"Owner warrants that the vessel is approved by the following companies and will remain so throughout the duration of the charterparty: Tbook vessel approved by BP/Exxon/Lukoil/Statoil/MOH"

The Court held that the clause required owners to keep the approvals in place throughout the charter, so that at any time, the vessel must not be in a state which, to the knowledge of owners, would remove the comfort of the warranted approvals. There would be a breach of warranty if some event occurred which, if known to the approving oil company, would cause it to withdraw or cancel their approval.

Both decisions are discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at: **www.simsl.com/OilMajorAppro0311.htm**

Voyage Data Recorders (VDR) – "CSI on the High Seas"

The relationship between a vessel owner and the master of an ocean going ship has created many of the nuances unique to maritime law.

In the age of sail, the master was seen as the agent of the owner and had authority to act on his behalf and make business decisions in far flung ports of call. Technological advances have changed the concept of the master from the autonomous agent of the owner once the vessel breaks ground, to something more akin to a seagoing manager charged with the stewardship of a very expensive business unit. With satellite communications, e-mail, sat-phone communications and shipboard teleconferencing owners and operators can monitor day-to-day shipboard operations like never before. Similarly, all of these activities can be digitally recorded.

Technology is changing the face of maritime law; as ships become equipped with more information gathering devices, the role of the ship's lawyer must also adapt to these new evidentiary problems – he must understand the kind of evidence being captured and how it may be used. With regard to litigation of collision matters, for example, unless the VDR's data can be challenged as unreliable, the information it contains will obviate the need for many of the traditional machinations employed in litigating such claims. This should result in a savings of legal fees and expenses, and foster prompter resolution of such claims.

■ James T. Brown and Paxton N. Crew of Legge, Farrow, Kimmitt, McGrath & Brown L.L.P. Houston have prepared a paper which discusses the implications of VDR for those involved in litigating maritime casualties in civil, administrative and potentially criminal proceedings. The paper can be found on the Steamship Mutual website at: **www.simsl.com/VDRPaper0111.htm**

Beware Demurrage Time Bars and Documentation

by Anna Yudaeva

Pursuant to a charterparty based on BPVOY 4, the vessel was chartered for a voyage from Freeport to Singapore.

The vessel arrived at Freeport and tendered notice of readiness on 6 February 2008, berthed on 7 February and commenced loading. She left the berth on 11 February while waiting the arrival of a further parcel of cargo, re-berthed on 17 February and on completing loading sailed for Singapore to discharge.

Owners issued a "Supplementary Invoice" for time and bunkers at Freeport for the second berthing along with a "Demurrage Invoice." This latter invoice was agreed and paid by charterers on 9 June. When owners pursued the unpaid "Supplementary Invoice" charterers said that this should have been part of the demurrage claim which had already been settled. Owners then sought to redefine the "Supplementary Invoice" as a claim for demurrage, but the 90 day time-bar period for demurrage claims in the charterparty had expired. Owners sought summary judgment on their demurrage claim.

■ The Commercial Court found for charterers and held that the later claim for demurrage was time-barred under the charterparty. The decision is discussed in more detail by Anna Yudaeva (anna.yudaeva@simsl.com) in an article on the Steamship Mutual website at: **www.simsl.com/Abqaiq0211.htm**

Part 36
– What is the Effect of a Counter- Offer?

A Part 36 offer is made in accordance with Civil Procedure Rules (CPR) Part 36 to settle a claim or part of a claim or any issue that arises in a claim.

The purpose is to put legitimate pressure on the other side to accept a proposal to settle, with potential costs consequences for non-acceptance. A Part 36 offer can be made by either party to the dispute. It is therefore an important tactical tool.

However, it is essential to understand how Part 36 offers work; when and on what terms such offers should be made and what sum is appropriate. By way of example, and much to the surprise of the claimants in two recent non-shipping cases decided by the English Court of Appeal, a Part 36 offer is capable of being accepted if not withdrawn, is not superseded by a new Part 36 offer(s) unless the earlier offer(s) have, on their terms, lapsed or been withdrawn and will remain capable of being accepted even if the other party to the dispute has subsequently made a counter-offer. This is, of course, contrary to the position at common law where a counter-offer constitutes a rejection of an earlier offer.

