
STEAMSHIP MUTUAL
newsletter
Sea Venture
issue 6

Contents

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Malcolm Shelmerdine

Sea Venture is available in electronic format. If you would like to receive additional copies of this issue or future issues in electronic format only please send your name and email address to **seaventure@simsl.com.**

Feedback and suggestions for future topics should also be sent to this address.

Introduction

This time of year marks the end of the traditionally quiet holiday period, when many companies pause to take stock and plan for the remainder of the year. Shipping is, though, a 24/7 business as vessels continue to ply their trade with consequent service demands on the Club. An important part of that service is the reporting, commentary and insight provided by Sea Venture on topical shipping and legal issues that impact on the Club's membership. We hope you find this issue to be helpful and of interest.

In October 2005 the *"Front Commander"*, a dispute dealing with the early commencement of laytime, was decided by the English High Court. The Court took an extremely technical view. The decision was widely criticised. In siding with charterers the impression was that the English Courts were willing to allow the free use of a vessel when a valid Notice of Readiness is tendered early. The charterers had instructed owners to tender notice of readiness early, berth and start loading prior to the first day of the laycan but the Court decided the emailed instructions did not amount to the express written consent required by the Charterparty. In overturning the decision the Court of Appeal has struck a further blow for *"fair dealing"* between owners and charterers, previously evidenced by the same court in the *"Happy Day"*. The decision is welcome and discussed in detail in this issue of Sea Venture.

"The decision is subject to appeal but, if not over turned, risks creating a new "permanent disability" category of claimant"

Other articles cover a number of decisions of the English Courts published between May and August, 2006. Of particular interest is the decision in *"Exfin Shipping"* which addresses the conundrum of what is a dispute and whether to arbitrate or not. There is also a further report on developing Chinese case law. On a less welcome note is an article discussing the recent decision of the Philippine Courts. The decision is subject to appeal but, if not overturned, risks creating a new "permanent disability" category of claimant. Some commentators have predicted the decision could cost the Philippines substantial sums in foreign earnings if shipowners decide to stop employing Philippine crews.

There are also contributions from English, Australian French, and Turkish lawyers discussing war risks, liberty clauses, frustration, seaworthiness obligations, recognition of foreign arbitration clauses, and the new Turkish Commercial code.

Feedback or suggestions for future topics you would like us to address are welcome. As ever, we would like to thank all contributors to Sea Venture.

Malcolm Shelmerdine

5th September 2006

Vasant Kumar Bhandari 1925 - 2006

On 22 May Vasant Kumar Bhandari died peacefully in his beloved Kolkata at the age of 81. He represented Club Member's interests in India since he joined Steamship Mutual's Indian representatives, Crowe Boda & Co (Pvt) Limited, in 1965. He will be missed by all who had the privilege of working with him and had the benefit of his advice and experience.

He was a key figure in the development of the Indian insurance industry and remained actively involved in the business to the end of his life. He was an academic by nature and his opinions on P&I matters, as well as a wide range of insurance and legal issues, were always meticulously researched and full of insight. In his later life he was much in demand as an arbitrator and committed himself completely to his work well past his retirement age such was the demand for his often forthright views and decisions. Privately he was a generous host with an incisive wit coupled with great modesty and charm.

The development of the Club's market leading position in India since his involvement with the Club will be only one legacy of VKB's career. The Managers convey their deepest sympathies to his family and friends on his death on behalf of all those who had the good fortune to have had the benefit of VKB's thoughtful advice and friendship.

New Club Board Directors Appointed

The Managers are pleased to announce that Mr G. Golparvar, of Islamic Republic of Iran Shipping Lines, and Mr C.S. Kim, of Korea Line Corporation, have recently been appointed to the Board of the Bermuda Association. These most welcome appointments will strengthen the representation on the Board of two of the Club's most important and longstanding markets.

An Inspector Calls. Accident Investigation - What Masters and Managers Ought to Know

Port and flag states (especially port states) are becoming increasingly active in their investigation of marine accidents. The rationale for these investigations varies; Sometimes they are made purely to promote the safety of life and property at sea. However, with the developing trend towards criminalisation, the aim of an inspection may also be to apportion blame. Against this background, and with methods varying from state to state, investigations raise particular difficulties for masters and managers.

In an article prepared for the Steamship Mutual website, Eamon Moloney of Eversheds LLP gives guidance for masters and crew on the procedures to follow and pitfalls to avoid when a vessel is subject to accident investigation. His article can be found at:

www.simsl.com/Articles/Investigation0906.asp

Recognition of Arbitration Clauses - French Law

The French Courts have proved a useful forum for cargo claimants determined to pursue cargo claims notwithstanding arbitration agreements incorporated into bills of lading providing that disputes should be arbitrated in some other jurisdiction. Article 1458 of the New Code of Civil Procedure had been interpreted broadly so that where there is no evidence that an arbitration clause incorporated into a bill of lading had been made known and accepted by a consignee at or before the completion of delivery the arbitration clause was not enforceable as against the third party holder of the bill of lading. However, as a consequence of recent decisions of both the Civil and Commercial Chambers of the Cour de Cassation, the French courts may now be less likely to accept jurisdiction for cargo claims brought in breach of an arbitration clause unless that clause is manifestly null and inapplicable. Further, if an arbitration clause incorporated into a bill of lading does not fall foul of this test the same Article allows the arbitration tribunal to decide on jurisdiction.

The recent French decisions, as well as their impact for carriers under bills of lading, are discussed in an article by Andre Jebrayel, Advocat at the Bar of Marseilles in an article on the Steamship Mutual website at:

www.simsl.com/Articles/FranceCode0906.asp

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The Obligation to Exercise Due Diligence - Australian Law

A decision of Federal Court of Australia, which has recently been heard on appeal by the Full Federal Court of Australia, has prompted a discussion on the Hague–Visby obligation both to exercise due diligence and properly care for cargo in the carrier's custody.

Consignments of cold rolled steel coils were carried from Japan to Australia pursuant to a contract of affreightment on two vessels. Many coils were damaged as a result of corrosion caused by contact with water. The plaintiffs sued the carriers, alleging breach of the bill of lading contracts under which the steel was carried. The Court found the cause of the damage on both voyages was condensation occurring during the voyages, and the carrier liable because there were failures to:

(a) Exercise due diligence; neither vessel was seaworthy for the purpose of carrying the steel coils on a voyage at the relevant time of year as a consequence of the failure to install a dehumidification system to remove excess water from the holds,

(b) Properly and carefully, carry, keep and care for the coils; by ventilating the cargo during the course of the voyage water vapour had been introduced into the holds.

The decision of the Full Federal Court has been reserved but the impact of the first instance decision so far as cargo claims litigated in Australia are concerned, and whether the decision merits the concern raised by some commentators, is discussed in an article by Peter McQueen and Professor Martin Davies of Blake Dawson Waldron, Sydney, on the Steamship Mutual website at:

www.simsl.com/Articles/Stemcor0906.asp

When Does Laytime Commence?

