STEAMSHIP MUTUAL

Sea Venture

newsletter

issue 3

Contents

Editorial Team
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Malcolm Shelmerdine

Feedback and suggestions for future topics should be sent to **seaventure@simsl.com**

Introduction

"a combination of an improved risk profile and rising operating standards has resulted in a declining claims trend"

In the period since our last edition in April shipping markets have fallen dramatically from their March peaks and controversy rages around whether the underlying cause of the decline is a fundamental shift in the demand/supply balance, a short term seasonal slowdown or speculative pressure from hedge funds. A similar pattern was seen in the second quarter of 2004, but last year the market had started to recover by mid-July and, after a period of stability in the late summer, rallied strongly in October and November. The first two weeks of August of this year have shown some signs of an upturn, particularly in the Baltic dry bulk freight indices, but whether that represents a technical rally from an oversold position or the start of something more fundamental remains to be seen, as the markets move from the summer doldrums into the greater activity of autumn.

The Club tends to follow these developments closely both because of the perceived historic link between levels of activity and levels of P&I claims and because of the influence that movements in the freight market can have on the incidence of charterparty disputes and the consequent level of FD&D claims. While many Clubs and other commentators continue to report a notable correlation between claims levels and the pressure on shipping markets, Steamship Mutual has not yet experienced this phenomenon in the current cycle. Indeed a combination of an improved risk profile and rising operating standards has resulted in a declining claims trend for the Club in the last two years. Whether this improving trend will continue is difficult to predict but in the meantime the Club's claims experience has continued to perform ahead of forecast with the pure underwriting surplus on both the 2003/04 and 2004/05 years rising over the first four months of the year, and reported claims for the same period for the current year below those reported for 2004/05:
www.simsl.com/Publications/Circulars/2005/B434.asp

This issue of Sea Venture contains the normal mix of Club related news and summaries of articles on the Steamship Mutual website. Contributions from the Club include articles discussing the recent decision in The "*Sea Success*", an English High Court decision dealing with the difficult question of when a master can reject cargo presented for loading, as well as the key changes in the new Shellvoy charter and the procedure to be followed when Nautical Assessors are consulted in collision cases. There are also contributions from the Club's correspondent lawyers in Genoa and Auckland, US and English lawyers and our long standing Indian representative. The editorial team would like to thank all contributors to Sea Venture.

Malcolm Shelmerdine

31st August 2005

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Sudhir Jayantilal Mulji

Mr Sudhir Mulji

1938 - 2005

It is with great sadness that we have to report the unexpected death of Mr Sudhir Mulji, on 10th July, at the age of 67.

Mr Mulji had been the Chairman of the Steamship Mutual Trust since May 2004, the culmination of his long and close relationship with the Board of Steamship Mutual, which spanned over 25 years. He had previously served as Chairman of the Club from 1997-1999. Mr Mulji's distinguished and multifaceted career spanned economics, shipping and journalism, including a period as Chairman of the State Trading Corporation of India, from 1986 – 1987. He had been joint Managing Director of Great Eastern Shipping, Bombay, and subsequently Deputy Chairman of that Company and Chairman of Great Eastern Shipping, London.

Mr Mulji was a tireless supporter of the Club and, despite increasingly fragile health, a regular attender and contributor at Board Meetings. He was a man who combined great intellect with great charm, and, uniquely, a passion for economics with a mischievous sense of humour. With his remarkable talent for seeing a different side to any question, he was one of the great personalities of the shipping industry, in a world where such figures are increasingly rare. He will be sorely missed.

Otto Fritzner receives Johan van der Veeken Award

Congratulations to Otto Fritzner, the Club's Chairman, seen here receiving the Johan van der Veeken award from the Mayor of Rotterdam at the opening ceremony of the Stolt-Nielsen Transportation Group's new offices. This award was presented to Mr Fritzner in recognition of his support and promotion of the City of Rotterdam.

Mr Fritzner (right) receiving his award

C C Tung Completes BIMCO Presidency

In May this year Orient Overseas Container Line (OOCL) Chairman, C C Tung, successfully completed his 2 year presidency of BIMCO, one of many such organisations to have benefited from Mr Tung's guidance over the years. A past chairman of the Hong Kong Shipowners' Association, Mr Tung has given his time, expertise and support to a diverse range of institutions and projects important to the shipping world during his long and distinguished career in the industry.

OOCL is one of the world's largest integrated international container transportation, logistics and terminal companies and is a valued, longstanding Steamship Mutual Member. In July 2005 Mr Tung was appointed Chairman of The Steamship Mutual Trust, following the sad death of Mr Sudhir Mulji. Mr Tung has been a Director of the Corporate Trustee since 1983 and previously served a four year term as Chairman from 1987 to 1991. Prior to that Mr Tung was a member of the main Club board from 1975 to 1984 and was Club Chairman from 1982 to 1984.

Delivery Without Bills of Lading - Can Owners Enforce an LOI Given by Receivers to Charterers

It often happens that a vessel arrives at the discharge port ready to discharge its cargo but the bills of lading for the cargo are not yet in the hands of the ultimate receivers. In this situation shipowners often come under pressure to deliver the cargo without production of the original bills of lading.

A bill of lading is the carrier's receipt for delivery of cargo and evidences the terms of the contract of carriage, but it also functions as a document of title which transfers ownership in the goods. In this last capacity it is "the key to the warehouse" and it is a simple working rule that an owner who delivers cargo without production of the relevant bill of lading does so at his peril and exposes himself to claims for misdelivery which can be potentially ruinous. Because of the risks involved, and owing to the mutual nature of the insurance provided by P&I Clubs, the rules of all the P&I Clubs in the International Group exclude from the scope of standard P&I cover claims arising out of the delivery of cargo carried on an entered ship without the production of the relevant bill of lading, subject always to the exercise of discretion by the relevant Club Board.

Whilst not condoning the practice, but in recognition of commercial reality, the International Group Clubs have approved a standard form of wording for a letter of indemnity (LOI) to be offered to shipowners in return for delivering cargo without production of the original bill of lading. This wording is set out in the Club's Circular B.354 of February 2001 which can be found on the Club website at:

www.simsl.com/Publications/Circulars/2001/B354.asp

In *Laemthong International Lines Co. Ltd v ARTIS & Ors,* the English Court of Appeal considered the wording of a P&I Club standard LOI. In its judgment of May 2005 the Court held that the Contracts (Rights of Third Parties) Act 1999 allowed shipowners to enforce directly against the receivers an LOI given by receivers to charterers.

This decision means that owners may have fresh possibilities for enforcing LOIs given on standard P&I Club wording against third parties. As always, however, each LOI will be construed on its own terms.

