SEA VENTURE

STEAMSHIP MUTUAL

ISSUE 20

In this issue

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INTRODUCTION

by Malcolm Sherlmerdine

Welcome to issue 20 of Sea Venture with its revised layout and additional space for more feature style articles where the subject matter warrants a little more detail than the usual summaries. As usual, this issue covers recent legal decisions as well as other subjects that we think will be of interest to Members, with links where appropriate to the Steamship Mutual website. The subjects covered include: a Court of Appeal decision with helpful guidance on the law to be applied where an arbitration clause is silent in this respect, the problems that can be encountered enforcing an English award in Australia, demurrage claims where a charterer refuses and /or is prevented from discharging, carriage of steel and Retla Clauses, pollution issues, crew claims, and an all too unwelcome but frequent event these days – claims for unpaid bunkers supplied by charterers and consequent arrests. The Managers are also pleased to include reports on (i) the Member Training Course that took place last June; while only the second time that the course has been held the feedback from the delegates has been extremely positive and plans are already in hand for the third course next year, and (ii) the Seatrade Safety at Sea Award 2012 received for the Club's Loss Prevention DVD "**Piracy – The Menace of the Sea**".

SIMSL news reports on feats of physical endurance undertaken by seven members of Club staff to raise money for worthwhile charitable causes: The Three Peaks Challenge, in which the Club entered a six person team, and the Marathon des Sables undertaken by Simon Kaye who successfully completed a gruelling seven day running race in the Moroccan Sahara desert covering 151 miles!

The Managers are grateful to all those who contributed to this issue but, in particular, to those members of the staff who are relatively new to the Club and who have written articles for Sea Venture for the first time: Alfonso Carmona, Nathaniel Harding, John Coccolatas, Elli Marnerou, Ben Johnson, and Stuart Crozier.

As ever the editors of Sea Venture welcome feedback on the publication.

Malcolm Shelmerdine

6 December 2012

EDITORIAL TEAM

Naomi Cohen
Malcolm Shelmerdine
Sian Morris
Richard Allen

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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"Piracy – The Menace at Sea" wins Seatrade Safety at Sea Award 2012

Seatrade AWARDS 2012 Winner of Safety at Sea Award

Chris Adams with Tom McInnes of Callisto Productions

Chris Adams receives the award

(L to R) The Rt Hon Michael Portillo; Koji Sekimizu, Secretary-General, IMO; Chris Adams, Director and Head of Loss Prevention, SIMSL; Tom Boardley, Marine Director, Lloyd's Register (award sponsor); Chris Hayman, Chairman, Seatrade

The Managers are delighted to have received on behalf of the Club the *Seatrade Safety at Sea Award 2012* for the Club's loss prevention DVD "**Piracy – The Menace at Sea**". The award, sponsored by Lloyd's Register, was presented by IMO Secretary-General Koji Sekimizu, who chaired the Seatrade Awards 2012 judging panel.

The awards ceremony dinner took place on Monday 14 May 2012 at the Guildhall, London. The event was attended by over 350 guests including ship owners, ship builders, brokers, government bodies, associations and others within the shipping industry.

Established in 1989, the Seatrade Awards is one of the most respected and recognised global maritime award schemes. The prestigious scheme rewards those who have demonstrated innovative solutions for safe, efficient and environmentally friendly shipping and is in keeping with the goals and objectives of the International Maritime Organization.

Mr Sekimizu concluded the evening by saying: *"Through these challenging times for the shipping industry, the Seatrade Awards once again provide an encouraging reminder that shipping is still able to tap into a rich vein of innovation and excellence by recognising and celebrating those who have demonstrated a clear ability to make improvements in key areas such as safety at sea and clean shipping and that these awards encourage others to strive for similar achievements."*

The production of "**Piracy – The Menace at Sea**" was supported by EUNAVFOR, NATO, the Royal Navy, UKMTO, OCIMF, INTERTANKO, INTERCARGO, IMO and the IMB among others.

As with the Club's previous loss prevention DVDs the project was undertaken by Callisto Productions and financed by The Ship Safety Trust.

■ Further information about the DVD, including the option to view the full film (including Chinese, Russian and Tagalog language versions) or a trailer, can be found on the dedicated "**Piracy - The Menace at Sea**" webpage at: **www.simsl.com/PiracyDVD.htm**

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When Charterers Fail to Pay for Bunkers

Bunker Claims

Market conditions over the past few years have been difficult and numerous charterers have become insolvent or filed for bankruptcy protection.

Following on from an article in issue 19 of Sea Venture – "*Charterers' Default and the Pitfalls to Avoid*": **www.simsl.com/CharterDefault0212.htm** – Jeb Clulow of Reed Smith considers claims owners face when charterers do not pay for bunkers.

Bunker suppliers may claim:

1. That they remain the owner of the bunkers by virtue of a retention of title clause provided for in their standard terms and conditions.
2. That vessel owners are a party to the bunker supply contract by virtue of the invoice being addressed to them as well as charterers.
3. That they have a maritime lien against the vessel.

In England and most common law jurisdictions the vessel and her owner will usually not be liable to pay for bunkers ordered by charterers.

The position in the USA can be different and a bunker supplier will therefore often seek to arrest there. This is because the US Maritime Lien Act (MLA) gives a bunker supplier a maritime lien where the person ordering the bunkers was authorised and, crucially, presumes that a charterer is so authorised.

If an arrest is made in the USA this does not mean that US law or MLA will apply or that liability will be established automatically. In addition, if owners have made it clear to the supplier that the stem is for charterers' account only no lien will arise.

■ These claims and the steps owners can take to avoid them are discussed in more detail at: **www.simsl.com/BunkerClaims1112.htm**

Charterers' Obligation to Discharge Cargo

Frustration, Causation, Demurrage

In *DGM Commodities Corp v Sea Metropolitan SA* the English Commercial Court dismissed an appeal by charterers against a decision by arbitrators to award owners demurrage when the cargo receivers failed to discharge cargo.

