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SEA VENTURE

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Paul Brewer

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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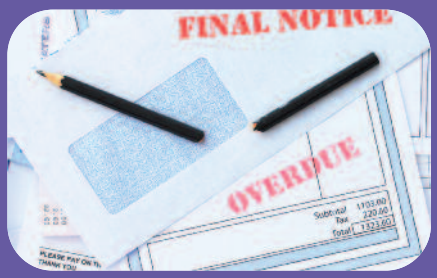

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The dedicated Sea Venture page on the Club website, where this and earlier issues with links to articles can be found, is at: ***www.simsl.com//SeaVenture.html***

INTRODUCTION

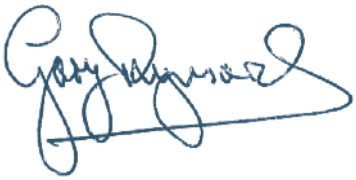
2012 Renewal

by Gary Rynsard

The background to the 2012 renewal was, of course, the most difficult freight market for 30 years. For most Members the prospect of any increase in premiums was extremely unwelcome. Naturally, Members would have much preferred there to have been no standard increase. Nonetheless, most understood that an increase in premium was necessary and that the Board, in setting a standard increase of 5%, had recognised the commercial realities of the current parlous state of the shipping market.

After many arduous and protracted negotiations the target set by the Board was achieved. For this support the Managers are very grateful. In a very few cases, usually where the record was unsatisfactory, it was ultimately not possible to come to an agreement. It is always disappointing to lose business, but we absolutely understand the need in current circumstances for every Member to pursue the best course as they see it; in all cases we parted company on good terms and stand ready to offer our services again in the future.

It is pleasing to report that taking into account growth during the year the Club has achieved its growth target. Most of the growth came from existing fleets in the traditional areas of the Club's business. Solid organic growth within a high quality membership is the route most likely to result in a sound operating performance. Ensuring continuing financial stability is a priority for the Board and management. It is pleasing to be able to report that this is being achieved.



Gary Rynsard

20 March 2012

As ever, the editorial team and I are grateful to everyone who has contributed to this issue of Sea Venture, but in particular to the staff for contributing 16 of the 20 articles discussing case reports in this issue. These articles cover a wide range of subjects: from the issues surrounding non-payment of hire – unfortunately a not uncommon occurrence in the current climate – to time bars for demurrage and cargo claims, the meaning of the words "exposed to War Risks" under the CONWARTIME clause, liens over sub-freights, crew claims, potential charterparty issues arising from sanctions, and more.

It is always pleasing to recognise first time contributors from the Club's claims teams – Gareth Thompson and Alex Towell – as well from relatively new members of staff – Bill Kirrane and Martin Turner. I am also grateful to our external contributors – Reed Smith, Ince & Co, MFB, Swinnerton Moore LLP, Brown Gavalas & Fromm LLP and David Martin-Clarke of Stone Chambers.

Finally, the cover of this issue features Steamship Mutual's teams for the Sailors' Society Three Peaks Challenge – see page 19. To sponsor the teams please go to: ***www.justgiving.com/Steamship-ThreePeaks***

Malcolm Shelmerdine

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Bharat Boda
1945 – 2011

It is with great sadness that the Managers must report the unexpected passing away of Mr Bharat Boda, Chairman of the Club's Indian Representatives Crowe Boda, on Monday 19 September 2011. Crowe Boda have successfully handled the Club's affairs in India for over 60 years. Mr Boda succeeded his father and uncle in this role and will be sorely missed.

SIMSL Chief Executive Gary Rynsard reflected on the relationship with Mr Boda saying "*You always came away from seeing Bharatbhai feeling better about yourself and the work you were engaged in. Very few people have this gift, though I must say it is something he inherited from his father who I also had the immense privilege of knowing. I comfort myself with the thought that his qualities are that of the Boda family and truly believe that he will have passed these on to the next generation which will prove to be the greatest gift he has given us all.*"

The Chairmanship of Crowe Boda passes on to Mr Atul Boda who, with the support of Executive Director Mr Robin Sathaye, will oversee the service Crowe Boda provide to the Club at Indian ports and also to the Indian membership.

Liens Over Sub-Hire
– Is it Really Just Stoppage in Transit?

by Diana Sailor

The effect of a lien on sub-freights may not be as straightforward as it first seems, and certainly not as clear or straightforward in practice as the wording of Clause 18 of the NYPE Charterparty suggests when it states: "*The Owners shall have a lien upon…all sub-freights for any amounts due under this Charter*".

If the "sub-freight" includes "sub-hire" (which is often disputed) then the owner would have the right to payment directly from the sub-charterer, bypassing or "leapfrogging" any intermediate charterers in the chain. This is premised on the The *"Cebu" (no 1)* and that a lien on sub-freight operates by way of an equitable charge which can be assigned.

As such, where time charters have been agreed on a "back-to-back" basis containing identical lien provisions, that charge is further assigned down the charterparty chain. Where hire is not paid owners (and others in the chain) may thus be in a position to intercept payments down the line of charters by serving lien notices. In this situation, it is often the end charterer who is tasked with deciding whose lien (if any) is valid and who to pay. If the "wrong" party is paid there is a risk of being sued by the other parties who are also exercising a lien. Further, if the exercise of the lien is invalid then there could be a right to withdraw from the charter or suspend performance.

The English High Court recently had *occasion to revisit the "well-known and long unresolved"* problem of identifying the nature of the lien under English law in *Cosco Bulk Carrier v Armada Shipping (the"Spar Sirius");* whether the traditional view that an owner's lien on sub-freight can operate as an equitable charge is still accepted, or whether it is now the case that a lien on sub-freight is a personal contractual right of interception analogous to an unpaid seller's right of "stoppage in transit".

■ The effect of this case and a general guide to the operation of liens over sub-hire is discussed further by Diana Sailor (diana.sailor@simsl.com) in an article written for the Steamship Mutual website at: **www.simsl.com/SparSirius0212.htm**

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Residential Training Course for Members 2012

Following the success of last year's inaugural event, and the extremely positive feedback from delegates, the Managers will again host the Club's residential training course for Members.

The course will run from 18 to 22 June 2012 and will be based principally in the port of Southampton. An outline of the programme can be found in the course brochure which can be viewed and downloaded on the Club website at: **www.simsl.com/MemberTrainingCourse.htm**

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 a bridge simulator to undertake a collision exercise that will be the subject of a later workshop. Building upon the experience of last year's course, there will be an emphasis upon the active participation of delegates by means of workshops and case-studies. 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, in view of the success of last year's course this will be 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. We look forward to welcoming delegates once more in June.

A Spanish Royal Decree on Shipowners' Insurance

by Juan Zaplana

Royal Decree 1616/2011 of 14 November 2011, regarding the insurance of shipowners for claims connected to maritime law was published on 15 November 2011 in the Spanish Official Bulletin.

