STEAMSHIP MUTUAL

newsletter

Sea Venture

issue 7

Contents

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

Introduction

"Last year alone saw the release of the new edition of the Club's innovative Claims Handling Guide, four additional training guides, the second edition of "Training Matters" and a new product "Sea News"."

World GDP has been growing at historically high levels over the last three years and is currently predicted to rise by close to 5% in 2007. In response, demand for shipping has produced record new building orders and a projected growth in the world fleet of about 5% a year for the next three years, assuming no major change in the economic climate[1].

This growth in the world fleet is most welcome but, even leaving aside the problems of supply and demand, the growth in world trade is creating a number of challenges for P&I Clubs. One example is the increase in claim costs discussed extensively in the Steamship Mutual Mid Year Review:

www.simsl.com/MidYearReview.html

The apparent upward trend in claims values is not surprising given the combination of an increasing world fleet, the greater volume and increased value of cargoes being shipped, rising commodity prices and escalating running costs, but these are factors over which the Club can have no influence.

The other major factor underlying the rising trend in claims, namely human error, inevitably comes to the fore when there are, as now, both chronic and acute shortages of experienced officers and crews as the result of the growth in demand. This is an area in which Steamship Mutual can and does play a proactive role through its many loss prevention and training initiatives. In association with Videotel, Steamship Mutual has produced over 50 training programmes since 1994. Last year alone saw the release of the new edition of the Club's innovative Claims Handling Guide, four additional training guides, the second edition of "Training Matters" and a new product "Sea News".

These publications are discussed in an article in this issue of Sea Venture. There are also 14 other articles from Steamship Mutual, discussing such varied subjects as arbitration in China, the new Mexican law of Navigation, liens for unpaid premiums, plus the normal summaries of recent English Court and arbitration decisions. We are also pleased to include an article by the General Counsel of Intertanko setting out the challenge to the legality of the EU Ship Source Pollution Directive currently before the European Court of Justice, as well as articles on the New ILO Consolidated Labour Convention, the amendments to the SOLAS and SAR conventions covering the treatment of persons rescued at Sea, and a discussion by Richemont Nicolas & Associes, Paris, of their experience of the prosecution in France of oil pollution fines subsequent to the Erika and Prestige incidents.

Malcolm Shelmerdine

1st February 2007.

[1] Clarkson Research Services

Freedom of the City of London awarded to Nikolaus W. Schües

Congratulations to Nikolaus W. Schües, Joint Managing partner of Reederei F. Laeisz, who, in a move that highlights the strong links between London and Hamburg, was recently awarded the Freedom of the City of London.

Until 1835 the Freedom of the City was essential to anyone who wished to exercise a trade in the City. It was first awarded in 1237. A number of ancient privileges were associated with it. They included the right to herd sheep over London bridge, to go about the City with a drawn sword, and if convicted of a capital offence, to be hung with a silken rope. It is only since 1996 that the Freedom has been open to non British or Commonwealth citizens.

Reederei F. Laeisz is represented on the Board of Steamship Mutual and has been a strong supporter of the Club for many years.

Steamship Mutual launches New Website

The new Steamship Mutual website goes live this month and will allow improved navigation and access to articles and information.

The remodelled website is the first step in the process of making the Club more accessible via the web. The site will continue to be developed to enhance the service provided by Steamship Mutual. To assist in this process feedback will be welcome as we consider the next stage of the project.

The look may have changed but the address remains the same:

(www.simsl.com)

Bimco Hold Cleaning / Cargo Residue Clause

BIMCO has recently issued a clause designed to address the allocation of responsibility between owners and time Charterers for time and costs incurred as a consequence of complying with MARPOL Regulations relating to the disposal of cargo residues.

The background to the clause is discussed in a Steamship Mutual website article by Sacha Patel **(sacha.patel@simsl.com):**

www.simsl.com/BIMCOHold0107.asp

Pilotage Incidents

" The frequency of casualties has ranged between thirty-seven and sixty-six per annum .."

The International Group's Pilotage sub-committee recently collected data from all Group Clubs in relation to incidents costing in excess of US$100,000 occurring between 20 February 1999 and 20 February 2004 in which pilot error was a feature. Based on this data, it has produced a report, a copy of which is available on the Steamship Mutual website at:

www.simsl.com/PilotError.pdf

setting out the frequency and severity of "pilotage" incidents on a worldwide basis.