The vessel was already on demurrage when a gasoil leak from an adjacent bunker tank contaminated part of a cargo of frozen chicken legs. Under the charter discharge was the responsibility of the charterers or their agents. The cargo receivers though refused to discharge the cargo and sought cash compensation. The arbitrators held that demurrage was interrupted as the vessel's unseaworthiness was causative of both the contamination and subsequent delay. However, the delay in discharging the cargo had been prolonged not only as a consequence of the receivers' failure to discharge the damaged cargo but because they refused to accept security and, instead, insisted on a cash settlement with owners. In addition, the local Veterinary Service imposed an order suspending all movement of cargo following their attendance on board the vessel.

by John Coccolatos

The owners agreed a settlement with the receivers after some 6 months of negotiations whereby the damaged cargo would be re-exported on the vessel on payment by the owners of a cash settlement of US$2.3m. Some three weeks later the Veterinary Service granted permission authorising the re-export of the cargo.

The arbitrators found that not only should the receivers have accepted reasonable security but that the Veterinary Service should have resolved the lifting of its suspension within a month. If it had, demurrage would have begun to run again on the basis that from that point on, the link between the owners' initial breach and the prolonged suspension was too remote.

The appeal, whilst substantiating the arbitrators' findings, primarily addressed the issue of frustration. The charterers had argued that because the tribunal had found that the Veterinary Service's order preventing discharge was the immediate cause of the delayed discharge the charter was frustrated. In dismissing the appeal the Court concluded that the charterers were under a non-delegable duty to discharge the cargo, that the receivers could if they had wished have procured the lifting of that order, and that the charterers were liable for the receivers' failure to discharge.

■ The decision is considered in further detail by John Coccolatos **(john.coccolatos@simsl.com)** in an article written for the Steamship Mutual website at: **www.simsl.com/DGM1212.htm**

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BIMCO Clause

The liquefaction of solid bulk cargoes (in particular, nickel ore loaded in Indonesia and the Philippines) is a significant issue and one that has caused, or at least contributed to, an alarming loss of life, vessels and cargo in recent years.

For every serious incident, there will no doubt have been several near misses that have gone unreported. Many of these might have been prevented if cargoes had been accurately described, properly sampled and had documentation displayed independently verified transportable moisture limits (TML).

Notwithstanding the requirements of SOLAS and the IMSBC Code, wherein fine particulate minerals are classified as "Group A" hazards, issues are still arising. The majority of responsible owners are aware of the hazards of liquefaction but are, at the same time, often faced with considerable pressure, intimidation during loading and a lack of a firm mechanism allowing them to sample cargoes prior to loading.

In an attempt to address this, the International Group of P&I Clubs and BIMCO have developed an industry standard clause, which provides the following:

- An overriding obligation for charterers to ensure that all solid bulk cargoes are presented for carriage in compliance with IMSBC Code and other applicable international regulations;
- Prior to the commencement of loading, charterers must provide the Master, or his representative with documented information in accordance with the IMSBC Code;
- Gives owners the right to take samples prior to loading and that these may be tested at an independent laboratory (as nominated by owners). Time and costs for charterers' account;
- Express provision for unrestricted and unimpeded access to cargo for the Master or owners' representative for the purpose of sampling;
- The Master may refuse to accept/load/sail and call for replacement cargo at his "*sole discretion*" if "*using reasonable judgement*" he considers there to be a risk (not limited to liquefaction) to the vessel, crew or cargo; and
- An indemnity provision in favour of owners for losses, costs, expenses and liabilities that arise from charterers' instructions or failure to comply with their obligations.

It is recommended that the clause be incorporated into time charters that allow for the carriage of solid bulk cargoes prone to liquefaction and voyage charters fixed for the same purpose. It can be accessed free of charge from the BIMCO website at:

www.bimco.org/Chartering/Clauses/Solid_Bulk_Cargoes_that_Can_Liquefy.aspx

by Nathaniel Harding

Members should contact the Club if they have any questions or concerns relating to this matter.

Article by Nathaniel Harding (**nathaniel.harding@simsl.com**)

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Commercial Common Sense

by Sian Morris

Rainy Sky v Kookmin Bank concerned interpretation of a refund guarantee issued by Kookmin Bank for advance payments made by the buyer under a shipbuilding contract. A poorly-drafted clause in the refund guarantee required the bank to pay back "such sums".

The question was to which sums these words referred? The buyer argued the sums were the "Instalments" mentioned in the same sentence (sums due under the shipbuilding contract, including the refund of advance payments in the event of the yard's insolvency); the bank contended the sums were those mentioned in the previous sub-clause (payable on various guarantee trigger events but not insolvency). The yard suffered financial difficulties and the buyer claimed under the guarantees.

The Supreme Court considered the role to be played by business common sense in deciding what the parties had intended. In many cases two interpretations are possible in which case, it is generally appropriate to prefer the interpretation which is most consistent with business common sense.

"In these circumstances I would, if necessary, go so far as to say that the omission of the obligation to make such re-payments from the Bonds would flout common sense but it is not necessary to go so far. I agree with the Judge and Sir Simon Tuckey that, of the two arguable constructions of paragraph [3] of the Bonds, the Buyers' construction is to be preferred because it is consistent with the commercial purpose of the Bonds in a way in which the Bank's construction is not." (Lord Clarke)

■ The decision is discussed in more detail by Sian Morris (**sian.morris@simsl.com**) in an article on the Steamship Mutual website at: **www.simsl.com/RainySky1212.htm**

Guarantees by Email

by Alfonso Carmona

In *Golden Ocean Group v Salgaocar Mining Industries* (SMI) the Court of Appeal considered the application of the Statute of Frauds 1677 to modern shipping business practices - charterparty negotiations by email, through brokers, incorporating a guarantee.

Both parties entered into negotiations for a long term charterparty via their brokers. Potential charterers SMI proposed their chartering arm (Trustworth) as charterers: "*a/c Trustworth Pte Limited Singapore fully guaranteed by [SMI]*" and negotiations were further conducted and concluded on that basis.

Following repudiation by Trustworth, Golden Ocean Group brought a claim against SMI under the guarantee alleging that Trustworth had failed to honour the charterparty. SMI contended that the guarantee was not enforceable pursuant to the requirements of s.4 Statute of Frauds.

The Court of Appeal considered whether an enforceable contract of guarantee can arise from a series of email exchanges without formal documents being signed; it concluded that the chain of emails with electronic signature, or even the name of the person indicating his authority, satisfied the requirements of the two-pronged test of s.4.

■ **Alfonso Carmona (alfonso.carmona@simsl.com)** considers this decision in further detail in an article on the Club's website at: **www.simsl.com/GoldenOcean1212.htm**

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Which Law Governs where Arbitration Clause is Silent?