The decision in the appeal against the unsatisfactory High Court decision in the "Front Commander", discussed in Sea Venture issue 4, was recently handed down. In determining the point from which laytime starts to count under an Asbatankvoy charterparty incorporating "The Vitol Voyage Chartering Terms", the English Court of Appeal once again demonstrated its appreciation of the need for *"fair dealing"*, previously evinced by the judgment in the *"Happy Day"*.

The High Court judgment, which was subject to considerable criticism, was overturned. Lord Justice Rix, who gave the lead judgment, acknowledged that *"if a charterer uses a vessel, known to be ready at the time of use, which has been tendered to him by a valid notice of readiness, or by an invalid notice whose invalidity is known, he must expect time to run against him, allowing for any relevant notice time, and subject to any express contrary agreement"*. He went on to state that the construction of the charter put forward by the charterers was *"unrealistic and uncommercial and a trap for the unwary master or owners' agent"*.

The case is discussed by Sarah McGuire **(sarah.mcguire@simsl.com)** in an article on the Steamship Mutual website at:

www.simsl.com/Articles/FrontCommander0906.asp

Illegal Iraqi Oil Shipments

" ..confiscation and sale of the vessel and its cargo were said by the UAE authorities to be justified by the fact the vessel had onboard oil of Iraqi origin .."

A number of innocent shipowners were caught up in the now infamous illegal oil shipments from Saddam Hussein's Iraq a few years ago. These contravened the prevailing UN Sanctions with resultant significant penalties. Particularly unfortunate were the owners of the "Greek Fighter", whose vessel was first detained on suspicion of carrying illegal Iraqi oil, ultimately confiscated by the UAE authorities and sold by public auction.

The owners claimed damages in excess of US$ 6 million from the charterers, alleging breach of a number of provisions of the Shelltime 4. Further, the owners sought to rely on the implied indemnity recognised by the Court of Appeal in *The "Island Archon"*.

In a lengthy judgment which addressed a number of issues arising under the Shelltime 4 and time charterparties generally, including Clause 4 (with regard to lawful cargoes), Clause 13 (liabilities arising as a result of complying with charterers' orders), Clauses 8 & 20 (the obligation to pay hire), the effect of an express safe port warranty on the qualified safe port warranty in the Shelltime 4 and the implied indemnity, Mr Justice Colman held that the charterers were liable for the full amount claimed by the owners.

A detailed analysis of Mr. Justice Colman's findings can be found on Steamship Mutual website in an article by Rajeev Philip **(rajeev.philip@simsl.com).**

www.simsl.com/Articles/GreekFighter0906.asp

Indonesian Nickel Ore

The current trend of high minerals prices has made viable some trades which would otherwise be uneconomic. One such trade is the shipment of unprocessed nickel ore from Indonesia and the Philippines on long ocean voyages. These ores have relatively low nickel content and have been shipped on shorter voyages to Australia and Japan for many years.

The ore is simply dug out of the ground, sorted for size, stored in stockpiles and then shipped. No further processing other than "solar drying", which is questionable in its efficacy, is involved. There are many islands in Indonesia from which this material is being shipped, mostly in very remote locations.

Nickel ore is not found in a homogeneous form. Much of the material is very fine clay-like particles but there are also larger rock-like particles, some of which can be very large indeed. The material also has a relatively large moisture content of up to 30-40% by mass.

As with many minerals of a finely particulate nature, including mineral ore concentrates, these ores have the property that they can liquefy and shift if their inherent moisture level is too great. Serious problems have been experienced in the last few months with ocean transport of these cargoes.

Due to the way these materials are mined, the composition and physical behaviour can differ greatly from mine to mine, between different shipments from the same mine, and even within a single cargo. Moisture content on its own is not a reliable indicator of the potential hazard; some cargoes may be of very dry, even dusty appearance and unlikely to liquefy whereas another cargo with the same moisture content from a different loadport may be of muddy wet appearance and may present a serious shifting hazard.

Carriage of materials liable to liquefy is governed by the IMO Bulk Code, where they are listed as "Group A" commodities. The Code specifies that for safe shipment, two important parameters must be evaluated by shippers: The first is the actual moisture content of the cargo to be shipped. The second is the Transportable Moisture Limit (TML) of the cargo. If the actual moisture content is below the TML, then the material is deemed safe for carriage. TML is calculated as 90% of the Flow Moisture Point (FMP) which is the moisture level at which that particular cargo type will flow when tested. A certificate stating the actual moisture content and the TML of the cargo proposed for shipment must be issued.

The main test for FMP which is used in Indonesia is the flow table test. This is a standard test which works well for materials such as mineral ore concentrates. Unfortunately the flow

