
STEAMSHIP MUTUAL
newsletter
Sea Venture
issue 4

Contents

Editorial Team
Naomi Cohen
Malcolm Shelmerdine

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

Introduction

The fourth edition of Sea Venture marks the first anniversary of the revised format of the Steamship Mutual newsletter. The feedback we have received during the year from members, brokers and correspondents has been overwhelmingly complimentary. In particular, the increased frequency of publication has been welcomed.

2005 was another good year for Steamship Mutual. The year opened with the Club's ratio of free reserves to entered tonnage above the International Group average. During the year there has been solid growth in both measures, with owned entered tonnage passing the 40m GT mark and free reserves forecast to be over US$147m at 20th February 2006. The significant improvements in the pure underwriting surpluses for both 2003/04 and 2004/05 and the early prospect of a positive outcome for 2005/06 form the foundations of a sound financial position for the Club going into 2006. These developments, which are all discussed in the Mid Year Review published in November

(www.simsl.com/Publications/MidYearReview/MYR.asp),

have enabled the Club's Board to take the view that a 5% standard increase would be sufficient to form a prudent basis for the forthcoming renewal.

"the combination of a conservative approach to risk management and a sound financial position enables Steamship Mutual to look forward to 2006 and beyond with confidence"

The New Year inevitably will bring fresh challenges. There are indications of an increase in the average cost of claims in the attritional layer up to US$200,000 which may increase further if commodity prices continue to rise. Uncertainty continues to beset the financial markets as U.S. interest rates rise. There are concerns as to whether the future supply/demand balance will remain positive for all areas of shipping and if current freight rates are sustainable. While the Club is not immune to these broader concerns, the combination of a conservative approach to risk management and a sound financial position enables Steamship Mutual to look forward to 2006 and beyond with confidence.

This edition of Sea Venture includes articles discussing the recent Court of Appeal decision in *Golden Straight Corporation v Nippon Yusen Kubishiki,* a case dealing with the influence of a future event on the assessment of damages, as well as other English High Court decisions on laytime, the identity of the lawful holder of a bill of lading and notices of withdrawal. There are articles from lawyers in New York, Durban and Panama, together with a report on recent developments in the CLC/Fund conventions. The editorial team is grateful to all the contributors to this edition of Sea Venture, and continues to welcome comment both on the content of Sea Venture and suggestions for the future.

Malcolm Shelmerdine

1st January 2006

back to contents

Conduct of Parties in Arbitration

Parties are often quick to criticise arbitrators for the way they handle arbitrations but rarely look at their own conduct, or that of their advisors, during the course of an arbitration. In the second of two articles written for Steamship Mutual by Clive Aston, an LMAA Arbitrator, he offers an arbitrator's view of some of the ways in which parties may get more out of arbitration at less cost.

The article can be found on the Steamship Mutual website at:

www.simsl.com/Articles/Arbitration0905.asp

Clive's first article *"An Arbitrator's Perspective - Balancing The Interests Of The Parties"* can be also be found on the website at:

www.simsl.com/Articles/Arbitrator0405.asp

Belgium Honours Capt. Wei Jiafu and COSCO GROUP

Capt. Wei receiving the honour from Mr.Patrick Nijs, Consul General of Belgium

In a ceremony held in Hong Kong on 15th November Capt. Wei Jiafu, Group President & CEO of the COSCO GROUP, and a Director of Steamship Mutual, was awarded the Belgian honour of the **Commander of the Order of King Leopold II**. The honour was bestowed upon Capt. Wei by the Consulate General of Belgium in recognition of the significant contribution made by the COSCO GROUP to the Belgian economy.

The COSCO GROUP is China's leading marine transportation company. The group also encompasses logistics, shipbuilding, ship repairing, terminal operation, financing, I.T. services and real estate development.

COSCO is a long standing Steamship Mutual member. Capt Wei has been a member of the main Club board since March 2000, while COSCO has been represented on the board from 1988

Hurricane and Natural Disaster - Carrier Liability for Damage to Cargo in the U.S.

"a non-delegable duty to provide the necessary care that carrying that cargo requires"

When vessels encounter violent storms at sea, it is commonly thought that the carrier is exonerated from liability for damage to the cargo on board by either "Act of God" or "Peril of the Sea" defences. However, along with these defenses, certain provisions of the United States Carriage of Goods by Sea Act impose on the carrier a non-delegable duty to provide the necessary care that carrying that cargo requires. The carrier must satisfy this continuing duty of care or risk being held liable for the damage caused to cargo during the Force Majeure event.

The unforseeability of the "Act of God" to the carrier is absolutely essential to absolve him of liability for damage to the cargo due to a storm. Where a carrier has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by a hurricane, or other Act of God, but fails to do so, then he is responsible for the loss. What must always be remembered is that the carrier's duty to safeguard cargo, as far as reasonably possible, remains in effect until delivery to a fit and customary wharf. Where the prevailing weather and other conditions, including the condition of the cargo itself, allows, this includes a duty to deliver the cargo to a safe location where it may not be damaged further or stolen, and to provide it with the level of care it reasonably requires in the interim.

In short, the carrier who exonerates itself from liability will have borne successfully the not insignificant burden of proving that there was no human negligence involved before, during or after the event giving rise to the defence on which he seeks to rely.

Thomas L. Tisdale, of Tisdale & Lennon, has prepared an article for the Steamship Mutual website in which he discusses these issues in greater detail. The article can be found at:

www.simsl.com/Articles/USCarrierLiability1205.asp

back to contents

Cargo Interests - The Right To Be Sued

In the recent case of *Primetrade AG v Ythan Limited* the English High Court was asked to consider two previously undecided issues in relation to the Carriage of Goods by Sea Act 1992 ("COGSA").