The facts of the *Laemthong* case are given in an article prepared by Christine Gordon **(christine.gordon@simsl.com)** for the Steamship Mutual website:

www.simsl.com/Articles/Laemthong0805.asp

(Members in any doubt as to their rights in such situations should seek advice from the Managers.)

U.S. Package Limitation - What Constitutes a "Package" and Who Can Claim Limitation?

"The issue of package limitation is a recurring theme in disputes involving cargo claims."

The issue of package limitation is a recurring theme in disputes involving cargo claims. The "*El Greco*", reported in Sea Venture issue 2, showed the approach of the Australian courts. *American Home v CSX Lines* shows the approach of the Federal Court of New York. In this case the Court needed to consider the various aspects of a long term commercial relationship in order to determine whether there was a right to limit, what was the "operable package" and whether a third party was entitled to limit. Resolution of these issues would determine whether liability in respect of a lost container of pharmaceuticals was US$1,381,632, US$1,000 or US$44,000 and who was entitled to limit their liability.

Carriage was from Puerto Rico to Jacksonville, Florida by vessel and then to Memphis, Tennessee, by truck. U.S. COGSA does not apply to the shipment because it was between two U.S. ports. The ocean carrier delivered a sealed container to the trucker it had hired for delivery to Memphis. The container and its contents went missing while left unattended by the trucker. The subrogated cargo insurer sued the ocean carrier and the trucker for the loss.

No physical bill of lading was issued for the shipment, however the service contracts issued for each shipment were stated to be subject to the carrier's tariff and bill of lading terms. These terms included a limitation of $1,000 per "package". The Court needed to decide whether the bill of lading terms applied, if so, what constituted the "package" - 2,156 cases, 44 pallets or the single 40 foot container - and whether the trucker could claim the benefit of the package limitation by virtue of a Himalaya Clause.

To find out how the Court resolved these issues see the Steamship Mutual website article by Vincent M. De Orchis and John A. Orzel of De Orchis & Partners, LLP, New York at:
www.simsl.com/Articles/CSX0805.asp

On a similar theme, the U.S. Supreme Court recently unanimously decided that a foreign shipper is bound by transportation arrangements and limitation of liability made on its behalf with domestic U.S. carriers even where the loss or damage occurs on land. A report on the important decision in *Kirby v Norfolk Southern* by Hyman Hillenbrand of DeOrchis Hillenbrand & Wiener, LLP, Florida, can be found on the Steamship Mutual website at:
www.simsl.com/Articles/Kirby0805.asp

Chile - Non-Delivery Claims - New Customs Practice

In an old style Sea Venture article we reported on the problems in Chile arising out of delivery of cargo without production of bills of lading. Chilean regulations dictate that cargo must be placed in a licensed Customs warehouse pending satisfaction of Customs requirements. In *East West Corporation v DKBS 1912 and AKTS Svendborg and Utaniko v P&O Nedlloyd B.V.* the consignees' Customs Agent paid the necessary duty on the goods and obtained their release without presentation of the bills of lading. The consignee subsequently refused to pay for the goods and the cargo owners sued the carrier for wrongful delivery.

This case brought into scrutiny the Chilean Customs law and practice. As an interim measure it was suggested that a carrier should, in future, issue a "delivery order" which identifies the party to whom the Customs Authority or Customs Agent should deliver the cargo. However, this solution did not provide for surrender to and retention by the carrier of the original bill of lading.

The matter has been considered further by the Chilean authorities and a new official procedure has now been enacted (Resolution 2250/05) which, in essence, states the following:

a) as a bill of lading is a document evidencing a maritime contract, a receipt and a document of title against which the carrier is obliged to deliver the cargo to the consignee and

b) as it is necessary to present the original bill of lading to Customs as evidence of the cargo consigned, but is not necessary for Customs to keep it

this document should be returned to the carrier by Customs before the cargo is released. Therefore, the original bill of lading should be returned by Customs to the bill of lading issuer by certified post no later than one day after the Customs declaration has been accepted. Customs are to keep a copy of the original bill of lading duly checked by the head of the Customs unit involved. The cargo will then be delivered once the requirements of the Customs declaration have been satisfied.

Having addressed the problems of the previous regime, this new procedure should help to minimise a carrier's exposure to claims for non-delivery of cargo in Chile.

Article by Luis Ongay
(luis.ongay@simsl.com)

A detailed discussion of the *East West* case appears in Sea Venture Vol. 21 at page 44 and can be accessed via the Steamship Mutual website at:

www.simsl.com/Sea_Venture/SeaVenture_Vol21/Section_2/11_BoL_DelW_Out_Isidora.asp

A Master's Dilemma

"What constitutes clausing of the bills of lading?"

The question of whether, and in what circumstances, a Master is entitled or obliged to reject cargo presented for shipment if that cargo would require clausing of the bills of lading is never straightforward. This is so even if the charter provides that the Master has the right and must reject cargo that is subject to clausing of the bills of lading. What constitutes clausing of the bills of lading? Is a bill of lading that describes the damaged condition of the cargo a claused bill of lading that would enable the Master to reject that cargo? These issues are discussed in a article by Natalie Campbell **(natalie.campbell@simsl.com)** commenting on the recent favourable decision in The "*Sea Success*", a case in which head time charterers were supported by the Club. The article can be found on the Steamship Mutual website at:

www.simsl.com/Articles/SeaSuccess0805.asp

India - Laytime and Demurrage Claims

A vessel was chartered to carry crude oil from Nigeria to the East coast of India. The vessel arrived at the load port on 9th August 2001 but only berthed on 13th August 2001.

Almost two months before the vessel arrived there had been a strike at the oil terminal which resulted in a shortage of crude oil stock. As a consequence, the berthing and loading operations of the vessel were delayed. There had also been a fire around the pipeline near the junction manifold three weeks before the vessel's arrival. Consequently, a number of flow stations, including the gas plant, were closed and the manifold isolated due to extensive damage. In addition, an oil spill reported off the pipeline had meant closure/suspension of all upstream stations and injection of oil.

What bearing, if any, did these events have on the owner's claim for laytime and demurrage under an amended ASBATANKVOY form? In his report on this case Shiladitya Bose of Crowe Boda, Kolkata, shows how English case law played a role in the award by Indian arbitrators which was subsequently upheld by both the Indian High Court and Supreme Court.

The report can be found on the Steamship website at:
www.simsl.com/Articles/IndiaLayDem0805.asp

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U.S. Coast Guard Security Inspections - Who Bears the Cost of Delay?