The Royal Decree implements EU Directive 2009/20/CE of 23 April 2009 and will come into force on 31 December 2011.

The Decree impacts on any non-military vessel with tonnage of 300 GT or over calling at any Spanish port or entering Spanish territorial waters. It additionally applies to any Spanish-flagged vessel of 300 GT and above wherever it operates.

From 31 December 2011 such vessels, when calling at a Spanish port, will need to have on board and exhibit to the Harbour Master upon arrival and clearance an original or authenticated copy of a Certificate of Entry. A copy of the Certificate of Entry marked *"this is an authenticated copy of the original Certificate of Entry"*, signed and stamped by the Club, would appear to be sufficient to meet requirements. The validity of electronic documents remains under discussion within the Spanish Maritime Authorities.

The Certificate of Entry will have to contain the following information:

a) Name of the vessel, OMI number and port of registry.
b) Name and place of business of the ship-owner.
c) Class and duration of the insurance (i.e. period of cover) or financial security.
d) Name and place of business of the insurance company/P&I Club and the location where the insurance was subscribed.

The insurance must cover claims in the same terms and for an amount per incident equal to the maximum limit of liability as set out in 1976 LLMC Convention amended by 1996 Protocol. The insurance shall be of the type offered by the P&I Clubs of the International Group. In cases where the insurance is contracted with a company other than a P&I Club, the insurance must still meet the requirements stated in the Royal Decree and the Spanish Insurance Act.

The consequences of not having the Certificate of Entry (or copy) on board are regulated by the Spanish Port Act and fines of up to €180,000 can be imposed if the Authorities consider an owner to be in breach of the obligations. The General Directorate of the Merchant Navy will also have the power to expel from Spanish territorial waters vessels which do not comply with the requirements.

From a practical point of view, the new regulation seeks to ensure owners have in place an appropriate insurance cover evidenced by the pertinent documents held on board when calling Spanish ports or territorial waters.

The relevant Harbour Master and Maritime Authorities will be the parties monitoring compliance and breach of the regulation is likely to result in significant fines and detention to vessels.

Article by Juan Zaplana
(juan.zaplana@simsl.com)

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Piracy – Gulf of Aden and Indian Ocean

Instances of armed attacks against ships and their crews in various parts of the world are still occurring.

Pirate attacks continue in the Gulf of Aden and the Indian Ocean. One ship, with her crew, was released by pirates at the end of December 2011, after 11 months in captivity, only for another ship to be captured the following week. However, fewer ships were hijacked in 2011 than in the preceding year, and in the final quarter of 2011 attacks fell to the lowest level for 15 months. This abatement is attributable to the on-going counter-piracy efforts, increased compliance with Industry Best Management Practices (BMP4) and perhaps also the increased use of private maritime security contractors, armed or otherwise. Nonetheless, there is no room for complacency. The current low level of attack is associated with the North-East monsoon weather conditions; it is expected that pirate activity will increase as weather conditions moderate. There is also concern that the pattern of pirate activity could change with a shift to operations at night.

Consequently, a high degree of vigilance is imperative on vessels whilst in the high risk area, but especially in the southern part of the Red Sea, Gulf of Aden, the western part of the Indian Ocean and the Arabian Sea. As can be seen from the ICC-IMB's Piracy Map for 2011 many attacks take place far from the Somali coast. Indeed, the Club has been involved in one case where a ship was boarded by pirates more than 800 miles from the East African coast. There have been two cases in the second half of 2011 where the actions of pirates who have boarded ships have resulted in serious fires on board, causing further danger to crews, as well as significant damage to the ships.

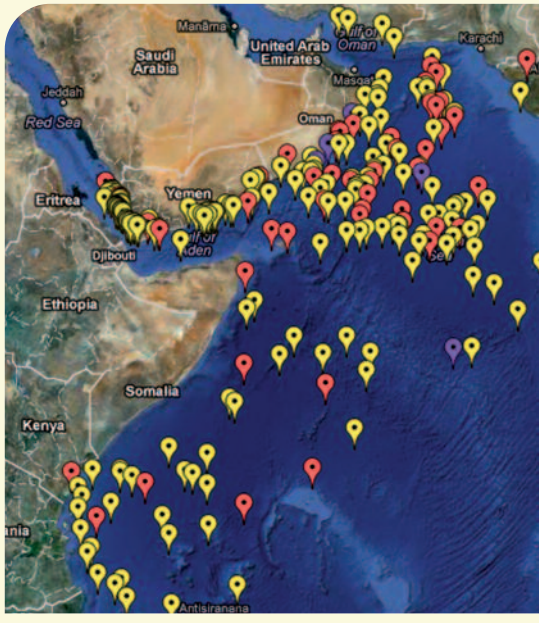
The dedicated piracy section of the Club's website at: **www.simsl.com/piracy.htm** is regularly updated with the latest information and guidance about the dangers of piracy.

The Club has also seen a number of armed and violent robberies, of cash, crew property and cargo, from ships off the West African coast, especially off the coasts of Nigeria and Benin. These have included thefts of thousands of tonnes of oil cargoes, worth millions of dollars.

The pirates involved in these cargo thefts appear to be well equipped and organised. They operate from fast, powerful motor boats, capable of operating as far as 100 miles offshore and they appear to search carefully for laden tankers, using satellite navigation and AIS receivers to locate ships. As with the piracy attacks in the Indian Ocean, they are able to board ships quickly; they use guns and threats of violence, all too often implemented, to quickly over-power the crew. They endeavour to destroy the ship's communication equipment immediately on taking control of the ship.

The pirates will often select some key crew members who will be forced to operate the ship under the pirates' control, while the remaining crew are kept under armed guard inside the accommodation. However, it is understood that in one case the pirates were able to operate the ship's cargo pumps, without the crew to assist them, and it may possibly be that some of the pirates are experienced tanker crew.

The pirates usually sail the ship to a location further offshore for a rendezvous with small unmarked tankers and cargo is then transferred, ship to ship, under the



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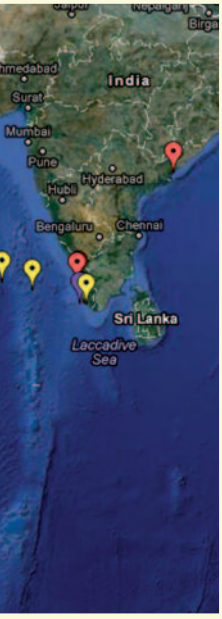
by Bill Kirrane

cover of darkness. In one case the pirates held the ship for a second ship to ship transfer, to a second unmarked tanker. It is also understood that in one case there appeared to be a dispute between the pirates and crew on the unmarked tanker as to the quantity of cargo received in the transfer. After the cargo is stolen, the ship is sailed closer to the coast and the pirates leave the ship after warning the crew not to raise an alarm for a number of hours.