In February 2004 the "Ythan" exploded with the consequent loss of the vessel, her cargo and six crew members. The explosion was in the cargo, a consignment of 3,760 mt of Metallic HBI Fines. Although security was sought and provided to cargo the owner alleged that the cargo was dangerous and started arbitration to recover the losses arising from the casualty. However, there was a chain of sale contracts, the respondents in the arbitration were not named on the bills of lading and at the time of the explosion the bills of lading where held to the order of the shipper, albeit subsequently sent to the respondents' cargo underwriter.

The two issues before the Court were (i) whether the respondent was the lawful holder of the bills of lading at any relevant time with rights of suit under s2(1) of COGSA and (ii) if the demand for security amounted to a "claim" under s3(1)(b) of COGSA which, if so, would make the respondents subject to the same liabilities under the contract of carriage as if they had been a party to the contract. Both issues are discussed in a Steamship Mutual website article by Janet Ching **(janet.ching@simsl.com)** at:

www.simsl.com/Articles/Primetrade1205.asp

No Emergency "Laundry List" For Charterers

The Connecticut District Court has recently denied a charterer's application* seeking emergency depositions of crew members and production of documents from a vessel in Houston which was next calling at New Orleans. The charterer used the vessel on a regular liner service which included regular port calls at Houston/NOLA. Discovery was sought in respect of damage to the 'tween deck in the No. 4 hold, apparently as a result of overstowage of cargo. The charterer sought depositions of 9 crew members and production of a "laundry list" of documents.

The ostensible reason for the request was to collect and perpetuate evidence in order to defend potential cargo claims at a later date. However, whereas the owner had already commenced suit against the charterer for damage to the vessel resulting from the incident in the High Court in London (pursuant to the charterparty forum selection clause) there had, as yet, been no evidence to indicate that any cargo had, in fact, been damaged. Moreover, the relevant bills of lading had English forum selection and choice of law clauses.

"The charterer sought depositions of 9 crew members and production of a "laundry list" of documents."

The court denied the petition from the bench (i.e. without a written ruling), finding that the charterer had failed to comply with the rule's procedural requirements, namely, that the petitioner list all potentially adverse parties (the cargo interests) and serve notice of the application on each such named party at least 20 days before the hearing. The court further found that there were no "exceptional circumstances" present to warrant granting the requested relief. As the court noted, *"[h]ere, the charter party petitioner has control over the vessel and that certainly was not the case in the decisions that I looked at where the concern was that the vessel would leave, the crew members would disperse and there would be no future opportunity to obtain the testimony that was requested."* Finally, the court found that the pending litigation in London, coupled with the fact that the owner had represented that it would produce relevant witnesses and documents if ordered to do so by the London court, *"gives me greater assurance that the need to preserve this testimony by way of expedited petition is not significant."*

With thanks to Thomas H. Belknap, Jr. of Healy & Baillie, New York, for preparing this article. LeRoy Lambert and Thomas H. Belknap, Jr. of Healy & Baillie acted for the successful owner in this application.

*Rule 27 of the Federal Rules of Civil Procedure

back to contents

"Red in Tooth and Claw"

The stakes are high for both owners and charterers when the decision is taken to withdraw a vessel from charterers' service and a Withdrawal Notice is served. Substantial claims and expensive disputes will inevitably follow if either owners or charterers wrongly refuse to perform their obligations under the charter on the mistaken assumption that a notice of withdrawal is or is not defective or wrongly served. The English High Court has recently considered these issues and highlighted the need for clarity where Owners purport to tender a Withdrawal Notice pursuant to an anti-technicality clause in a charterparty.

In the *"Li Hai"**, after receipt of notice of withdrawal hire was paid save for a deduction of U$500. As a result of that deduction owners withdrew their vessel from charterers' service. However, the Court decided that the Withdrawal Notice was ambiguous as to what sums were to be remitted and awarded charterers damages marginally in excess of US$2 million.

When giving his decision Hirst J took the opportunity to consolidate previous case law which considered the form and effect of Withdrawal Notices *(the "Pamela", the "Afovos", the "Nanfri")* and set out the requirements of such notices in order that owners and charterers alike might benefit from a comprehensive understanding of what is arguably one of the most important clauses in the charterparty.

In an article written for the Steamship Mutual website Sarah McGuire **(sarah.mcguire@simsl.com)** discusses the *"Li Hai"* and the related issue of deductions for anticipatory off hire as well as potential estoppel issues based on the parties' past conduct. Anti-technicality clauses are also featured. The article can be found at:

www.simsl.com/Articles/LiHai1205.asp

**Western Bulk Carriers K/S v Li Hai Maritime Inc*

Charterers' CQD Obligations

"The vessel owner alleged breach of charterers' obligation of CQD and claimed damages for the delay"

Where a voyage charter provides for loading/discharging with "customary quick despatch" (CQD), charterers are obliged to perform cargo operations as fast as possible in the circumstances prevailing at the time.

In a recent dispute concerning CQD charterers/receivers paid import duties on cargo but refused to pay additional duty imposed retrospectively after the discharge had started. Instead they challenged the additional duty in the local courts and eventually established that that duty was invalid. Discharge was, however, delayed as a consequence of the local authorities' refusal to allow discharge to continue whilst the court action went on.

The vessel owner alleged breach of charterers' obligation of CQD and claimed damages for the delay. The charterers denied there was any breach because CQD only required them to discharge the cargo as quickly as was reasonable in the actual circumstances prevailing in the port.

Should the charterers have paid the additional duty to avoid any delay to the vessel, or was the fact of their success in challenging the validity of that duty evidence of the reasonableness of that decision and consequent delay to the vessel? These issues are discussed in an article by Joe Mays of Mays Brown Solicitors on the Steamship Mutual website:

www.simsl.com/Articles/CQD1205.asp

"Supplytime 05": BIMCO Finalises Its Revision of "Supplytime 89"

In November 2005 BIMCO released its revision of the Supplytime 89 Uniform Time Charter Party for Offshore Services Vessels. Since it replaced its 1975 predecessor the Supplytime 89 has become the most widely used standard form contract in the offshore industry. However, despite its widespread use the form has not been free of criticism. In particular, the Clause 26 Early Termination mechanism has lead to considerable litigation.