Arbitration Mystery Tour

The Court of Appeal recently provided some much needed clarity on what law is to be applied to an arbitration agreement where there is no choice of governing law in the arbitration clause itself. There had previously been some uncertainty as to which law applies to an arbitration where there is no express governing law stipulated in the arbitration clause itself and the seat of the arbitration is in a different country from the governing law stipulated in the general law and jurisdiction clause. In English law, an arbitration agreement is separate and distinct from the underlying contract. This means that it is possible for an arbitration agreement to be governed by a different law to that of the underlying contract. The Court of Appeal has now set out some helpful guidelines for ascertaining the relevant law in these circumstances.

The dispute in *Sulamerica v Enesa* arose in connection with two insurance policies relating to the construction of a hydroelectric generating plant in Brazil. The insured (Enesa) made claims under the policies. However, the insurers (Sulamerica) refused to pay out, denying all liability.

The insurers commenced arbitration in England seeking, amongst other things, a declaration of non-liability. In response, the insured commenced proceedings in the Brazilian courts pursuant to the exclusive jurisdiction clause. The insurers, in turn, initiated an anti-suit injunction in the English High Court in order to halt the Brazilian proceedings.

■ In an article written for Steamship Mutual Tara Johnson of Holman Fenwick & Willan discusses the Court of Appeal decision. Her article can be found on the website at: **www.simsl.com/Sulamerica1012.htm**

Australian Refusal to Recognise London Award

Voyage Charter as Sea Carriage Document?

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a mechanism by which non-domestic arbitration awards can be enforced within signatory states in the same way as domestic awards within that state.

Accession to the Convention has, however, never provided an absolute assurance that an award will be recognised and enforced in a particular signatory state. The way in which signatories approach the Convention is based on their own domestic law. Members may have come across issues, arising from domestic rules, when enforcing awards in different jurisdictions particularly where default awards are produced; or where no signed contract exists in which the arbitration clause appears.

A recent example of a court failing to enforce an award under the 1958 Convention has arisen in Australia. The Australian Federal Court in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* held, contrary to an earlier Australian Supreme Court Decision, that a voyage charterparty is "a sea carriage document" for the purpose of Australian COGSA 1991 -Sections 11(1)(a) and 11(2)(a). This means that the charterparty arbitration clauses and foreign law provisions, (as with such clauses in bills of lading) are rendered ineffective, certainly where the shipment takes place from or within Australia but possibly to Australia as well (though choice of law provisions may be permitted in those circumstances). As such arbitration clauses are not effective, then awards made under them are also unenforceable, even where a respondent has participated fully in the arbitration. Australian arbitrations are, however, permitted by virtue of Section 11(3) COGSA 1991.

The Federal Court therefore refused to enforce a non-domestic (London) final arbitration award despite the defendant being held to be a party to the charter, specifically agreeing the incorporation of a London arbitration clause and English Law and then taking full part in the dispute and defending the arbitration.

The decision, unless appealed, may have a potentially serious impact on those Members contracting on voyage terms, in particular where the carriage of goods from Australian ports is concerned and where the counterparty has assets/a presence solely in Australia.

■ In an article written for the Steamship Mutual website Simon Wolsey of MFB considers the case and these issues in further detail: **www.simsl.com/Norden1212.htm**

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Korean Visitor

Club's Korean Team

Malcolm Shelmerdine, David Christie and Kevin Kang

Secondments for Club staff at Member offices are an important and invaluable tool not only as a means of promoting closer relationships but in order to gain experience of the day to day problems of shipping faced by owner and charterer Members. Reciprocal secondments allow Member staff to experience the issues the Club has to address when responding to their needs. As a result, over the years many close and valued relationships have been developed on a business and, just as important, a personal level.

In September this year Andrew Hawkins from the Managers' London office had the privilege of joining two Korean Members, SK Shipping Co Ltd and Hyundai Merchant Marine (HMM), for a week and a two week secondment respectively. Korea is a long-standing and very important area for Steamship Mutual and the Managers were extremely pleased that in "exchange" for Andrew, HMM kindly agreed to send Kevin Kang to work in the Club's London office for two weeks. Kevin primarily handles charterparty disputes for HMM and, mirroring Andrew who wrote a short article on his time at HMM for their publication "Compass", what follows is Kevin's account of his time with the Club:

"I joined HMM in early 2008 and this September I have had an opportunity to join Steamship on a two-week exchange programme. My primary task was to understand the Club's various functions and work, and get to know the people at Steamship – that I had only spoken to on the phone and met previously – better.

When I first arrived at the office, there were already a number of faces – people I had met before in Seoul – making me so welcome.

For me, the two week programme promised a busy schedule, which would include: sessions/lectures with managers of Steamship in different departments … Investments, Loss Prevention, P&I, FD&D etc; sharing time with the people in Steamship during the working day and also after work; and giving a presentation.

During the numerous sessions I had, I really felt that my time was usefully spent discussing and learning various aspects of marine related topics from people who are actually specialists and, as a result, this has helped me to deal with my many cases after my return to Korea.

While at the Club I was asked to give a talk about HMM and Korean Culture, which included showing a short video presenting "Kangnam Style". I hope everyone enjoyed the talk and found the materials presented helpful. As a matter of fact, it was my first experience to give a presentation in front of foreigners and, being entirely honest, I was a little nervous and anxious while I prepared it. But I was told afterwards by those present that any nerves that I had did not show and in fact once I started to speak and afterwards I felt that had achieved something very valuable. I must though express my special thanks to JS Kim who helped arrange the presentation.

Of course, after work, I really had a lovely time with the people in Club's Korean team experiencing the food of various countries, and drinking "soju" and beer together. Honestly speaking, and without betraying any confidences, I did not expect Steamship's people to be so good at drinking soju. And I can never forget the outstanding memories made with very funny pictures!!

I was taken to see my first live premier league football match. Although I am not yet a fan of West Ham United, I would like to let Tom Jones at Steamship know that I am trying very hard to become one. However, it's difficult when others at the Club tried just as hard to persuade me their teams are much better.

After I returned to Korea I absolutely feel very comfortable to discuss the cases I have with people at Steamship which enhances the speed and quality of the work. For me this was one of the major benefits of my time with Club.

Finally, I want to say – once again – a big thanks to Steamship for the extremely warm and generous welcome I enjoyed and that it was a real pleasure to meet with all of you. I have many precious memories that will definitely live in my heart for a long long time."