During these attacks pirates have threatened crew members with violence and inflicted injuries on some. They have also ransacked accommodation and stolen cash, personal effects and clothing from the crew.

While the theft of oil cargo appears to be the work of well organised gangs, the Club also continues to see cases of armed robbery of cash and crew property from ships anchored off ports in West Africa. These thefts generally take place at night, with the pirates searching through ships at anchorage for an easy target. After they board the ship and threaten the crew, they steal any cash and crew personal effects and leave the ship as quickly as they came.

■ Ships in the area should remain vigilant to the threat of piracy and follow procedures similar to BMP4, recommended for protection against Somalia based piracy.BMP4 can be found on the Club's website at:
www.simsl.com/PiracyBMP4.pdf
Article by Bill Kirrane (bill.kirrane@simsl.com)



Map reproduced with kind permission of ICC IMB. The IMB Piracy Reporting Centre is funded solely by donation.

NSF – What Certificates on Delivery? – Further Appeal

The English High Court decision in *Polestar v YHM (The "Rewa")* was discussed in Sea Venture issue 18 and on the Club website at: www.simsl.com/Polestar0911.htm

The case concerned the sale of a vessel "as was" on an amended Norwegian Saleform 1993 and whether the seller was required to deliver the vessel with certificates that were relevant at the time of inspection, or certificates that had, since the date of inspection, become relevant. Between inspection and delivery of the vessel a new MARPOL provision had come into force requiring the vessel to have an International Sewage Pollution Prevention (ISPP) Certificate. The buyer had sought to cancel the Memorandum of Agreement (MoA) on this basis. In the same period, the value of the vessel had halved.

At arbitration the buyers' argument had prevailed but the sellers had successfully appealed that decision before the High Court. The case has now been heard by the Court of Appeal. When dismissing the buyers' appeal the interpretation of clauses 11 and 14 of the contract were considered.

Clause 11 provided that "*the vessel shall be delivered with … her National/International trading certificates, as well as all other certificates the Vessel had at the time of her inspection*".

The Court of Appeal held that the sellers' obligation on delivery was to ensure the vessel had on board all certificates that she had at the time of her inspection and that, absent specific wording to that effect, there was no obligation to provide further certificates that the vessel did not have at the time of her inspection.

A further ground of appeal was that the vessel had been detained because of the absence of the ISPP Certificate. The buyer had argued that the detention gave them a further entitlement to cancel since, as the seller had covenanted in the bill of sale, the vessel was not free from detentions. However, Clause 14 stated *"provided always that the Sellers shall be granted a maximum of 3 banking days after Notice of Readiness has been given to make arrangements for the documentation set out in Clause 8"*.

The Court of Appeal held that clause 14 allowed the seller three banking days to *"make arrangements"*, which meant the clause contemplated the sellers taking such steps to provide the necessary documentation for the valid legal transfer of the vessel in accordance with the bill of sale and MoA. The vessel had been delivered on 30 September and thus the seller had three banking days after that date to lift the detention and to deliver the vessel free from detentions.

Therefore, and in a welcome decision that arguably demonstrates a commercial common sense approach, the appeal failed and the buyer was not entitled to cancel the MoA under either clause 11 or clause 14.

Article by Malcolm Shelmerdine (malcolm.shelmerdine@simsl.com)

by Malcolm Sherlmerdine

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Sanctions – Charterparty Considerations

Sanctions measures, including arms embargoes, trade bans and asset freezes, continue to be a preferred means by which the UN, EU and US seek to exert political pressure on a number of governments who are deemed to be involved in the financing of terrorism, the development of nuclear weapons and weapons of mass destruction, and who are obstructing democracy and economic development.

The last few months have seen an escalation of measures with regard to Iran and Syria.

Perhaps of particular note are the latest EU measures in respect of Iran set out in EU Council Decision 2012/35/CFSP of 23 January 2012 which prohibit the import, purchase, or transport of Iranian crude oil, petroleum products and petrochemical products, as well as the provision of insurance and reinsurance related thereto. An EU Regulation giving effect to the Council Decision is anticipated in the next few weeks. It is to be hoped that the Regulation will remove the current uncertainty surrounding some of the provisions of Decision 2012/35/CFSP.

To keep Members advised of developments the Club will continue to issue Circulars and Risk Alerts in relation to sanctions . Members are advised to discuss any questions they may have with their normal contacts at the Club or visit the dedicated Sanctions area on the Club website at: **www.simsl.com/Sanctions.htm**

Sanctions and their scope are, however, only one aspect of a complicated legal and factual matrix. Charterparty considerations represent another important area particularly in light of the possibility of Iran adopting retaliatory responses that would have an impact on contracts of carriage, contracts of sale and marine war risks insurance. The Strait of Hormuz is a narrow strait in the region connecting the Persian Gulf with the Gulf of Oman and the Arabian Sea. In 2011, a daily flow of almost 17 million barrels of oil flowed through the Strait of Hormuz. This reportedly accounted for about 35% of all seaborne traded oil and more than 85% of these crude oil exports were destined for the Asian markets, mainly Japan, India, South Korea, and China.

■ In an article written for the Club website Stephen Kirkpatrick and Jacqueline Zalapa of Reed Smith discuss the issues facing Members letting or taking vessels on time or voyage charter terms which may be ordered to the region, specifically, compliance with charterers' orders, port safety, frustration and consequential matters, in the context of Iran's threats to block the Strait of Hormuz, or military strikes or other hostile action. The article can be found at: **www.simsl.com/SanctionsConRS0212.htm**

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Deck Cargo

– Can Liability be Excluded?

by Alex Towell

If cargo is carried on deck, and if the contract of carriage in respect of that cargo states the cargo "as being carried on deck", then that cargo is excluded from the definition of "goods" as set out under Article I (c) of the Hague Visby Rules.

As such, the Rules do not apply to that carriage and clauses on the bill of lading seeking to exclude the carrier's liability are not caught by Article III rule 8 of the Rules.

However, sections 1(6) and 1(7) of COGSA 1971 provide:

" (6) Without prejudice to Article X(c) of the rules, the Rules shall have the force of law in relation to:

(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract,...

(7) If and so far as the contract contained in or evidenced by a bill of lading... within paragraph (a)... of subsection (6) above applies to deck cargo... the Rules as given the force of law by that subsection shall have effect as if Article 1(c) did not exclude deck cargo...

In this subsection 'deck cargo' means cargo which by the contract of carriage is stated as being carried on deck and is so carried."