■ Faye Doherty discusses these issues and Part 36 offers generally in an article written for the Steamship Mutual website at: **www.simsl.com/Part360211.htm**

by Faye Doherty

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Hazardous Conditions
– Obligation to Notify Coast Guard

In a recent decision the United States Court of Appeals for the Sixth Circuit reinstated a jury verdict which found that a vessel crew's failure to report immediately a hazardous condition aboard their vessel to the United States Coast Guard amounted to a knowing or willful criminal violation of the Ports and Waterways Safety Act.

Owners and operators of vessels that operate in US waters should ensure that all of their crews and operations personnel are well aware of the requirement to notify immediately the Coast Guard of any hazardous conditions or casualties.

U.S. v Canal Barge Company involved criminal charges brought against the owners of a barge, its shoreside manager, and two employee tug boat captains for failure to report immediately a hazardous condition to the Coast Guard. The hazardous condition in question was a crack in the vessel's hull from which some of the cargo of benzene leaked. The captain on duty reported the crack and leak to the shoreside manager and ordered the crack patched with soap. The shoreside manager suggested more substantial (but not permanent) patching of the crack. Another captain working on the tug became aware of the crack and the repairs. No one reported the crack to the Coast Guard until the patch failed while the barge was being handled by another tug boat company four days later.

The Coast Guard brought three criminal charges against the barge owner, the shoreside manager and both captains: 1) willful failure to report the hazardous condition; 2) negligent failure to report the hazardous condition and; 3) conspiracy to violate the reporting requirement regulation.

A case report with background information on the relevant statutory provisions, based on a Maritime Alert by Keesal, Young & Logan, can be found on the Steamship Mutual website at: **www.simsl.com/USCGCanalBargeKYL0211.htm**

Image courtesy of United States Coast Guard Photography

New Luxury Cruise Ship for Oceania

Built
2009-2010

Tonnage
66,000 gross tons

Width
106 feet

Draught
24 feet

Building Yard
Fincantieri S.p.A., Sestri Ponente, Italy

Length
785 feet

Decks
15

Cruising speed
21 knots

The cover of this issue of Sea Venture features the "Marina" - Oceania Cruises' new flagship. The vessel was christened on 5th February 2011 in Miami and is fitted with state of the art loss prevention equipment to ensure her safe operation as is customary in this part of the industry. Oceania Cruises, together with sister company Regent Seven Sea Cruises, are entered with Steamship Mutual.

Steamship Mutual follows an underwriting strategy underpinned by diversity of Membership and a commitment to all high quality areas of the shipping industry. The cruise sector represents one such area, many of whose best regarded cruise vessel operators are members of the Club.

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Wind and Wave Action
Not Inherent Vice

In an appeal by insurers on the scope of the exclusion in a marine insurance policy for loss caused by inherent vice, the U.K. Supreme Court in *Global Process Systems v Syarikat Takaful Malaysia Berhad* held that even though loss was very probable, and the weather in which the loss occurred was within the reasonable contemplation of the parties, that was insufficient to afford the insurers an inherent vice defence. The Court of Appeal decision was discussed in Sea Venture issue 15 (and on the website at: **www.simsl.com/ViceandPeril0210.html**).

The case concerned an oil rig which was being transported on a barge with its legs jacked up from Galveston to Malaysia for conversion into a mobile oil production unit. Around the Cape of Good Hope fatigue cracking caused by the repeated bending of the legs due to the motion of the barge caused the legs to break and be lost. The assured had obtained an all-risks insurance incorporating the Institute Cargo Clause (A) which excluded *"loss, damage or expense caused by inherent vice or nature of the subject matter insured."* The insurers said that where the ordinary incidents of the voyage acted merely as a trigger causing the loss, those incidents were not a new intervening external cause that caused the loss but were events that the cargo had to be fit to encounter. The assured in turn said that this imported a requirement of seaworthiness and that inherent vice meant inherent i.e. the cause of loss had to come from within.