Whilst the latest iteration includes a number of amendments to the 89 Form, two key provisions which merit close examination are its "knock-for-knock" clause, and the Early Termination clause already mentioned.

An article by Rajeev Phillip **(rajeev.philip@simsl.com)** looking at the amendments to these clauses, and their impact can be found at:

www.simsl.com/Articles/Supplytime1205.asp

back to contents

Future events and the Impact on Damages

When assessing damages should account be taken of an option to cancel in the contract if the event giving rise to the exercise of that option had not arisen at the time the contract was repudiated but did subsequently arise? Should commercial certainly or the likelihood of a future event prevail when assessing damages? This novel and difficult point was addressed the case of *Golden Strait Corporation v Nippon Yusen Kubishiki* which was recently decided by the English Court of Appeal. These issues are discussed by Sian Morris **(sian.morris@simsl.com)** in a Steamship Mutual website article at:

www.simsl.com/Articles/Golden1205.asp

An Alternative Unsafe Port Claim

While port authorities are not directly involved in safe port disputes they may often become indirectly involved; a charterer that is liable to an owner in respect of such a claim may seek to recover any sums paid to the owner from the port authority. The success of any such action will depend on the facts and on any statutory or contractual immunities or exemptions. However, it is not only the charterer who should consider such actions. It may be that the owner does not have a claim against the charterer, for example, where there is no express warranty of safety in the charterparty, or a warranty cannot be implied, or any warranty is restricted. Alternatively, the owner may have a claim but it is valueless because the charterer becomes insolvent. In these circumstances can an owner claim directly against the port authority?

A direct claim of this type arose in the recent case of The *"Charlotte C"*, a discussion of which can be found in an article on the Steamship Mutual website by Robert Melvin of Richards Butler at:

www.simsl.com/Articles/CharlotteC1205.asp

back to contents

When Does Laytime Commence?

"Despite argument from owners to the contrary, the Court found that the emails exchanged did not amount either to express or implied consent to the early commencement of laytime."

The High Court has recently given some guidance on the important question of when laytime should be regarded as having commenced when a vessel arrives at the loadport and starts loading before the start of the laydays.

The owners let their vessel "Front Commander" to the charterers on an amended Asbatankvoy charter. The vessel was to load a cargo of oil at Escravos, Nigeria, and the agreed laycan was 9/10 January 2004. A few days before the vessel's arrival, charterers managed to secure an earlier stem and were therefore happy for the vessel to arrive at the loadport port early. After owners had received several emails from charterers giving notice of their intention to berth the vessel and start loading as soon as possible after the vessel's arrival, the vessel arrived and tendered Notice of Readiness at 00.01 on 8 January. Loading started the same day and was completed 2 days later.

Two clauses in the charter sought to address the situation – one printed clause which stated that laytime was only to commence before the start of the laydays with "charterers' sanction" and an additional clause which required "charterers' consent in writing" before laytime would commence before the start of the laydays.

It was agreed that demurrage was payable but the dispute turned on if or when the NOR given by owners became effective for the commencement of laytime and whether the email exchange prior to berthing satisfied the charter clauses referred to in the preceding paragraph.

Despite argument from owners to the contrary, the Court found that the emails exchanged did not amount either to express or implied consent to the early commencement of laytime and merely confirmed that NOR was to be tendered on arrival and that charterers wanted the vessel to commence loading as soon as possible on arrival.

Laytime therefore did not commence until the first day of the laycan on 9 January.

Interestingly the Court decided that the Court of Appeal decision in the *"Happy Day"* on which owners sought to rely, was irrelevant as the only issue in this dispute was whether or not the requisite consent had been given by charterers during the email exchange referred to in the preceding paragraphs.

The Court's decision is rather unsatisfactory from a commercial point of view and gives charterers a windfall profit. It also serves as a harsh lesson to owners to ensure that there is express compliance with any charterparty provisions dealing with early commencement of laytime before agreeing to start loading prior to the contractual laydays.

It is understood that the owners have been granted leave to appeal. With other pending cases possibly turning on this decision, it will be interesting to see if the decision of the High Court is reversed.

Article by Duncan Howard **(duncan.howard@simsl.com)**

back to contents

South Africa - Club LOU Adequate Security For Release Of Vessel

Finally there is a definitive answer from a High Court of South Africa as to whether a P&I Club letter of undertaking constitutes adequate security within the ambit of the Admiralty Jurisdiction Regulation Act. Earlier this year, in the case of the *"Bow Neptun"** the Durban and Coast Local Division of the High Court of South Africa answered the question in the affirmative.

From the time the Act commenced in 1983, Club letters were frequently accepted as security to obtain the release of a vessel from arrest in South Africa. It was commonly believed that this could only be done by agreement with the arresting party. There were occasional instances where the release of a vessel was ordered by the courts against the provision of security by way of a P&I Club letter, but no written judgment was handed down, or the letter was to be substituted with a bank guarantee in due course.

On 26 May 2005, the Durban court granted an order for the arrest of the mv "Bow Neptun" as security for proceedings to be pursued by cargo interests by way of arbitration in London or an action before the Commercial Court in Antwerp, Belgium, and further stipulated that the vessel was to be released from arrest on the provision of security to the satisfaction of the claimants or the Registrar.

Prior to the arrest the security had been tendered for the claim on behalf of the owners in the form of a Club letter. This tender was rejected by the claimants. Following the arrest of the vessel an amended letter was tendered, which was also rejected. Although the letter responded to an arbitration award or judgment of a court of competent jurisdiction, cargo interests insisted that, in exchange for them agreeing to accept the Club letter, the owners and the Club should submit to Belgian law and jurisdiction in respect of the claims. The parties could not reach agreement and the owners and the Club sought an order for the urgent release of the vessel against the furnishing of the Club letter.