The apparent conflict between these provisions was discussed in the *"BBC Greenland"*, a case involving a voyage from Italy to Mobile, USA, and the loss and damage to filter tanks carried on deck. The bill of lading had been claused on its face: *"All cargo carried on deck at the Shipper's / Charterer's / Receiver's risk..."*. Disputes under the bill of lading were subject to English law and arbitration unless the *"bill of lading is subject to the US Carriage of Goods by Sea Act of the United States of America"*, in which case (i) U.S. COGSA applied and (ii) *"the Carrier may, at the Carrier's election, commence suit in a court of proper jurisdiction in the United States in which case this court shall have exclusive jurisdiction."*

The issues before the court were whether:

1. The clausing on the bill of lading amounted to a statement that the cargo was "carried on deck" or an exclusion of liability if cargo was carried on deck,
2. The Rules nevertheless applied to the carriage because of section 1(6) and 1(7) COGSA 1971.

■ Alex Towell (alex.towell@simsl.com) considers the decision in *Sideridraulic Systems Spa & Anor v BBC Chartering & Logistics Gmbh* (*the "BBC Greenland"*), and why the court decided the cargo was deck cargo and US COGSA applied. His article can be found the Steamship Mutual website at: **www.simsl.com/BBCGreenland0212.htm**

SHELLTIME 4 Clause 15 – Cost of Bunkers on Redelivery

Do the words "*price actually paid*" mean the price paid when the bunkers were stemmed or that paid by the party seeking reimbursement under the clause 15 of Shelltime 4?

Clause 15 provides that charterers are to pay for bunkers on board at the time of delivery and owners shall accept and pay for all bunkers on board at redelivery "*at the price actually paid, on a first-in-first-out basis*" and that *"such prices are to be supported by invoices"*. The vessel had been chartered from her disponent owners and then sub-chartered. On the conclusion of that charter the charterers had re-let the vessel back to her disponent owners for one time charter trip, at the end of which the head charter was considered simultaneously concluded and the vessel redelivered to her disponent owners.

The disponent owners supplied bunkers to the vessel during the period when the vessel was sub-chartered to them. As a result, did the words "*price actually paid*" refer to the price that the charterers paid to disponent owners on redelivery under the sub-charter, which was determined by the first sub-charter, or to the prices actually paid by the disponent owners to the bunker suppliers when the vessel was on sub-charter to them?

In dismissing charterers' appeal the Commercial Court agreed with the tribunal that the words "*price actually paid*" meant the price paid when the bunkers were stemmed.

■ The court's decision is discussed in detail in an article by Gareth Thompson (gareth.thompson@simsl.com) on the Steamship website at **www.simsl.com/BonnieSmithwick0312.htm**

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EU – Enforcement of Judgements v Arbitration Proceedings

The Court of Appeal in *West Tankers Inc v (1) Allianz Spa and (2) Generali Assicurazione Generalia Spa(the "Front Comor")* highlights the use of arbitral proceedings in EU Member States as potential "shields" to enforcement of judgments from other Member States.

Readers may recall this case and the issue of anti-suit injunctions from earlier Sea Venture articles: **www.simsl.com/FrontComor0407.html** and **www.simsl.com/SeaVenture_12.pdf** ("*Anti-Suit Injunctions Contrary to EU Law*")

The original dispute arose after the *"Front Comor"* collided with a jetty owned by the charterers. The charter was subject to English law and London arbitration.

Charterers recovered under their insurance and commenced London arbitration proceedings against the owners for the excess. However insurers, using their rights of subrogation, brought proceedings in Italy. Owners sought to restrain the insurers from taking further steps save by way of arbitration and required them to discontinue the proceedings in Italy. Those proceedings concluded with a ruling from the European Court of Justice that no discontinuation could be so ordered. Accordingly, both sets of proceedings ran on in tandem.

The case has now come before the English courts again on the issue of whether judgment should be entered by the English court in respect of a negative declaratory award obtained by owners in London arbitration stating that they were under no liability for damages to the owners of the pier.

■ The question before the Court was whether it had the power under s.66

Arbitration Act 1996 to enter judgment in the terms of an arbitral award in circumstances where the award was made in declaratory terms (more particularly, a negative declaration). In an article written for the Steamship Mutual website, Asad Naqvi of MFB discusses the decision at first instance and that of the Court of Appeal, as well as commenting on another Commercial Court decision in The *"Christian D"* which dealt with a similar point. His article can be found at: **www.simsl.com/FrontComor0212.htm**

Reconciling Competing Time Bar Provisions – A Stroke of Genius?

by Francis Vrettos

Ensuring all possible time limits are protected is every claimant's nightmare but the English High Court may have provided some certainty in this regard as far as cargo claims pursued under the Inter-Club Agreement 1996 ("ICA") are concerned with the recent decision in *The "Genius Star 1".*

The vessel was time chartered on an amended NYPE 1946 form and sub-chartered for a single trip time charter. The cargo was discharged on 19 Sept 2006, following which a cargo claim arose. Sub-charterers settled the claim and sought an indemnity under the ICA which was incorporated in the sub-charter. In their turn, charterers claimed an indemnity under the ICA from owners under the head charter. Both charters also contained an amended Centrocon time-bar of 12 months from final discharge for all claims. The time limit for notification of claims for indemnity under the ICA is two years.

Back-to-back arbitrations were commenced but only after 12 months from final discharge had elapsed. Notification of the claims for indemnity under the ICA was given shortly after the sub-charterers had settled the cargo claim. This was some 16 months after discharge of the cargo. In reliance on the Centrocon clause, owners argued that the claim for indemnity was time-barred.

The arbitrators construed the conflicting provisions of the Centrocon clause and ICA in favour of the charterers. On appeal the High Court upheld the arbitrators' decision.

■ The basis on which the conflict between Centrocon and ICA time bar provisions was resolved is discussed by Francis Vrettos (francis.vrettos@simsl.com) in an article written for the Steamship Mutual website at: **www.simsl.com/GeniusStar0212.htm**

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Terminating a Time Charter

– Do Landlord and Tenant Principles Apply?

The English High Court recently heard an interesting appeal by the bareboat charterer of the vessel *"Mahakam" (Parabulk II SA v Heritage Maritime Ltd).*

A dispute arose between the parties during the course of the 60 month charterparty when charterers failed to make timely payments under the terms of the charter. In addition to the standard payment requirements, clause 38.8 provided that punctual payment of hire "shall be of essence". Charterers defaulted in their hire payments and owners claimed to have terminated the charterparty in June 2009.

Owners claimed to have terminated lawfully on three alternative grounds including the charterers' repeated failures to pay hire and the fact that their "*evident inability to pay*" constituted a repudiatory breach of the

charterparty. Charterers disputed that owners had lawfully terminated the charter, claiming that any right to terminate for failure to make payments, as set out in the termination notices, had been waived by each successive demand for hire. In support of their position, charterers relied on cases from the field of landlord and tenant law; if, knowing of an event of default and the right to terminate a lease, a landlord nonetheless makes an unequivocal demand for rent, he is taken to have waived the right to terminate for non-payment of that rent.