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MTC 2012

"HMS Victory" at night

Disembarking "HMS Victory"

Aboard "Princess Caroline" – Solent Cruise

During Special Consideration Claims Workshop

At Sea

The Club's second Residential Training Course for Members took place at the De Vere Grand Harbour Hotel in Southampton during the week commencing 18 June. Twenty three delegates attended from companies based in the UK, Brazil, Italy, Russia, Philippines, South Korea, Taiwan, Venezuela and India.

The course commenced in London on Monday 18 June when the delegates were welcomed at the office of the Managers' London representatives, SIMSL. Presentations were given on crew and personal injury matters, and this was followed by visits to the Syndicates and lunch with SIMSL Directors and staff. In the afternoon the delegates travelled to the course base in Southampton at the De Vere Grand Harbour Hotel. The course included a practical session in the Bridge Simulator at the Warsash Maritime Academy. This reproduced the events of a collision incident that had resulted in a claim covered by the Club. In the subsequent workshop, the delegates considered the facts of the incident in order to determine the appropriate apportionment of liability. Other practical sessions in the course included the handling of a major casualty, a mock arbitration and the determination of claims that can only be covered through the exercise of discretion by the Club's Board of Directors. Other presentations during the course covered the subjects of cargo liabilities, piracy, oil pollution, underwriting and loss prevention.

Social events during the week of the course included a cruise within the port of Southampton, a visit to HMS Victory, and a tour and lunch onboard a cruise ship.

Feedback from delegates has once more been extremely positive and the comments received will be used to develop future iterations of the course. Comments from delegates included the following:

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Collision Impact, WMA Bridge Simulator

Survival Unit, WMA

At Master Builder's Hotel, Buckler's Hard

" The course was impeccable and the concern from the Club for our welfare was perfect! The course content was very useful and important to my daily routine."

"Extraordinary experience of learning, understanding and using the learning for an actual decision."

"Excellent organisation."

"Perfectly organised training course. Thank you!"

"The course is very comprehensive and helpful."

"Well organised, matters deeply discussed in all their most important aspects."

More photos from the course are available at:
www.simsl.com/MTC2012Review.htm

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Who Has Control?

In *Chimbusco Pan Nation Petro-Chemical Co Ltd v The Owners and/or Demise Charterers of the ship or vessel "Decurion"* the Hong Kong Court limited the scope for sister ship arrest.

The "Decurion" was arrested by Chimbusco for bunkers supplied to the "Decurion", owned by Maruba SCA ("Maruba"), and for bunkers supplied to 10 other vessels through bunker supply contracts with Maruba. Maruba were neither the owners nor charterers of these 10 other vessels. These vessels were chartered by Clan SA ("Clan"), another company within the Maruba Group. Maruba accepted that Chimbusco had an *in rem* claim for the bunkers supplied to the "Decurion" but contested the right to arrest for the bunkers supplied to the 10 other vessels and sought to have this element of the claim struck out.

The Admiralty jurisdiction of the Hong Kong Courts is governed by High Court Ordinance s.12B(4) which lays down the following conditions for a sister-ship arrest:

1.when the cause of action arose, the defendant was the "*owner or charterer of, or in possession or in control*" of the offending ship; and

2.at the time when the action is brought, the defendant is "*the beneficial owner as respects all the shares*" of the ship to be arrested.

There was no difficulty with satisfying the second condition as Maruba was the registered owners of the "Decurion". The issue was whether Maruba was "in possession or control" of the other 10 vessels. Chimbusco relied on the close connection between Maruba and Clan, both members of the Maruba Group, as evidence that Maruba was "*in control*" of the other 10 vessels.

The Court held that "*control*" for the purposes of s.12B(4) must mean something more than the control which would normally come with the possession of a ship. The most obvious example is the ability to dictate what is to be done in relation to the vessel. The Court held that since clause 8 of the NYPE time charters for the 10 other vessels expressly conferred the ability to direct the employment of the vessels to Clan, the ability to control the vessels lay with Clan and not Maruba. The mere fact that a party is described as "*operator*", or may be the parent of the charterers, is not conclusive evidence that that party has control over a ship. Maruba succeeded in striking out Chimbusco's claim against the 10 vessels.

By limiting the definition of "*control*" to the ability to tell the person in possession of the ship what to do with that ship, the Court chose to limit the right of arrest to clear cases of common ownership between two ships. This decision ensures certainty for owners as to whether their ships may or may not be arrested. Therefore, whilst the decision is a set-back for bunker suppliers, it should be welcomed by owners.

■ We are grateful to Su Yin Anand and Jason Tam of Ince & Co, Hong Kong, for preparing this article.

Fines run into Millions

"This significant criminal fine should send a message to shipping companies worldwide that those who pollute our oceans will be held accountable."

Two high profile case in the last 6 months alone have shown the continuing commitment of the enforcement and prosecution agencies to bring to account companies that fail to comply with MARPOL Annex I and U.S. Federal regulations which require them to ensure oily wastes are discharged properly at sea and proper records maintained.

The sentiment above was expressed by a U.S. Department of Justice Assistant Attorney General in the first of the two cases which involved deliberate and unrecorded overboard discharges of oily waste, intentionally bypassing pollution prevention equipment including the ship's oily water separator and oil content monitor. The defendant company pleaded guilty. The sentence included a US $1 million criminal fine as well as a $200,000 community service payment to the National Fish & Wildlife Foundation.

In the second case, where sentence is due imminently, owners were convicted on several counts including conspiracy and causing the vessel to enter to port with a falsified oil record book that failed to account accurately for how the vessel was managing its bilge waste and for obstruction of justice for falsely stating in the oil record book that required pollution prevention equipment had been used when it had not. The chief engineer was also convicted of obstruction of justice for the same reason. Additional convictions related to discharging machinery space bilge waste into port without using required pollution prevention equipment, including the oily water separator and related failures in recording requirements. Owners face potential total penalties of up to $3 million. The chief engineer faces a custodial sentence of up to 20 years for obstruction of justice and six years for knowingly failing to maintain an accurate oil record book.

by Naomi Cohen

Further details of these cases can be found in a report by Naomi Cohen (**naomi.cohen@simsl.com**) on the Club website at: **www.simsl.com/USOilyWasteCases1012.htm**

Club circular B.432 of June 2005 provides additional information on oily water separator MARPOL and U.S. regulatory requirements as well as issues relating to Club cover: **www.simsl.com/B.432.pdf**

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Retla Clauses – do they Work?