The frequency of casualties has ranged between thirty-seven and sixty-six per annum, with an average annual cost per incident between US$470,000 and US$1,690,000. Although these figures are substantial they do not appear to identify any particular trend.

Appendix I of the Report gives details of the Master/Pilot Exchange (MPX) forms that should be completed prior to each pilotage. A Group circular of December 1998 encouraged shipowners to use these MPX forms and Members should be reminded of the importance of ensuring that such exchanges should take place.

Enclosed as Appendix II is IMO Resolution A960 outlining the recommendations for training and certification of Maritime Pilots. The international response to this Resolution has been varied and many governments ignore it entirely. Accordingly, the Group is of the view that it should liaise with interested industry bodies, such as the International Maritime Pilots' Association (IMPA), International Chamber of Shipping and International Shipping Federation, and governments to investigate the possibility of making A960 mandatory such that all pilots will be required to be trained, certified and audited to an international standard.

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

China - First Step towards Recognition and Enforcement of Foreign Awards

Foreign parties involved in disputes with Chinese companies encounter numerous difficulties. A major hindrance is in enforcing foreign court judgments. China has signed very few judicial-assistance treaties, thus hampering the development of a system to litigate such disputes at an international level. Yet foreign court judgments are rarely recognised in China. Under the present circumstances, therefore, the foreign company is usually obliged to litigate directly in China.

On 14 July 2006, the Supreme People's Court and the government of the Hong Kong Special Administrative Region signed and published the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region. This Arrangement provides a first opening for civil and commercial awards in Hong Kong to be enforced against assets in China, and vice versa, and will come into force once guidelines have been published by both sides.

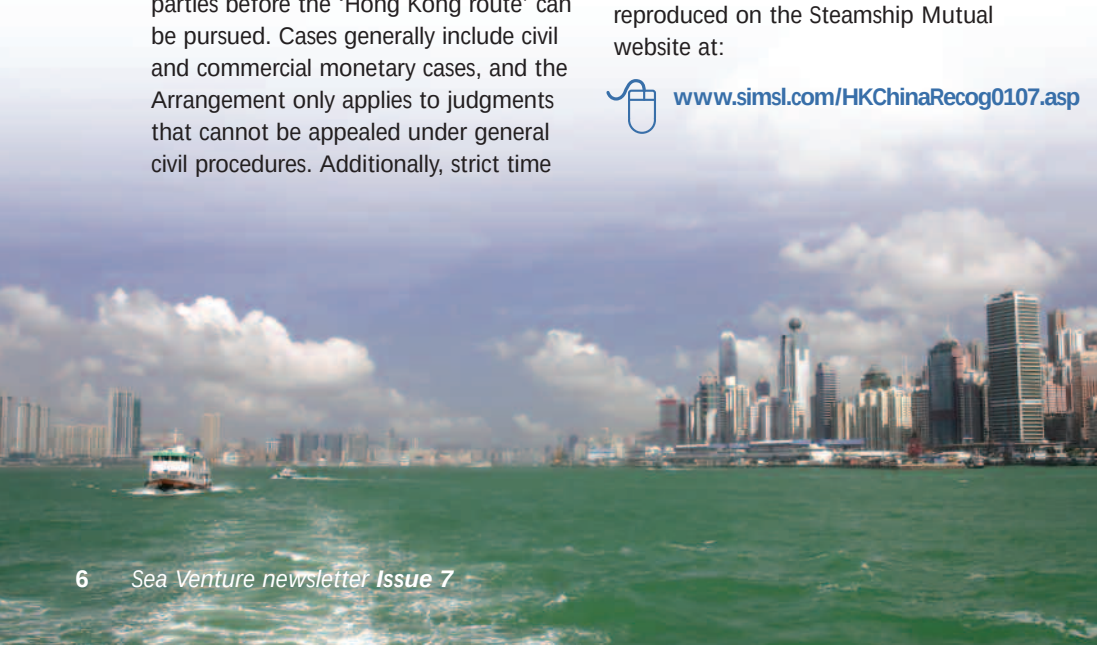
Although internal procedural guidelines have yet to be finalized, July's Arrangement already provides certain conditions for recognition and enforcement. It is necessary, for example, for a Choice of Court clause to have been agreed in writing between the two parties before the 'Hong Kong route' can be pursued. Cases generally include civil and commercial monetary cases, and the Arrangement only applies to judgments that cannot be appealed under general civil procedures. Additionally, strict time limits of between six months and one year apply to recognition and enforcement of a judgment.

