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SEA VENTURE

STEAMSHIP MUTUAL

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EDITORIAL TEAM

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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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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***

INTRODUCTION

by Malcolm Shelmerdine

As with any industry there will always be claims and disputes in shipping between contractual and non-contractual parties. In a downturn the frequency of claims and disputes, particularly at lower values, tends to increase as cash flow becomes more of an issue, whereas the number of claims overall might fall somewhat as the volumes of cargoes shipped reduce.

Even if correct it does not necessarily follow that with falling numbers of claims the cost of claims will also fall. Parties in dispute are often less inclined to settle at reasonable levels and inflationary or other pressures can lead to higher value claims and settlements.

We aim to provide an excellent level of service regardless of the number of claims or value of the disputes involving the Club's Members. Sea Venture is one of the tools with which Steamship Mutual both provides that service and is able to demonstrate the depth of its expertise. Indeed, in this issue 18 of the 23 articles have been written by our claims handlers and the subjects covered are illustrative of the breadth and geographical spread of the claims and issues that confront the Club's Members.

We hope the content of this issue will be of interest and as ever we welcome any suggestions for topics to be addressed in future editions of Sea Venture.

Malcolm Shelmerdine

30 September 2011

Cover Images

*Steamship Mutual's entered tonnage is 95 m GT which includes 57.9 m GT of owned tonnage. Within this latter figure there are a number of market leading vessels. The "**Oasis of the Seas**" - launched in December, 2009, and at 220,000 GRT, and capable of carrying 5,400 guests the world's largest passenger vessel - was featured in issue 14 of Sea Venture. It is always pleasing to feature or include images of members vessels in Sea Venture. On the cover of this issue are three other market leading vessels entered with Steamship:*

*At 147 m in length, with a total capacity of 13,317 mt, capable of transporting clean and dirty oil products, as well as acting as a storage unit, the double hulled M.T.V. "**Vorstenbosch**" (top left image) owned by the Verenigde Tankrederij Group is also possibly the world's most advanced bunker tanker.*

*The "**Vale Brasil**" (bottom image) was launched in May 2011 and has capacity to carry 400,000 tons. It is the largest ore carrier in the world. At 362 meters in length the vessel is also longer than the Eiffel Tower is high. The "Vale Brasil" is the first of seven ore carriers ordered by Vale from Daewoo Shipbuilding & Marine Engineering Co, a shipyard in South Korea.*

*Built in Japan and launched on the 27 August 2010 the "**Dalian Glory**" (top right image) is a crude oil tanker. At 333 metres long and with a 60 m beam she has a liquid oil capacity of 350,000 cubic metres. "Dalian Glory" is owned by Sunrise Petrochemicals, part of the Sinokor group of companies.*

The Trouble with Retirement

...is that You Never Get a Day Off

On 20 August Stephen Quartermaine retired as Head of both Underwriting and Reinsurance at the Club to be replaced by Stephen Martin and Rupert Harris respectively.

Having trained as a barrister Stephen joined the Club in 1976 as a claims adjuster, specialising in cargo and defence work. In 1979 he became an underwriter dealing with Italian Members, followed in due course by South America, Mediterranean Europe, Turkey and North Africa. He has been responsible for the Club's reinsurances since 1985 and in 2008 also became Head of Underwriting.

Stephen has represented the Club at the International Group's Reinsurance Sub-Committee (RISC) since 1984. He has participated in many IG working groups and was the Chairman of the group that developed Hydra – the IG's cell captive re-insurance vehicle. This important project came to fruition in 2005.

During his career the Club has grown significantly and there have been many changes in P&I. The IG Clubs now retain US$8m of each claim as compared to US$500,000 in 1976. However, the biggest change has been in regulatory demands for substantially increased capital.

Like all underwriters, Stephen recalls well the triumphs and disasters of business gained and lost, sometimes difficult reinsurance renewals, and the ups and downs of the business in general. But he is happy that he leaves with the Club in very good condition.

He will stay with Club as a consultant until the end of this year. Already an active member of two amateur orchestras, in which he plays the French horn (the Wandsworth Symphony and the Kensington Philharmonic Orchestras), Stephen intends to devote more time to his music once retired. He also plans to travel, take drawing lessons and play more tennis and chess. "The trouble with retirement is that you never get a day off" is a distinct risk!

His successor as Head of Underwriting, Stephen Martin, is also the Club's Chief Operating Officer. Like Stephen Quartermaine, Stephen Martin is a barrister by profession. Prior to becoming COO Stephen was head of claims and FDD and has been closely involved with underwriting, in particular in the USA. Stephen Martin paid the following tribute to his colleague:

"Stephen has been a major contributor to the RISC and one of the key architects of Hydra by which the Clubs provide capital and security to meet the risks of pooling, without reducing their free reserves. It is a mark of his success in this and in many other areas crucial to the Group's reinsurance arrangements that his retirement will be much regretted by the Managers of the other Clubs as well as by his colleagues at Steamship Mutual; we will all miss his immense knowledge, his thoughtful contributions and his reassuring calm when dealing with the most complicated issues.

Those qualities have also ensured equilibrium in the Club's underwriting performance and reinsurance policy, which have been under Stephen's guidance for the last several years. Members, brokers, reinsurers and underwriters alike have always been able to depend upon Stephen's absolute integrity and sheer decency: a great tribute to him and an immensely good thing for the Club. Despite considerable achievements and outstanding ability, he has been unfailingly modest and receptive to all, throughout his many years at the Club."

Playing for the Wandsworth Symphony Orchestra

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

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Laser Focus on Asset Recovery

– Pre and Post-Judgment Tools for the Maritime Industry

The only reason you are reading this article is because arbitration awards or court judgments are not always worth the paper they are typed on.

Without a vessel arrest or attachment of other assets, owners and charterers often question whether it is worthwhile to go ahead with an LMAA or SMA arbitration. And for good reason; as a New York appellate court recognized a few years ago in *Aqua Stoli Shipping v Gardner Smith Pty Ltd*, vessel arrests or attachment of assets are necessary because *"it is frequently, but not always, more difficult to find property of parties to a maritime dispute than of parties to a traditional civil action. Maritime parties are peripatetic, and their assets are often transitory."*

This calls for what can be a delicate balancing act. Clubs and their members must be more proactive than ever in both searching for and retaining security in support of claims. Yet, at the same time, regard must be had to the costs and likely success of the pursuit of assets. In the two years since an appellate court ruled maritime practitioners could no longer attach a maritime defendant's electronic fund transfers passing through New York as security, lawyers have searched around the world for the next big thing. This mindset is wrong. There is no Rule B magic bullet useful for all occasions. However, so long as the maritime industry continues to contract in U.S. dollars, there are tricks of the trade to hunt for the assets of a non-cooperative wrongdoer.