Unless specially treated, steel cargoes are susceptible to visible surface rust. Surface oxidation can range from superficial to serious. If the former it may not be necessary to clause the bills of lading but in the case of the latter clausing will be necessary. The problem faced by the reasonably competent and observant master is to decide when rusting is no longer superficial, and then how accurately to describe the extent of the rusting. Retla clauses are widely used in the carriage of steel cargoes as a means of seeking to avoid these difficulties.

But what reliance can be placed on a Retla clause particularly if the rust when removed is likely to reveal uneven pitting to the surface of the steel?

Retla clauses work on the premise that there is no representation that the goods shipped are in an "apparent good order and condition", and that if the shipper would prefer a bill of lading that describes the apparent order and condition of the cargo a bill of lading will be issued that (i) does not include a Retla clause, and (ii) is in conformity with any reservations as to the cargo's condition set out in the mate's receipts.

However, Retla clauses have attracted widespread criticism. They have been justified on the basis that the shipper can demand a bill of lading without the clause but in practice, and for obvious reasons, shippers want clean bills of lading. Therefore it is questionable how often bills of lading without the clause are sought by shippers if that bill of lading would otherwise have been claused. As such, they are at worst a means by which bills of lading that do not represent the cargo's condition can be issued, and to that extent (i) misrepresent the true facts, and (ii) if so, any potential liability in that respect may not be covered as of right under Club Rules.

In 1970 a Retla clause was upheld by the U.S. 9th Circuit. The court concluded that there was no representation by the carrier that a cargo of steel pipes were free of rust when received for shipment. The same issue has now come before the English courts but in this case – *The "Saga Explorer"* – the court concluded the the decision to issue "*clean bills of lading involved false representations by the owner*".

■ The reasons for this decision and degree to which, if at all, a carrier can rely on these clauses is discussed in an article on the Steamship Mutual website **www.simsl.com/SagaExplorer1212.htm** by Malcolm Shelmerdine (**malcolm.shelmerdine@simsl.com**).

Strikes, Congestion – Revisited

The issue of who bears the risks of delay as a result of berth congestion at the end of a strike as between owners and charterers has recently been revisited by the Court of Appeal in *Carboex S.A v Louis Dreyfus Commodities Suisse S.A.*

The English High Court decision was discussed in Sea Venture issue 18 and on the website at: **www.simsl.com/Carboex0811.htm**

Four vessels had been chartered on the AMWELSH voyage charterparty to carry coal from Indonesia to Puerto de Ferrol in Spain. But there was congestion at the discharge port as a consequence of a nationwide haulage strike over fuel prices. The strike had, in fact, ended before each of the vessels berthed and did not cause any disruption in the actual discharge process. However, all of the vessels were delayed getting into berth.

The charterers' position was that the vessels were delayed by reason of the strike and that this period was excluded from laytime: "*In Case of strikes, ……or any other causes …… beyond the control of the Charterers consignee which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage.*"

In contrast, owners' position was that it was only delays caused by strikes after the vessel had berthed that was excluded from laytime.

The dispute had been arbitrated in London and decided in owners' favour. The charterers successfully appealed that decision to the High Court. The strike clause in the charterparty was held to be wide enough to cover (i) delay in discharge due to the after effects of a strike that had ended and (ii) delays in discharge caused by congestion due to a strike where the vessel had only arrived after the strike had ended.

by Jo Cullis

The Court of Appeal upheld the High Court decision.

■ The decision is discussed in an article by Jo Cullis (**jo.cullis@simsl.com**) on the Steamship Mutual website at: **www.simsl.com/Carboex1212.htm**

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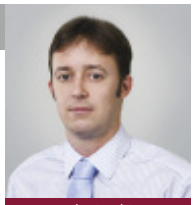
Maintenance and Cure

Illness not Manifest

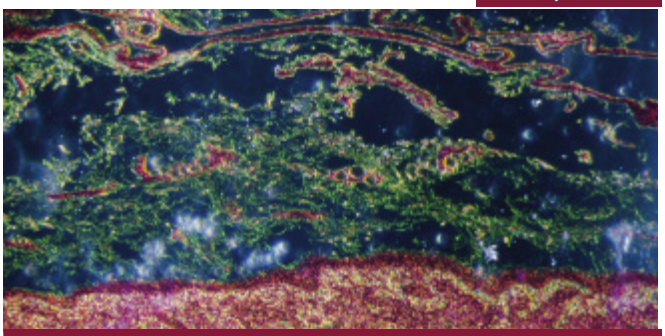


by Paul Brewer

Under U.S. General Maritime Law there is a presumption in favour of a seaman's entitlement to maintenance and cure and all doubts are to be resolved in his favour. However, it is the seaman who has the burden of proving that his illness occurred, was aggravated, or reoccurred while he was in the service of the vessel.

In a very recent decision by the 2nd Circuit Court of Appeals in *Messier v Bouchard Transportation* it was found that whether or not a condition manifested itself or the crewmember showed symptoms during sea service is irrelevant in an analysis of entitlement to maintenance and cure as long as the condition "*occurred*" while the seaman was in service of the vessel.

The *Messier* case involved a seaman who was diagnosed with Lymphoma 2 months after he signed off from the vessel. The diagnosis was based on a blood test run two days after he had signed off. The 2nd Circuit held that despite the fact that the Lymphoma was completely asymptomatic and had not manifested itself while the seaman was aboard the vessel, it was clear that the illness was present during his service and therefore "occurred" while the seaman was aboard the vessel.



Lymphatic node tissue under microscope

The 2nd Circuit reversed the district court's summary judgment in favour of the employer, Bouchard, and ruled that the seaman was entitled to maintenance and cure as a matter of law.

■ The case is considered in further detail in an article by Paul Brewer (**paul.brewer@simsl.com**) on the Club website at: **www.simsl.com/Messier1012.htm**

Jones Act Damages

Fatal Accident – Vicarious Liability?

by Stuart Crozier

A crew member was accidentally but fatally shot by a fellow crewmember whilst aboard a vessel. Was the individual who carried the firearm acting within the scope of his employment? This is a question which was discussed in the case of *Beech v Hercules Drilling Company* when considering whether the estate of the deceased was able to recover Jones Act damages.