Given the close business ties between Hong Kong and mainland China, these reciprocal enforcement arrangements may have a considerable impact. As lawyers and businesses take the new contractual terms into account, this impact should increase. This new route may prove to be especially favorable for those with common law expertise, although there are at present certain constraints to its effectiveness. For example, the issue of provisional remedy, such as property preservation or injunctions, remains unresolved. This is a major consideration in such disputes, as the Chinese party frequently transfers its properties in the course of a litigation to frustrate a final judgment.

Despite these complexities, the opening of a new route will please those foreign companies that would prefer to litigate outside Mainland China, even if the opposing party has assets in China only. An awareness of the Arrangement's various clauses and requirements will enable businesses to plan ahead and make best use of the new legal situation.

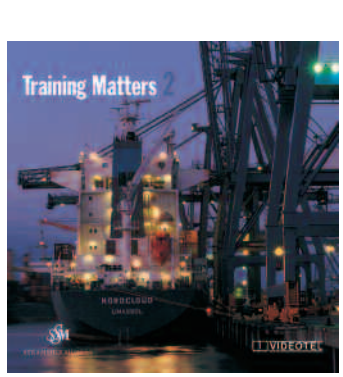
Article by Janet Ching **(janet.ching@simsl.com)**, based on the full article by Wang Jing & Co Law Firm which is, with their kind permission, reproduced on the Steamship Mutual website at:

www.simsl.com/HKChinaRecog0107.asp



Loss Prevention Publications

"…loss prevention is a better remedy than an attempt to seek recourse after a casualty has occurred."



Since the last issue of Sea Venture was published in September, 2006, Steamship Mutual's association with Videotel Marine International has resulted in the release of a further training programme called *"Pilot On Board! - Working Together"*. This programme is directed towards masters and navigating officers, and its objective is to achieve improved integration of the pilot into the bridge team. The Club regularly experiences incidents which occur whilst a pilot is onboard and these can result in substantial liabilities for the shipowner (see page 5 of this issue of Sea Venture).

Even if incidents arise as the result of negligence on the part of the pilot, it is rarely possible for the shipowner to avoid the financial consequences. In view of this, loss prevention is a better remedy than an attempt to seek recourse after a casualty has occurred. There is often a lack of understanding on the part of the bridge team of precisely what will be involved in the passage from the pilot station to berth. Equally, the pilot may lack important information about the vessel, her equipment and characteristics. *"Pilot On Board! - Working Together"* promotes the need for a full exchange of information between the master and the pilot, and will hopefully result in closer cooperation during passages under pilotage such that the risk of loss or damage is greatly reduced.

This theme, of incidents involving pilotage, is continued in another new product called *"Sea News"*, again produced with Videotel. This takes the form of a news digest covering a small number of issues of topical interest, and a case study of a casualty. The first edition covers the ILO Maritime Labour Convention (see page 10 of this issue of Sea Venture), a case-study of an incident that occurred when a vessel was under pilotage, a review of computer based training, and an examination of problems that arise in the use of target tracking devices.

Steamship Mutual and Videotel have also issued a new version of their product *"Training Matters"*. This booklet and DVD emphasise the increasing importance of training, and explain how Steamship Mutual and Videotel cooperate in the production of training programmes. Details are also provided of the various means by which onboard training can be provided by Videotel.

Other programmes produced by Steamship Mutual in association with Videotel this year address training on the following topics:

- Freefall Lifeboats
- Minimising Fatigue - Maximising Performance
- Environmental Officer Training Course

Further details of these programmes, and of any others produced by Videotel in association with the Club can be obtained from Chris Adams **(chris.adams@simsl.com)**.

Rescue Respite for the Shipowner?

Going to the aid of those in distress is a fundamental principle by which most seafarers live. Unfortunately some countries are less sympathetic than others when asked to assist in easing the smooth passage ashore of those saved at sea. It is hoped that this situation may improve after recent IMO amendments covering obligations now imposed upon ship's masters and Member States when rendering assistance to refugees and/or asylum seekers. An article prepared by Dan Carr, Assistant General Counsel for Stolt-Nielsen Transportation Group Inc., and Don Murnane and Daniel Fitzgerald of Freehill Hogan & Mahar, New York, discussing these amendments can be read at page 14 of this issue of Sea Venture

The IMO amendments came into force in July 2006. The Club has recently had experience of their impact when a member's vessel, the 'Stolt Guardian', came to the aid of a small craft in the Gulf of Mexico. The boat sank shortly after the last of the 8 occupants scrambled onboard. All the occupants were carrying identity papers confirming they were refugees from Cuba.