■ In an article written for the Steamship Mutual website, Chris Nolan of Holland & Knight explores recent developments in U.S. asset recovery including: the risks and rewards of seeking pre-judgment security in unfamiliar jurisdictions like U.S. state courts; the extent of attaching assets of an alleged alter-ego company, successor-in-interest, or sister ships, and how SMA arbitrators are reacting to what used to be rare pre-judgment security applications. His article can be found at: **www.simsl.com/AssetRecovery0911.htm**

Flag State or Littoral State – Which Jurisdiction?

A fundamental aspect of international trade is that it involves the exchange of goods and services across international borders.

When disputes arise under such trades it is not difficult to appreciate how conflicts may arise as to which state's laws should govern the dispute – the exporter's or importer's? This jurisdictional quandary is complicated further by the multitude of other players involved in trade by sea; a vessel performing the carriage, or part thereof, will often transit the territorial waters of other states, whilst the vessel's registry, crew, charterers, or sub-charterers, or third-party managers may all conceivably be domiciled in separate states.

This judicial uncertainty can in large part be avoided contractually through the use of exclusive jurisdiction clauses, although parties may attempt to ignore such clauses where it is beneficial to their interests to do so. However, where a dispute arises in tort or delict the jurisdiction for that claim is more often than not at best unclear.

by Dean Forrest

This was the issue before the Admiralty Court in *Saldanha v Fulton Navigation Inc (The "Omega King").* The claimant, an Indian Chief Engineer was injured serving on board a Marshall Islands registered vessel when it was lying at anchor off the coast of Wales. He brought proceedings in the English courts and obtained a default judgement. The defendant ship owner argued that England was "forum non conveniens". This was rejected by the Admiralty Court who confirmed that where a tort occurs in the coastal waters of a state, it is the laws of that state, and not the flag state, that are applicable.

■ This decision and its wider jurisdictional issues are discussed in an article by Dean Forrest (dean.forrest@simsl.com) on the Steamship Mutual website at: **www.simsl.com/OmegaKing0911.htm**

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e Risk of LOIs

The recent English High Court decision in the *"Jag Ravi"* has once again highlighted the perils and pitfalls of discharging and delivering cargo other than against production of bills of lading, albeit in that in this case the decision was in the vessel owner's favour.

Unbeknown to the vessel owner the cargo buyer did not pay for or take up the bills of lading when issued. Further, the buyer had prior to shipment on sold the cargo and, under that contract, the on sale buyer agreed to provide a Letter of Indemnity (LOI) if the bills of lading were not available at the discharge port. As a result, when the vessel charterer contacted the on sale buyer requesting a LOI, that party issued a LOI addressed to *"The Owners / Disponent Owners / Charterers of the Jag Ravi"*. The vessel owner was unaware of the existence of the LOI when, on charterers' orders, the cargo was discharged.

The shippers sued the vessel owners in Singapore. Not surprisingly, the owners claimed an indemnity under the LOI. In The *"Laemthong Glory"* (No 2) the vessel owner successfully claimed third party rights under an LOI in materially similar terms when acting as the agents of charterers for the purpose of delivering the cargo. The LOI in that case had been given by the cargo receiver to the charterer, but in the *"Jag Ravi"* the on sale buyers sought to resist the claim because:

(i) The LOI had not been offered to the charterers and, therefore, there was no contract between the charterers and on sale buyers under which the vessel owners could claim third party rights to an indemnity, and

(ii) Notwithstanding the LOI was addressed to *"The Owners / ..."* since the vessel owner was unaware of the existence of the LOI when discharging the cargo, the offer of an indemnity cannot have been accepted.

■ The decision and risks of LOIs are discussed in detail by Yasmeen Rouhani (yasmeen.rouhani@simsl.com) in an article on the Steamship Mutual website at: **www.simsl.com/JagRavi0811.htm**

How Heavy is a Feather?

– The U.S. Supreme Court and Causation in Jones Act Seaman Cases

by Martin Turner

A recent case ruled upon by the U.S. Supreme Court in respect of the Federal Employer's Liability Act (FELA) has direct relevance to Jones Act seaman cases because the Jones Act provides that such personal injury lawsuits are to be considered under the auspices of the FELA statute and its standards as they are applied to railroad workers.

The issue is that FELA has long been interpreted as applying a "featherweight" burden of causation such that *"...if defendant's negligence played a part, no matter how small, in bringing about the injury..."* he will be considered to have caused or contributed to the plaintiff's injury and, thus, have a financial liability to pay damages. The case of *CSX Transportation v McBride* sought to challenge that interpretation and move the standard to one more in line with conventional tort claims, such that any negligence of the defendant would have to be shown to be the "proximate cause" of the injury.

The U.S. Supreme Court decided, if only on a 5 to 4 majority, not to alter the existing interpretation of FELA and thus the "featherweight" standard of causation still stands.

■ The decision is reviewed in further detail by Martin Turner (martin.turner@simsl.com) in an article written for the Steamship Mutual website at: **www.simsl.com/McBride0811.htm**

California

– Criminal Enforcement of Local Air Pollution Standards Against Ships Curtailed

As further evidence of aggressive enforcement of local environmental laws, California prosecutors in Los Angeles filed criminal charges against the owners and managers of a vessel for what inspectors claimed was excessive smoke while the vessel was in port.

Historically, excessive smoke violations were the subject of civil fines, which have steadily increased in recent years. The attempt at criminal enforcement was believed to be the first of its kind.

Fortunately, the prosecutors' aggressive approach met with substantial opposition. The charges were dismissed on the motion of defense counsel with the trial court ruling that the U.S. Federal Clean Air Act preempts the local and state provisions used by the South Coast Air Quality Management District as a basis for penalizing vessels for excessive emissions from diesel engines.