The implementation by United States Coast Guard ("USCG") of the Maritime Transportation Security Act 2002 has led to several disputes between owners and charterers concerning allocation of liability for loss of time and additional (often unforeseen) expenses.

The High Court of England and Wales has recently delivered a judgment dealing with whether time lost awaiting inspection by the USCG was for owners' or charterers' account under a trip time charter. Despite some compelling arguments put forward on behalf of the owners, the Court held that the vessel was off-hire for a period of over 6 days whilst the vessel awaited inspection by a team of USCG inspectors. The full report on this case by Sacha Patel **(sacha.patel@simsl.com)** can be found at:

www.simsl.com/Articles/Doric0805.asp

In a July 2004 website article "U.S. Ports - Liability For Cost of Security Guards", also by Sacha Patel, three London arbitration decisions concerning losses arising from intervention by the USCG were reviewed. The full text of that article can be found at:

www.simsl.com/Articles/US_SecGuardCosts.asp

"the Court held that the vessel was off-hire for a period of over 6 days"

SHELLVOY 6 - The New Provisions and their Substantive Impact on Shipowners

"Amendments were made which substantially altered the shipowner's position".

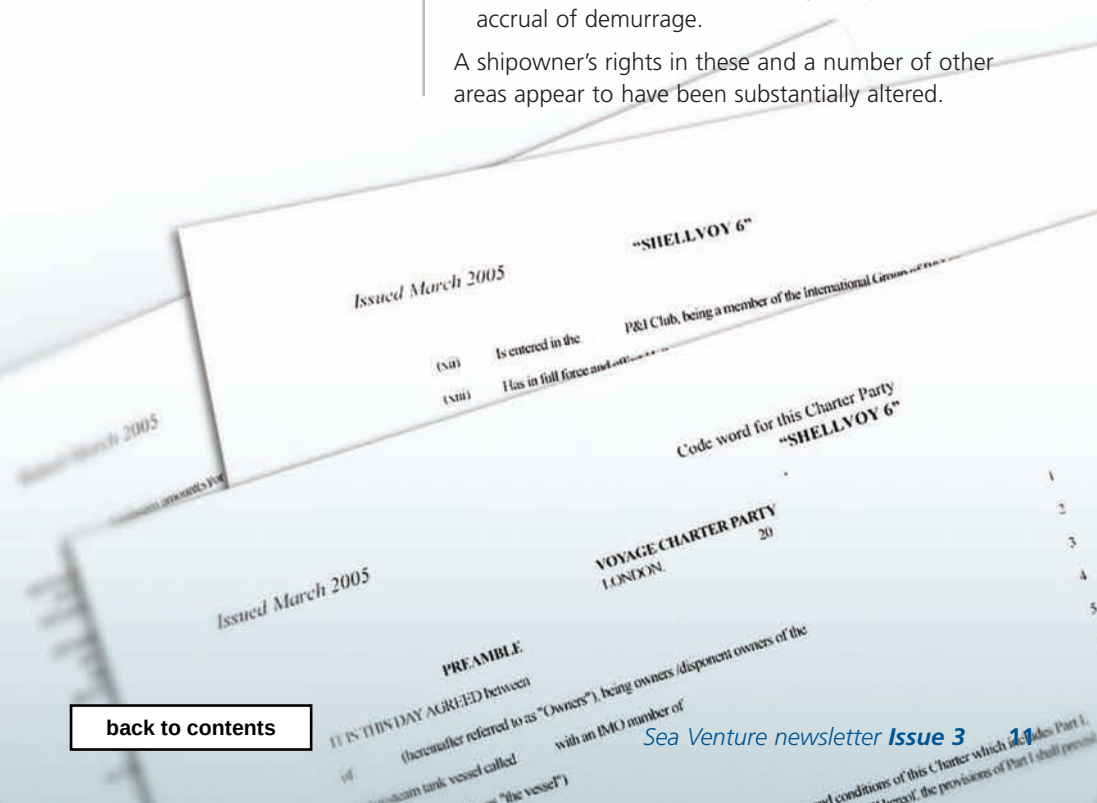
From 4th April 2005 Shell began fixing voyage charters on its newly launched Shellvoy 6 form. This new charterparty has since then been adopted by other charterers in the market. Whilst there has been general commentary on the changes, there has been little in depth analysis of the key amendments to the Shellvoy 5 and its 1999 Amendments. An article prepared for the Steamship Mutual website by Rajeev Philip **(rajeev.philip@simsl.com)** outlines and highlights the impact of the key changes from a shipowner's commercial and operational perspective.

In the "Note to Brokers" which accompanied the launch of the new form, Shell explained that the purpose of the revision was to "*capture all current additions and amendments to Shellvoy 5 in one new document whilst taking the opportunity to clarify standard interpretations and practice*". Shell strove to be entirely transparent in its approach, highlighting and explaining the changes both on the document, and in an accompanying explanatory note. However, whilst endeavouring to encapsulate earlier amendments and perceived industry norms, amendments were made which substantially altered the shipowner's common law position as well as its position under previous iterations of the Shellvoy form.

The website article can be found at:
www.simsl.com/Articles/Shellvoy60805.asp
and includes a review of the following areas:

- the shipowner's obligations with regard to trading the vessel in advance of the expected ready to load date,
- options and remedies relating to voyage instructions,
- laydays and termination and
- the commencement and running of laytime and the accrual of demurrage.

A shipowner's rights in these and a number of other areas appear to have been substantially altered.



Steel Carriage, Ventilation and Good Practice

In many cases, vessel Masters and/or Chief Officers are of the opinion that steel cargoes are to be ventilated as much as possible during periods of good weather. This practice, of course, gives no consideration to the prevailing humidity conditions, dew points and temperatures. In most cases, when ventilation is carried out in this manner without proper regard for dew point and relative humidity, condensation in the form of cargo sweat and/or ship's sweat will form resulting in potentially significant cargo claims.

Condensation related claims on steel cargoes, especially those delivered to the United States, have in the past proven to be costly and time consuming to defend. Over the past 2 years, high steel prices in the United States, due in part to the demand for steel in China and an increase in the domestic demand for steel, have resulted in a good secondary market and an overall low occurrence of significant cargo claims. The present trend, however, is for steel prices and demand to drop in the United States. As steel prices drop, the potential for costly steel cargo claims increases due to lower demand and a weak secondary salvage market.