The facts of the case were undisputed: A driller employed by Hercules Drilling had unintentionally and in breach of company policy brought a gun on board the vessle. One night while on duty the driller showed the gun to Beech, who was also a crew member though not on duty. The gun was discharged accidentally, fatally shooting Beech.

Reversing the decision of the lower court, the 5th Circuit Court of Appeals ruled that Hercules Drilling was not liable for the tragic, but accidental death of the crew member. The issues as to when a crewmember may be deemed to be acting in furtherance of the business interests of his employer, what constitutes the course or scope of employment and whether an employer can be vicariously liable for the actions of its employee were considered.

■ Stuart Crozier (**stuart.crozier@simsl.com**) summarises the Fifth Circuit's decision and considers the implications of the case and the issue of 'the scope of employment' in an article on the Club's website at **www.simsl.com/Hercules1012.htm**

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Exxon Valdez Legacy

The U.S. Supreme Court's decision in the *"Exxon Valdez"* continued, but did not complete the Supreme Court's exploration of maritime punitive damages.

That decision confirmed the availability of punitive damages in the maritime context and accepted that a mechanical ratio between compensatory and punitive damages accomplished the stated purpose of punitive damages punishing for past conduct and deterring future similar bad acts. But the Court limited its pronouncement to the facts at hand. Under the facts of the *Valdez*, the Court held that where the compensatory damages were substantial, the conduct, while reckless, was not intentional and did not profit the wrongdoer, a ratio of about 1 to 1 was sufficient. The decision, however, left for another day, determination of the appropriate ratio where the compensatory damages were minor, the conduct intentional, and the wrongdoer actually profited monetarily from its conduct. (The Supreme Court decision in the *Exxon Valdez* was reviewed in Sea Venture issue 12 and on the website at: **www.simsl.com/ExxonSupremeCt0908.html**)

In *Clausen v Icicle Seafoods*, the defendant has asked for Supreme Court review in a matter raising these very issues. The issue is an important one because, in *Valdez*, the Supreme Court also stated a party should be able to "predict" with some degree of certainty the monetary consequences of its conduct. Since the Supreme Court has thus far only given limited guidance in this area, predictability, at present, is lacking.

In the non-maritime context, dealing with cases arising out of state as opposed to federal law, the Supreme Court has treated the issue as one of "due process" under the federal constitution as it applies to the states and held in *State Farm v Campbell* that rarely would a ratio exceeding single digits meet constitutional muster. While neither the *Valdez* nor *Icicle* have invoked the federal aspects of due process, one is hard pressed to think that the two lines of cases will not intersect. Hence, for the present, *State Farm* should provide useful guidance. *State Farm* also introduces some sophistication into the analysis, admonishing the lower courts when setting the ratio to take into account fines and penalties which also have a punitive aspect and, in injury cases, to consider that general damages, i. e. pain and suffering, may also reflect a form of "punishment."

■ Alfred J. Kuffler of Montgomery, McCracken, Walker & Rhoads considers these issues in an article written for the Steamship Mutual website at: **www.simsl.com/USPunitive1212.htm**

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Repudiation

Keeping Contracts Alive

Cooke J's recent decision in *Isabella Shipowner v Shagang Shipping (The "Aquafaith")* tests the limits of the rule that an innocent party to a repudiatory breach is entitled to keep the contract alive. Because of this, the principles that emerge from *The "Aquafaith"* are likely to have significant implications for contract law in general. In the shipping market, the case will be welcome news for shipowners. Charterers are unlikely to be similarly enthused.

The dispute concerned the scope of the principle enunciated in *White and Carter v McGregor* that an innocent party faced with a repudiatory breach can insist on keeping the contract alive. Lord Reid set out two exceptions where the claimant will be limited to a remedy in damages: first, where the defendant's co-operation is required before the claimant can complete performance, and second, where the claimant has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages.

There is a noticeable lack of judicial consensus as to the exact formulation for determining whether the innocent party is entitled to keep the contract in being. As will be seen, *The "Aquafaith"* appears to introduce yet another variant of the test.

■ In an article written for the Steamship Mutual website Andrew Leung of Stone Chambers reviews the decision in further detail: **www.simsl.com/Aquafaith0512.htm**

Bunker Consumption and Deductions from Hire

A Lacuna Filled

Speed and performance issues can still cause problems but in fact the law on how to calculate under and overperformance was quite settled, apart from the question of how to apply a set-off for any bunker underconsumption. With hire rates low and bunker prices high, this issue can often be crucial in determining the extent to which hire can be deducted. The courts have now ruled on the issue thereby explaining the method of calculation. Where a consumption warranty includes the phrase *"about"* it is generally accepted by the courts and arbitrators that an allowance of 5% should be applied. Thus, where consumption is defined at, say, *"about 40 metric tons per day"*, the allowable range is between 38 and 42 metric tons.

Consider now the case where the vessel has underperformed in terms of speed which would give rise to a longer sea passage and thus loss of time to charterers but has also only consumed 36 metric tons per day. Owners had promised, and thus charterers could expect, a consumption of up to 42 metric tons per day. Have owners saved charterers 6 metric tons per day; or 2 metric tons per day (based on 38 metric tons consumption); or should 40 metrics tons per day be applied without any allowance?

As regards overconsumption the judicial position is clear – it is the upper limit which should be applied ("*The Al Bida*"). As regards underconsumption, arbitral tribunals have varied their decisions with some deciding on the average figure, i.e. the stated daily consumption. In *Hyundai Merchant Marine v Trafigura (The "Gaz Energy") (No 2)* the court has found that one needs to calculate underconsumption by reference to the lower end of the scale. In the example this would be 38 metric tons, thus a saving of just 2 metric tons per day.

■ The decision is discussed in more detail by Richard Gunn and Kostas Bachxevanis of Reed Smith in an article on the Steamship Mutual website at: **www.simsl.com/GazEnergy1112.htm**

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Ballast Discharge Standards

	Vessel's ballast water capacity	Date constructed	Vessel's compliance date
New vessels	All	On or after 1 December 2013	On delivery
Existing vessels	Less than 1500 m^3	Before 1 December 2013	First scheduled drydocking after 1 January 2016
	1500-5000 m^3	Before 1 December 2013	First scheduled drydocking after 1 January 2014
	Greater than 5000 m^3	Before 1 December 2013	First scheduled drydocking after 1 January 2014

The U.S. Coast Guard Final Rule on *Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters* was published in the Federal Register on 23 March 2012. The rule establishes a standard for the allowable concentration of living organisms in ships' ballast water discharged in waters of the United States.