The effect of the Supreme Court's ruling is that the exclusion of loss caused by inherent vice is limited to circumstances where loss is inevitable or is caused only by something internal to the cargo insured; where the action of wind and waves have played a part it will be virtually impossible for insurers to rely on inherent vice as a defence. Accordingly, where loss by inherent vice is being excluded, insurers will nonetheless have to assess the inherent condition of the goods being insured and their susceptibility to loss or damage, even in conditions reasonably to be expected on the voyage.

In an article written for the Steamship Mutual website Kamal Mukhi of Hill Dickinson reports on the Supreme Court decision: **www.simsl.com/InherentVice0311.htm**

Sanctions

The recent civil unrest in some parts of North Africa and the Middle East has and will, so long as there is uncertainty in the region, have the potential to create difficulties for owners and charterers trading to those countries. The Club is happy to advise and assist members in these circumstances.

A related issue is sanctions, whether imposed by the US, UN, EU, or other national or international authorities.

The Club's website now has a dedicated Sanctions area: **www.simsl.com/Sanctions.htm** where members can access important information relating to sanctions, including Club circulars, Risk Alerts, relevant articles and links to the text of Governmental regulations. Recent updates include:

- Political Unrest in Libya and Sanctions Measures: **www.simsl.com/Circulars-Bermuda/B.547.pdf**
- Restrictive Measures in Respect of Cote D'Ivoire: **www.simsl.com/RA24EUCD252011_CoteDIvoire.pdf**
- Sanctions - Impact on Chartered Vessel Entries:**www.simsl.com/RA25SanctionsCharteredVesselEntries.pdf**

When No Means No
– Arbitrator's Jurisdiction

Juan Zaplana

The decision of the Court of Appeal in *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International Gmbh* has again confirmed that caution needs to be exercised if a party decides to challenge the jurisdiction of arbitrators to determine a dispute.

S.72(1) Arbitration Act 1996 provides:

"A party alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question:-

(a) Whether there is a valid arbitration agreement, ...

By proceedings in the court ....."

Toepfer commenced arbitration in London for the alleged breach of a contract for the supply of milling wheat. Broda alleged there was no concluded contract between them, that they were not bound by the GAFTA arbitration agreement in that contract and commenced proceedings in Russia for a declaration in that respect. Broda also asked the GAFTA tribunal not to accept jurisdiction. The Russian court agreed with Broda but the GAFTA tribunal, while aware of the Russian decision, concluded that there was a binding contract and that it had jurisdiction to decide the substantive dispute. Accordingly, the tribunal invited the parties to serve submissions which Broda did while maintaining there was no binding contract.

When the tribunal issued an award in favour of Toepfer, Broda applied to the English High Court to challenge the jurisdiction of the tribunal to hear the dispute under s.72 Arbitration Act.

Broda's argument was that a party that did not argue that the tribunal had no jurisdiction but who served submissions in respect of the dispute in that arbitration did not lose its rights subsequently to challenge the tribunal's jurisdiction (under s.72). However, the English High Court decided that the tribunal did have jurisdiction.

Broda appealed. In the Court of Appeal Lord Justice Stanley Burton said s.72 had *"surprisingly…not been the subject of previous authority"*.

■ The Court of Appeal's decision is discussed in an article by Juan Zaplana (juan.zaplana@simsl.com) on the Steamship Mutual website at: **www.simsl.com/BrodaAgro0211.htm**

Tendering N OR before Free Pratique Granted
– Part 2, in cluding Demurrage Time Bars

In issue 15 of Sea Venture the first instance judgment in *AET Inc Ltd v Arcadia Petroleum (the "Eagle Valencia")* was described as "*an interesting example of a court looking at the charterparty in its entirety in order to determine the true intention of the parties, rather than adhering to a strict interpretation of the wording of a single clause*": **www.simsl.com/Eagle0210.html**

The case was decided in owners' favour and concerned issues of demurrage payable under a Shellvoy 5 charter with Shell's additional clauses of February 1999 (SAC). The Court of Appeal has now overturned that decision.

Additional clause 22 of SAC stated that if owners failed to secure customs clearance or free pratique within 6 hours of tendering Notice of Readiness ("NOR"), the NOR would not be valid; however, the original NOR would still be valid if the authorities granted free pratique only after the vessel had berthed.