The Durban court, following the reasoning of the Supreme Court of

back to contents

Appeal which had held, in a different context that "security" under the Act included a bank guarantee, stated that:

"…… both the bank guarantee as well as the P&I Club Letter of Undertaking are couched in similar terms. They are both private contractual undertakings given by either the bank or Club/insurance company to secure an Applicant's claim against a Respondent either before or after arrest."

Cargo interests in the *"Bow Neptun"* submitted that the letter could not constitute security under the Act because it was not enforceable in South Africa. The Club did not have any assets situated within South Africa. Therefore, if the Club failed to meet its undertakings in terms of the letter, claimants would have to institute proceedings outside South Africa in order to enforce them.

The Durban court was not persuaded and pointed out that in the unlikely event that a foreign bank does not honour its guarantee or undertaking, the cargo interests would also be obliged to proceed against the bank in that foreign country. Whilst it was conceded that there is indeed a certain amount of risk involved the court found that it is an acceptable risk in line with modern commercial practice.

In conclusion, the court was satisfied that the letter of undertaking tendered by the Club constituted sufficient security within the ambit of the Act.

We thanks to Victoria Hobson and Jenny McIntosh, Garlicke & Bousfield Inc, Durban, for preparing this article.

** mv "Bow Neptun": Star Tankers AS and the American Steamship Owners Mutual Protection & Indemnity Association Inc / Methyl Company Limited and Lojit Corporation, Case No. A62/2005 (DCLD).* Details of the other cases referred to in this article can be found on the Steamship Mutual website at:

www.simsl.com/Articles/BowNeptun1205.asp

U.S. - Foreign Arbitration Clause in Crew Contract Enforced

The approach of the U.S. Courts to foreign arbitration clauses in seamen's employment contracts was summarised in Sea Venture issue 2 in the context of the Eleventh Circuit Court of Appeals decision in *Bautista et al v Norwegian Cruise Lines.*

This landmark decision has paved the way for shipowners to arbitrate injury and other employment claims where a foreign crew member signs an agreement to arbitrate in a country which is party to one of the two treaties which enforce arbitration - the New York and Panama Conventions.

In an article written for the Steamship mutual website, Curtis J. Mase and Beverly D. Eisenstadt of Mase & Lara, who represented Norwegian Cruise Lines, discuss the case in greater detail and explain the conditions which must be satisfied to ensure that such arbitration clauses can be enforced. The article can be found at:

www.simsl.com/Articles/Bautista1205.asp

Industrial Action v Free Movement of Workers & Services

An attempt by the ITWF and the Finnish Seamen's Union to take industrial action (including a strike by the latter and a concerted multi-jurisdictional boycott by the former and its affiliates) in order to prevent a Finnish Ferry operator from re-flagging its vessel under an Estonian flag was initially blocked by the English Courts. Granting an injunction to prevent industrial action by the Federation and the Union Mr. Justice Gloster held, in *Viking Line ABP v ITWF and Finnish Seaman's Union*, that the threatened action was against EU free movement of workers and services rules, citing the ECJ's ruling in the *Bosman* case which held that these rules applied not only to the actions of public authorities but also to *"rules of any other nature aimed at regulating gainful employment in a collective manner"*, and *"obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law"*.

The Unions appealed against this decision arguing that the right of trade unions to take action to preserve jobs was a fundamental right recognised by Art. 136 of the EC Treaty (Nice). If, as was contended, the threatened activities fell within Art 136 they would not be caught by the rules relating to the free movement of workers and services.

The Court of Appeal set aside the injunction on the basis that the answers under EC law were not clear and concerned issues of fundamental importance which needed to be addressed by the ECJ. The Court of Appeal questioned whether the threatened union activities actually fell foul of the free movement provisions in the EC Treaty, but did not rule on the point. The appeal was adjourned pending reference to the ECJ.

A more detailed report of this case by Rajeev Philip **(rajeev.philip@simsl.com)** can be found on the Steamship Mutual website at

www.simsl.com/Articles/Viking1205.asp

China - Emerging trends in Maritime Litigation

"Even though there is no strict doctrine of precedence a number of decisions from the more important Maritime Courts are now being reported...."

The economic boom in China over the past two years has been the main driving force behind the upturn in shipping markets. Increased demand for imported raw materials and for the means of exporting finished products have meant that ships of all types are calling at Chinese ports far more frequently than ever before. A by-product of this is that increasing numbers of disputes are being litigated in the Chinese courts according to Chinese law.

Except for Hong Kong (which still maintains the common law system that was in existence prior to the 1997 handover) China's laws are codified; Chinese maritime law is found in the Maritime Code and the Maritime Procedure Law which came into force in 1993 and 2000 respectively. Even though there is no strict doctrine of precedence a number of decisions from the more important Maritime Courts are now being reported, either by the Courts themselves or by lawyers practising in those Courts. It is likely that these decisions will be referred to in future, similar, cases and should have some persuasive value.

In the first of a series of articles Rohan Bray **(rohan.bray@simsl.com)** of Steamship Mutual's Hong Kong office comments on the report of a decision of the Shanghai Maritime Court in the case of *Sekwang Shipping v Shanhai Maritime Bureau & ors.* The issue in dispute was the vessel owner's right to limit liability for pollution, clean up costs and compensation arising from a collision with another vessel. Rohan's first article can be found at:

www.simsl.com/Articles/ChinaCases1205.asp

back to contents

Shipping Rice to West Africa - Beware!

The trade in rice to West Africa is long established. At any one time there are probably hundreds of thousands of tonnes of rice in transit to or being discharged at various West African ports. However, discharge operations are rarely without incident. Stevedore mishandling, with consequent loss of rice from torn bags or the rejection of bags, mis-tallying, and pilferage are not uncommon at many West African ports. Advantage is frequently taken of these problems by the cargo receivers and the cargo underwriters to bring inflated claims for loss or damage or shortages of cargo. Inevitably there are threats to arrest vessels unless security is provided, and vessel owners and their Clubs are faced with the unsatisfactory dilemma of agreeing that the governing law and jurisdiction of any claims is not the contractual law and jurisdiction but either that of the place of discharge or some other jurisdiction and law (frequently French).