Owners should take steps to insure that their Masters and Chief Officers are aware of the proper steps to be taken in order to determine whether ventilation of a steel cargo is necessary. In order to determine whether or not to ventilate a cargo hold loaded with a steel cargo, the dew point of the outside air should be compared to the dew point of the air within the hold. Owners should insure that their vessels are provided with a hygrometer (an instrument consisting of both a wet and dry bulb thermometer that is utilised to determine dew point/relative humidity). Furthermore, inexpensive portable wet/dry bulb thermometers should be placed in each cargo hold in order to determine the dew point of the air in the cargo hold. A sling psychrometer can also be utilised to measure dew point in the cargo holds.

The basic dew point rules relating to ventilation are as follows:

- *If the dew point of the air inside the cargo hold is lower than the dew point of the outside air, ventilation should NOT be carried out.*
- *If the dew point of the air inside the cargo hold is higher than the dew point of the outside air, ventilation should be carried out.*

Consideration should be given to the surface temperature of the cargo, particularly when cargo is loaded in a cold climate and designated for discharge in a warm climate. Although it is often difficult to accurately determine the surface temperature of steel cargoes during the voyage without the use of expensive thermocouples, it should be noted that the temperature of steel cargoes would increase slowly during a given voyage. In cases where steel cargoes are loaded in cold climates (such as Baltic Sea and Russian/Ukrainian ports) and designated for delivery in warmer climates (such as the U.S. Gulf of Mexico or South America), there will be little to no need for ventilation and steps should be taken to insure that the warm outside air is not introduced into the hold. If this warmer air is introduced into the hold, condensation will form on the surface of the relatively colder steel cargoes.

As a general rule, cargoes loaded in a cold climate and being transported to a warmer climate should NOT be ventilated. Conversely, cargoes loaded in a warm climate and being transported to a colder climate should be ventilated.

It is essential that vessels carrying steel cargoes maintain a clear and concise record of the temperature, dew point, humidity and prevailing weather conditions in the form of a ventilation log. A proper bilge sounding log should also be maintained in order to document any increase in bilge levels due to condensation formation. Without the benefit of such records, defending Owner's interests against claims of condensation related rust damage is difficult.

Owners that intend to employ their vessels in the steel cargo trade should be aware of the potential for these costly condensation damage related claims and ensure that their Masters and officers take the proper steps to prevent condensation formation during the voyage.

With thanks to Technical Maritime Associates, Inc for preparing this article and for Murphy, Rogers, Sloss & Gamble for allowing us to publish it.

Collision - Procedure for Court Consultation with Nautical Assessors

The English Admiralty Court has recently laid down the procedure to be followed when Nautical Assessors are consulted in a collision case. The procedure, which reflects the newly recognised right of the parties to be involved in the consultation process while balancing this right with the need to minimise cost and delay, was established by Goff J in the "*Global Mariner*"/"*Atlantic Crusader*" case.

A full report of this case by Ian Freeman **(ian.freeman@simsl.com)**, including a discussion of the procedural issues, determination of liability and the responsibilities of a vessel at anchor, can be found on the Steamship Mutual website at:

www.simsl.com/Articles/GlobalMariner0805.asp

India Shipping Summit 2005

The India Shipping Summit will be held on 21st and 22nd September 2005 in Mumbai and focuses on the development of Indian shipping and the prospects for future growth. The conference programme seeks to bring together all maritime business interests in India and is supported by the Club and its Indian Representative, Crowe Boda.

Details of the conference programme and a current list of confirmed speakers can be found at:

http://www.indiashippingsummit.com/conference/conference_prog.htm

The Club has been fortunate to have had a long association with the Indian market starting in 1946 when India Steamship became the first non-UK based Member.

The Club's Indian entry has been represented on the Board since 1960 and has provided nine Directors and two Chairmen over that period. Indian controlled entered tonnage currently stands at over 2.5 million GT from 22 Members.

Representation of the Club by the Boda Group started in 1949 and Crowe Boda was established in 1956 by the late Jagmohandas Bhagwandas Boda and Sidney Crowe, a former senior partner of the Managers. Since that time the Club and Crowe Boda have strived to offer its Indian Members flexible and personal service adapting to the changing needs of the Indian market.

The Managers and Crowe Boda send their best wishes to the organisers and delegates and hope to meet Members from the region in Mumbai in September.

Shipowner's Right to Limit - Jurisdictional Issues

"a shipowner's rights to invoke limitation under the 1976 Limitation Convention is not restricted to jurisdictions in which claims subject to limitation are brought."

The English Court of Appeal has recently approved the first instance decision in *The Western Regent** thereby confirming that a shipowner's rights to invoke limitation under the 1976 Limitation Convention is not restricted to jurisdictions in which claims subject to limitation are brought.

The limitation decree in question related to an alleged US$9.9 million claim for damage caused to a well head installation by a seismographic vessel in the North Sea. One month after the incident, and before any claims had been brought, the owners of "The Western Regent" served the limitation "claim" on the owners of the installation in England (the limitation figure in England was 2,590,000 SDRs - approximately US$ 3.6 million at today's rate). A month later, the owners of the installation, Total, commenced proceedings against the vessel owners in Texas (the vessel owners' alleged principal place of business), claiming US$ 9.9 million for damage to property, lost production and business interruption.

Limitation in the United States is governed by the Shipowner's Limitation of Liability Act, 46 U.S.C.S 183 *et seq.,* under which the amount of the limitation fund is determined by the value of the vessel after the incident. In this case, there was no damage to the vessel and its post collision value comfortably exceeded the amount of Total's claim. As such, limitation in the U.S. was of no use to the vessel's owners.

With over US$ 6 million at stake (the difference between the limitation figures of the two jurisdictions), Total sought to defeat the limitation decree in England on the ground that the vessel owner could only launch such proceedings when underlying legal proceedings had been instituted in England.

Their arguments were rejected by the English High Court, and have now been rejected by the English Court of Appeal. In a judgment that is likely to have a far-reaching impact on a shipowner's right to limit, Clarke LJ, leading a strong Court of Appeal, stressed that the right to invoke limitation under the 1976 Convention is not restricted by jurisdictional issues relating to where underlying claims are or will be brought. It was held, instead, to be a free standing right restricted only by the procedural rules of the state in which it is being invoked.

However, the Court of Appeal (agreeing with the First Instance Judge) declined to grant an anti-suit injunction against Total in respect of the Texas proceedings. The Court decided these proceedings were not unconscionable or in breach of contract, and with comity in mind, that it was inappropriate to pre-empt the Texan court's ruling with regard to the limitation decree in England.