The arbitrators decided there was no waiver and owners' termination of the charterparty had been valid, as well as that taking into account all the unpaid instalments of hire owners had lawfully terminated the charterparty for repudiatory breach.

Charterers appealed. Mr Justice Eder held that (a) there was no principle binding upon him from the law of landlord and tenant that required him to find that a demand for future rent waived the right to terminate the contract, (b) even if there were such a right, the Court was not bound to follow it in shipping cases and (c) that if such a principle did exist, that demand for payment had been made at a time when there was no entitlement to terminate and, therefore, no entitlement that could be waived.

■ Further details of this decision and of the waiver issues are discussed by Diana Sailor (diana.sailor@simsl.com) in an article written for the Steamship Website at: **www.simsl.com/Mahakam0212.htm**

RightShip Approval Clauses

– The Right Idea?

Image courtesy of CF Spencer & Co Ltd

Arbitrators and maritime counsel usually become involved in a shipping dispute only after one party's expectations are disappointed.

Charterers often find out about a vessel's shortcomings when it fails to perform as anticipated, is detained in port due to deficiencies, or is rejected by a shipper. RightShip, the Australia-based ship vetting company, attempts to bridge the information gap by supplying an ocean of data on commercial vessels and even rating vessels' suitability for a given voyage.

RightShip holds itself out as an independent ship vetting company that provides reliable and transparent ratings for virtually any commercial vessel afloat. Users log into RightShip's Ship Vetting Information System (SVIS) and enter basic information about the proposed voyage. RightShip analyzes the user's request and its own database of information on the vessel. Based on this information, RightShip provides a 1 to 5 star rating which indicates whether the vessel is acceptable for the voyage or requires further review. Users can also view information about the vessel from RightShip's database. RightShip may even conduct physical inspections of low-scoring vessels to determine whether they can be approved.

Whilst there have been decisions on the subject and construction of clauses requiring RightShip approval as a matter of English law (see:**www.simsl.com /Silver0908.html**) New York arbitrators or courts have not yet had occasion to rule on RightShip approval clauses, but tanker vetting clauses can provide a useful analogy.

■ In an article written for the Steamship Mutual website, Peter Skoufalos, a partner at Brown Gavalas & Fromm LLP in New York, considers RightShip clauses, given their possible ramification for an owner and the scope for costly disputes. His article can be found at: **www.simsl.com/RightShip0212.htm**

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Beware Demurrage Time Bars and Documentation (Part II)

by Sian Morris

The controversial issue of demurrage time bars has been before the court again with the Court of Appeal reconsidering this matter in the *"Abqaiq"* following the judgment of Field J of the Commercial Court.

That first instance decision was discussed in Sea Venture issue 17 and the associated website article:
www.simsl.com/Abqaiq0211.htm

The amount of demurrage was not in dispute, but charterers had defended the claim on two bases: First, owners were precluded from claiming demurrage because they had mischaracterised the claim and the original demurrage claim had been paid as put forward. Second, having mischaracterised their claim initially, owners then failed to comply with the time bar when representing the claim. The Commercial Court held in favour of charterers. Owners appealed.

The Court of Appeal has now reversed that decision and, as with the *"Eagle Valencia"* (**www.simsl.com/Eagle0210.html**) taken a further step back from the *"too mechanistic an approach"* to the presentation of demurrage claims followed by tribunals and the courts. For example, the *"Sabrewing"* (**www.simsl.com/Eternity0109.html**) in which the failure to provide signed pumping logs within the 90 day time limit for one discrete aspect of the claim meant that, on its proper construction, the effect of the time bar clause was that the entire claim for demurrage was time-barred.

- The decision in the *"Abqaiq"* is discussed in detail by Sian Morris (sian.morris@simsl.com) in an article written for the Steamship Mutual website at: **www.simsl.com/Abqaiq0212.htm**

Deviation and Fundamental Breach of the Contract of Carriage

– A Last Goodbye?

The concept of deviation, in the sense of an unjustified departure from the voyage agreed in the contract, has played an important role in the development of English maritime and insurance law.

The Marine Insurance Act of 1906 specifically provided that, in the context of a policy for a voyage (as opposed to a period of time): *"...where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of the deviation..."*

In an attempt to mitigate the position of the cargo interests in such a situation, the law of carriage of goods by sea required the carrier to proceed by the prescribed route. If he did not do so and loss or damage to the cargo then occurred, the carrier was held to be in "fundamental breach" of contract. In consequence, he was held liable for that loss or damage, regardless of any defences or limitations in the contract of carriage that might otherwise have applied.

- In an article written for the Steamship Mutual website, David Martin-Clark, an Associate member of Stone Chambers, discusses the case law by which the concept of fundamental breach of contract has developed and asks whether there is now a case for burying the doctrine of deviation as a fundamental breach in the maritime arena. His article can be found at: **www.simsl.com/Astrazeneca0212.htm**

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U.S. – Enforcement of Arbitration Clauses in Crew Contacts

by Paul Brewer

There has been a good deal of activity in the United States concerning the enforceability of arbitration clauses in crew contracts.

This has culminated in a ruling from the Eleventh Circuit Court of Appeals in the case of *Lindo v Norwegian Cruise Lines* which affirmed the district court's order that compelled the case to arbitration.

Lindo alleged that he had injured his back after he was ordered to transport heavy trash bags to the ship. His employment contract specified that all Jones Act claims would be resolved by binding arbitration. The effect of the clause in Lindo's case was to require arbitration in Nicaragua under Bahamian law.

Lindo challenged the arbitration provision; he maintained that the application of Bahamian negligence law in an arbitration, rather than U.S. statutory negligence law under the Jones Act, amounted to a prospective waiver of his Jones Act claim.

In reaching its decision the Appeal Court reviewed the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as Supreme Court and Circuit precedents.

■ Full details of the court's rationale can be found in an article written by Paul Brewer (paul.brewer@simsl.com) for the Steamship Mutual website at: **www.simsl.com/LindoNCL0212.htm**

Arbitrator as Advocate?

The recent Commercial Court decision in *ED&F Man Sugar Limited v Belmont Shipping Limited (The "Amplify")* has provided some clarity on the scope of s.33 Arbitration Act 1996 ("the Act"), confirming that a tribunal is not obliged to alert a party to potential arguments different to that which it has advanced.

The original dispute between the appellant charterer and the respondent owner concerned a demurrage claim and the commencement of laytime. The award, which was based on documents alone, noted that the charterer had not relied upon the decision in The *"Happy Day"* and that the potential consequences of that case had not affected the tribunal's conclusion.