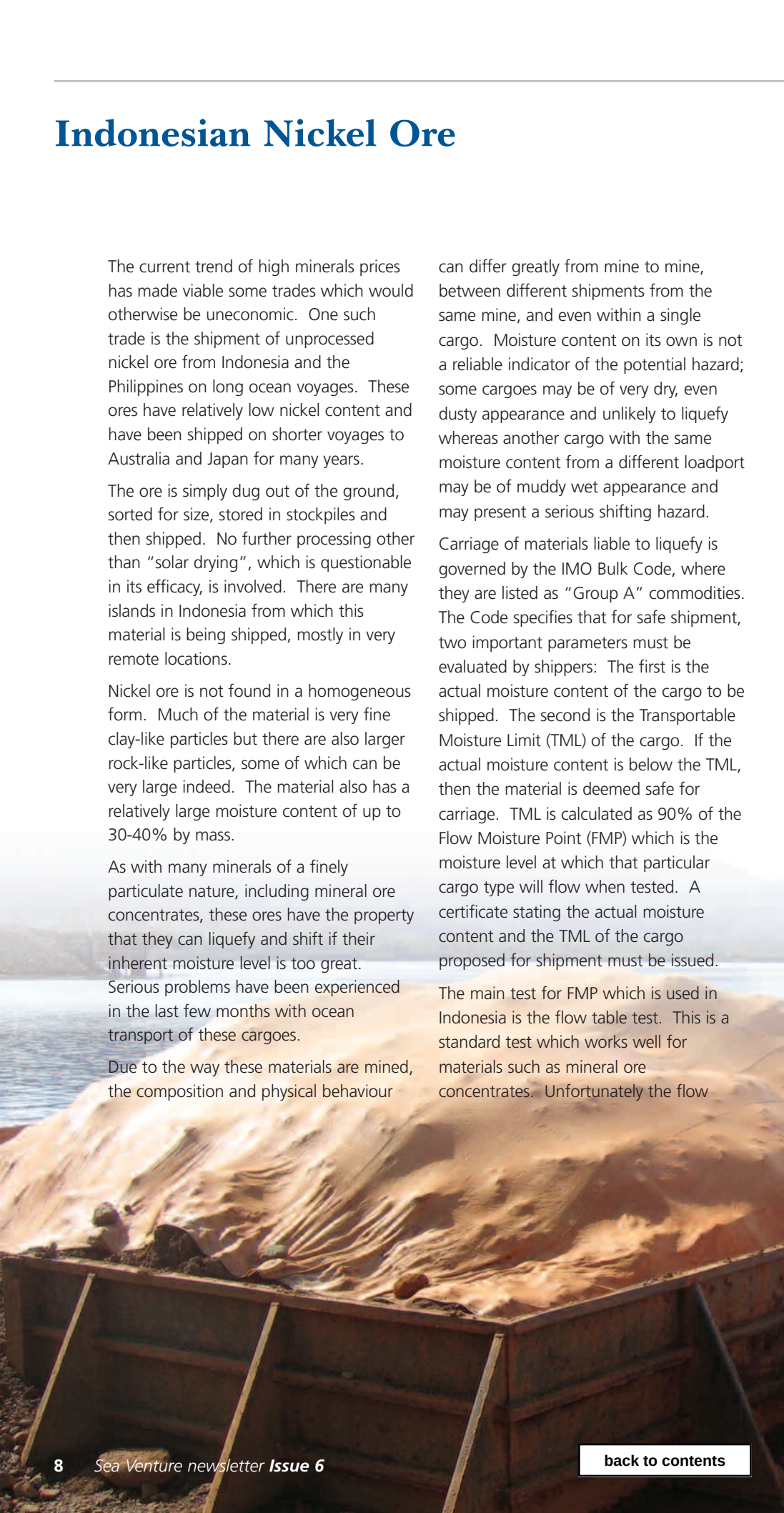

table test does not give well defined results on this type of nickel ore; in a recent case different laboratories obtained widely varying results on samples supposedly representing the same cargo. There are also problems at the load ports of rainwater wetting of unprotected stockpiles of cargo prior to shipment.

The situation at present is unresolved and unsatisfactory. There are alternative tests described in the IMO Bulk Code which may be more appropriate for these nickel ore cargoes, but the reliability of these alternative tests for this type of cargo has not yet been evaluated. The Bulk Code also describes a shipboard method for checking whether a cargo may be suitable for shipment. This involves filling a small can with the material and repeatedly banging it on a hard surface. The appearance of the material at the end of the test can be used to shed light on the suitability of the material for shipment. This test is also difficult to interpret and should not be a substitute for proper laboratory testing using an appropriate methodology.

Members involved in this trade should treat the material with caution and in the event of uncertainty contact the Managers London representatives for advice and assistance.

With thanks to Dr Martin Jonas of Brookes Bell for preparing this article.

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Recent Developments in UK Industrial Disease Litigation

The House of Lords recently held in *Barker v Corus (UK) PLC* that damages payable by a Defendant in a mesothelioma case must be apportioned to take into account the extent to which a defendant's breach of duty contributed towards the overall risk that a claimant would develop the condition. This contrasts with an earlier case, *Fairchild v Glenhaven Funeral Services,* also involving a mesothelioma claim against several defendants, where the House of Lords had held that each individual defendant was liable for contributing to the risk of the injury with the result that each defendant was liable to pay damages in full (with the right to seek contribution from the other defendants).

The apportionment envisaged by *Barker* involves only causation, that is, contribution to risk. The extent of each defendant's contribution is determined by the trial judge and is based on the duration of exposure and, if relevant, the intensity and type of exposure compared with claimant's total exposure to asbestos dust. Therefore, if a defendant exposed the claimant to asbestos dust for one year and other employers exposed the claimant, in similar circumstances, for nine years, the defendant would only be responsible for 10% of claimant's damages.

The decision in *Barker* is reviewed further by Richard Allen **(richard.allen@simsl.com)** in a case report prepared for the Steamship Mutual website at:

www.simsl.com/Articles/Barker0906.asp

Admitted Sums - When there is, or is not, a Dispute

Prior to the Arbitration Act 1996 it was common for "indisputable" or admitted claims to be pursued before the court by summary judgment because there was not, in fact, any "dispute" to be referred to arbitration. In *"The Halki"* the majority of the Court of Appeal firmly decided that the wording of section 9 of the 1996 Act precluded summary judgment being granted where a claim was indisputable or there was no arguable defence to it. Swinton Thomas LJ took the view that there was a dispute between the parties until the defendant admits the sum claimed is due and payable. The Court did not though decide whether judgment could be granted where the claim had been admitted but the defendant refused to pay.

The view that there is no dispute to be referred to arbitration where a claim is admitted has also been supported by authorities from before the 1996 Act came into force; for example, *"The M Eregli"* - *"an admission would in effect amount to an agreement to pay …and there would then clearly be no basis for referring it to arbitration"*(Kerr J). In contrast, in *Glencore Grain Ltd v Agros Trading Co* Clarke LJ said *"I do not accept that a dispute cannot continue to be a dispute once the claim has been admitted"*.

What constitutes a dispute can have serious consequences for the claimant if, in error, the claimant starts proceedings to recover an admitted sum when the claim should have been arbitrated. These issues were highlighted in the recent decision in *Exfin Shipping,* and are discussed in an article by Bengi Ljubisavljevic **(bengi.ljubisavljevic@simsl.com)** in a case report written for the Steamship Mutual Website at:

www.simsl.com/Articles/Exfin0906.asp

The Legal Status and Responsibilities of the Ship Manager under PRC Law

Under current PRC Law, the ship owner, the contractual carrier and the actual carrier are all parties who potentially may be held jointly and severally liable for any cargo damage under a contract of carriage of goods by sea.

In an interesting decision of the Shanghai Maritime Court it was held that ship managers who cannot provide evidence of the specific management responsibilities they undertake and the division of labour in managing the vessel between themselves and the ship owners may be regarded as an actual carrier for the purposes of PRC Law and, accordingly, be held liable for cargo damage in the same manner as an owner or contractual carrier.

The court in *PICC Shanghai Branch v Grand Fleet Navigation Ltd* also considered the issue of due diligence, as well as the position of the charterer under the PRC Maritime Code. A review of the case by Connie Lee **(connie.lee@simsl.com)** can be found at:

www.simsl.com/Articles/GrandFleet0906.asp

War Risk and Terrorism

War risk clauses entitle owners to refuse to embark or continue to a destination which is considered to be the subject of war/warlike activities. Instead owners are entitled to proceed to an alternative port to disembark cargo, or additional insurance has to be paid to continue to the original intended destination (see earlier Steamship Mutual website article *"Iraq – Legal Implications of War"* at:

www.simsl.com/Articles/Iraq_RBWarRisk0303.asp

In order to avoid potentially huge expenses, insurers often exclude liability for war risks.

It then becomes very important to understand what is included within a war risk clause. War has been defined by case law to exclude terrorist activities. In line with recent world events, this no longer suits present day realities, and war risks clauses have been extended to cover terrorist activities. However there is no consistent definition of terrorism.