A detailed discussion of this case and its implications for both limitation and anti-suit injunctions has been prepared by Rajeev Philip **(rajeev.philip@simsl.com)** and can be found on our website at:
www.simsl.com/Article/WesternRegent0805.asp

**Seismic Shipping Inc. v Total E&P UK PLC*

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Restrictive Injunctions v Specific Performance

It is a well established principle of English law that an order for specific performance is not a remedy available to parties to a time charter *("The Scaptrade")*.

The English Court of Appeal recently reviewed the existing law on negative injunctions in the context of a dispute between a pool operator and owners of vessels operating in the pool who wanted to withdraw them from the pool early. Distinguishing *"The Scaptrade"* decision the Court made an order that owners could not withdraw their vessels from the pool until the underlying dispute had been determined by a final arbitration award.

The decision in *Lauritzen Cool AB v Lady Navigation* is discussed in an article by Duncan Howard **(duncan.howard@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Articles/Lauritzen0805.asp

Transporting Liquefied Natural Gas

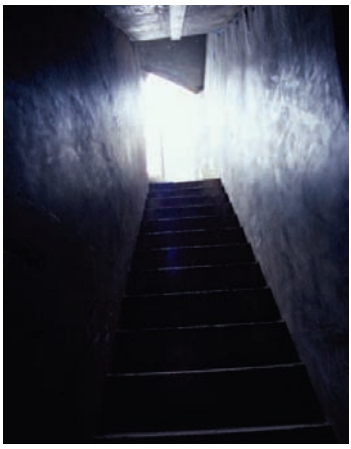
Liquefied Natural Gas (LNG) carriage has an excellent safety record with almost 40,000 voyages covering 60 million miles around the globe without a major accident over a 45-year history. LNG shipping is nonetheless a complex, highly specialised and expensive venture. The cargoes are carried at temperatures below -160˚C and the typical cost of a new building is double that of a VLCC. To finance new buildings owners agree charters guaranteeing income streams for as long as 20 years with both owners and charterers assuming significant risks in the event of the other's non-performance.

LNG is not new. It has been transported and used for some 45 years. However, in the summer of 2003, Alan Greenspan, Chairman of the Federal Reserve Board, flagged LNG as a "hot topic," raising awareness of the need to expand the energy portfolio of the United States. He said that LNG could play an integral part in meeting the future energy demands of the United States. LNG demand in the United States alone is projected to increase by 30 percent during the next 10 years.

Although LNG carriage has an outstanding safety record the nature of the trade and vessel values mean that disputes which may arise are potentially substantial. In an article written for the Steamship Mutual website Dr Shahab Mokhtari **(shahab.mokhtari@simsl.com)** gives an insight into LNG transportation and the contractual issues associated with its carriage. The article can be found at:

www.simsl.com/Articles/LNG0805.asp

Entry into Confined Spaces



It is a requirement for ships to carry properly calibrated equipment with which trained personnel can test the atmosphere and assess the risk of entering a space. Prudent owners/managers will ensure that their crews are properly trained in the necessary procedures which apply to entry into enclosed spaces. However, even this does not always prevent accidents. In a recent but all too familiar incident a crew member entered an unassessed enclosed space and collapsed. A second crew member went in to help him and then a third to help them both. Finally, a fourth crew member remembered his training and went for help. This action saved his life.

Enclosed spaces include the following:

- Cargo holds
- Ballast tanks
- Peak tanks
- Bunker tanks
- Pipe tunnels
- Pump rooms
- Void spaces
- Cofferdams
- Fresh water tanks
- Duct keels

and any other spaces which are normally kept closed.

Guidance notes on this important safety issue can be found in the Loss Prevention area of the Steamship Mutual website at: **www.simsl.com/Loss_Prevention/Guidance_Notes.asp.** The Club, in association with Videotel, has produced a series of safety training videos which contain further material on shipboard operations including enclosed spaces. For further information on this training package visit: **www.simsl.com/Publications/Videos/videos.asp#Videotel.**

Article by Captain Frank Quick **(ship surveys@simsl.com).**

Anti-Suit Injunctions and European Law

In the past the English Courts have enforced arbitration clauses and agreements on jurisdiction by granting "anti-suit injunctions" against foreign proceedings. This has helped, for example, to enforce clauses in bills of lading providing for the Courts of the carrier's place of business to have jurisdiction, and to defend the position of owners / the Club where bills of lading incorporate an arbitration clause from a charterparty. The English Courts can still do this where the foreign proceedings are outside Europe. However, where the foreign proceedings are within Europe (the European Union, Iceland, Norway and Switzerland) the English Courts now cannot grant anti-suit injunctions to enforce a jurisdiction clause. It is likely that soon the English Courts will also not be able to grant anti-suit injunctions against proceedings within Europe in beach of London arbitration clauses. In an article by Robert Gay of Hill Taylor Dickinson the problem is explained, and suggestions made as to ways of dealing with it. The article can be found on the Club website at:

www.simsl.com/Articles/AntiSuit0805.asp

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Supreme Court Rules ADA Applies to Foreign Flagged Cruise Ships - *Sometimes*

Following the report on *Spector v Norwegian Cruises in "All At Sea",* issue 2 of Sea Venture, a highly-divided Supreme Court - a 5-4 decision - has now ruled that foreign-flagged cruise ships embarking in U.S. waters are subject to liability to disabled passengers under the ADA for alleged discrimination practices, policies and procedures. The Court remanded the matter back to the lower court to determine whether plaintiffs were discriminated against as claimed, and whether the structural modifications sought were in conflict with international law or otherwise interfere with the ship's internal affairs. While disability-rights advocates have publicly touted the Supreme Court's decision as a victory, the ruling is viewed by industry insiders as largely favourable.

The Court expanded the definition of "internal affairs" to encompass a ship's basic design and construction, stating that before legislation could govern such matters, Congress would need to state clearly its intent to apply the law to foreign vessels. There is no such statement contained in the ADA. Alternatively, the Court noted that to the extent any proposed modification of a ship's structure was inconsistent with international law or operational safety, such modifications would not be deemed "readily achievable" anyway, as defined in the Act.

The decision uses language suggesting application of Title III's prohibition on discrimination, even though applicable in some cases to foreign ships, is limited to U.S. waters, that limitation would mean alleged discrimination aboard ships whose itineraries do not include U.S. ports, even if the tickets are sold in the U.S., may not be covered by the ruling.

Although concern had been expressed that the decision could invite application of other U.S. laws to foreign ships generally, the ruling probably has no such effect. The scope of the decision involves only application of U.S. laws when foreign ships enter U.S. waters, not when they operate abroad. *Spector* stands for the proposition that federal statutes do not automatically apply to a foreign ship's internal affairs, including its labor relations with foreign crew or basic design and construction, unless Congress first includes in the statute a clear statement requiring such application to foreign ships.