In an article written for the Steamship Mutual website Simon Boyd **(simon.boyd@simsl.com)** explains how carriers can reduce their exposure to claims by taking certain preventative steps. The article can be found at:

www.simsl.com/Articles/Rice1205.asp

EU Directive on Ship-source Pollution - Open to Challenge?

As reported in Sea Venture issue 3 *("EU Criminalisation of Accidental Pollution")* there has been much comment on this controversial directive since its first draft was released in 2003. Directive 2005/35 has been criticised for its impact on the industry, its human rights implications, its effectiveness in preventing further pollution incidents and its legality in terms of international law.

The Directive came into force on 1 October 2005. Despite vigorous protest from industry bodies since its inception in draft form, the Directive finally published included no concessions. By way of background, the Directive was introduced because it was felt that numerous ships were ignoring the provisions relating to the discharge of polluting substances contained in MARPOL 73/78. No corrective action was being taken and this needed to be changed in order to protect EU waters. One of the key stated purposes of the Directive was to remove the discrepancies in the domestic legislation by which individual EU member states had implemented MARPOL 73/78 and thereby *"harmonise its implementation at Community level"* (Para. 3 of the Preamble to the Directive).

It would appear, however, that this attempt to *"harmonise"* the implementation of MARPOL not only deviates from that Convention but also contravenes the over-arching principles of UNCLOS to which MARPOL is subject.

In an article written for the Steamship Mutual website Rajeev Philip **(rajeev.philip@simsl.com)** addresses the questions of the legality of the Directive and of who can challenge its validity, in what forum and on what basis. His article can be found at:

www.simsl.com/Articles/EU_CrimPoll1205.asp

Also on the website: *"EU Directive on Ship-Source Pollution In Force"* by Emily Bourne of DLA Piper Rudnick. This article sets out and explains the provisions of Directive 2005/35 and can be found at:

www.simsl.com/Articles/EU_CrimPoll1005.asp

Developments in the CLC/Fund Conventions

The International Group will be working with the IOPC Fund and OCIMF to facilitate 50/50 sharing

The Supplementary Fund Protocol, which provides a third tier of oil pollution compensation up to SDR 750 million (US$1,084 million) payable by signatory states from a levy on oil imports, came into force on 3rd March 2005 in those 8 states that have signed the Protocol - Denmark, Finland, France, Ireland, Japan, Norway, Germany and Spain. Accordingly, STOPIA - the agreement whereby ship-owners voluntarily accept the first SDR 20 million (US$29 million) of any pollution liabilities irrespective of the size of the tanker - also came into force on that date. A number of other States are expected to ratify the Protocol before the end of 2005.

The future of the CLC and Fund conventions was again considered at the IOPC Fund Assembly in October. A proposal by the UK and 10 other states to instruct the Working Group to continue with a limited revision was supported by 23 states whereas the Greek proposal to terminate the mandate of the Working Group was supported by 28 states. As a result, the Assembly agreed that the Working Group would be shut down and revision of the regime would be removed from the Assembly's agenda.

The International Group's proposal to extend STOPIA to all 1992 CLC states and to put in place a mechanism to achieve an overall 50/50 sharing in the cost of all claims was accepted and was a key factor in reaching this decision. However, some states remarked that this proposal was received too late for the details to be considered fully at this meeting. The International Group was, therefore, asked to work with the IOPC Fund Secretariat and OCIMF to develop a draft agreement or agreements to facilitate 50/50 sharing overall which could be considered by the Assembly in early 2006.

In the meantime, the International Group was asked whether it was possible to put the extended STOPIA scheme into effect as soon as possible. This work is currently underway, but because of the reinsurance implications it will not be feasible to put the entire 50/50 agreement in place before 20th February 2006.

Article by Colin Williams **(colin.williams@simsl.com)**

Details of the Supplementary Fund and STOPIA were given in Sea Venture issues 1 and 2 which can be viewed on the Steamship Mutual website at:

www.simsl.com/Sea_Venture/SeaVenture_Homepage.asp

back to contents

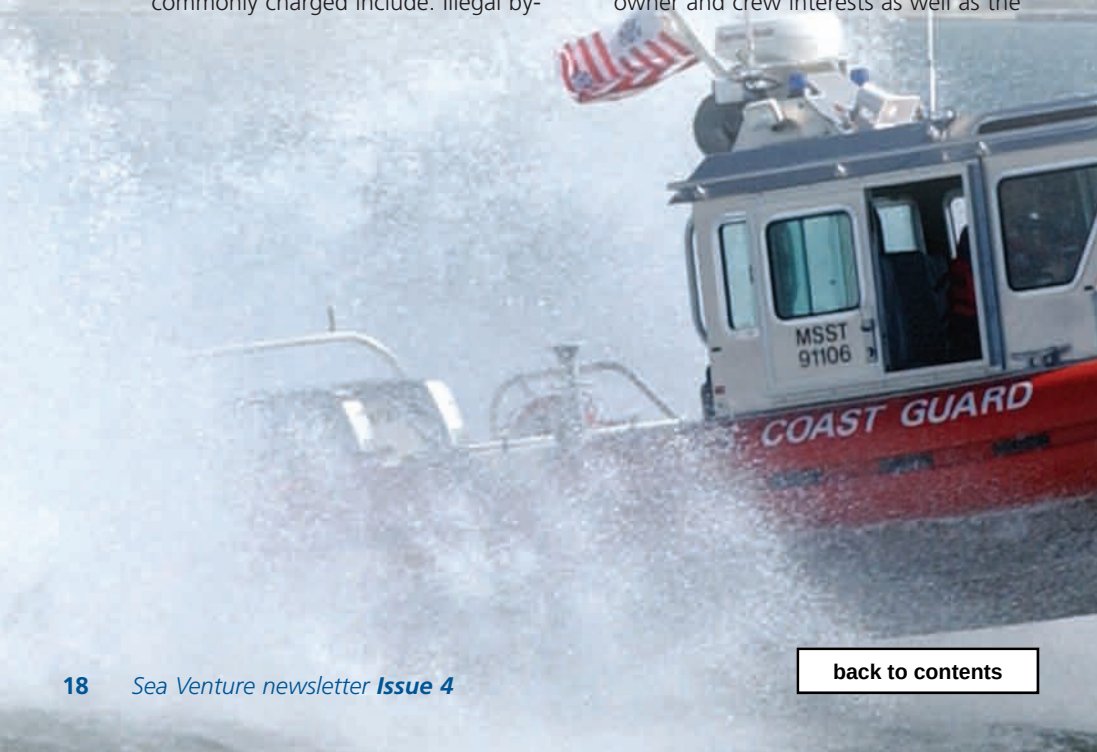
Suspected MARPOL Violations in the U.S. - The Human Cost