The visible emission standards which were challenged in the criminal case are distinct from California's low sulfur fuel regulations that the Courts have so far upheld (see website article at: **www.simsl.com/CaliforniaFuel24Miles0411.htm** which discusses those regulations). With this most recent ruling, if a citation is received, consideration might be taken as to whether or not the local or state law is enforceable. Members are of course strongly encouraged to ensure their vessels comply with all local, state and federal air emissions standards. For more on this development, see the website article by Keesal, Young & Logan at: **www.simsl.com/CaliforniaSmoke0811.htm**

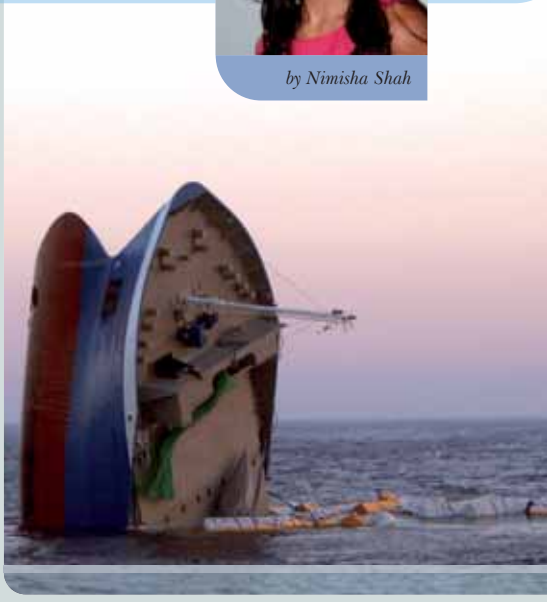
LOF 2011

by Nimisha Shah

The Lloyds Open Form (LOF) has been in existence for over a century and is a widely used international salvage agreement administered by the Lloyd's Salvage Arbitration Branch. The form provides a means by which the terms of a salvage operation are agreed.

The introduction of LOF 2011 by Lloyd's in May of 2011 has bought about a number of changes to the existing contract. For example, and of significance for the handling of future claims, salvage awards under LOF will be published and available by subscription at: **www.lloydsagency.com**. This provides greater transparency for the assessment of salvage awards. Parties who wish to withhold the publication of an award will have to apply to the LOF Arbitrator/Appeal Arbitrator for an order postponing or preventing publication, supported by a "good reason". There is also an obligation on the parties to report to Lloyd's the signing of an LOF.

Perhaps the most pivotal amendment to the accompanying Lloyds Standard Salvage Arbitration clauses is the introduction of special provisions 13, 14 and 15: The use of the LOF contract in casualties involving large container vessels was proving problematic when dealing with "unrepresented cargo interests". Clause 13 now gives salvors the opportunity to send arbitration notices to those who have provided security. This obviates the previous requirement to send such notices to the owners of the salved property. The incorporation of Clause 14 allows, in circumstances where 75% of the salved fund (by value) reaches an amicable settlement with salvors, for such settlements to be binding on unrepresented cargo interests. Clause 15 provides that where the cost of including the salved cargo is likely to be disproportionate to its overall liability for salvage, such cargo may be excused from liability for salvage.



■ LOF 2011 is discussed in further detail in a website article by Nimisha Shah (nimisha.shah@simsl.com) at: **www.simsl.com/2011LOF0911.htm**

Member Training Course – June 2011

T Club's inaugural Member Training Course took place this year between 13 – 17 June.

Twenty two delegates attended, representing nineteen companies based in Korea, Taiwan, Brazil, Germany, USA, Egypt, UK, India, Spain and Cyprus.

The course commended with a visit to the office of the Managers' London Representatives, SIMSL, where the delegates were welcomed by the CEO and SIMSL Directors and their respective Syndicate representatives. Following short presentations on underwriting issues and lunch, the delegates were accompanied to the De Vere Grand Harbour Hotel in Southampton where the bulk of the course was held.

The course covered a wide range of topics including Loss Prevention, Piracy, Crew and Personal Injury Claims, Pre-Employment Medical Examinations, Dangerous Cargoes, Fixed and Floating Object claims, Oil Pollution, Sanctions, and FD&D issues such as charterparty defaults, off-hire and bunker claims. One morning was spent in the ship simulator facility at the Warsash Maritime Academy where delegates participated in a collision exercise that was based upon an incident that had been the subject of a claim handled by the Club. After witnessing the collision incident in play-back mode, the delegates were then invited to assume control of one of the ships and take appropriate action to avoid the collision; with varying degrees of success. The incident was then used as the basis of a workshop to determine the apportionment of liability. This prompted lively debate.

Another interesting workshop session involved the issue of discretionary cover under the Club's Rules. Following the presentation of a number of case studies, based upon actual incidents, the delegates were invited to act as the Club's Board of Directors to determine the extent to which cover should be provided.

Social events during the week in Southampton included an evening cruise on Southampton Water, a guided tour of HMS Victory, a traditional English pub dinner, and an afternoon of Test cricket. Following the presentation of attendance certificates, the course concluded with dinner at the venue hotel.

During the course at the De Vere Hotel

Onboard "Princess Caroline"

The feedback from delegates has been extremely positive, as illustrated by some of the following comments from the course appraisal form:

"The course was well planned, coordinated and executed. I would like to thank all members of SSM for all the efforts taken to make this course a grand success"

"The hospitality provided by the Club was A - i.e. the best"*

"Excellent variety of presenters / experts. A very useful week, excellent hospitality, planning and execution."

"This is a wonderful training course."

"A very nice course, everything well organised."

The feedback from the delegates is being used to develop the course content and in view of the success of the inaugural event, arrangements are now being made for the 2012 course which will be held in Southampton on a similar basis during the week commencing 18 June 2012. Further details will be published in due course, but any Member wishing to send delegates next year should contact Jenny Bull (jenny.bull@simsl.com).

Delegates boarding HMS "Victory"

Delegates and SIMSL representatives

Philippines

– Additional Compensation under Collective Bargaining Agreements

by Tom Nightingale

A recent judgment in the Philippine Supreme Court appears to have set a precedent in seafarers' claims in relation to the further protection often afforded by employment under a Collective Bargaining Agreement (CBA).

Wilfredo Antiquina v Magsaysay Mariitme concerned a seafarer who suffered a fracture of his lower left arm after machinery struck him during routine maintenance aboard the vessel. After receiving a preliminary diagnosis and treatment in Romania, Antiquina was repatriated for further medical treatment. Once repatriated, after several physiotherapy sessions had not led to any improvement in functionality, he was advised to undergo a bone grafting procedure, but he refused. Antiquina then filed a complaint for permanent disability benefits and was given a Grade 11 disability (US$7,645) based on the Philippines Overseas Employment Administration (POEA) contract.

Antiquina additionally filed a complaint with the National Labor Relations Commission (NLRC) alleging that he was employed under an Associated Marine Officer's And Seamen's Union of the Philippines (AMOSUP) CBA which had a permanent medical unfitness clause entitling him to full disability benefits of US$80,000.