The charterer sought to challenge the award, under s.68 of the Act, on the basis that the arbitrators had breached their duty under s.33 of the Act to *"act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case"* by not enquiring whether any reliance was placed on *The "Happy Day"*. The charterer relied on a comment made by Waller LJ in *The "Magdalena Oldendorff"* that *"if an arbitrator appreciates that a party has missed a point then fairness requires the arbitrator to raise it so that the party can deal with it."*

The Commercial Court disagreed, stating that *"arbitrators are not barred from asking a party whether it has considered raising a different case from that which it has advanced but section 33 of the... Act does not oblige them to do so."* On the facts, the tribunal had discharged their obligations and the Act did not require them to go any further, by offering an opportunity to put a case different from that which the charterer had chosen to put.

■ The decision and its consequences are discussed in further detail by Kate Greensmith of Ince & Co, who acted for the successful defendant, in an article on the Steamship Mutual website at: **www.simsl.com/Amplify0212.htm**

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The CONWARTIME 1993 Clause – Finally Tried and Tested

In November 2011 the English High Court was asked to decide a dispute concerning Conwartime clause and, in particular, the meaning of the underlined words from clause (2) of Conwartime 1993 *"...may be, or are likely to be, exposed to War Risks"*.

The shipowners had sought to rely on Conwartime 1993 to justify proceeding via the Cape of Good Hope rather than through the Gulf of Aden as ordered. Teare J concluded that the clause required a real likelihood or real danger that the vessel would be exposed to acts of piracy but before remitting the dispute back to the arbitrators gave the parties the option to make further submissions. The decision is discussed in an article by Tony Swinnerton and Christine Vella of Swinnerton Moore LLP on the Club website at: **www.simsl.com/conwartime-1993.htm**

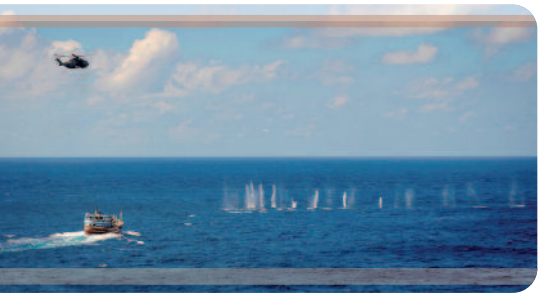

Image courtesy of The Royal Navy Counter Piracy website

In mid-January 2012, Teare J was asked to decide a further issue on which owners and charterers disagreed. This was the meaning of the words *"exposed to War Risks"*, with War Risks being defined in clause (1) as including acts of piracy. Reading the clause as a whole the judge concluded:

- That *"exposed to War Risks"* should properly be construed as referring to a situation which is "dangerous".
- What is dangerous will depend upon the facts of the particular case but declined to trespass upon the fact-finding responsibilities of the arbitrators.

Giving guidance to the arbitrators (as well as generally) the judge said: *"I shall order that the award be remitted to the arbitrators to reconsider, in the light of my judgment and having regard to the evidence adduced by the parties, whether, in the reasonable judgment of Bulkhandling, there was a real likelihood that the vessel would be exposed to acts of piracy in the Gulf of Aden. In shorthand the question is whether, in the reasonable judgment of Bulkhandling, there was a real likelihood that the Gulf of Aden would, on account of acts of piracy, be dangerous to Triton Lark".*

As with the decision in November 2011, this decision provides welcome clarification of the test shipowners need to satisfy if they are considering refusing an order to transit an area affected by "acts of piracy" (or of any of the other events falling within the Conwartime definition of War Risks). We are grateful to Swinnerton Moore LLP for this and last November's article commenting on the *"Triton Lark"*.

Crew Claims in the Philippines – Ever Changing Seas

by Martin Turner

The outcome of cases involving claims by Filipino crew is never easy to predict.

Two cases with similar facts might yield different and apparently contradictory results. Cases usually turn on three issues which are often at the core of disability compensation claims:

- whether a medical condition is "work-related"
- whether an inability to return to work within 120 days demonstrates a *"total and permanent disability"* and
- whether the Philippines Overseas Employment Administration (POEA) contract or an applicable collective bargaining agreement (CBA) provides the governing scale of disability benefits.

In a recent case the Philippines Supreme Court (3rd Division) had to review these issues yet again. It additionally considered the rules relating to medical conditions which are not listed as "occupational diseases" under the POEA Standard Employment Contact and the burden of proof that applies to such conditions which that contract deems *"disputably presumed as work-related"*.

■ In an article written for the Steamship Mutual website Martin Turner (martin.turner@simsl.com) reviews the decision in *Fil Star Maritime Corporation v Hanziel Rosete*. His article can be found at: **www.simsl.com/Rosete0212.htm**

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California –

Enforcement of Vessel Fuel Standards up to 24 Miles from Coast

by Naomi Cohen

The debate and litigation surrounding the *Regulation on Fuel Sulphur and Other Operational Requirements for Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline* was on-going for several years.

Charts from CARB Marine Notice 2011_2.

Sea Venture issue 11 **www.simsl.com/SeaVenture_11.pdf** and several subsequent website articles reported on the litigation by Pacific Merchant Shipping Association ("PMSA") (a mutual benefit corporation comprised of owners and operators of U.S. and foreign-flag vessels) which sought to prevent the state of California from expanding its enforcement of vessel fuel standards to 24 miles, well beyond the state's traditional 3-mile territorial limit.

In March 2011 the U.S. Court of Appeals for the Ninth Circuit rejected the PMSA appeal on this issue meaning that the California Air Resources Board (CARB) was free to enforce the amended Regulation. In November 2011 CARB issued a Marine Notice (2011-2) confirming that the amended Regulation would be enforced with effect from 1 December 2011.

The changes to the fuel requirements are as follows:

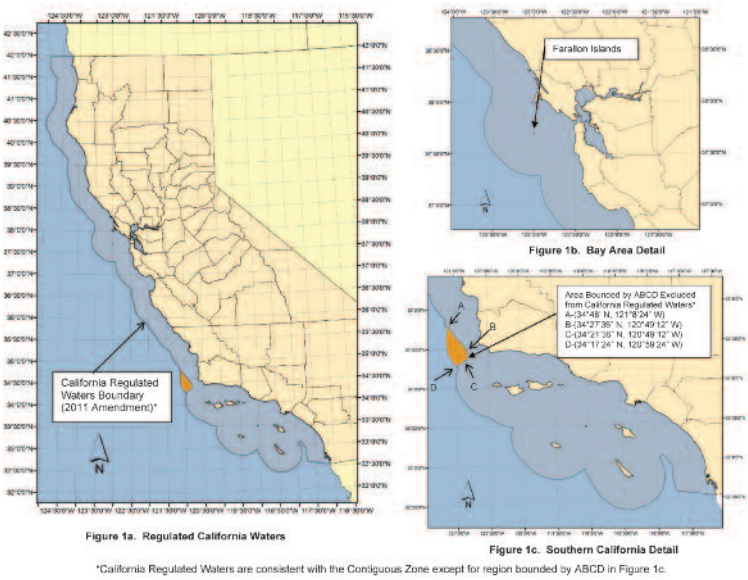

Figure 1a. Regulated California Waters

Figure 1b. Bay Area Detail

Figure 1c. Southern California Detail

*California Regulated Waters are consistent with the Contiguous Zone except for region bounded by ABCD in Figure 1c.