In addition to those vessels currently required to conduct mid-ocean ballast water exchange, the discharge standard will apply to seagoing vessels that do not operate beyond the U.S. Exclusive Economic Zone, that take on and discharge ballast water in more than one COTP Zone, and are greater than 1,600 GRT.

The first vessels to which the new requirements will apply are new vessels constructed on or after 1 December 2013, for which the compliance date is the date of delivery (see table above right). The only new requirement for which compliance is actually required from 21 June 2012 is the incorporation of vessel-specific *Biofouling Management and Sediment Management Plans* in the already required vessel Ballast Water Management Plan.

Although the new discharge standard became effective on 21 June 2012, the required use of an approved Ballast Water Management System will be phased-in and not required until after December 2013. The phase-in schedule is dependent on vessel build date, ballast water capacity, and drydock schedule:

- Further details about the discharge standard, approval process for management systems, coast guard guidance, enforcement and resources can be found in an article written for the Steamship Mutual website by Naomi Cohen (**naomi.cohen@simsl.com**) at: **www.simsl.com/USBWDS1012.htm**

Recouping Down the Chain

In three arbitration appeals the English High Court was tasked with considering which party or parties in a string of charters had to bear the cost of U.S. Gross Transportation Tax (USGTT) on the vessel's calls to U.S. ports.

Owners had chartered the vessel to a head charterer, with three sub-charters below. Time charters were on amended NYPE form with materially identical terms and the charterparties contained the BIMCO US Tax Reform 1986 clause (as recommended by BIMCO circular No. 9 of 6 July 1988).

Head charterers reimbursed the owners for the US$ 134, 400 USGTT levied on the vessel's calls to the U.S.. Head charterers sought a reimbursement from their immediate sub-charterer who, in turn, sought reimbursement from their sub-charterer and so on until the end of the chain. Various arbitrations followed.

The issues for the court to consider were:

1. the relevance of BIMCO circular;
2. the actual incidence of the USGTT; and
3. the meaning and effect of the BIMCO U.S. TAX Reform 1986 clause.

The Court held that the owner was entitled to a reimbursement from head charterers for the USGTT it had paid, but no one else in the chain was entitled to reimbursement. However, it should be noted that the decision was confined to the facts of the case and there were no findings as to the incidence of USGTT.

- The case is discussed in further detail by Nathaniel Harding (**nathaniel.harding@simsl.com**) in a Steamship Mutual website **article at: www.simsl.com/USGTT1212.htm**

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Unreasonable Refusal to Mediate

The recent decision of the High Court in *PGF v OMFS* has confirmed that the courts will be persuaded to deviate from the standard rules for making costs orders when a party has unreasonably refused an offer to mediate.

This particular case concerned a commercial property dispute between a landlord and tenant. However, the principles concerning the award of costs apply equally to all civil disputes in the English jurisdiction. Here, an offer was made by the defendant to settle the case on the basis of Part 36 of the Civil Procedure Rules (Part 36) – see: **www.simsl.com/Part360211.htm** and **www.simsl.com/Part36Thewlis0212.htm**.

Part 36 contains detailed provisions for the award of costs in litigation when an offer is made thereunder. When a claimant accepts an offer that is properly made in accordance with the requirements of Part 36 the defendant is liable to pay the claimant's costs:

- up to the date of the acceptance if accepted within the period that the offer is expressed to be open for acceptance (a minimum period of 21 days) but
- if the offer is accepted after the period that the offer is expressed to be open for acceptance, and the offer has not lapsed or been withdrawn, the claimant is then liable to pay the defendant's costs for any intervening time between that date when the offer was expressed to be open for acceptance and the date of acceptance.

In this instance the court deviated from the default position and refused to award the defendant costs for the intervening period because they had unreasonably refused an offer to mediate. This emphasises the English courts' commitment to promoting alternative forms of dispute resolution in order to reduce costs and save court resources, and is a reminder of their willingness to penalise parties who unreasonably refuse this option.

by Gareth Thompson

This judgment is discussed in more detail by Gareth Thompson (**gareth.thompson@simsl.com**) in an article written for the Steamship Mutual website at: **www.simsl.com/OMFS1212.htm**

Student Visit

Training and education is important in a dynamic environment such as shipping. There are ever changing international regulations to consider, the increasing use of sanctions and of course evolving case law and regulatory demands. To deal with these demands the Club has an active in-house seminar programme covering a wide range of topical issues and regularly presents seminars to Members around the world. In addition, the Club's second Residential Training Course for Members was held in 2012 and, where possible, secondments are encouraged (see pages 9 and 10 of this issue, and "*An Intern's Experience*" in issue 19).

Port of Valencia Group

Underwriting presentation to Erasmus Group by Simon Kaye

Erasmus Group delegates

The Managers are also happy to assist the wider maritime community with information about P&I and over the last three years have been pleased to entertain students from the Erasmus University, Rotterdam and the Port of Valencia. Both run year-long courses in maritime studies. As part of those courses, each organisation arranges a visit to various London maritime organisations including Lloyd's, IMO and ITOPF. Steamship Mutual's role has been to explain P&I insurance and the covers and support provided by Clubs. During their visits in March and April 2012 the students were, among other things, shown the Club's **Guide to Casualty Investigation and Claims Handling – "A Team Effort"** – and were given presentations on P&I claims by Neil Gibbons and Juan Zaplana (European syndicate), and on underwriting by Simon Kaye (Eastern syndicate) and Rachael Simpson (Americas syndicate).

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Illegitimate Pressure?

Earlier this year the English High Court was asked to consider whether a settlement agreement can be voidable for duress on the basis of "illegitimate pressure" arising from pressure that was not in itself unlawful.

In April 2009, Progress Bulk Carriers (PBC), as disponent owners, chartered the "Cenk K" to Tube City (TC) to carry a cargo of shredded scrap from the USA to China. The agreed laycan was 15 – 21 April 2009. However, on 7 April PBC fixed the vessel to another party without informing TC. Relying on PBC's assurances that they would provide alternative tonnage and compensate them for damages flowing from their failure to deliver the "Cenk K", TC did not terminate the charterparty notwithstanding that they could have accepted PBC's conduct as repudiatory and claimed damages.