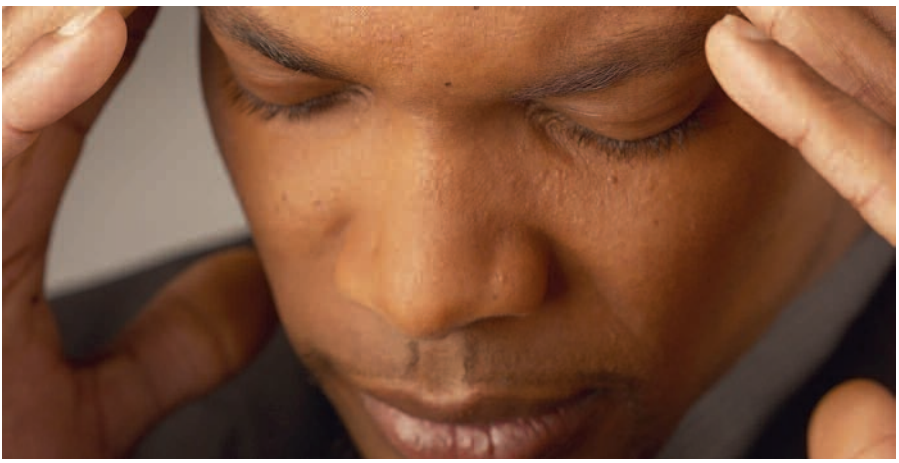
As a result of heightened post-September 11th security measures, there has been a significant increase in the scrutiny to which vessels visiting the United States are being subjected. One result has been a rash of vessel and crew detentions as well as criminal allegations and charges against vessel owners, operators, managers, officers and crew in respect of MARPOL violations.

The US Coast Guard and other US law enforcement personnel are examining the use and functionality of oily water separation systems and associated records and logs more carefully than ever before. The authorities have made it clear that they will seek jail sentences for masters, chief engineers and other crew members accused of committing pollution offences, falsifying records, witness tampering and/or instructing crew members to lie to the authorities. Even in the absence of a pollution incident, the mere discovery of potential by-passing paraphernalia, such as a flexible hose or suspicious fittings and piping in the engine room, can trigger a Grand Jury investigation, detention of crew, withholding of the vessel's Customs Clearance and everything possible will be done to prosecute alleged criminal conduct. Offences commonly charged include: Illegal by-passing of the oily water separation system, "false entries" in the Oil Record Book and related charges such as conspiracy, obstruction of justice and witness tampering.

Following the traditional rules in maritime matters and alleged pollution incidents, criminal liability should be founded on an individual's mental status: wilful or knowing conduct and/or wilful ignorance. Regretfully, this does not appear to be the case for suspected MARPOL violations in the U.S.; Rather, it is the authorities' position that MARPOL is a public health and welfare statute which obviates the need to show any criminal intent for a company and/or individual to be held responsible for alleged criminal conduct.

Few would argue that a company or individual who intentionally pollutes should not be punished in accordance with the laws that they violate. However, in an increasing number of cases, the U.S. authorities have commenced full-blown investigations on the basis of little more than suspicion and, at times, as a result of the findings of over-zealous of Coast Guard investigators. Not only are these investigations expensive, both in terms of the costs of representing the owner and crew interests as well as the





cost of delay to the vessel, but such actions have repeatedly resulted in innocent crew members being arrested as "material witnesses", taken off the vessel in shackles and thrown into jail until they are released by a judge. Recently, there have been a number of reported and confirmed instances where crew members have suffered serious stress-related ailments, including heart attacks and even death, as a result of such treatment. If it is, indeed, the intention of the U.S. authorities to uphold public health and welfare ideals, surely the heavy-handed investigatory and prosecutory techniques currently being employed need to be revised in order to ensure that such goals are achieved in a more humane manner.

In an article written for the Steamship Mutual website George Chalos of Fowler Rodriguez Chalos considers the human cost of suspected MARPOL violations in the U.S. and the steps which can be taken to minimise the impact on crew. George's article can be found at:

www.simsl.com/OWS_HumanCost1205.asp

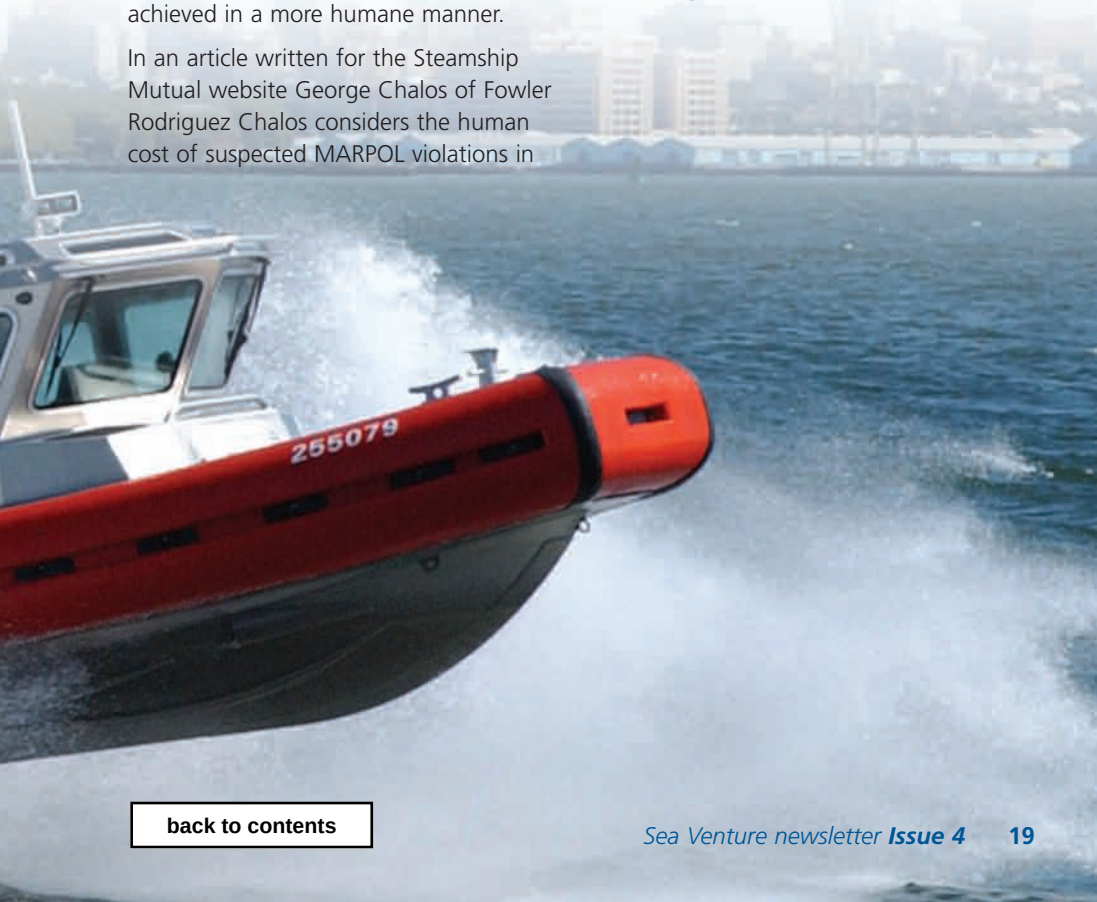
Additional materials on Oily Water Separation issues the Steamship Mutual website include:

Club Circular B.342 of June 2005:

www.simsl.com/Publications/Circulars/2005/B432.asp

"Oily Water Separation Offences - U.S. Prosecutions Continue" (article):

www.simsl.com/Articles/OilyWater1105.asp



Panama - First Judgments In Claims Involving The Panama Canal Authority

A shipowner whose vessel is involved in an accident due to pilot error while transiting the Panama Canal can claim damages from the Panama Canal Authority ("PCA"). The initial requirement is for the vessel to stay in Panamanian waters during an investigative hearing into the causes of the accident by the PCA's Board of Local Inspectors ("BLI"), which takes place within 24 hours of the incident and usually does not last more than a day. After an initial administrative claim procedure within the PCA, the shipowner may pursue its claim judicially in Panama's two maritime courts.

Administrative proceedings within the PCA must be brought within two years of the date of the accident. If the shipowner is not satisfied with the PCA's final decision in the administrative claim, it has one year from the date such decision is rendered in writing to commence judicial proceedings against the PCA in Panama's maritime courts. The time taken by the PCA to resolve an administrative claim varies according to the circumstances of each case. It could take anywhere from a few months to several years. Factors which have a bearing on the time taken include case complexity, claim amount and whether there are other pending administrative or judicial claims arising from the same incident; Crew, passengers, cargo interests and port operators may also make a claim against the PCA.

The Panamanian Maritime Courts have now issued their first judgments in claims involving the PCA. In the June 2005 summary judgment in *Societe Nationale de Transports Maritime (C.N.A.N.) v PCA*, the Second Maritime Court found for the claimant, the owners of the M/V "El Hadjar". The Court declared any action by the PCA to recover damages it had suffered as a result of the vessel striking a light post at Cristobal's breakwater in June 2000 to be time barred. In September 2005, in *Zagora Ediki Naftike Epihirisi v PCA*, the Second Maritime Court issued a judgment finding the PCA 60% at fault for an accident in January 2001 involving the M/T "Neapolis" in which the BLI had previously determined the vessel to be squarely at fault and the PCA had denied all liability. A PCA pilot was in control of the vessel when she collided with the centerwall of Pedro Miguel Locks causing damage to the lock, vessel and pollution. The PCA was ordered to pay US$479,865 plus interest but, as a Government entity, the PCA is exempt by Panamanian law from legal costs. Both judgments are currently under appeal to the Supreme Court.

With thanks to Juan David Morgan Jr of Morgan & Morgan, Panama City for preparing this article.

Trip Time Charter - A Guarantee of Income or Merely Duration?

The English High Court was recently asked to decide whether early redelivery in the case of a trip time charter that provided *"The Charterers guarantee a minimum 35 days' duration ....."* meant owners were entitled to income equivalent to 35 days' hire or, rather, to damages in respect of the balance of the charter period subject to the normal rules of mitigation.

Sacha Patel **(sacha.patel@simsl.com)** discusses the decision in *Miranos International Trading Inc v VOC Steel Services BV* in an article written for the Steamship Mutual website:

www.simsl.com/Articles/Miranos1205.asp

Maritime Pollution in Canada - Extending the Reach and Power of Prosecutors

"Canada was seen as a "soft haven" for polluters"

New legislation implemented in Canada earlier this year is designed to catch polluters who were previously beyond the regulatory grasp. Vessels en route to the USA, with its strict and punishing pollution measures, would dump oily waste off the coast of Newfoundland. Although the dumping took place within Canada's Exclusive Economic Zone or "EEZ" (the 200 mile territory off the coast) it was outside the Canadian territorial seas and the polluters could not be prosecuted. Canada was seen as a "soft haven" for polluters; Discharged oily waste would wash up on Canadian shores where migrating birds congregate and many of the birds died as a direct result of coming into contact with this contamination.