The Court of Appeal agreed with charterers that NOR tendered could not be valid where a vessel did not obtain free pratique until more than six hours later, and laytime did not begin until the vessel berthed. The Court also had to consider whether owners had complied with the Shellvoy 5 standard demurrage time bar clause requiring the demurrage claim to be fully and correctly documented and received within 90 days of discharge.

by Caro Fraser

■ Caro Fraser (caro.fraser@simsl.com) considers both aspects of the Court of Appeal decision in an article on the Steamship Mutual website at: **www.simsl.com/Eagle0211.htm**

Arrest, Dangerous Cargo and Delays
– Who Pays?

by Sarah McGuire

Consider a situation where the actions of a third party lead to substantial loss suffered by two innocent parties to a voyage charter. Where does that loss fall?

The vessel was voyage chartered, on amended Asbatankvoy terms, for the carriage of a cargo of fuel oil from Indonesia to Thailand. Disputes arose following two periods of delay: the first being an *"arbitrary and erroneous"* detention of the vessel by the Indonesian Navy at the load port and the second (arguably a knock-on effect of the first) while waiting charterers' orders after the vessel had sailed from the load port. Not surprisingly, the delay at the load port had an effect on the underlying cargo sale contract.

Owners claimed demurrage and/or damages for both periods of delay in arbitration; first, on the basis that charterers had loaded a dangerous cargo and that caused the detention of the vessel and second, for following charterers' orders and pursuant to the express provisions of the charterparty.

Charterers denied that the cargo was dangerous and argued that, in any event, they were entitled to rely on the General Exception and Paramount Clauses of the charter.

■ In an article written for the Steamship Mutual website Sarah McGuire sarah.mcguire@simsl.com discusses whether the losses flowing from the two separate periods of delay "*lay where they fell*" or were for owners' or charterers' account, as well as the lessons to be learnt: **www.simsl.com/DangerousDelay0211.htm**

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Clarity of Drafting

by Dean Forrest

Exclusion and indemnity as well as "*knock for knock*" provisions are commonly found in offshore contracts (as discussed in issue 15 of Sea Venture and on the website at: **www.simsl.com/GrandIsle0210.html**).

Whether they work and the extent to which they apply is a question of drafting. The Supreme Court decision in *Farstad Supply v Enviroco Ltd (the "Far Service")*, on appeal from the Scottish courts, is of particular interest.

The vessel owners had claimed damages from a tank cleaning company, Enviroco, contracted by their charterer. Enviroco argued that if they were liable to owners the charterers were liable to contribute pursuant to section 3(2) Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. The Act allows a party that has been found liable to pay out damages to recover a contribution from another party who *"if sued, might also have been held liable"* to the vessel owner.

That, though, would have been to ignore the indemnity and exemption clause of the charter that provided:

"Owners shall defend, indemnify and hold harmless the Charterer,… from and against any and all claims, demands, liabilities, proceedings... resulting from loss or damage in relation to the vessel... irrespective of the clause of the loss or damage, including where such loss or damage is caused by, or contributed to, by the negligence of Charterers..."

■ The intention of this and similar clauses is risk allocation between contracting parties. In this case the clause worked. The decision and the reason why charterers were protected are explained by Dean Forrest (dean.forrest@simsl.com) in an article on the Steamship Mutual website at: **www.simsl.com/FarService0211.htm**

Sale Contract v Charterparty Readiness

by Rebecca Chetwood

On 13 October 2010, the Court of Appeal delivered its judgment in *Soufflet Negoce SA v Bunge SA.*

The buyers had purchased 15,000 mt of barley FOB Nikotera. The "Lady Hind" arrived at the load port and was presented *"in readiness to load"* within the agreed delivery dates but the sellers alleged that the vessels holds were unclean and refused to load. As such they refused to accept that the requirement of readiness had been satisfied. The buyers claimed damages for the sellers' failure to load the cargo.

The issue between the parties was whether the *"readiness to load"* requirement of the sale contract was equivalent or amounted to the same thing as a Notice of Readiness ("NOR") served under a charterparty. If so, the buyers' obligation under the sale contract was more than simply to present a vessel for loading within the sale contract delivery period.