Both the Labor Arbiter (in 2002) and the NLRC (in 2003) awarded full disability benefits of US$80,000. The respondents, undeterred, filed a petition for certiorari with the Court of Appeal. It was to be decided whether Antiquina's allegations had been properly documented, a point which had not previously been raised.

■ Tom Nightingale (tom.nightingale@simsl.com) discusses the outcome of this case in an article written for the Steamship Mutual website at: **www.simsl.com/Antiquina0911.htm**

A Question of Authority

In a recent U.S. Fifth Circuit Court of Appeals decision claims brought by the cargo claimant against the vessel owner failed because there was no privity of contract between the vessel owner and cargo claimant.

The bill of lading had been issued on behalf of a sub charterer "as carrier" and the charterer had been dismissed from the proceedings when it filed for bankruptcy protection. Even if the bill of lading had evidenced a contract between the vessel owner and cargo claimant, the claim still failed in the U.S. because the charterers' agent had exceeded the charterers' authority when issuing a bill of lading that did not conform with the mate's receipt.

■ The Court of Appeals decision is discussed in an article by Michael Chalos and Ryan Gilsenan of Chalos, O'Connor & Duffy, LLP, New York, on the Steamship Mutual website at: **www.simsl.com/SagaMorusChalos0811.pdf**

Had the claim been brought in England and been subject to English law it is likely that the claim against the owner would also have failed on grounds of privity. However, while it is not clear from the judgment whether questions of apparent or ostensible authority were considered, it is likely that the decision would have been different if the claim had been decided on English law principles applying to the charterers' authority to issue bills of lading.

■ The English law perspective is discussed in a website article by Eduardo Prim of MFB Solicitors at: **www.simsl.com/SagaMorusMFB0811.pdf**

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"PIRACY – The Menace at Sea"

The persistent and widespread threat to merchant shipping and seafarers arising from the activities of Somali pirates emphasises the continuing importance of heightened vigilance, vessel fortification measures, drills and training to reduce the risk of boarding and hijack of vessels operating in the high risk area.

Edward Stourton outside EU NAVFOR HQ, Northwood

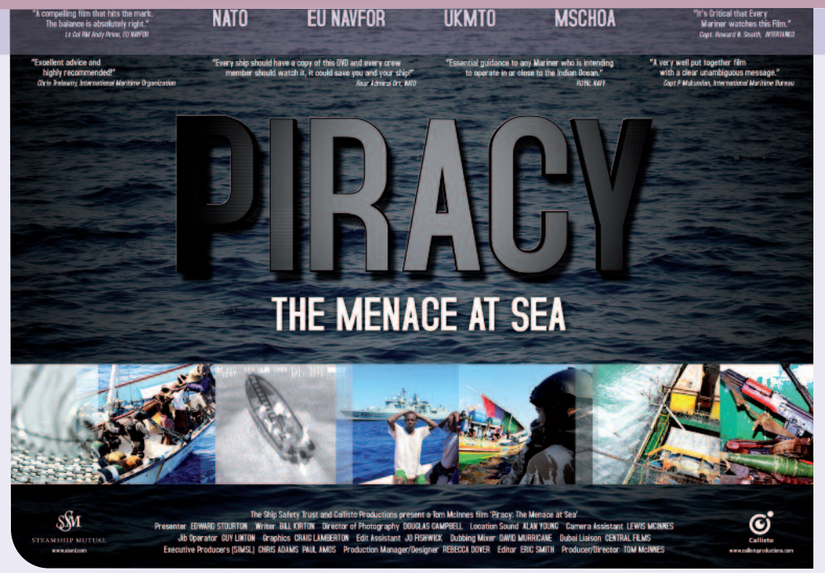
This is particularly important far offshore where protective naval resources are more thinly spread, and much greater reliance needs to be placed upon self-protection.

The Best Management Practice Guidelines have been compiled by the industry to assist Masters and their crews to implement effective action to deter piracy, and render vessels less vulnerable to attack, and are now in their fourth iteration, BMP4. It is self-evident that if pirates are prevented from boarding a vessel, it cannot be hijacked. Consequently, BMP compliance is essential to reduce the risk of a vessel being pirated.

In view of the significant loss prevention benefits that flow from full and effective implementation of BMP, the Club's latest Loss Prevention DVD, "**PIRACY – The Menace at Sea**" has been produced with the objective of encouraging more widespread BMP compliance.

As with the Club's previous loss prevention DVDs, the project was funded by The Ship Safety Trust, and undertaken by Callisto Productions Ltd. Filming was undertaken in London and the United Arab Emirates and with the assistance of EU NAVFOR, NATO, UKMTO, IMO, IMB, OCIMF, INTERTANKO, INTERCARGO and BIMCO.

An invited audience attended a premiere showing of the film at the Museum of London on 3rd August 2011. The DVD-ROM, which contains relevant web-links and important reference documents, including the recently published BMP4, will be distributed to Members in September 2011. In order to promote more widespread understanding of the requirements of BMP,



the DVD incorporates Russian, Chinese and Tagalog sub-titled versions of the film.

It should be remembered that the Masters, officers and crews of hijacked vessels are the innocent victims of this unacceptable menace. At any one time there are several hundred crew hostages held by Somali pirates pending the conclusion of ransom negotiations. The duration of their captivity extends for many months, during which period they endure extremely difficult conditions and have no means of knowing when they will see their families and homes again. If the use of the information contained within this DVD helps to avoid the capture of a single vessel, it will have achieved its purpose. We hope however that it will do much more.

A trailer from the DVD and further information can be found at:
www.simsl.com/PiracyDVD.htm

The Club's dedicated Piracy webpage is at:
www.simsl.com/piracy.htm

Security planning onboard

Vessel security hardening at Jebel Ali

Douglas Campbell, director of photography

Col. Richard Spencer, Chief of Staff EU NAVFOR

Capt. P. Mukundan, IMB

Chris Trelawny, IMO

Philip Pascoe, OCIMF

Chris Adams, SIMSL, with Edward Stourton

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Maritime London Officer Cadet Scholarship Scheme

The Maritime London Officer Cadet Scholarship Scheme supports officer cadets through their initial training to the point of their first professional qualification as a junior officer.

In previous issues of Sea Venture (12 and 14) we have reported the training progress of Gregory Taylor, the cadet sponsored by Steamship Mutual through funding provided by The Ship Safety Trust.