The Supreme Court decision is discussed in greater detail in a Steamship Mutual website article by Lawrence W. Kaye of Kaye, Rose & Partners, LLP at:

www.simsl.com/Articles/ADA0805

Pearl River Delta and Hong Kong as a SOx Emission Control Area

"Asian ports are going to have to follow this example sooner or later. Indeed, Hong Kong and Shenzhen should take the lead because, together, they have more ships in their waters than anywhere else in the world."

As reported in Sea Venture issue 1 the Regulations for the Prevention of Air Pollution from Ships established by MARPOL Annex VI entered into force on 19th May 2005.

Annex VI sets limits on sulphur oxide and nitrogen oxide emissions from ships and prohibits deliberate emission of ozone-depleting substances. The regulations include a global cap of 4.5% m/m on the sulphur content of fuel oil. The Annex also contains provisions allowing for special "SOx Emission Control Areas" (SECAs) to be established with more stringent controls on sulphur emissions. In these areas, the sulphur content of fuel oil must not exceed 1.5% m/m. So far, the Baltic Sea has been designated as a SECA. IMO's Marine Environment Protection Committee (MEPC) has recently accepted the proposal that the North Sea should also be a SECA.

In the Hong Kong Special Administrative Region, environmentalists are lobbying for Pearl River Delta ports, including Hong Kong, to be designated a SECA. In a report recently released by an environmentalist think tank, Civic Exchange, it was proposed that China might wish to consider this proposal proactively.

The report also suggested that the Pearl River Delta should take the lead in Asia in limiting ships' emission of air pollutants following the example of western countries where the authorities had begun to demand that ships burned cleaner fuel oil. The report said that "*Asian ports are going to have to follow this example sooner or later. Indeed, Hong Kong and Shenzhen should take the lead because, together, they have more ships in their waters than anywhere else in the world.*"

The Hong Kong Authorities are studying the feasibility of this proposal. The Hong Kong Shipowners Association is also discussing with concerned parties the possibility of setting up a SECA in the region. The Association emphasised that Hong Kong based shipowners are environmentally conscious, that most of them were already complying with the new provisions of Annex VI and using fuel oil with less than 4.5% m/m in sulphur content. The Association has also pointed out that the limited availability of fuel oil with sulphur content of less than 1.5% m/m might pose an obstacle to the establishment of a SECA in the region.

Article by Edward Lee **(edward.lee@simsl.com)**

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EU Criminalisation of Accidental Pollution

In March 2003, the European Parliament introduced a draft Directive providing for criminal sanctions (including both fines and imprisonment) related to ship source pollution. The Directive was introduced because it was felt that a very large number of ships, whilst sailing in EU waters, were ignoring the provisions relating to the discharge of polluting substances contained in MARPOL 73/78 without corrective action being taken. Therefore, there was a need to harmonise MARPOL's implementation at a Community level.

The Directive provides that discharges of oil and other noxious liquid substances (i.e. discharges of Annex I or II substances) in excess of the limits provided for in MARPOL will be regarded as an infringement and constitute a criminal offence "if committed with intent, recklessly or by serious negligence". It further provides that such infringements should be subject to effective, proportionate and dissuasive criminal and/or administrative sanctions. Such sanctions will apply to any person involved in the pollution incident, will extend to discharges on the high seas, and will not be insurable.

Various industry organisations, including the International Group but led by the European Community Shipowners' Associations (ECSA), argued against these proposals because:

- they contradict MARPOL and UNCLOS provisions which do not provide for sanctions following accidental pollution;
- "serious negligence" is not widely accepted as a legal concept and there is the risk that sanctions will be applied to acts of "ordinary" negligence resulting in serious levels of pollution;
- this legislation seems to move away from the EC's main intention of taking action to criminalise owners who run sub-standard shipping and to concentrate on criminalising seafarers.

However, despite these submissions, the Directive was approved without amendment on 12th July 2005 and EEC Members states have 18 months in which to implement these provisions into their national law. In the meantime, legal challenges are being considered by shipowner organisations.

Article by Colin Williams
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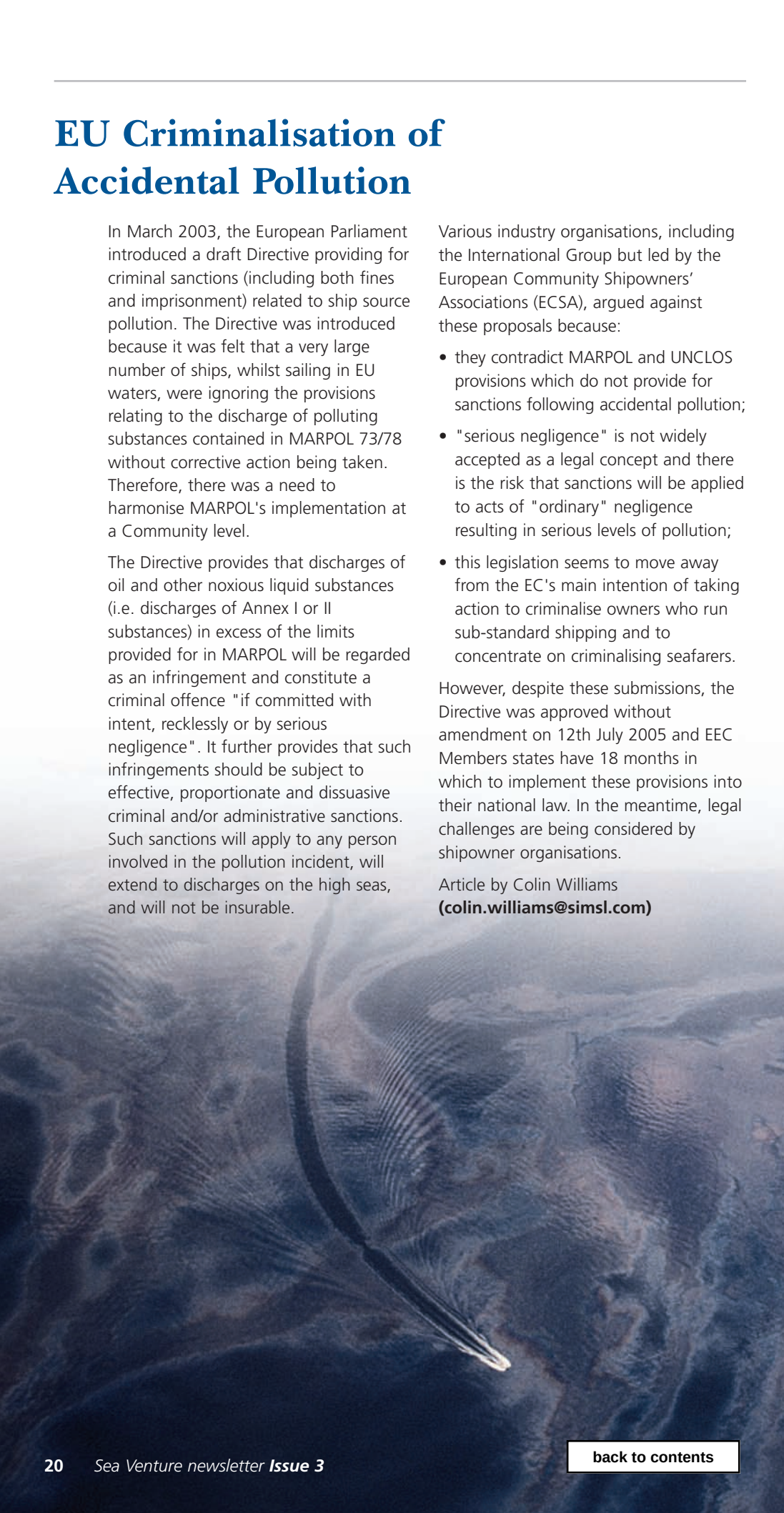