Fuel Requirement	Effective Date	Percent Sulphur Content Limit
Phase 1	1 July 2009	Marine gas oil (DMA) at or below 1.5% sulphur; or Marine diesel oil (DMB) at or below 0.5% sulphur
Phase 1	1 August 2012	Marine gas oil (DMA) at or below 1.0% sulphur; or Marine diesel oil (DMB) at or below 0.5% sulphur
Phase 2	1 January 2014	Marine gas oil (DMA) or marine diesel oil (DMB) at or below 0.1% sulphur

The *Ocean-Going Vessels - Fuel Rule* page of the CARB website gives further details about the Regulation, enforcement and penalties, including all related Marine Notices, and can be found at: **www.arb.ca.gov/ports/marinevess/ogv.htm**

- Further background, including information about MARPOL Annex VI affecting the area pursuant to North American Emissions Control Area regulation, can be found in a website article at: **www.simsl.com/CaliforniaFuel24Miles0411.htm**

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

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Entitlement to Payment for Hire and Bunkers Following Termination of Charter

by Anna Yudaeva

A recent London arbitration decision has awarded owners additional remuneration in lieu of hire and bunkers consumed for carrying and discharging cargo subsequent to termination of a charterparty.

The vessel was chartered on an amended Baltime 1939 form and delivered to charterers on 13 July. Charterers failed to pay hire on delivery or the subsequent payment due on 28 July. The vessel was laden with bagged cement bound for Matadi when, on 3 August, charterers told owners they were *"obliged to stop any activities"* and went on to expressly ask owners to *"at least discharge the goods."*

By 14 August three instalments of hire remained unpaid. Owners gave charterers 72 hours' notice to pay hire due or the vessel would be withdrawn and simultaneously gave a notice suspending performance immediately. Upon expiry of the 72 hours owners notified charterers that they were treating the failure to pay hire as repudiatory conduct, which was duly accepted, thus bringing charter to the end. Further, owners withdrew the vessel from charterers' service as per the anti-technicality notice given. At arbitration, owners claimed unpaid hire and bunkers up to termination of the charter. They made a further quantum meruit claim for hire and bunkers consumed in carrying and discharging cargo at Matadi.

The tribunal held that owners were entitled to the claimed amounts because charterers had expressly asked owners to "at least" carry the cargo to the port of discharge and this request was made when charterers were already in breach of charter, although prior to termination.

■ The award is discussed in detail by Anna Yudaeva (anna.yudaeva@simsl.com) in an article written for the Steamship Mutual website at:
www.simsl.com/PostTermClaim0212.htm

Stowaway Gives Vessel Seal of Approval!

An injured New Zealand fur seal was spotted on the rudder of the Laeisz owned vessel "PIRO" during her call at Port Kembla in January.

The animal's peculiar choice of refuge sparked the interest of many locally, concerned about its fate as it appeared to be recovering from a shark bite. The National Parks and Wildlife Service opted against removing it from the rudder saying: *"We ask people to keep in mind that shark attacks are a natural occurrence and, yes, they may inflict wounds on an animal but if you start interfering with natural processes, you are going to interrupt the balance of things."*

The seal appeared to be otherwise healthy and the wound on its back was not weeping. Resting out of water is common behaviour for sick, injured or exhausted fur seals, even though this choice of location may have been a tad unconventional. The seal is believed to have climbed onto the rudder when the ship was lower in the water.

Owners were pleased that the seal instinctively knew the vessel was a safe and suitable haven in its time of need.

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A Cautionary Tale
– What Grounds to Claim?

by Sarah McGuire

Glencore Energy (UK) Ltd v Sonol Israel Ltd (The "Team Anmaj") was an application by the defendant cargo buyers to strike out the claimant sellers' demurrage claim on the basis that it was out of time.

The sale contract between the parties included a laytime provision and incorporated *"Demurrage: As per charter-party rate, terms and conditions"*. However, the cross-referencing between the sale contract and the charterparty terms created difficulties and the issue Beatson J was asked to determine was whether:

1. The sale contract created a liability for demurrage by way of "indemnity" or
2. By incorporation of the provisions of the charterparty, the sale contract should be construed as containing an independent demurrage obligation.

The important distinction between the two being that where the claimant relied on the demurrage provision as an "indemnity", the obligation for payment only accrued when the defendant buyer was presented with the invoice and, accordingly, the limitation period would start to run from that date meaning the claim had been brought (just) within the time limit.

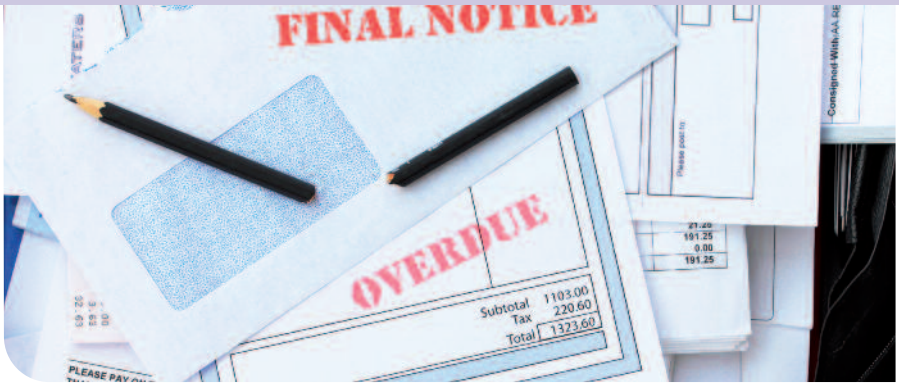
In his judgement, Beatson J considers the nature of such liquidated damages clauses and the commercial certainty they afford to the parties to a contract. He also considers how, where contracts overlap creating uncertainties, the obligation to pay demurrage might be affected.

■ In an article written for the Steamship Mutual website Sarah McGuire (sarah.mcguire@simsl.com) discusses the judgment in detail:
www.simsl.com/TeamAnmaj0212.htm

Charterers' Default and the Pitfalls to Avoid

In the current market the Club is often asked to advise on owners' rights and remedies should charterers stop paying hire. Payment of hire is a contractual obligation, the non-payment of which will put charterers in breach of charter. There are many questions to be addressed when charterers fail to pay hire.

Most owners are surprised to learn that mere non-payment of hire, even on more than one occasion, is unlikely to amount to a repudiatory breach of charter such as to entitle an owner to treat the charter as at an end.



Payment of hire is rarely a condition of the charter and to demonstrate a repudiatory breach an owner must also show that its charterer has "evinced an intention not to be bound" by the terms of the charter.