These matters are discussed in greater detail in an article by Frances Hamilton and Alex Andrews of Richards Butler which can be found on the Steamship Mutual website at:

www.simsl.com/Articles/Lebanon0806.asp

Filipino Crew Claims - Worrying Developments

"These clearly erroneous decisions carry with them serious repercussions..."

There have been a number of recent developments in the Philippines' jurisprudence which are adverse to owners who employ Filipino crew and need to be considered when dealing with Filipino crew claims.

Garnishment

The first area of concern is the practice of garnishment; The Philippines National Labour Relations Court (NLRC) has recently been allowing claimants to draw down on a bond despite the fact that an appeal is pending before the Supreme Court. The bond is a prerequisite of an appeal. It is security which must be provided by an owner wishing to appeal a first instance decision. The bond is posted by a local bonding agent on the back of a Club letter of undertaking. Crewmembers are frequently given leave by the Court to cash in the first instance judgement against the bond with the caveat that if the owner's appeal is successful the monies will be returned. Needless to say it is virtually impossible to recover the funds even if the first instance decision is overturned.

Deemed Permanent Disability

Of perhaps greater concern are recent seminal decisions which have found that a crewmember is judged to be permanently disabled (and hence entitled to a contractual disability payment of US$ 60,000) once he has been unable to work for 120 days. In reaching this decision the Supreme Court has cited Article 192 of the Labour Code. While the State Insurance Fund clause in the Labour Code of the Philippines does state that a disability should be rendered permanent when lasting longer than the noted period, the Supreme Court has erred in that the Labour Code only applies to disability benefit claims under the Social Security System. Crew claims are filed under the POEA (Philippines Overseas Employment Administration) contract which governs the employer/employee relationship and do not fall under the Labour Code. There is no equivalent provision under the POEA standard terms and conditions which dictates that temporary total disability shall be deemed total and permanent.

These clearly erroneous decisions carry with them serious repercussions and a string of permanent disability adjudications in the favour of seaman who have suffered relatively minor injuries.

While it is hoped that representations by industry groups to the local Philippine authorities may bring pressure to bear to change the situation, in the meantime owners should be mindful of these developments when dealing with Filipino crew claims. In an article written for the Steamship Mutual website, Gary Field **(gary.field@simsl.com)** gives guidance on the many ways in which Members can mitigate their exposure despite these adverse decisions:

www.simsl.com/Articles/Filipino0906.asp

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Carriage of Valuable Goods

The Club was recently approached for advice by a Member that had contracted to carry a cargo of ancient Egyptian artworks from Alexandria to Europe. The member was keen to know whether liability for loss or damage to such cargo was covered by the Club.

The short answer to the question is yes, subject always to a Member's terms of entry with the Club. In this respect, in addition to the Club's Rules in relation to loss of or damage to cargo, the specific Rules are 25 xiii (iv) and (v).These deal with valuable cargo and ad valorem bills of lading.

The former provides there shall be no recovery from the Club in relation to loss or damage to valuable cargo, for example specie, bullion, or other objects of a rare or precious nature, "*unless the contract of carriage relating thereto and the spaces, apparatus and means in which the same are to be carried and the instructions given with regard to the safe custody thereof have been approved in writing by the Managers on such terms as they may require.*"

The latter limits the Club's cover to US$ 2,500 in respect of cargo carried under an ad valorem bill of lading unless the contract has been approved by the Managers.

Amongst the factors that the Managers will consider in such cases are the following:

- The contracts; the carriage may be the responsibility of the charterers of the vessel but it will still be necessary to establish the extent of the vessel owners contractual duties and obligations owed to cargo, whether under the charterparty and/or bill of lading or otherwise.
- Some countries restrict the export of ancient artefacts; shippers or charterers will need to ensure that any relevant regulations are complied with and ideally should provide confirmation that they have done so, so that the goods can be shipped or exported legally, even on a temporary basis.
- Valuable goods may be delicate or fragile and liable to damage; shippers or charterers will need to ensure that such goods are adequately secured and protected within their containers. Dependent on the actual goods it may be sensible to seek confirmation from the shippers or charterers that they have employed specialist stowage contractors and are satisfied that the goods are properly and securely

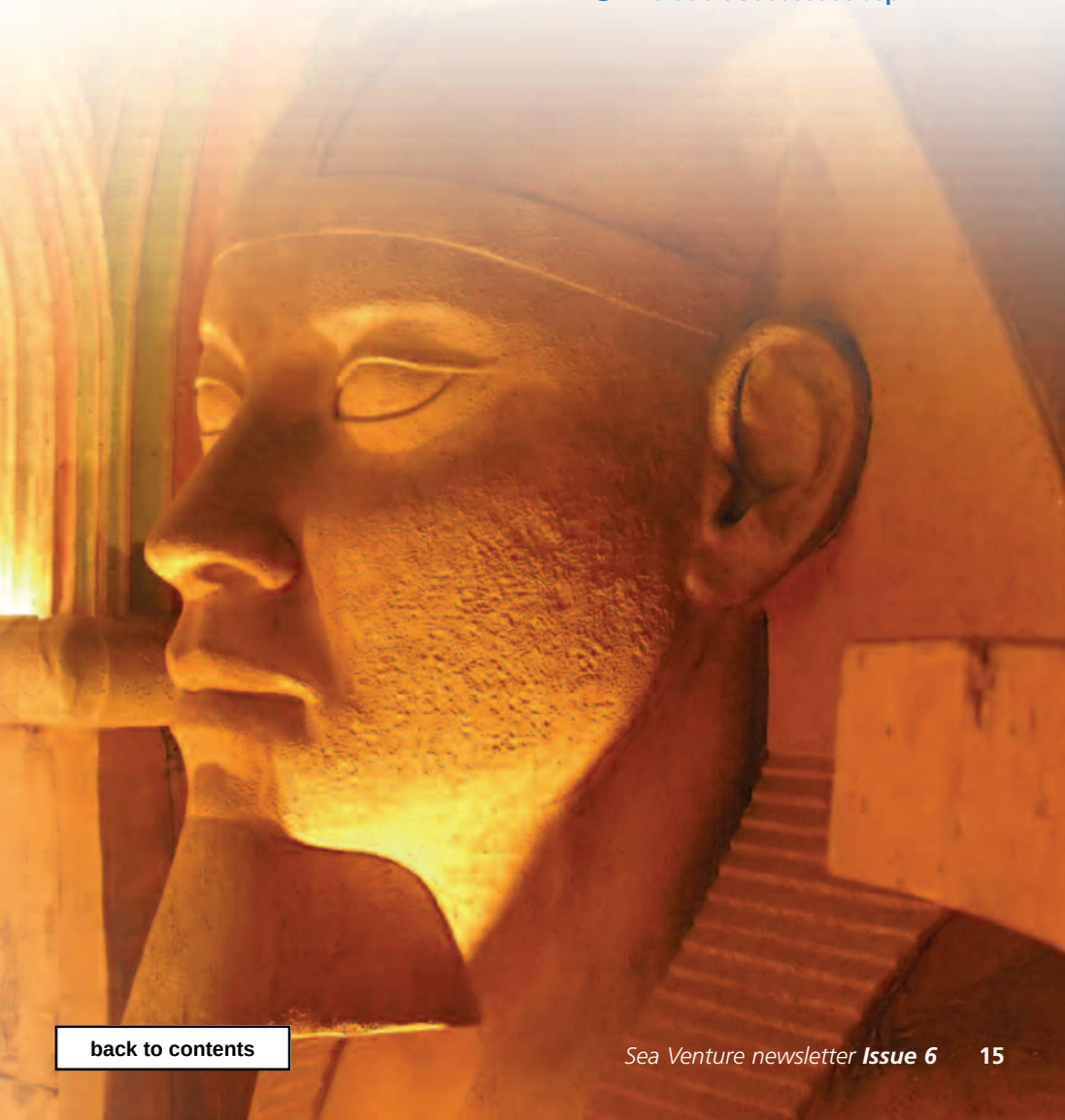
stowed within the containers. If so, clausing the bill of lading to reflect that the shipper was responsible for the packing and sealing of the container and that the carrier will not be liable for loss or damage caused by matters beyond the carrier's control should assist the carrier to defend consequent claims for loss or damage