The vessel was scheduled to transit the Panama canal. Prior to the IMO amendments the authorities in Panama rarely allowed such people to be landed ashore and, if they could be persuaded otherwise, the shipowner probably would have been required to pay for their welfare and security until their status was determined.

Fortunately, after the Club's Panamanian correspondent brought the authorities' attention to their obligations under the IMO amendments, and contact had also been made with the local US Embassy, the regional Rescue Co-Ordination Centre (RCC) and Office of the United Nations High Commissioner for Refugees (UNHCR) in Switzerland, the refugees were allowed to disembark without significant delay to the vessel, and without any requirement that the shipowner should have to bear any future responsibility.

Achieving this successful outcome was by no means straightforward and the authorities' initial reaction was perhaps not surprising given the recent nature of the regulatory amendments. Although assistance can be sought form the Club and Club's correspondents in these circumstances the joint IMO/UNHCR publication on this subject, entitled *'Rescue at Sea',* is a useful reference source. The 'Procedures' section gives the following guidance to the master if someone in distress at sea is rescued and claims asylum:

- Alert the closest RCC;
- Contact UNHCR;
- Do not ask for disembarkation in the country of origin or from which the individual has fled;
- Do not share personal information regarding the asylum-seekers with the authorities of that country, or with others who might convey this information to those authorities.'

The *'Rescue at Sea'* guide can be found on the Steamship Mutual Website at:

www.simsl.com/SAR_SOLASAmends_IMOLeaflet.asp

Article by Mark Underhill **(mark.underhill@simsl.com)**

French Law - Oil Pollution Prosecutions

In 2003, and following the Erika and Prestige casualties fines for oil pollution off the French coast were increased substantially to a maximum Euro 1,000,000, or the value of the vessel, or four times the value of cargo on board and freight. In addition specialized Courts were established at Le Havre, Brest, and Marseille to deal with such incidents.

The Court at Brest covers incidents in the Atlantic and has over the last three years heard 30 cases. In more than half of these cases the shipowner against whom the allegation of pollution has been directed has been represented before the court by Christophe Nicolas of Richemont Nicolas & Associes, Paris. In an article written for the Steamship Mutual website

www.simsl.com/FrenchPollution0107.asp

Christophe shares his experience, describes the French system, some of the defences available to the shipowner and sets out a number of recommendations to be followed by the master in the event his vessel is alleged to have caused or to be the source of a pollution incident.

Recent Arbitration Awards

There have been a number of LMAA decisions reported since the last edition of Sea Venture. Of particular interest have been disputes on when a fixture that is negotiated "subject to details" is fixed,

(www.simsl.com/SubjectDetails0107.asp)

the proper measure of damages arising from the late redelivery of a vessel by Charterers,

(www.simsl.com/LateRedelivery0107.asp)

as well as Charterers' liability for demurrage when delay was caused by their refusal to discharge cargo until security for alleged cargo damage claims had been provided by or on behalf of owners

(www.simsl.com/Demurrage0107.asp).

These decisions are discussed by Sian Morris **(sian.morris@simsl.com)** in articles written for the Steamship Mutual website - see links above.

The New ILO Consolidated Maritime Labour Convention - Charting Labour Standards for the Future

"What is fundamentally different about this Convention is that it is about quality shipping. Beyond improving the working conditions of the seafarers, it is also about further marginalising the bad shipowners who end up costing the entire industry. This is a very sound economic benefit for the entire industry" (Bruce Cariton of the Maritime Lawyers Association of the USA).

New maritime labour standards were established at the 94th International Labour Conference last February in Geneva. Except for the four abstentions, a unanimous 314 votes were cast in favour of adopting the New Maritime Labour Convention 2006. This "super Convention" consolidates and updates more than 54 international labour standards adopted since 1920. The new Convention lays out seafarers' rights to decent work conditions. It is meant to be easily understandable, globally applicable, readily updatable and uniformly enforceable. Primarily, the 2006 Convention provides a comprehensive Charter for seafarers and shipowners.