Most owners are surprised to learn that mere non-payment of hire, even on more than one occasion, may not on its own and absent any express provision to the contrary (see page 11: *Terminating a Time Charter*) amount to a repudiatory breach of charter such as to entitle an owner to treat the charter as at an end.

■ Sian Morris (sian.morris@simsl.com) discusses these issues and others in more detail in an article on the Club website at:
www.simsl.com/CharterDefault0212.htm

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Certainty at Last?
– Latest Developments in Part 36 Offers

by Gareth Thompson

It may seem that there has been a recent explosion of case law concerning the technical requirements for making a valid settlement offer pursuant to Part 36 of the Civil Procedure Rules ("CPR").

Indeed, issue 17 of Sea Venture considered the first instance decision of C v D which looked at the effect of incorporating a time limit for acceptance into a Part 36 offer. (See the related website article at: **www.simsl.com/Part360211.htm.)**

To recap briefly, the purpose of Part 36 of the CPR is to provide a framework by which participants to litigation can make an offer to settle a claim, in part or whole. There are costs penalties associated with failing to accept an offer if the recipient is subsequently unable to achieve a more favourable settlement/judgment.

The latest decisions in this area of law are the Court of Appeal judgment in *C v D* and, more recently, the High Court judgment in *Thewlis v Groupama Insurance*. The latter provides a useful synopsis of the preceding case law on this subject and clarification on the technical drafting requirements necessary for an offer to be deemed valid under the terms of Part 36.

- Both these judgments are discussed in detail by Gareth Thompson (gareth.thompson@simsl.com) in an article written for the Steamship Mutual website at: **www.simsl.com/Part36Thewlis0212.htm**

"Thank you very much to Steamship!"
– An Intern's Experience

Over the years the Managers have offered a variety of internships for students studying in various fields related to the maritime and P&I industries. In the following article, Kai Roehreke, our most recent intern, describes his experiences.

I am Kai Roehreke, 26 years old, and a student of the University of Bremen of Applied Sciences. In 2006 the University introduced a new bachelor degree course focusing on the future needs of the shipping industry as far as the qualification of shore based personnel is concerned, especially in the areas of chartering, operating, claims management and ship management. One key aspect of the course is to teach the legal, as well as technical, aspects of the industry.

The course, which lasts 7 semesters, incorporates a mandatory internship abroad in the 5th semester. I was given the great opportunity of an internship at Steamship Insurance Management Services Limited in London. I found this very interesting and it showed me that the University lectures on insurance had been quite rudimentary!

The mandatory internship is a marvellous chance to improve our practical knowledge and I could not think of a more suitable company than Steamship in which to do so. I spent the majority of my time working within the European Syndicate as a claims handler. I dealt with a range of diverse cases from cargo surveys, learning to identify what particular areas of concern different cargoes bring, to repatriation of injured crew members, often involving urgent medical treatment and distraught family members far from the patient. Additionally, I had the opportunity of spending some time with the Loss Prevention Department and Underwriting. This gave me a complete overview of what P&I is all about and the different facets of cover and service that Steamship Mutual offers its Members.

I had already completed a training programme with a German ship owner before I started my studies so my Steamship internship enabled me to see both sides of the P&I world and to understand the concerns and problems of each.

My time at Steamship has shown me that I would very much like to spend further time in London during my career, hopefully working in a P&I Club. I would like to use this article to say thank you very much to Steamship and all its staff. I had a great time, made a lot of new friends and I won't forget this time in a hurry!

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Two Teams, Three Peaks and the Sailors' Society

The Sailors' Society Three Peaks Challenge is a prestigious fundraising event which takes place every other year.

This year's Challenge will be the fifth for the charity. The past three events have raised a total of £1.5 million for the Sailors' Society. 40 teams from shipping related industries are taking part in this year's event which takes place from 15 to 17 June 2012.

The Sailors' Society is an international charity that provides an invaluable personal lifeline to seafarers throughout the world and exists to enrich and enhance the well-being of the world's 1.2 million seafarers. The charity, through a network of Port Chaplain's and Seafarers' Centres across the world, helps to provide practical, emotional and spiritual support for seafarers worldwide.

This demanding event will test each team's physical and mental abilities as well as teamwork and navigational skills as they climb Great Britain's highest peaks within 24 hours. The peaks to be tackled are Ben Nevis (1344m/4406ft) in Scotland, Helvellyn (950m/3118ft) in the Lake District and Snowdon (1085m/3560ft) in Wales.

From left to right: William Baynham, Anna Yudaeva, Nimisha Shah, Martin Turner, Jamie Taylor and Karolina Harvey

The Three Peaks Challenge is a fantastic fundraising opportunity but it is also a race and teams will be competing against one another to achieve the best possible times. In recognition of this the Cargill Cup is awarded on a points basis to the team with a combination of the fastest climb time and most money raised. There are also trophies available for second and third place based on speed and the highest fundraising team is awarded a trophy from the Sailors' Society.

This year two teams will be representing SIMSL: A girls team – Nimisha Shah (Eastern Syndicate), Karolina Harvey (Eastern Syndicate) and Anna Yudaeva (European Syndic ate) and a boys team – William Baynham (European Syndicate), Jamie Taylor (European Syndicate) and Martin Turner (Americas Syndicate). To sponsor this year's teams please go to: **www.justgiving.com/Steamship-ThreePeaks**

SIMSL News

We have recently said farewell to two valued and longstanding members of staff who have been with the company for a combined total of over 50 years.

- Jenny Bull (pictured left), Executive Assistant, joined the company in June 1981 as an Audio Typist.
- Rosemary Fowler, Telephonist/ Receptionist, joined the company in April 1989 as a Clerical Assistant.

We wish them both a happy and healthy retirement.

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• Website News • Website News • Website News •

Visit the Steamship Mutual website at: **www.simsl.com** to see the latest updates on a variety of current issues including:

Circulars
www.simsl.com/Club-Circulars.htm

Piracy
www.simsl.com/piracy.htm

Website Articles
www.simsl.com/publications-articles.html

"A Team Effort" – A Guide to Casualty Investigation and Claims Handling

Members have previously received the Club's claims handling guidance tool "A Team Effort" in Interactive DVD-ROM. This publication is in the process of being updated for the 2012/2013 year and will include additional materials and an additional language version – Brazilian Portuguese.

In addition to the information previously only available in hard copy, the Guide also contains the latest Club's Rules and List of Correspondents. Each claims-specific section of text is linked to the relevant Club Rule for that particular area of cover. Additional specimen documents, reference materials and hyperlinks to useful internet resources including the Steamship Mutual website are also provided.

In a highly versatile and user-friendly format for use on-board and ashore, "A Team Effort" gives the viewer access to resources which will assist in dealing with the wide variety of situations that can affect an Owner and his vessel. Further information about this production can be found on the Steamship Mutual website at: **www.simsl.com/loss-prevention-and-safety-training.html**

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