- Other prudent considerations include the position of the container in the stow. It may be the case that the goods are temperature-sensitive and therefore, should not be stowed near heated bunker tanks or other heat sources. The goods may also be vulnerable to excessive vibration or vessel motion.
- Subject to stability and port rotation requirements, it may be prudent to stow the containers where they are not easily accessible, so they are protected from potential theft, and subject to limited container movements. The same will apply to any shore side storage when the carrier may still be deemed to be responsible for the containers.

In the event of uncertainty and if advice and assistance is required Members' are always welcome to seek guidance from the Managers' representatives.

Article by Neil Gibbons
(neil.gibbons@simsl.com).

http://www.simsl.com/Articles/ValuableGoods0906.asp



Frustrating Delays

'There can be no frustration if the delay in question is within the commercial risks undertaken by the parties' - Mr. Justice Gross quoting Chitty on Contracts in his recent judgment in *The "Sea Angel"*

In *National Carriers v Panalpina,* Lord Simon of Glaisdale observed that frustration of a contract takes place when "*there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances.....*".

The question when and in what circumstances a charterparty can be frustrated as a result of delay were recently addressed in *The "Sea Angel"* by the English High Court. The charterers of the "Sea Angel" were salvors involved in the "Tasman Spirit" casualty, and had chartered the vessel for around 20 days on an amended Shelltime 4 charterparty to transhipcargo from the "Tasman Spirit".

In deciding that the delay in question did not frustrate the contract, Mr. Justice Gross considered the impact of risks expressly dealt with by the Charterparty and risks associated with the salvage operation generally, as well as the conduct of the parties. Whilst the particular circumstances of this case were unusual, the decision provides helpful guidance when there is delayed performance in any number of charterparty and other contractual situations.

The decision is discussed in an article by Shiladitya Bose **(shiladitya.bose@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Articles/SeaAngel0906.asp

Steamship Mutual News

Three Peaks Team

We are pleased to acknowledge the achievement of Sarah Chase who won the Insurance Institute of **London's Lloyd's prize for Marine Insurance Underwriting** as part of the ACII examinations. Sarah was also awarded four distinctions in the ten subjects covered.

Steamship entered a team in the **Cargill/British & International Sailors Society ("BISS") Three Peaks Challenge.** The team of Malcolm Allinson, Sarah Chase and Dan Thomas were required to climb three of the highest peaks in England, Scotland and Wales within 24 hours. Not only did the event raise £512,000 for BISS but our team also completed the course in 12 hours. BISS is a national and international charity that operates in over 90 ports across the world to provide practical help and support to the world's 1.5 million seafarers. In addition, Sacha Patel raised over £3,000 for BISS and the Cutty Sark Trust by running **The London Marathon.** He was also a member of Steamship's 20-strong team in the **JPMorgan Chase Corporate Challenge** which is predicted to raise in excess of $500,000 for charities and organizations around the world.

http://www.biss.org.uk/

JPMorgan Chase Corporate Challenge Team

Bound by Conduct - Contract Formation, Waiver and Estoppel

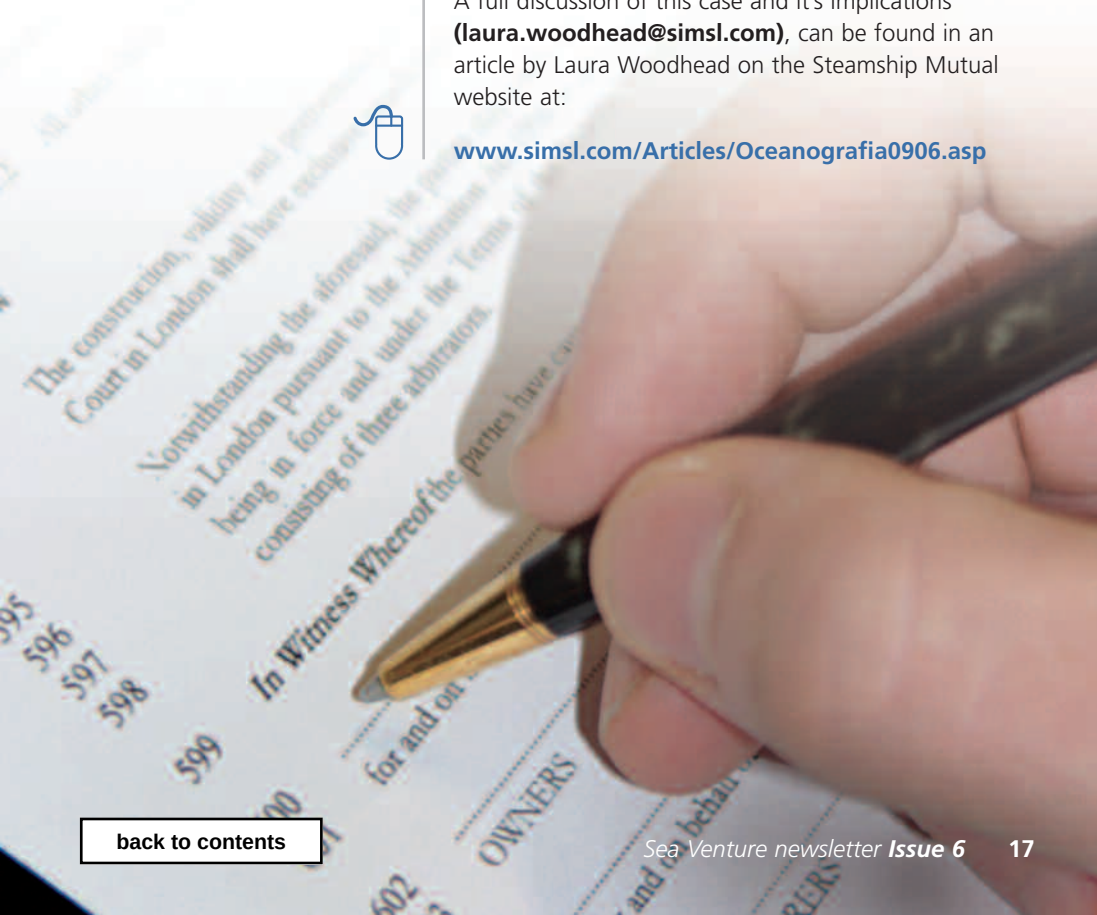
In *Oceanografia SA De CV v DSND Subsea AS* it was held that notwithstanding an express requirement for the signature of both parties for there to be a binding contract, a party could be deemed to have waived the requirement of a formal signature.