■ The decision is a useful opportunity to revisit the requirements for service of a valid NOR under a charterparty. These criteria, as well as the reasons why the court decided in favour of the buyers in this case, are discussed by Rebecca Chetwood (rebecca.chetwood@simsl.com) in an article on the Steamship Mutual website at: **www.simsl.com/LadyHind0211.htm**

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What is Force Majeure?

There is a general understanding that by simply claiming an extraordinary event as force majeure a party is automatically discharged from any contracting duties. This assumption is often incorrect and thorough attention must be given before invoking force majeure.

by Flavio Damaceno

Force majeure may be defined as a civil law concept designed to excuse one or all parties from liabilities and or obligations under a certain contract. For example, an occurrence of extraordinary events, specified events or events beyond the parties' control.

Under a civil law system, force majeure operates as a matter of law. The definition and application are foreseen in statutes and the concept is implied into any civil law contract. Contracting parties may exercise their rights of freedom of contract to expand the definition and widen its application. It is important, therefore, always to refer to the relevant contract before making general assumptions.

As a matter of English law force majeure is a generic term that has no specific legal meaning; for it to have any effect the parties to a contract need to define those events which they agree would constitute force majeure. In the absence of a force majeure clause, parties will need to rely on other remedies, such as frustration.

■ In an article written for the Steamship Mutual website Flavio Damaceno (flavio.damaceno@simsl.com) discusses the concept and application of force majeure from a civil law system point of view and also makes reference to the approach of English law. The article can be found at: **www.simsl.com/ForceMajeure0211.html**

Loss Prevention Publications

Piracy DVD

The threat to commercial shipping posed by the activities of Somali pirates shows little sign of being eliminated. As weather conditions moderated off Somalia and in the Indian Ocean at the end of September 2010, there was as expected a resurgence in pirate activity. Since then, attacks and hijackings have occurred with great frequency over a very considerable sea area and, as at the end of January 2011, Somali pirates were holding 33 vessels with 758 crew hostages.

Notwithstanding the attention that this subject has received over the last two years, it is also a matter of concern that there continue to be reports that significant numbers of vessels operating in the affected waters are not complying with the Best Management Practice Guidelines to Deter Piracy (BMP3), and particularly failing to register passage plans with MSCHOA and to report to UKMTO.

In view of the continuing high level of threat and the apparent need to raise awareness of the benefits of compliance with BMP3, the Managers believe that there is considerable loss prevention benefit to be derived from producing a DVD on this topic and production work on this project has recently commenced. The production will be funded by the Ship Safety Trust and, as with previous DVDs will be produced by Callisto Productions and presented by Edward Stourton. As with *A Team Effort* the production will be in DVD ROM format to enable reference materials to be incorporated. Whilst the primary focus of the DVD will be Somali piracy, it will also address the more widespread risk of attacks and incidents of armed robbery on ships that continues to exist in other parts of the world.

BMP3 is available to view and download via the Club website at: **www.simsl.com/IndustryPiracyBMP0610.htm**

Risk Alerts

The first *Risk Alert* was published in July 2009. Since then a further twenty three alerts have been issued covering a wide variety of loss prevention subjects as shown by those published since the last issue of Sea Venture:

- Restrictive Measures in Respect of Cote D'Ivoire
- Carriage of Direct Reduced Iron – DRI
- Iran, Sanctions and the Provision of Security
- Evidence Collection from VDRs
- Dangerous Spaces

All Risk Alerts can be found on the Steamship Mutual website and are available to view and download at: **www.simsl.com/RiskAlert.htm**

Steamship Visits to Taipai and Seoul

Mr C.K. Ong, President of U-Ming Marine Transport Corporation (head of table, left), welcomes the Steamship Mutual team and U-Ming delegates.

Taipei Seminar

During a recent trip to Taiwan, staff from Steamship Mutual's London and Hong Kong offices visited Members and Brokers in Taipei.

As well as the opportunity to discuss claims handling and underwriting topics, seminars were given by Paul Amos and Connie Lee on a variety of subjects including shortage and contamination claims, speed and consumption claims, as well as loss prevention initiatives.