Gregory commenced his training in September 2007 at the Warsash Maritime Academy and gained the requisite sea time to qualify for his professional examinations on a variety of vessel types: bulk carrier, cruise ship, passenger/ro-ro freight ferry and an aids to navigation support vessel. During the seagoing phase of his training Gregory encountered a number of interesting and challenging experiences, the most worrying of which must have been the outbreak of fire on the vehicle deck of the ro-ro freight ferry whilst at sea.

Having achieved the necessary passes in his written examinations, in May 2011 Gregory was successful in his oral examination by the UK Maritime and Coastguard Agency and has now attained his Foreign-Going Class 3 Certificate of Competency. We congratulate Gregory on this successful completion of his training and are proud to have been able to provide him with the necessary support to achieve his professional qualification.

Unfortunately, Gregory has so far been unsuccessful in obtaining a position. If any Member has a suitable vacancy, we will be happy to pass information on to Gregory.

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Strikes, Congestion and Delays – Whose Risk?

by Jo Cullis

A common source of conflict between owners and charterers is where delay results from berth congestion at the end of a strike.

In a recent decision, the English High Court considered whether the strike clause in a berth charterparty applied in the case of delay caused by congestion to vessels (i) waiting to berth as a consequence of a strike that had ended and (ii) that had arrived after the strike had ended.

Discharge at the terminal had been delayed by some two weeks by a strike. Charterers contended that the delay was by reason of the strike and that this period was excluded from the computation of laytime by the strike exceptions clause. Owners position was that the combined effect of the charter WIBON provision and strike exceptions clause was that charterers took the risk of delay caused by congestion in the port and that, as the strike was over when the vessel berthed, no period stood to be deducted from laytime.

Whether consequential delays are excluded by the terms of a strike clause will, of course, depend not only on the wording of the particular clause but the charterparty construed as a whole. In this case the arbitrators' award in favour of owners was overturned on appeal.

■ The court's reasoning is discussed in an article by Jo Cullis (jo.cullis@simsl.com) on the Steamship Mutual website at: **www.simsl.com/Carboex0811.htm**

Voluntariness in Salvage and Duty to Act

Under English law principles, a right to a salvage award arises when a person acts as a volunteer to preserve at sea any vessel, cargo, freight or other recognised subject of salvage from danger.

A fundamental element is "voluntariness" – where the person acts without any pre-existing contractual or legal duty.

This element and a consequent claim for salvage was considered in an action in the South African Western Cape Court and, subsequently, in the Supreme Court of Appeal *(Transnet v The MV Cleopatra Dream)*. The "Cleopatra Dream" had departed from the port of Saldanha Bay under compulsory pilotage when she suffered engine failure and drifted towards the shallow water off Jutten Island. The pilot summoned tugs to regain control of the vessel that were supplied by the National Port Authority Transnet Limited.

The court considered two questions of law and fact: First, whether the salvage operation rendered by Transnet was voluntary rather than in the performance of a statutory or common law duty; did the service provided fall outside the scope of normal performance of Transnet's duties? Second, in the event of it being found to be a salvage operation in the performance of a statutory or common law duty, whether Transnet was entitled to a salvage reward under the provisions of the International Salvage Convention 1989 and the local Tariff Book. The Salvage Convention does not exclude voluntariness in salvage rendered by a public authority, though the provisions of the relevant national legislation must first be considered.

by Paul Amos

■ A website article by Paul Amos (paul.amos@simsl.com) examines the issues raised in the "*Cleopatra Dream*" case in the context of what constitutes voluntariness in salvage by a public body. His article can be found at: **www.simsl.com/Cleopatra0911.htm**

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EU – Rights of Passengers Travelling by Sea and Inland Waterways

The European Union has historically given greater focus to the legal rights of passengers and tourists travelling by air and railroad, whereas the rights of passengers travelling by sea and inland waterways have received comparatively little attention.

In recognition of this, the European Parliament and European Council have formally adopted EU Regulation 1177/2010 which aims to establish a set of rules for the rights of passengers when travelling by water. The aim of the regulation is to achieve a consistent legal framework in the interest of passengers travelling in all modes and to ensure that all passengers are entitled to enjoy the same levels of quality and safety, however and wherever they travel within the European Union.

Aneeka Jayawardena (aneeka.jayawardena@simsl.com) explores the purpose of the Regulation, the rights afforded under it and the Regulation's primary beneficiaries. The reception the Regulation has received in the maritime and transport industry and its potential impact upon cruise and ferry operators are also considered.

■ Aneeka's article can be found on the Steamship Mutual website at: **www.simsl.com/EUSeaPassengers0911.htm**

by Aneeka Jayawardena

Key Ruling in Deepwater Horizon

On 26 August 2011 the Court presiding over the Deepwater Horizon litigation issued a 39 page order addressing motions to dismiss aspects of a Master Complaint filed by more than 100,000 private claimants seeking to recover economic and property damages, punitive damages and attorneys' fees from, amongst other defendants, BP, Transocean, and Halliburton.

Analyzing the interplay among admiralty law, the Oil Pollution Act 1990 ("OPA"), the Outer Continental Shelf Lands Act ("OCSLA"), and various state laws, the court dismissed the plaintiffs' state law claims against the OPA Responsible Parties for nuisance, trespass and fraudulent concealment (misreporting amounts discharged) on the ground that such claims were preempted by the general maritime law. The court also dismissed the Plaintiffs' general maritime law claims against the Responsible Parties because such claims would frustrate and circumvent the remedial scheme set out in OPA. The court also determined that the plaintiffs did not allege a plausible claim for attorneys' fees under either general maritime law or a bad faith exception and consequently dismissed that part of their suit as well.

The court, however, also ruled that OPA does not immunize other non-Responsible Parties from liability to claimants who, prior to OPA, would have been able to bring claims under the general maritime law. Thus, the order allows some plaintiffs to seek damages from non-Responsible Parties outside of OPA under the general maritime law. Perhaps most concerning is the court's ruling that both Responsible and non-Responsible Parties still face exposure to punitive damages because, the court reasoned, the imposition of punitive damages would not circumvent OPA's remedial scheme.

■ Joe Walsh and Bert Ray of Keesal Young & Logan's Long Beach and Anchorage offices analyse the order in further detail in an article written for the Steamship Mutual website at: : **www.simsl.com/Deepwater0911.htm**

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Wrongful Arrest and War Risks Policies – Obligation to Sue and Labour?

by Sian Morris

On 24 December 2008 the vessel "Silva" was arrested when passing through the Suez Canal. It was arrested by an Egyptian court in respect of unpaid court fees owed by the unrelated owners of an unrelated vessel.