The (Disponent) owners of the vessel, M/s DSND, with whom Oceanografia SA De CV (charterers) had entered into negotiations for the provision of an off-shore supply vessel, commenced arbitration proceedings in London for unpaid sums under a purported charterparty dated 28 August 2001. The charterers challenged the jurisdiction of the arbitration panel. They contended that there was never a binding contract and relied on the terms of their offer; '*offer subject to the signing of mutually agreeable contract terms and conditions*'; this had not been fulfilled. The owners' position was that all of the terms had been agreed, and that if signature was a pre-condition, then the charterers had waived that condition by words and conduct, and were estopped by convention from denying the existence of a binding charterparty.

In reaching his decision Mr. Justice Aikens focused on what he described as the charterers' "*outward manifestation of its position*" which was more important than any "*private reservations*" the charterers may have had. He held that the charterers, through their conduct, had elected not to insist on the need for signature, and had elected to go ahead with the charterparty without signature. Their conduct amounted to estoppel by convention, which prevented the charterers from denying the existence of the contract.

A full discussion of this case and it's implications **(laura.woodhead@simsl.com)**, can be found in an article by Laura Woodhead on the Steamship Mutual website at:

www.simsl.com/Articles/Oceanografia0906.asp



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Frustrating Events and Liberty Clauses

On 30 January 2003 "the Florida" was chartered on a Vegoilvoy standard form charterparty to carry vegetable oil from Dumai and/or Kuala Tanjun to Lagos, Nigeria. On 1 March however, before the cargo was presented for loading, the Nigerian authorities banned the importation of vegetable oil. The charterers attempted to cancel on the basis that the voyage was frustrated but owners refused, relying on the liberty clause in the charterparty. No cargo was ever made available for loading and eventually owners commenced arbitration proceedings against charterers in respect of their failure to perform.

The question before the Court in *Select Commodities Ltd v Valdo SA* (2006) EWHC 1137 was; can a liberty clause in a charterparty preclude charterers from relying on the doctrine of frustration?

The clause relied on by owners set out a number of liberties against various events and, so far as relevant, provided:

"In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the owner or Master is likely to …make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, [1] the owner may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the cargo at port of shipment and upon their failure to do so, may warehouse the cargo at the risk and expense of the cargo;…, When the cargo is discharged from the Vessel, as herein provided, it shall be at its own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the owner shall be freed from any further responsibility. For any service rendered to the cargo as herein provided the owner shall be entitled to a reasonable extra compensation".

The Tribunal found that, but for the liberty clause, the charterparty would have been frustrated by reason of the Nigerian import ban. In this case, however, the charterers were precluded from relying on the doctrine of frustration because the liberty clause dealt with the situation where no cargo had yet been loaded. The charterers appealed.

On appeal Mr. Justice Tomlinson held that the key question was whether or not the liberty clause provided sufficiently for an

event which, even before a cargo had been designated and brought forward for loading, made discharge at the contractual destination impossible. If it did then there was authority that, in such circumstances, the doctrine of frustration would be inapplicable. He referred to "*The* Safeer" (1994) 1 LLR 63, a case in which a war risk clause dealt with what otherwise would have been a frustrating event. The vessel had loaded a cargo of bagged rice for discharge at Kuwait and had arrived and started discharge the day before the Iraqi invasion of Kuwait in August 1990. After a significant delay discharge was resumed but under the orders of the Iraqi Military. The charterers argued that the Charterparty had been frustrated whereas the owners position was that the charter provided liberty to comply with the directions of a belligerent state to deliver cargo. Rix J (as he then was) said:

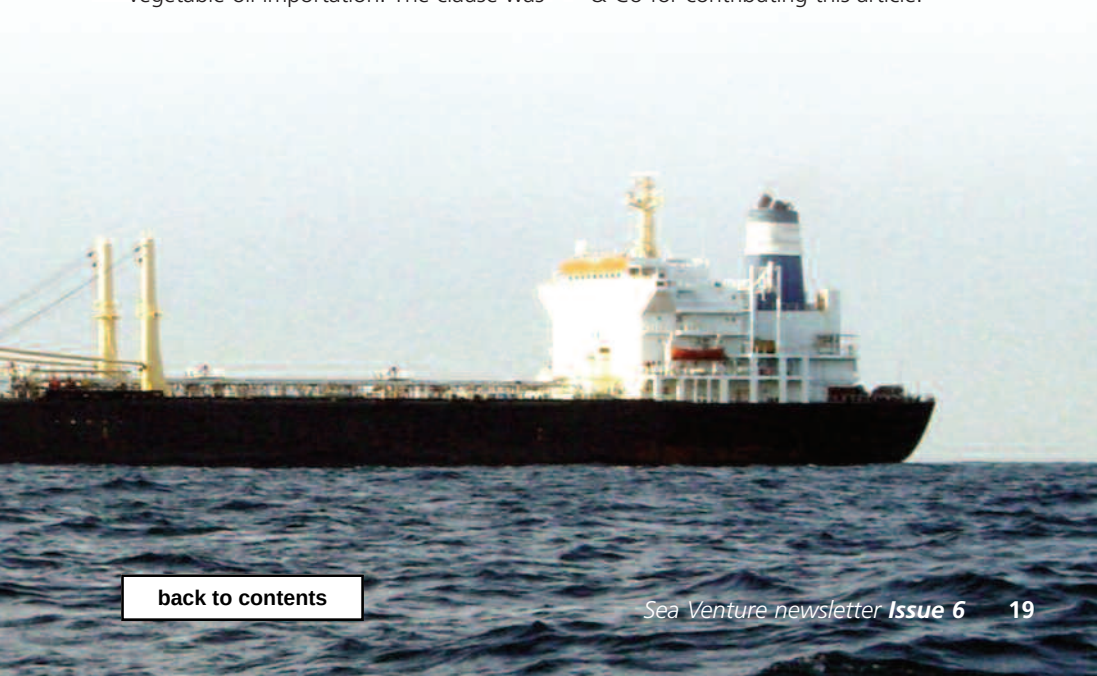
"If the vessel has liberty to comply with a direction to discharge or deliver the goods to a party not entitled to them, why should the contract be frustrated while that liberty is being carried out"

In *Select Commodities Ltd* the Court's view was that the liberty clause did not make full and complete provision for all the effects of the Nigerian ban on vegetable oil importation. The clause was designed to deal with the practical disposition of cargo. No provision was made within the clause to deal with the situation, as in the present case, where performance was rendered impossible *before* a cargo was even designated and brought forward for loading. Indeed, the Court held that the purpose of the clause was not to permit owners to earn freight in the event of frustration, but simply to apportion responsibility and liability in such circumstances where a cargo had already been loaded, or at least had been brought forward for loading, when the frustrating event occurred.