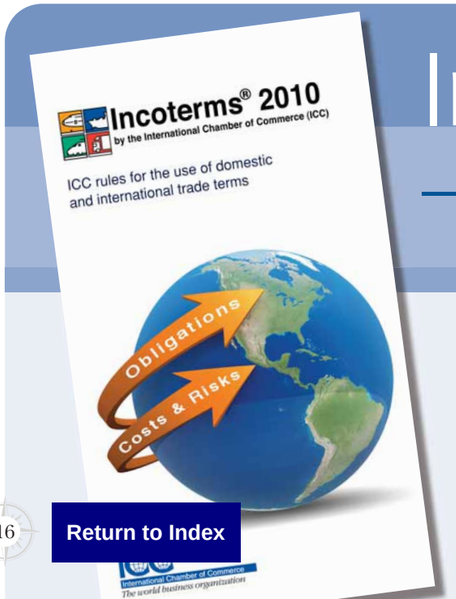
Seoul Reception

The Managers held a reception in Seoul during November and were pleased to welcome 140 guests from the Korean market.

In the presentation given the Club's progress over the year was highlighted and the Members were thanked for their loyal support of the Club.

Korea represents a significant part of the Club's Asian portfolio and the Managers are proud of the close association that exists between the Club and the leading Korean ship owners.

Left to right: Y.K. Lee (Korea Universal Marine), Jonathan Andrews, J.S. Kim and B.S. Kim (Mutual Marine).



Incoterms 2010 – What Has Changed?

The eighth edition of the Incoterms came into force on 1 January 2011. The International Chamber of Commerce periodically reviews these terms to ensure that they are kept up to date with changes in international trade practice.

Although there has been no radical departure from Incoterms 2000, the changes seek to accommodate the growing complexities in trade practice over the last decade.

Incoterms 2010 adopts a more simplified format and now contains more detailed guidance notes for each rule. It is hoped that this will reduce misunderstandings when considering the use of the most appropriate contractual terms in international commercial transactions. The new terms have been changed so as to encourage the use of Incoterms globally; in particular, in the United States, by improving compatibility with the Uniform Commercial Code, as well as in the EU, by taking into consideration the existence of EU custom-free zones.

The most obvious change is the abolition of the four terms DAF, DES, DEQ and DDU. These have been replaced with two new terms: DAP (delivered at place) and DAT (delivered at terminal). There are now 11 rather than 13 terms to choose from, with each term being categorised as either suitable for sea and inland waterway transport, or suitable for any mode of transport.

It is expected that changes in phraseology will allow flexibility for further developments in trade, customary practices and the use of e-communication.

It must be remembered that these terms are not mandatory; if parties wish to include the latest version into their standardised sale contracts they will need to do so expressly.

by Claire Blackmore

- The above mentioned changes, as well as further changes which take into account growing concerns about security, the common practice of string sales, insurance issues and double charging at terminals, are discussed in more detail in an article by Claire Blackmore (claire.blackmore@simsl.com) on the Steamship Mutual website at: **www.simsl.com/Incoterms2010.htm**

Without Prejudice

– Admissibility of Exchanges as an Aid to Interpretation

The Commercial Court decision in *Oceanbulk Shipping & Trading SA v TMT Asia Limited* was discussed in issue 15 of Sea Venture and on the Club website at: www.simsl.com/Oceanbulk0210.html. Since then the case has been heard on appeal before both the Court of Appeal and the Supreme Court.

by Sian Morris

The High Court had held that evidence of without prejudice exchanges is admissible not only to actually identify the terms of a settlement reached but also to explain the meaning of those terms. The Court of Appeal disagreed. The dissenting judge, Lord Justice Ward, however was driven to say:

"Why on earth can you not use negotiations to establish the truth of what the concluded contract means? Not to do so would strike my mother as barmy."

The Supreme Court took a similar view and overturned the Court of Appeal decision, with Lord Phillips saying:

"When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of without prejudice negotiations."

■ Both decisions are discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at:
www.simsl.com/Oceanbulk0211.htm

Anti-Suit Injunctions

by Nooshin Moafi

Following the High Court decision in *Angara Maritime v Oceanconnect*, in which owners successfully evidenced that they had purchased the vessel's bunkers from their charterer in good faith and without notice of the bunker suppliers' rights (see issue 16 of Sea Venture and website article at: **www.simsl.com/Angara0910.html**) the bunker suppliers, Oceanconnect, appealed an earlier order of the High Court granting an anti-suit injunction in relation to proceedings they had started in Louisiana.