After a series of negotiations, in order to fulfil their sales contracts, TC had no choice but to accept under protest a "take it or leave it" offer from PBC. That offer was conditional on TC agreeing to accept a substitute vessel outside the contractual laycan and to waive its claims for damages but with a $2 per mt freight discount.

TC subsequently sought to argue that their agreement to waive all its claims for damages in respect of PBC's repudiatory breach was procured by economic duress. An award was made in TC's favour in arbitration in London and that decision was upheld on appeal even though PBC had no legal obligation to provide a substitute vessel, and the threat not to do so until TC agreed to waive its claim for damages was not unlawful. The factors that come into play when distinguishing illegitimate pressure "*from the rough and tumble of the pressures of normal commercial bargaining*" are discussed in an article by Elli Marnerou (**elli.marnerou@simsl.com**) on the Steamship Mutual website at: **www.simsl.com/TubeCity1212.htm**

by Elli Marnerou

General Average Security

by Ben Johnson

The appeal of an arbitration award in *Mettall Market OOO (MMO) v Vitorio Shipping Company ("The Lehman Timber")* addresses whether an owner's acceptance of an insurer's guarantee discharges the owner's lien over cargo and whether the costs of storing liened cargo are recoverable.

Owners declared GA when the vessel's main engine broke down four days after release by Somali pirates following payment of ransom. GA security was sought from cargo interests. MMO refused to provide either GA guarantees or a bond albeit that a guarantee was provided by cargo insurers covering about 10% of the cargo. Consequently, owners refused to deliver the cargo and placed it in storage ashore. While an average guarantee is security, a bond is the method by which cargo interests pay general average contributions without argument as to the precise contractual arrangements.

In this case the bills of lading were on the CONGEN 1994 form and incorporated the terms of a voyage charter that provided for GA to be adjusted in London in accordance with the York Antwerp rules. There was no express contractual right to exercise a lien to obtain security for GA or to recover the costs of exercising a lien. However, in the arbitration owners successfully recovered from MMO their contribution to general average and the storage costs.

The High Court decision on appeal confirmed the principle that an owner is entitled to retain a lien for general average until security in reasonable form and amount is tendered. This would include the tendering of a GA bond but a guarantee, even if for the entire cargo, was not on its own sufficient security. GA guarantees secure cargo's liability under a GA bond and without the bond the guarantee is not sufficient security.

■ Following the general rule that the costs of retaining possession of goods in the exercise of a lien are not recoverable from the owner of those goods (*Somes v British Empire Shipping*), the tribunal's decision on storage costs was overturned. Leave to appeal to the Court of Appeal was granted but the Commercial Court's decision is discussed in detail in an article by Ben Johnson (**ben.johnson@simsl.com**) on the Club website at: **www.simsl.com/MMO1212.htm**

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Steamship Team rise to the Challenge

Jamie Taylor, William Baynham, Nimisha Shah, Martin Turner, Karolina Harvey, Anna Yudaeva

On Helvellyn

Nimisha on Ben Nevis

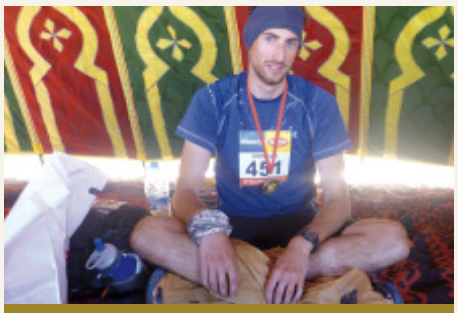
Over the weekend of 16 and 17 June a team from Steamship tackled the **Sailors' Society Three Peaks Challenge 2012** in weather typical of the British 'summer'.

The starting point at 2 p.m. was Ben Nevis (the highest mountain in Scotland at 4,409 feet) which took the team 6 ¼ hours to climb and descend through rain and snow. The peak did not afford a view to the start due to the weather conditions. The team then travelled for five hours to the Lake District arriving at the base of the second peak, Helvellyn, at 2 a.m. That climb was shortened due to safety concerns; there was zero visibility on the summit (due to mist, fog and darkness) so all teams were turned around at about 1,700 feet. The total time on Helvellyn was 2 hours. The head lamps which were needed for climbing at night had the unfortunate effect of attracting the local midges which enjoyed an early breakfast on several team members! Another four/five hours by coach and the team arrived at Snowdon in North Wales (3,560 feet). Despite a more promising dry start with the odd patch of sun, by the time they had reached the last steep incline close to the summit it became apparent that there would be no view from this last summit either, where the team photo was taken. After the long walk down the Llanberis path, Snowdon was completed in 4 ¼ hours.

Despite the effort and challenging conditions, the team enjoyed the overall experience and are very pleased to have raised just over £11,000 for the Sailors' Society and its international efforts to help seafarers in need.

The team, Jamie Taylor, William Baynham, Nimisha Shah, Martin Turner, Karolina Harvey and Anna Yudaeva (*pictured left to right*) would like to thank fellow SIMSL staff as well as friends and associates from the P&I and shipping industry who generously sponsored the team and helped raise this impressive sum for such a worthwhile cause.

Underwriter takes on World's Toughest Foot Race



Simon Kaye

On 8 April 2012, 900 competitors from 42 different nations "toed the line" for the start of what is dubbed the world's toughest foot race, the Marathon des Sables, a 151 mile (243km) race over seven days in the Moroccan Sahara desert. Amongst the competitors was Eastern Syndicate Underwriting Associate, Simon Kaye.

The race, a self-sufficient event, requires runners to carry in rucksacks all food, clothes, medical kit and survival gear necessary for the duration of the week, with water strictly rationed at checkpoints along the course at approximately 10km intervals.

Terrain consists of salt flats, water crossings, rocky plains and, most gruelling of all, sand dunes. With day time temperatures reaching in excess of 50°C, the combination of weight, heat, injuries and exhaustion lead to more than 70 retirees during the course of the week, most notably on the 82km "double stage", the toughest section of the event run through the day and into the night, the course lit by the stars and competitor's compulsory head torches.

Simon was running for The Great Ormond Street Children's Hospital Charity for whom he raised over £2,500 thanks to the generous donations of Steamship's staff, Club Members, family and friends. His finishing position was 407th in an aggregate time of 44h 50m 44s.

Moroccan Sahara Desert

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