In an article written for the Steamship Mutual website, Larry Kaye, of Kaye Rose and Partners, San Diego, explains the aims and of the Convention and mechanisms by which these will be achieved once it comes into force. The article can be found at:

www.simsl.com/MLC0107.asp

Hong Kong - Conflicting Decisions on Delivery under Straight Bills of Lading

The question of whether delivery under a straight bill of lading requires production of an original bill has recently been thrown into confusion in Hong Kong following the recent first instance decision of Mr Justice Stone in *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd*. In his judgment Stone J relied on the Singaporean case of *Voss v APL Co Pte Ltd* and comments made in the English case, the *"Rafaela S,"* in the House of Lords that arguably were obiter dicta, to find that production of an original bill of lading was a condition precedent to the delivery of goods under a straight bill of lading. Stone J went so far as to affirm the obiter comments of Lord Bingham in the House of Lords and agreed that, if necessary, he too would hold presentation of an original bill of lading to be a necessary pre-condition to delivery, even where there was no express provision to that effect within the bill.

This latest decision would seem to conflict with that handed down by Mr Justice Waung in the first instance decision in the *"Brij"* in July 2000. In light of these conflicting decisions the situation in Hong Kong with regard to delivery under straight bills of lading remains uncertain.

This decision is discussed in further detail by Sue Watkins **(sue.watkins@simsl.com)** in an article prepared for the Steamship Mutual website:

www.simsl.com/BrightFortune0107.asp

Brazil - Carrier's Liability for Unauthorised Imported Merchandise

" The new regulation provides for fines equivalent to ten times the value of the freight .."

Article 24 of Medida Privisoria No. 320, dated 24 August 2006, is a provisory measure.

The article imposes an obligation on an importer to return or destroy cargo which is not authorised for import pursuant to environmental, health, security legislation or sanitary regulations. In the past this obligation was solely directed to the importer. The proposed article, however, provides that an owner will be liable if the cargo is covered under a bill of lading issued "to order" or to a non-existent individual or corporation with an unknown address.

The new regulation provides for fines equivalent to ten times the value of the freight, plus the costs incurred in returning or destroying the cargo. Therefore, the consequences of contravention are significant.

The measure is clearly aimed at reducing the costs incurred by customs for storage and destruction of unauthorised cargo. This has, apparently, been an endemic problem in some Brazillian ports for a considerable time.

Cases where a negotiable document is issued, such as a to order bill of lading, where the final receivers of the cargo are not readily known to the ship owner, will be problematic; This legislation clearly poses an additional burden on the carrier to ensure that the address and a contact details of the receiver are available and that these can be verified. In this way the risk of liability for unauthorised imports becomes the responsibility of the receiver. Receivers should be notified repeatedly of the fact that the cargo is at their disposal, once it is discharged from the vessel.

This is, as yet, only a provisional measure. Congress will vote on 23rd December to decide whether it should become law (with or without amendment).

Whilst there is a possibility that liability may be covered under the Club Rule relating to "failure of cargo interests to collect cargo", Members are advised to follow the steps mentioned above to protect their interests.

Fines imposed under this Provisory Regulation, do not fall squarely within the types of fines contemplated by the Club's Rules. For this type of fine to be covered under the heading of "Other Fines" (Rule 25xvi (e)) Members would have to show that they took all necessary steps as would appear reasonable to the Directors to avoid the event giving rise to the fine.

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

The Shipping Industry takes its Case to the European Court of Justice

The European Court of Justice (the ECJ) now has before it an important case concerning the EU Ship Source Pollution Directive (35/2005). The Directive seeks to criminalise accidental pollution. The case is significant not just for the shipping industry but also to clarify European Union (EU) and European Economic Area (EEA) Member States' obligations. It examines the inter-relationship between an international regime established by treaties and contrasting legislation emanating from the EU. The Directive, which was hastily drawn up following the Prestige incident, is very broad in its scope. It applies irrespective of flag and its provisions apply not just within States' territorial seas but also within their Exclusive Economic Zones (EEZ) and on the High Seas.

A broad coalition of interests within the shipping industry is seeking clarification by the ECJ in Luxembourg as to the legality of the Ship Source Pollution Directive. The shipping industry submits that it goes beyond the provisions laid down in MARPOL and UNCLOS, which they say establish a uniform regime. The Directive seeks to criminalise pollution when caused with intent, recklessness or with serious negligence. This last test of culpability, it is submitted, does not satisfy the EU requirement of legal certainty. There is concern that if the consequences of the pollution are serious, then the degree of fault will also be taken to be serious.