Oceanconnect had arrested the vessel in Louisiana in an attempt to establish jurisdiction for their claim whereas owners had sought and obtained a declaration of non-liability from the English High Court pursuant to the jurisdiction provisions of an escrow agreement entered into subsequent to an earlier arrest.

■ In an article prepared for the Steamship Mutual website Nooshin Moafi (nooshin.moafi@simsl.com) discusses the principles governing the grant of anti-suit injunctions and the reasons for the Court of Appeal decision to set aside, which is at first blush at odds with the earlier High Court declaration of non-liability:
www.simsl.com/antisuit0211.htm

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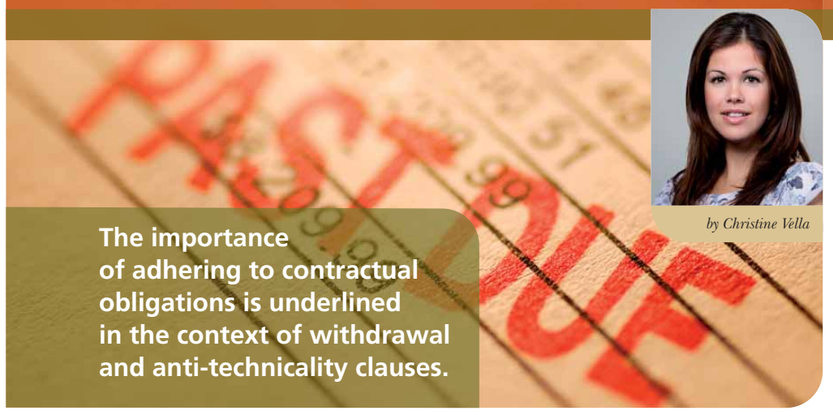
Anti-Technicality Clauses and Withdrawal – Exercise of Great Caution Revisited



The importance of adhering to contractual obligations is underlined in the context of withdrawal and anti-technicality clauses.

by Christine Vella

The risk to owners if they withdraw a vessel wrongfully can be substantial, while the risk of withdrawal to charterers is equally significant. It is for good reason that withdrawal clauses have been referred to as forfeiture clauses, the effect of which can be draconian.

The recent decision in the *Owneast Shipping Limited v Qatar Navigation QSC (the "Qatar Star")* has once again brought these issues to the fore. The vessel had been chartered on a standard NYPE for a four year period. Clause 5 dealt with the vessel's withdrawal in the event of a failure to pay hire on time and, as is commonly the case, the charter incorporated an anti-technicality clause requiring owners to give three days' notice to correct any failure to pay hire before withdrawing the vessel from charterer's service. The anti-technicality clause was effective if the failure to pay hire was a consequence of "*… an error or omission of Charterer's employees, bankers or agents or otherwise for any reason where there is absence of intention to fail to make payment as set out,…*".

The charterers had a very poor record of payment. On one occasion charterers paid hire after receiving an anti-technicality notice from owners. However, when charterers failed to pay the 34th hire instalment owners withdrew the vessel the next day stating that charterers' conduct evidenced an intention no longer to be bound by the charter.

■ Were owners entitled to withdraw the vessel without first having served an anti-technicality notice? This question, as well as the timing and form of anti-technicality notices, is discussed in an article by Christine Vella (christine.vella@simsl.com) on the Steamship Mutual website at:
www.simsl.com/QatarStar0211.htm

Port State Control – Top Ten Findings

Every few years Germanischer Lloyd collate and review data from port state control inspections and prepare a report of the findings.