Two years later, it had still not been released, and its owners tendered notice of abandonment to their war risks insurers. The owners claimed the value of the insured hull and freight.

The war risks insurers argued two points: First, that the Egyptian arrest procedure was covered by the "ordinary judicial process" exclusions in the policy. Secondly, that the owners had failed to take various steps (primarily legal) to obtain the release of the vessel and asked for a declaration that the owners had failed to perform their contractual obligation to sue and labour. The case came before the English Commercial Court.

On the first issue, Mr. Justice Burton held that the arrest of the "Silva" had been sustained using forged documentation. He held that the arresting court must have known that the documentation was not likely to be genuine and that no reasonable court could have acted as the arresting court did. The arrest was *"effectively extortion by the State under a veneer of court process."*

On the second issue, Burton J held that no criticism could be made of the owners or their Egyptian lawyers in their attempts to obtain the release of the vessel, so there had not been any breach of the owners' contractual obligation to sue and labour.

■ The decision in *Melinda Holdings v Hellenic Mutual War Risks* is discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at: **www.simsl.com/Melinda0911.htm**

Shipbuilding Dispute – a Refund for Buyers?

by Andrew Hawkins

In *Nanjing Tianshun Shipbuilding and Jiangsu Skyrun v Orchard Tankers* the English High Court refused a challenge to the jurisdiction of an arbitral tribunal under s.67 Arbitration Act 1996 and found no grounds for allowing permission to appeal under s. 69.

This was a dispute arising from a shipbuilding contract which the buyers purported to cancel on grounds of late delivery. While intending to dispute the buyers' right to terminate and claim for the refund of instalments paid, the sellers failed to commence arbitration proceedings within 30 days from cancellation as required by the terms of the shipbuilding contract. The relevant clause of the contract further provided that if cancellation was "*disputed by the seller as aforesaid*" sums paid by the buyer were not to be refunded without an arbitration award.

Accordingly, the buyers' took the view that the sellers' failure to commence arbitration proceedings within 30 days barred any right to dispute the cancellation of the contract and thus they were entitled to receive a refund of all the instalments they had paid.

In contrast, the sellers argued that while arbitration proceedings had been commenced late this did not bar their right to challenge the cancellation. They also alleged that the buyers were not entitled to repayment of the instalments on the basis that the tribunal lacked jurisdiction when the arbitration had been started (by them) late. In the words of Steel J, if correct, this would have led to a *"somewhat remarkable"* result

■ The case is discussed in further detail by Andrew Hawkins (andrew.hawkins@simsl.com) in a Steamship Mutual website article at: **www.simsl.com/Nanjing0911.htm**

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NSF – What Certificates on Delivery?

A recent English High Court case addressed the scope of certification requirements under the Norwegian Saleform 1993 (NSF).

In particular, where a certificate had not been required when the vessel was inspected and the Memorandum of Agreement (MoA) signed but, at the time of delivery, was required if the vessel was to trade Internationally, did the absence of such certificate mean that the buyers could refuse to take delivery?

Both parties were aware that the vessel needed to comply with Annex IV of MARPOL and that an International Sewage Pollution Prevention (ISPP) Certificate was required by 27 September 2008. However, while the sellers had applied for dispensation from Annex IV, that dispensation had not been granted when the sellers gave Notice of Readiness for delivery under the MoA. Further, between the date of signing the MoA and delivery the value of the vessel had halved.

The arbitrator agreed that the buyers were entitled to cancel the MoA because under its terms the vessel had to be delivered with international trading certificates and these included an ISPP certificate, whether or not there was such a requirement when the vessel was inspected.

by Francis Vrettos

■ The seller successfully appealed the arbitrator's decision. The case is discussed by Francis Vrettos (francis.vrettos@simsl.com) in an article written for the Steamship Mutual website at: **www.simsl.com/Polestar0911.htm**

Which Time Bar and What is Final Discharge?

Where a charter for three consecutive voyages provides that claims are time barred unless the claimant's arbitrator has been appointed "within 12 months of final discharge or termination of this Charter Party" when does time start to run – the former or the latter date? And if the former, to which voyage do the words "final discharge" refer? Or, is time capable of running from both?

In *X v Y* the owners claimed demurrage of US$376,086.03 on the first voyage but started arbitration some 12 months and 15 days after the completion of discharge on that voyage. The "termination" of the charterparty was almost four months later.

Not surprisingly, the charterers said the claim was time barred because (i) "final discharge" meant discharge on the voyage in respect of which the claim arose and (ii) the clause required an arbitrator to be appointed within 12 months of whichever was the earlier; "final discharge" or termination of the charterparty.

In contrast, owners' position was that there were two starting points for the giving of notice; either the date of "final discharge" or the date of termination of the charterparty, and that because arbitration had been started within 12 months of the latter, the claim was in time.

The arbitrator decided in charterers' favour on their first point but agreed with owners that there were two potential time bars and that because arbitration had been started within 12 months of the charterparty termination date, the claim was in time.

by Anna Yudaeva

■ Both parties appealed. That decision is discussed by Anna Yudaeva (anna.yudaeva@simsl.com) in a website article at: **www.simsl.com/XYTimeBars0811.htm**

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U.S. – Waivers of Liability on Cruise Ships

by Paul Brewer

The use of waivers by providers of dangerous recreational activities to bar suits for negligence has been consistently upheld by the courts in the 11th Circuit (Florida).

In order to be enforceable, a waiver must be clear and unequivocal. For cruise lines, however, additional difficulties in enforcing a waiver arise due to application of a U.S. Code provision; 46 U.S.C. § 30509 applies to invalidate an exculpatory clause where the common carrier is attempting to limit its liability for negligence related to its traditional activity of providing transportation to passengers. Additionally, 46 U.S.C. § 30509 only applies in situations where maritime law is applicable. In order for maritime law to apply, two requirements must be met:

1. the incident causing the harm took place in navigable waters, and
2. the activity giving rise to the incident has a potentially disruptive impact on maritime commerce and shows a substantial relationship to traditional maritime activity.

The statute does not apply where the carrier is acting outside the performance of its duty as a carrier.

Some events on cruise ships such as the use of a flow rider (wave generator), might therefore allow for a waiver to be utilised and relied upon; after all, the flow rider does not fall into a shipowner's traditional activity of providing transportation to passengers nor, one would think, could it been deemed an activity which has *"a substantial relationship to traditional maritime activity".*

■ In an article written for the Steamship Mutual website Paul Brewer (paul.brewer@simsl.com) and Lauren DeFabio of Mase & Lara, Miami, consider the use of waivers of liability and their importance to the cruise industry. The article can be found at: **www.simsl.com/CruiseWaiver0811.htm**

New Zealand – Time Charterers Criminally Liable for Pollution

In New Zealand, a charterer can be criminally liable for pollution emanating from a ship, even if it is not responsible for the navigation or management of the ship and has no control in any practical sense.