As such, Mr. Justice Tomlinson allowed the appeal in charterers' favour. The Nigerian ban on vegetable oil imports was a frustrating event. The liberty clause did not deal with or make full provision for the effect of a frustrating event in circumstances where there was no cargo to load. Therefore the charterparty was frustrated and owners were not entitled to damages for breach of contract.

So, to answer our question, a liberty clause potentially will preclude charterers from relying on the doctrine of frustration, but *only* if the liberty clause deals fully and completely with the effects of the frustrating event.

We are grateful to Christian Dyer of Ince & Co for contributing this article.



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Source: ITOPF

New OPA Limits

Following the "Athos I" oil spill in the Delaware River in November 2004, the U.S. authorities considered the compensation limits provided for under OPA '90 to be insufficient. Accordingly, the Coast Guard and Maritime Transportation Act of 2006, signed by President Bush on 11 July 2006, includes the following changes to the liability limits provided for under OPA '90:

Vessel Type	Current OPA '90 Limits	New OPA '90 Limits
A. Single hull tank vessels (including single-hull fitted with double sides only or a double bottom only) ...	The greater of $1,200 per gross ton OR	The greater of $3,000 per gross ton OR
... in the case of a vessel greater than 3,000 gross tons	$10,000,000	$22,000,000
... in the case of a vessel of 3,000 gross tons or less	$2,000,000	$6,000,000
B. A tank vessel other than a single hull vessel referred to in A, above ...	The greater of $1,200 per gross ton OR	The greater of $1,900 per gross ton OR
... in the case of a vessel greater than 3,000 gross tons	$10,000,000	$16,000,000
... in the case of a vessel of 3,000 gross tons or less	$2,000,000	$4,000,000
C. For any non-tank vessel	$600 per gross ton or $500,000, whichever is greater	$950 per gross ton or $800,000, whichever is greater

The amended limits are effective in respect of an oil discharge or substantial threat of discharge as follows:

- For any tank vessels, on or after 9 October 2006.
- For any other vessel, on or after 11 July 2006.

The text also includes language which requires the President to adjust these limits of liability "not less" than every three years to reflect significant increases in the Consumer Price Index.

The existing regulations governing the need for Certificates of Financial Responsibility (COFRs) have not yet been amended which means that existing COFRs remain valid despite the increase in limits of liability.

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

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Sea Water Ingress and Seaworthiness

A very recent decision of the English High Court demonstrates that ingress of sea water into a vessel's hold cannot be treated as a decisive indication of unseaworthiness at commencement of the voyage - despite what many cargo recovery agents would seek to argue!

According to Judge Mackie QC in *Ceroilfood v Toledo: "if the claimants establish that there was an unexpected ingress of sea water into the vessel's hold then that will be a peril of the sea within Article IV Rule 2(c) and the Defendants will not be liable unless the Claimants have established either causative negligence or shown that the vessel was unseaworthy at the start of the voyage*".

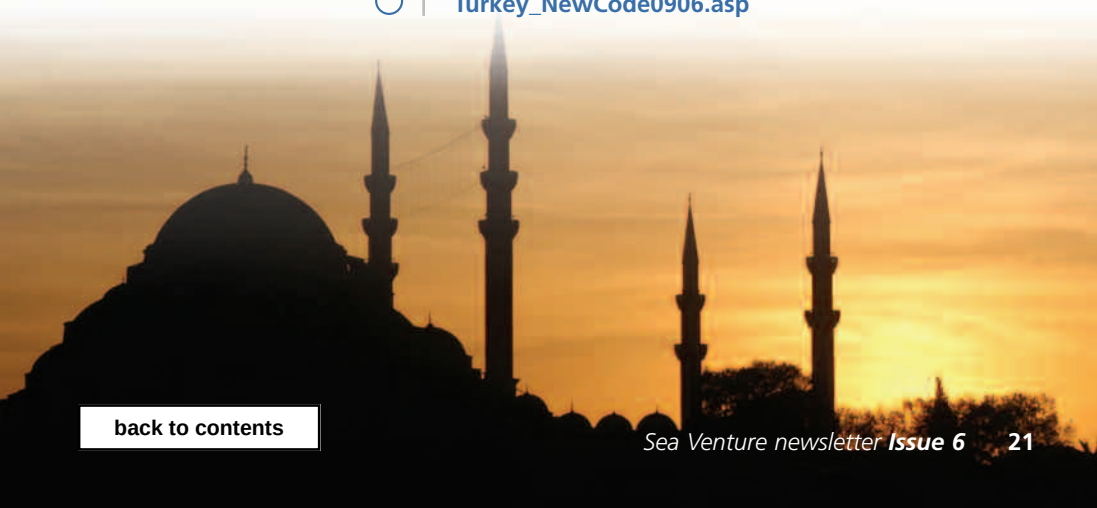
A full discussion of the decision, the impact of which on cargo claims could be considerable, and which also addressed the scope and application of the Hague Rules Article III Rule 6 Time Limit, can be found in an article by Nina Jermyn **(nina.jermyn@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Articles/Toledo0906.asp

Turkey - New Commercial Code

The second draft of the new Turkish Commercial Code is currently under review by the Ministry of Justice. It is anticipated that the new Code will be in force by 1 January 2007. Dr. Fehmi Ulgener of Ulgener Legal Consultants/Law Office sat as chairman of the sub-committee to the Chamber of Shipping charged with the task of reviewing and evaluating the first draft of the new Code. In an article prepared by Dr. Ulgener for the Steamship Mutual website the background to the draft new Code is discussed and some important changes to the fourth and fifth chapters of the Code, which deal with maritime and insurance law, are highlighted. These include issues relating to carriers' liability, recognition of time charters and the acceptance of Club Letters of Undertaking as security in lieu of or to gain release from arrest. The article can be found at:

www.simsl.com/Articles/Turkey_NewCode0906.asp



Steamship Mutual/Videotel Training Programme Wins Award

As Members will be aware from Club circulars, Steamship Mutual has for many years co-operated with Videotel Marine International Limited in the production of video and computer based training programmes. The first title, a three part series on Bridge Procedures, was published in early 1994. Since then, over 50 further programmes have been produced.