The 2010 edition of the report - *Port State Control: The Top Ten PSC findings (or how to avoid detention)* - is based on data collected in 2008/9. The report shows that the top ten deficiency findings in detention reports for this period were:

1. Charts and nautical publications
2. Engines, generators, auxiliaries
3. Cleanliness of engine room
4. Oily water separator
5. Oil Record Book
6. Magnetic compass
7. Emergency fire pump arrangements
8. Fire dampers
9. Fire doors
10. Lifeboats

Deficiencies found on detained ships by category were:

- Load lines (6.0%)
- MARPOL Annex I (7.4%)
- Stability, structure and electrical equipment (8.8%)
- Life saving appliances (11.5%)
- Safety of navigation (13.6%)
- Fire safety measures (16.3%)
- Propulsion and auxiliary machinery (17.4%)
- Others (18.9%)

■ Further details are given in the report which, with GL's permission, is available to view on the Steamship Mutual website at:
www.simsl.com/GLPSCTop10Findings0211.htm

SIMSL News

In House Training

A series of lectures for SIMSL staff has been co-ordinated with the Institute of Chartered Shipbrokers. Lecture topics are: *The Practitioners in Shipping Business, The Geography of Trade and International Trade and Finance, International Terms of Sale and Finance in International Trade and Insurance.* As part of the Club's continuing training programme, arrangements are being made with the ICS for the course to run again in 2011.

Separate to the ICS course the Chartered Insurance Institute has now accredited two P&I modules developed by the International Group – *The Marine Insurance Business* and *P & I Insurance: History, Operation and Practice* – as part of a longer term plan for an International Group P&I qualification. The Club's training programme also includes twice monthly in house seminars on a number of practical and legal developments given by the Club's staff and a number of the leading London law firms – Reed Smith, Holman Fenwick & Willan, Hill Dickinson, MFB and Thomas Cooper – as well as other experts.

Left to right: Jamie Taylor, Francis Vrettos, Dean Forrest, Rebecca Chetwood, Tim Guyer and Dougal Gordon.

Victory for "Youngsters"

The most recent Steamship Trivia Night was a closely-fought affair with young upstarts from the aptly named team "We Thought It Was A Disco" emerging victorious from the basement of local establishment The Water Poet. What the team lacked in years, they more than made up for in enthusiasm and obscure general knowledge.

The Greco-Scot duo Francis Vrettos and Dean Forrest proved a devastating partnership, with Jamie Taylor emerging as the team's secret weapon in the crucial opening round. Rebecca Chetwood, Tim Guyer and Dougal Gordon all deserve an honourable mention for their outstanding contribution to what was very much a Steamship Team Effort.

Aquatical House New Reception

The refurbishment of the reception area of the Managers' London office was completed in mid-December. The stylish new look has been well received by staff, Members and other visitors and is one of the first commercial premises in the UK to use the latest energy efficient lighting, heating and cooling systems. The refurbishment project, under the careful supervision of Building Administration Manager Piers Barclay, was completed in excellent time despite the challenges of severe adverse weather conditions that delayed the supply of a number of materials.

Left to right: Piers Barclay with receptionists Janet Meldon-McSweeney and Rosemary Fowler.

• Website News • Website News • Website News •

Piracy Page

One Earth Future (OEF) Foundation has conducted a large-scale study to quantify the cost of piracy as part of its Oceans Beyond Piracy project. Based on its calculations, maritime piracy is costing the international economy between $7 to $12 billion, per year. The OEF report, The Economic Cost of Maritime Piracy, details the major calculations and conclusions made in the study. The report is available to view, with kind permission of OEF, via the Steamship Mutual website at:
www.simsl.com/EcCostPiracyOEFPaper0111.htm

Other recent additions to this page include:

- *ICC IMB Piracy Report 2010*
- *U.S. Coast Guard Advisory on Piracy – Emerging Security Threats Against Vessels*

Circulars

Members receive copies of Club circulars but they are also available to view and download via the website at:
www.simsl.com/Club-Circulars.htm

Recent circulars have covered the following subjects:

- *Charterparty Clause – Financial Security in Respect of Pollution*
- *Regulations of The PRC on the Prevention and Control of Marine Pollution from Ships*
- *Venezuela – Illegal Narcotics onboard Vessels*

Subscribe to our RSS Feed

The Club website has an RSS feed which keeps subscribers up to date with details of the latest articles and news published on the site. To add the feed to your internet browser go to the website homepage at: www.simsl.com and click on the "subscribe to updates" link (at the bottom left of the screen). You will be offered several methods to subscribe. Follow the instructions that best suit your needs.

If you would prefer to view the latest Steamship Mutual news with your emails, some email systems are designed to accept RSS feeds. Instructions vary from system to but this is usually a relatively straight forward process.