MARPOL Annex VI - INTERTANKO Clauses

In order for owners to comply with the considerable emission control requirements of the Air Pollution Regulations contained in MARPOL Annex VI those responsible for providing bunkers, whether bunker supply companies or charterers under time charterparties, must ensure that the bunkers supplied meet the requisite standards. The bunker delivery notes must contain the minimum information required by MARPOL Annex VI, which includes sulphur content and a statement that the fuel supplied meets the requirements of Regulation 14.1 or 4 a (the sulphur limit Regulations) and Regulation 18.1 (the general fuel quality Regulation) and is signed by the fuel supplier's representative. Samples must be provided to the vessel which comply with IMO guidelines.

INTERTANKO's Documentary Committee has prepared the INTERTANKO Bunker Emission Clause for Time Charters and the INTERTANKO MARPOL Annex VI Clause for Bunker Supply Contracts to assist owners and charterers in ensuring compliance with the MARPOL Annex VI regulations and similar European regulations. These clauses and explanatory notes are reproduced with permission of INTERTANKO on the Steamship Mutual website at:

www.simsl.com/Articles/AirPoll0505_CharterClause.asp

Italy - Change in Limitation Rules for Domestic Carriage

The Italian Constitutional Court has recently ruled that article 423 of the Italian Navigation Code is contrary to the fundamental principles of the Constitution, to the extent that it allows the maritime carrier to limit liability for loss or damage to cargo even in cases of gross negligence or wilful misconduct.

The Court focused its attention on the differences between the rules governing the liability of the maritime carrier and those governing liability for carriage by air and road where limitation is excluded in cases of wilful misconduct or gross negligence. The Court held that this difference in approach was contrary to principles contained in the Italian Constitution which state that the law has to provide the same rules for similar cases.

In an article prepared for the Steamship Mutual website Studio Legale Mordiglia, Genoa, explain how this ruling has affected article 423, which governs domestic carriage. The article can be seen at:

www.simsl.com/Articles/ItalyLimitation0805.asp

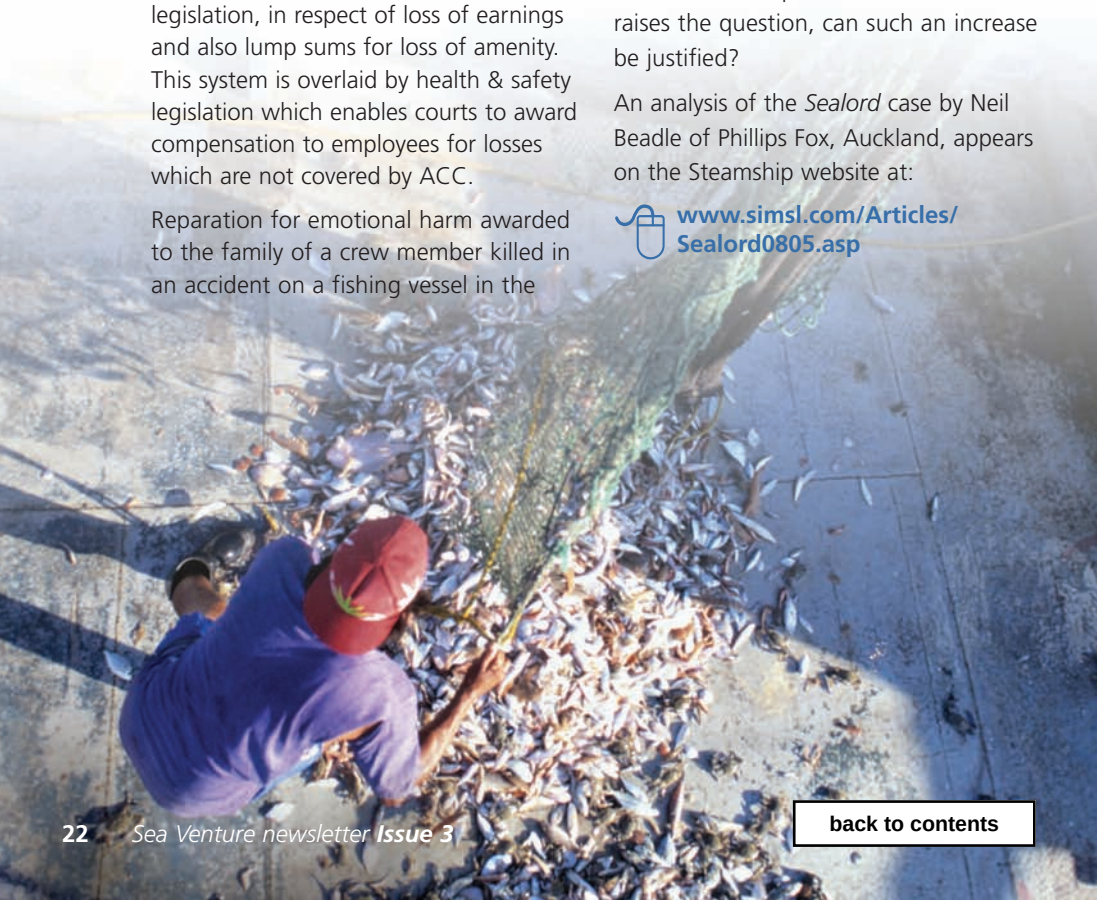
New Zealand - Substantially Increased Reparation for Emotional Harm

Compensation for injuries at work in New Zealand is determined under the Accident Compensation Corporation (ACC) system at rates determined by legislation, in respect of loss of earnings and also lump sums for loss of amenity. This system is overlaid by health & safety legislation which enables courts to award compensation to employees for losses which are not covered by ACC.