Under the Maritime Transport Act 1994 (MTA) and the Resource Management Act 1991 (RMA), the owner and master of a ship each commit an offence if a discharge occurs from the ship. The liability is strict, with limited defences. Section 222(2)(a) MTA (to which the RMA also refers) defines "owner" of a ship as follows:

"Owner, in relation to any ship (except in the circumstances, and to the extent, provided in sections 343 and 370 of this "Act) includes-

...

...

(iii) Any charterer, manager, or operator of the ship, or any other person (other than a pilot) responsible for the navigation or management of the ship."

The facts in *Southern Storm (2007) Limited v Nelson City Council*, on appeal from the District Court, were as follows: an oil spill occurred while the "FV Oyang 70" was being bunkered at a berth. The council prosecuted the time charterer in relation to the spill. The defendant sought to distinguish between a demise charter on the one hand and voyage and time charters on the other hand. It argued that "any charterer" in section 222(2) MTA should be interpreted narrowly and only include those charters where the charterer has responsibility for the ship. The High Court did not accept those submissions and decided that the definition in the MTA was clear: owner includes any charterer, even if the charterer is not responsible for the navigation or management of the ship. The High Court considered that the policy reason behind such an interpretation is that it ensures that not just those who actually operate the ship take care, but that it also provides an incentive to those who charter a ship to ensure that the owner/operator is operating the ship to a proper standard.

■ Article by Barbara Versfelt, Special Counsel, Lowndes Jordan, Auckland.

Competing Causes
– Agreeing the Risk of Delay

by Sarah McGuire

Happily, most contracts are performed without incident. There are, of course, occasions where circumstances cause problems or delay. It is in anticipation of such circumstances that particular contractual provisions are negotiated in an attempt to allocate responsibility and /or risk between the parties.

However, what if events conspire so that the circumstances giving rise to a problem or delay are the result of competing or concurrent causes?

In the "*Hang Ta*" the English High Court was asked to consider the interpretation of a clause under a CIF contract which provided for the valid tender of NOR on arrival at the discharge berth or, if the berth was occupied, on arrival, WIPON. In this case, however, the berth was both occupied and thus unavailable on arrival but would also have been inaccessible if available because of the tidal conditions. Where, then, should the cost of delay fall?

■ The issues in this case and the question of whether NOR can be tendered only if the delay is caused solely by berth congestion are considered by Sarah McGuire (sarah.mcguire@simsl.com) in an article written for the Steamship Mutual website at:
www.simsl.com/HangTa0911.htm

Piracy – Is Cargo Lost?
(Part II)

by Neil Gibbons

In issue 16 of Sea Venture (September 2010) the English High Court decision in *"Bunga Melati Dua"* was discussed.

The vessel, along with her cargo of bio fuel and crew, had been taken by pirates off Somalia in August 2008. The vessel was released in late September but some eleven days prior to her release the cargo owner served notice of abandonment on its insurers seeking to have the cargo declared an actual and/or constructive total loss (CTL). Cargo underwriters rejected the notice, but it was agreed that proceedings were deemed to have been commenced.

On arrival at the discharge port the cargo had not deteriorated but had missed its market and was stored until the following year when it was sold at a price substantially lower than its insured value. The cargo owner claimed the balance, some US$7.6 million. Their claim against cargo underwriters was unsuccessful at first instance (see website article: **www.simsl.com/Masefield0910.html**) and, although the CTL argument was not pursued, the cargo owner appealed.

■ The Court of Appeal decision is discussed in a website article by Neil Gibbons (neil.gibbons@simsl.com) at:
www.simsl.com/Masefield0911.htm

Pollution Regulation Round-Up

by Naomi Cohen

US Coast Guard and Environmental Protection Agency – Joint Enforcement of MARPOL VI Requirements

On 27 June 2011 the USCG and US EPA sent a joint letter to the shipping industry to remind them of the regulations relating to the prevention of air pollution from ships; The United States became a party to MARPOL Annex VI in 2008 and the treaty is implemented in the United States through the Act to Prevent Pollution from Ships (APPS). The MARPOL Annex VI regulations have been in force since 8 January 2009 for US-flagged vessels and foreign-flagged vessels operating in US waters. The letter provides the regulated community with notice that USCG and EPA will be taking measures to promote compliance with federal and international air pollution requirements and will be actively pursuing violations. The letter can be found on the US EPA website at: **www.epa.gov/compliance/resources/agreements/caa/jointletter062711.pdf** and further details relating to the regulatory requirements can be found at: **www.epa.gov/compliance/civil/caa/annexvi-mou.html**

The letter also refers to the North American Emission Control Area and the (then) proposed US Caribbean Emission Control Area which has since been approved by IMO – see below.

North American and US Caribbean Emission Control Areas (ECAs)

Amendments to MARPOL Annex VI *(Prevention of air pollution from ships)* will formally establish a North American Emission Control Area, in which emissions of sulphur oxides (SOx), nitrogen oxides (NOx) and particulate matter from ships will be subject to more stringent controls than the limits that apply globally. The North American ECA (adopted in March 2010 and entered into force in August 2011) takes effect in August 2012.

At the Marine Environment Protection Committee (MEPC) session in July 2011, IMO adopted MARPOL amendments to designate certain waters adjacent to the coasts of Puerto Rico (United States) and the Virgin Islands (United States) as another ECA (United States Caribbean Sea ECA). These amendments are expected to enter into force on 1 January 2013, with the new ECA taking effect 12 months later. (Another amendment will make old steamships exempt from the requirements on sulphur for both the North American and United States Caribbean Sea ECAs.)

The two other designated ECAs already in force under Annex VI are the Baltic Sea and the North Sea areas.

Antarctic – Regulations on Use or Carriage of Oil

A new MARPOL regulation to protect the Antarctic from pollution by heavy-grade oils is added to MARPOL Annex I *(Regulations for the prevention of pollution by oil),* with a new chapter 9 on *Special requirements for the use or carriage of oils in the Antarctic area.*

Regulation 43 prohibits both the carriage in bulk as cargo and the carriage and use as fuel of:

- crude oils having a density, at 15°C, higher than 900 kg/m3;
- oils, other than crude oils, having a density, at 15°C, higher than 900 kg/m3 or a kinematic viscosity, at 50°C, higher than 180 mm2/s; or
- bitumen, tar and their emulsions.