Bill C-15, An Act to Amend the Migratory Birds Convention Act, 1994 and The Canadian Environmental Protection Act, 1999, was enacted last May and will allow regulators to prosecute pollution offences within Canada's EEZ. The new legislation has extended not only the geographical ambit of the previous regime but also the pool of those who can be held responsible to include agents and corporate officers and directors, as well as implementing a system of substantially increased fines and prison sentences.

In an article written for the Steamship Mutual website, Peter Cullen of Stikeman Elliott LLP explains the nature of the new regime in greater detail. His article can be found at:

www.simsl.com/Articles/CanadaPollution1205.asp

back to contents

U.S. - Developments in Rule B Attachment

American Maritime attachment under "Rule B" is an extraordinary remedy which permits pre-trial seizure of a defendant's property on an ex parte basis. First approved by the Supreme Court in 1825, the practice has been the subject of ongoing debate and controversy over the years. A Rule B attachment serves two purposes: first, it establishes "quasi in rem" jurisdiction over the defendant property owner; second, the property which is attached provides a fund from which a decree can be paid after trial.

In 2002, the U.S. federal appeal court for the Second Circuit (New York) held that an "electronic fund" transfer ("EFT") in the hands of an intermediary bank constituted attachable intangible property of the defendant. Such attachments can, however, generate controversy concerning whether the actual cyber-transfer is "owned" by the defendant and within the district from which the order of attachment has issued.

In the recent case *Aqua Stoli Shipping,* Judge Rackoff held that various electronic fund transfers seized by the plaintiff pursuant to Rule B should be released from attachment because the *"[p]laintiff's ability to collect a prospective judgment was remarkably secure",* given that the *"defendant is a very large stable company with no demonstrative history of failing to make good on judgments [and thus] attachment of EFTs will be as available post-judgment as it has been pre-judgment."* The decision has generated significant controversy, not the least of which includes comparison to the recent rapid downfall of other "very large, stable" companies such as Enron, Worldcom and Arthur Andersen.

Roughly two months after the *Aqua Stoli* decision, another judge in New York's Southern District, Judge Crotty, decided *Blake Maritime,* which also involved attachment of electronic fund transfers. In upholding and maintaining the attachment, Judge Crotty noted, contrary to *Aqua Stoli*, that adding a "need" or "necessity" requirement to Rule B constitutes a re-writing of the law on maritime attachments. The court noted that the "need test" is not found anywhere in Rule B. The *Blake Maritime* case will not be appealed; however, Judge Crotty's views are likely to be examined by the Second Circuit on the appeal of the *Aqua Stoli* case. Until the "need" or "necessity" requirement is decided there is the possibility of far more challenges to Rule B attachments, and increased litigation of what has traditionally been a rather straightforward process.

Rule B, coupled with its Supplemental counterparts, has proved to be a dynamic remedy, whose utility only appears to be growing, and is discussed in greater detail in an article on the Steamship Mutual website by Don P. Murnane, Jr. a Partner in Freehill Hogan & Mahar LLP, New York, and Michael Elliott, an Associate in the same firm. The article can be found at:

www.simsl.com/Articles/RuleB1205.asp

Recent Publications

Mid Year Review 2005

Members received the Mid Year Review in hard copy at the beginning of December. The Review provides an up-to-date picture of the Club's progress in the current financial year, covering developments in underwriting, investments, regulatory environment, reserves and the outlook for 2006/07.

The Mid Year Review can be downloaded from the Steamship Mutual website at:

www.simsl.com/Publications/MidYearReview/MYR.asp

A Guide to Casualty Investigations & Claims Handling 2005/2006

The second version of this CD has now been produced. The 2005/2006 edition incorporates improvements based on Members' suggestions. The text of key conventions, contracts and indemnity forms have also been added.

This CD provides a video presentation describing how Members and the Club should work together in the handling of the main categories of P&I claims. Supporting text gives easily understood explanations of key aspects of the collection of evidence. Each claims-specific section of text gives easy access to examples of many of the documents involved and is linked to the relevant Club Rule for that particular area of cover. In addition to the full text of the Club's Rules and List of Correspondents, reference materials and hyperlinks to useful internet resources are also included.

For further details about the Guide and how to obtain a copy see the Steamship Mutual website:

www.simsl.com/Publications/ClaimsHandling/Claims_Handling.asp

Articles Published on the Steamship Mutual Website

- Measures to Counter Piracy, Armed Robbery and other Acts of Violence against Merchant Shipping
  www.simsl.com/Articles/MCAGuidance1205.asp
- Piracy off Somali Coast
  www.simsl.com/Articles/SomaliaGuidance1105.asp
- Shift of Timber Deck Cargo
  www.simsl.com/Articles/TimberShift1205.asp
- Novorossiysk - Container and Ro-Ro Cargo Declarations
  www.simsl.com/Articles/Novo_CargoDec1005.asp
- Hong Kong - Fluorspar
  www.simsl.com/Articles/Fluorspar1005.asp
- Rio de Janeiro and Niteroi Ports - Oil Operations
  www.simsl.com/Articles/RioDJ_OilOps1005.asp
- Turkey - Pollution Fines
  www.simsl.com/Articles/Pollution_Turkey0104.asp

STEAMSHIP MUTUAL

For further information please contact:

Steamship Insurance Management Services Limited
Aquatical House,
39 Bell Lane,
London E1 7LU.
Telephone: +44 (0)20 7247 5490 and +44 (0)20 7895 8490
Email: seaventure@simsl.com

Website: www.simsl.com

back to contents