One of the most recent programmes produced by Videotel and Steamship Mutual on the subject of **"Anchoring Safely"** was the winner of a **Bronze Award** in the short film/video category in this year's **Horizon Interactive Awards** competition. The Horizon Awards were created to recognise outstanding achievement in the field of interactive media.

In addition the 2006/07 edition of the Club's innovative Claims Handling Guide, **"A Team Effort" - A Guide to Casualty Investigation & Claims Handling**, was released in August. This Interactive CD-ROM contains updated versions of the Club Rules, List of Correspondents and Staff Contacts. Editorial improvements have been made to the video and text chapters, and additional images have been added. Many reference documents such as standard forms of charterparty and International Conventions are also contained within the CD, and there are links to useful internet resources, thereby making the CD a comprehensive and stand-alone claims handling resource. The CD is also now available in versions with the video sub-titled in Spanish and Chinese.

The Guide is intended for use both ashore and onboard Members' vessels. By providing Masters with guidance on matters of essential importance in the handling of particular claims, loss minimisation is facilitated. The CD is also an extremely useful training resource for those who may be new to P&I insurance.

Recent Publications

The 2006 Report & Accounts and Management Highlights

Members received these in hard copy in June. They have also been published 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/2006/Rep_Acc.asp
- Management Highlights
  www.simsl.com/Publications/Management_Highlights/Management_Report.asp

Additional Cover For Non-Poolable P & I Risks

Circular B.447 informs Members of a general reinsurance facility which enables the Club to provide cover for a wide range of non-poolable liabilities and costs for ship operators. The facility is designed to offer additional insurance to Members who wish to be protected against certain non-poolable risks not otherwise insured under the Rules. The nature of the risks for which cover is available are detailed in the Circular:

- **www.simsl.com/Publications/Circulars/2006/B447.asp**

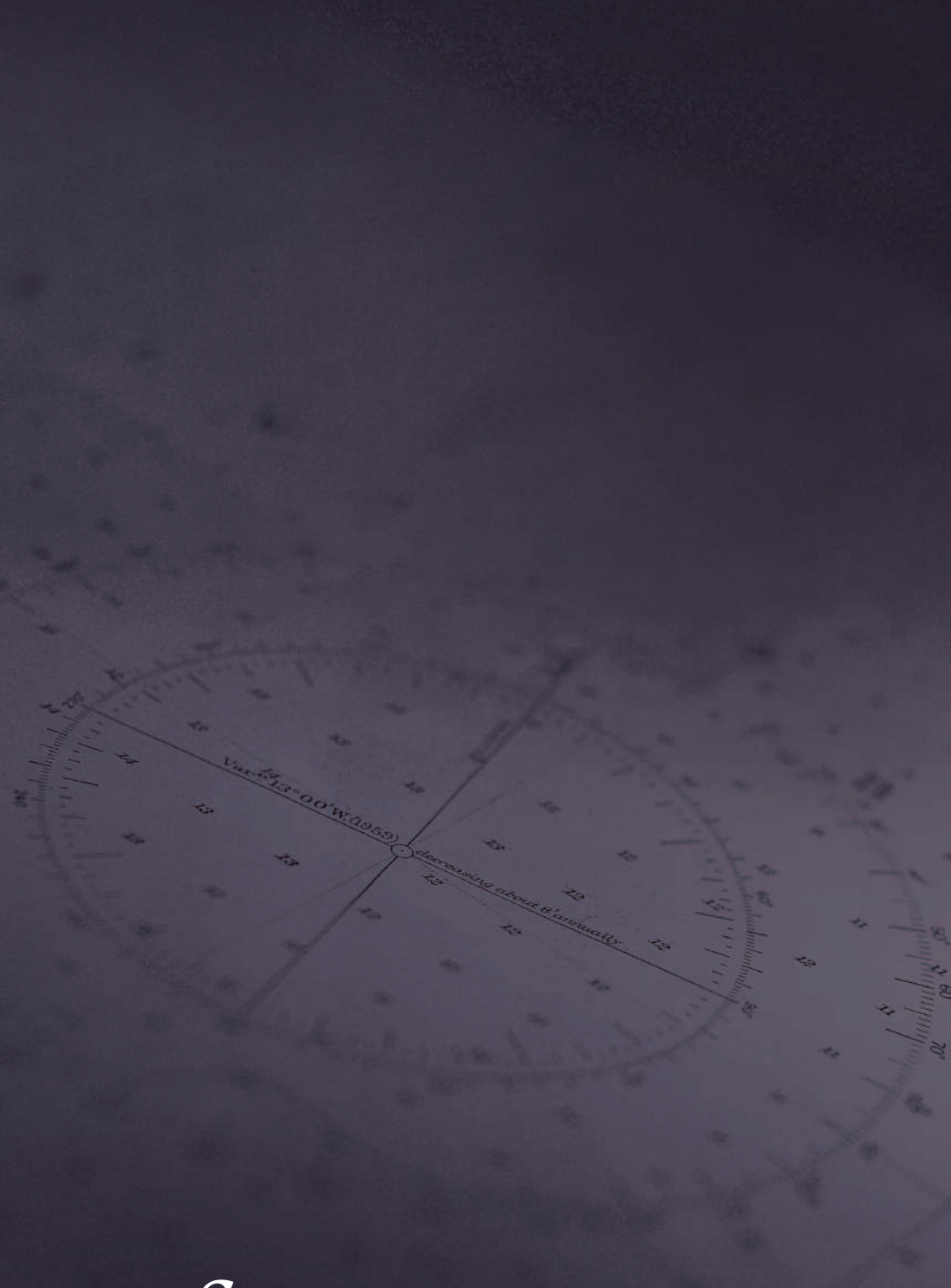
Articles Published on the Steamship Mutual Website

Important amendments to SOLAS and SAR conventions came into force on 1 July 2006. These have been summarised in the following website articles:

- Lifeboats - Measures to Prevent Accidents
  www.simsl.com/Articles/Lifeboats0606.asp
- Persons in Distress At Sea - SAR and SOLAS Amendments
  www.simsl.com/Articles/SAR_SOLASAmends0606.asp
- Bulk Carrier Safety - SOLAS Amendments in Force
  www.simsl.com/Articles/Bulk_SOLASAmends0606.asp
- Voyage Data Recorders for Cargo Ships
  www.simsl.com/Articles/CargoVDR0606.asp

Other articles:

- Chemical Spills - OPRC-HNS Protocol in Force June 2007
  www.simsl.com/Articles/OPRC_HNS_0606.asp
- Compensation for Oil Pollution Damage - Parties to the Supplementary Fund Protocol
  www.simsl.com/Articles/3rdTierParties0606.asp



STEAMSHIP MUTUAL

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