Reparation for emotional harm awarded to the family of a crew member killed in an accident on a fishing vessel in the recent *Maritime Safety Authority v Sealord Group Limited* case is so much greater than anything previously awarded in comparable situations that it raises the question, can such an increase be justified?

An analysis of the *Sealord* case by Neil Beadle of Phillips Fox, Auckland, appears on the Steamship website at:

www.simsl.com/Articles/Sealord0805.asp



Recent Publications

The 2005 Report & Accounts and Management Highlights

Members received these documents in hard copy in July. They can now be found on the Steamship Mutual website. The Management Highlights can be downloaded as a whole or by section, as preferred.

- Report & Accounts
  www.simsl.com/Publications/RA/2005/Rep_Acc.asp
- Management Highlights
  www.simsl.com/Publications/Management_Highlights/Management_Report.asp

Circulars

- **MARPOL 73/78 - Oily Water Separators**
  Circular B.432 of June 2005 reports an increasingly hard line on oily water separator offences taken by port states such as Germany, France and the United States and reminds Members of the Club cover issues associated with such offences.
  www.simsl.com/Publications/Circulars/2005/B432.asp
- **Taiwan Marine Pollution Control Act and Compulsory Insurance**
  From 1st July 2005 new compulsory insurance requirements apply to vessels calling at Taiwanese ports. The new regulations are outlined in Circular B.431 of June 2005.
  www.simsl.com/Publications/Circulars/2005/B431.asp

Articles Published on the Steamship Mutual Website

- Read Before Signing
  www.simsl.com/Articles/Wimpey0805.asp
- Hold Cleaning - Who Bears The Cost?
  www.simsl.com/Articles/HoldClean0805.asp
- Sewage - Revised Regulations In Force
  www.simsl.com/Articles/Sewage0805.asp
- Paris MOU CIC On Radio Distress And Safety Systems
  www.simsl.com/Articles/ParisMOUCIC_GMDSS0805.asp
- Tokyo MOU CIC on Operational Requirements
  www.simsl.com/Articles/TokyoMOU_OpReqs0805.asp
- Michigan - Permit System To Address Ballast Water Issue
  www.simsl.com/Articles/Michigan_Ballast0705.asp
- U.S. Nontank Vessel Response Plans - Enforcement Postponed
  www.simsl.com/Articles/US_NonTankResPlan0605.asp

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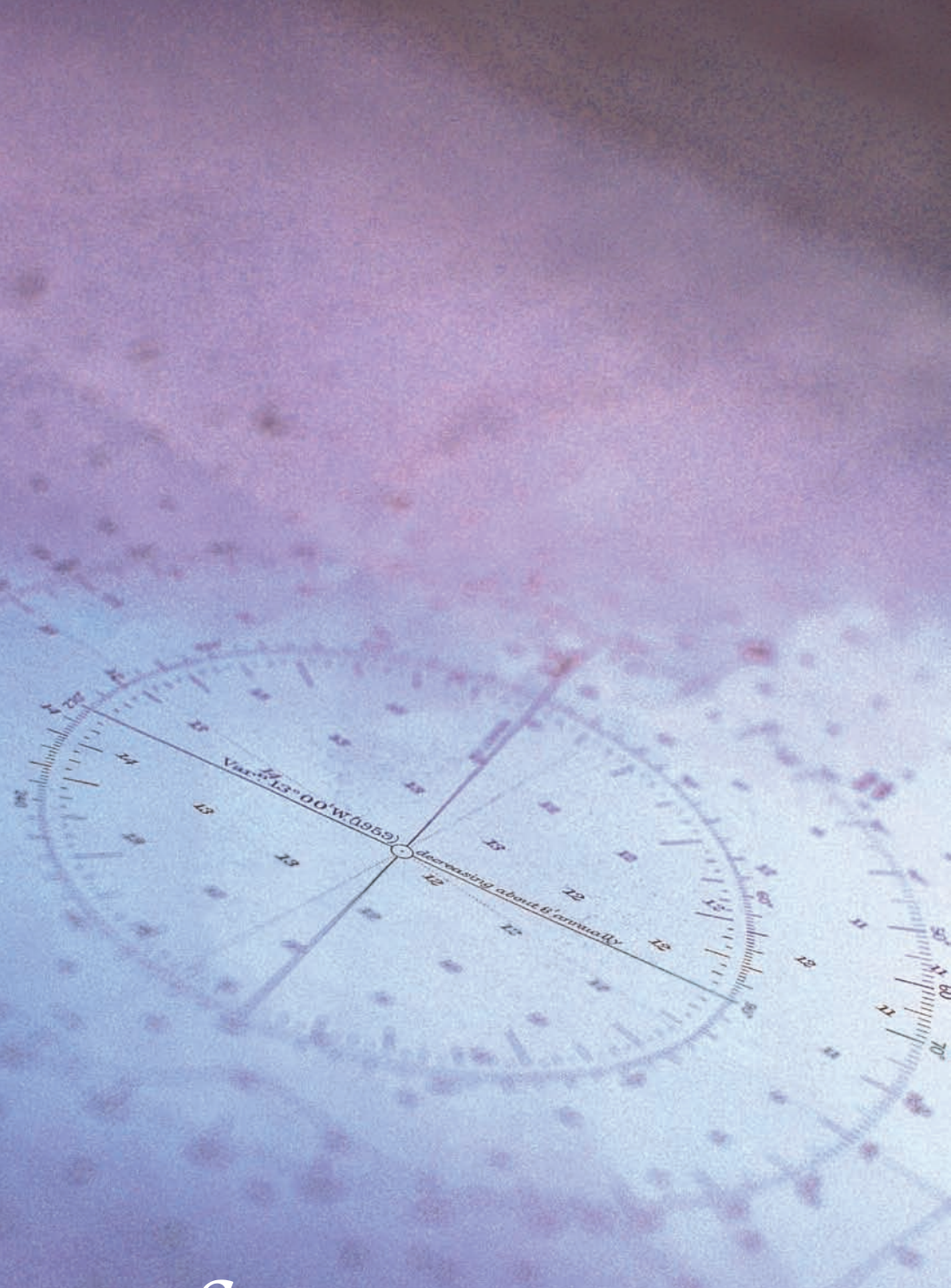

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