This means, in effect, that ships trading to the area, whether passenger or cargo ships, would need to switch to a different fuel type when transiting the Antarctic area, defined as *"the sea area south of latitude 60°S"*. The regulation entered into force on 1 August 2011. An exception is envisaged for vessels engaged in securing the safety of ships or in search and rescue operations.

Global Greenhouse Gas Reduction Regime under MARPOL VI

Mandatory measures to reduce emissions of greenhouse gases (GHGs) from international shipping were also adopted at IMO's 62nd MEPC session in July 2011, representing the first ever mandatory global greenhouse gas reduction regime for an international industry sector.

The amendments to MARPOL Annex VI *Regulations for the prevention of air pollution from ships,* add a new chapter 4 to Annex VI on *Regulations on energy efficiency for ships* to make mandatory the Energy Efficiency Design Index (EEDI), for new ships, and the Ship Energy Efficiency Management Plan (SEEMP) for all ships. Other amendments to Annex VI add new definitions and the requirements for survey and certification, including the format for the International Energy Efficiency Certificate.

The regulations apply to all ships of 400 gt and above and are expected to enter into force on 1 January 2013.

However, under regulation 19, individual national administrations may waive the requirement for new ships of 400 gt and above from complying with the EEDI requirements. This waiver may not be applied to ships above 400 gt for which the building contract is placed four years after the entry into force date of chapter 4; the keel of which is laid or which is at a similar stage of construction four years and six months after the entry into force; the delivery of which is after six years and six months after the entry into force; or in cases of the major conversion of a new or existing ship, four years after the entry into force date.

The EEDI is a non-prescriptive, performance-based mechanism that leaves the choice of technologies to use in a specific ship design to the industry. As long as the required energy-efficiency level is attained, ship designers and builders would be free to use the most cost-efficient solutions for the ship to comply with the regulations.

The SEEMP establishes a mechanism for operators to improve the energy efficiency of ships.

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

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The International Convention on the Arrest of Ships 1999

by Claire Blackmoore

The International Convention on the Arrest of Ships 1999 will enter into force on 14 September 2011 in the ten states that have ratified the convention.

Albania became the 10th state to ratify the 1999 Convention on 14 March 2011, triggering its entry into force 12 years after the conference in Geneva at which it was adopted. The other nine ratifying states are: Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic, while Denmark and Norway have signed but not ratified the convention. The International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships 1952 is currently still in force in a large number of states.

Arrest, or the threat of an arrest, is a powerful weapon commonly used by maritime claimants to obtain security for a claim or to satisfy a judgment, which they may otherwise have difficulty in enforcing, assuming certain criteria are met. Arresting ships is therefore an important issue for all involved in the international shipping and trading community.

The 1952 and 1999 Arrest Conventions aim to provide for and regulate an international practice of ship arrest which strikes the right balance between the opposing interests of the ship owner and the maritime claimant. The objective of the 1999 Convention is to refine and update the 1952 Convention.

■ A comparison of the 1952 and 1999 Convention provisions, as well as the 1999 Convention's scope of application and likely implications for forum shopping, is considered in an article by Claire Blackmore (claire.blackmore@simsl.com) on the Steamship Mutual website at: **www.simsl.com/99ArrestConvention0911.htm**

When is a Charterparty not a Charterparty? A Salutary Tale for Negotiating Parties

In *TTMI Sarl v Statoil ASA,* as is common practice in the shipping industry, the parties fixed the vessel on the basis of an email recap, recording such details as, inter alia, the cargo, the number of laydays and the freight rate. The voyage was performed, freight was calculated, invoiced and paid.

However, because on drawing up the recap the brokers had mistakenly identified the parent company as the vessel's time chartering owner, rather than the tanker chartering arm of the company, charterers rejected owners' claim for demurrage stating that there was no contract in existence with the owners.

The dispute was referred to a single arbitrator who struck out the owners' demurrage claim on the ground that there had been no contract between the owners and the charterers and, therefore, no arbitration agreement between them. The matter came before the Commercial Court on appeal by the owners.

The Judge was asked to consider the importance of the identity of the contracting counterparty in concluding a valid charterparty and whether the terms of the recap could be relied upon where the written contract was defective but had, in fact, been performed.

■ The decision is discussed in further detail by Sarah McGuire (sarah.mcguire@simsl.com) in a website article at: **www.simsl.com/TTMI0911.htm.**

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SIMSL News

Left to right: Capt. Richard Sheridan, Kate Johnson and Danny McDaid.

Retirements

The following staff have retired in recent months:

- Capt. Richard Sheridan, Loss Prevention Associate – 5 years' service.
- Kate Johnson, Reinsurance Manager – 24 years' service.
- Danny McDaid, IT Director – 17 years' service.
- Val Holt, Syndicate Accountant, also retired after almost 40 years' service. Val joined the company in 1971 as a Book Keeper.

We wish them all a happy and healthy retirement.

Janice Stevens

Qualifications

Congratulations to Janice Stevens, Syndicate Accountant for the Americas, who has passed the final stage of the Association of Accounting Technicians accounting qualification.

Denise receives presentation for long service.

37 Years' Service

Denise Fitch joined the company in March 1974 as a Filing Clerk.
She now works in the Americas Syndicate.

• Website News • Website News • Website News •

Sanctions

The Sanctions area of the Steamship Mutual website provides updates on sanctions measures as they impact on shipping and insurance activities. In addition to items of general application there are areas dedicated to each of the following countries: Egypt, Iran, Ivory Coast, Libya and Syria. The Sanctions area is at:
www.simsl.com/Sanctions.htm

Circulars

Recent circulars have covered the following subjects:

- *Regulations of the PRC on the Prevention and Control of Marine Pollution from Ships*
- *US Pollution NRC and MSRC - MSRC Addendum Concerning Use of Dispersants*
- *Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011)*

All circulars are available to view and download via the website at:
www.simsl.com/Club-Circulars.htm

Loss Prevention

A series of four new **posters** on the subject of *Galley Safety & Hygene* were sent to Members with Club Circular B.552. They are also available to view and download via the Loss Prevention Posters area:
www.simsl.com/loss-prevention-posters.html

The Club's **Risk Alerts**, which cover a wide variety of issues including lessons learned from claims handling experience, recommendations for best practice and information on compliance with new regulatory regimes, can be found at:
www.simsl.com/RiskAlert.htm

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