The coalition of shipping interests is led by INTERTANKO, joined by INTERCARGO, the Greek Shipping Cooperation Committee, the International Salvage Union and Lloyd's Register. All these claimants are very concerned about the Directive and the increased exposure to criminal liability for their members. Seafarers and salvors, who are in the front line in the event of any casualty, are particularly concerned and do not wish to be exposed to ill-defined legislation that may be used "in the heat of the moment" as a means to satisfy the public's demand for accountability and retribution.

The case was brought before the ECJ upon the reference of the English High Court of Justice following the judgment of Mr Justice Hodge on 30th June 2006. The ECJ is the only body that can rule on the legality of EU legislation. Cases are not lightly referred to the ECJ. The claimants had to show that their case was "well founded". The court interpreted this as meaning that the claimants had "a reasonable prospect of success". The High Court referred four key questions to the ECJ for preliminary ruling. Meanwhile the proceedings before the High Court were stayed. The questions referred to the ECJ were:

(1) Whether it is lawful for the EU to impose criminal liability in respect of discharges from foreign flag ships on the high seas or in the Exclusive Economic Zone, and to limit MARPOL defences in such cases.
(2) Whether it is lawful for the EU to exclude MARPOL defences for discharges in the territorial sea.
(3) Whether the imposition of criminal liability for discharges caused by "serious negligence" hampers the right of innocent passage.
(4) Whether the standard of liability in the Directive of "serious negligence" satisfies the requirement of legal certainty.

The law as regards matters of criminal law must not only be clear but crystal clear. The test of serious negligence gives rise to concern. Its ambiguity may well lead national courts seeking to apply the test to look to the consequences of the act(s) and, if they are serious, they may hold the negligence to have been serious. A major oil pollution incident is one of the most highly politically charged events and the reaction of the public is often one of outrage. Due to the Directive there is increased possibility that individuals may be held to be criminally liable.

It must be emphasised that the shipping industry does not in any way condone illegal acts causing pollution to the marine environment. But accidents can happen and whilst adequate compensation should be available, it should not follow as a matter of course that someone should be criminally liable.

The shipping industry provides an efficient and environmentally friendly transportation solution for the global economy. Its seafarers often work in demanding circumstances and their dedication to duty is rarely recognised sufficiently. Creating an uncertain criminal liability regime will do nothing to ensure adequate retention levels or encourage recruitment of professional mariners.

The claimants have now filed their written submissions before the ECJ. EU and EEA Member States have also had the opportunity to file written observations before the ECJ. It is understood that the Governments of Greece, Cyprus and Malta have done so in support of the claimants' case.

Given that Member States must implement the Directive by 1 April 2007 it was recognised by the High Court that the case should be considered expeditiously by the ECJ. Despite these proceedings the Directive has not been in anyway suspended. Member States must comply with the deadline set to bring their own laws into line with the Directive.

Now that written observations have been submitted the Judge Rapporteur will draw up a preliminary report which will be discussed at a general meeting of the Judges and Advocates General. This will be followed by an assignment of the case for the formation of the Court, the size and chamber of which is decided by the Registrar and possibly by intervention of Member States. In effect this decides the number of judges who will sit on the panel (the maximum number being 13). A date will then be fixed for an oral hearing. Whilst it is hoped that this will take place during 2007 it is not certain. After the hearing an Opinion is produced by the Advocate General assigned to the case. There is no scope for the parties to make additional representations after seeing the Opinion, which may or may not be adopted by the court as the basis for its decision. The decision of the ECJ will be final - there is no procedure for appeal.

This case has generated a great deal of interest from legal commentators in many jurisdictions. The traditional legal order is being challenged. The shipping industry as a truly international industry is governed by a complex web of laws. Pre-eminent are the international treaties that have been carefully negotiated. These provide the backbone to the legal order. The role of the International Maritime Organization (IMO) is pivotal, the IMO treaties are widely ratified and accepted, none more so than MARPOL which is a truly global framework for the industry. Where national or regional laws are implemented it is vital that they do not contradict binding treaty law that so many States have also submitted to.

There is an analogy with a previous case brought by the shipping industry. In that case INTERTANKO lead a challenge to certain regulations concerning equipment and manning of tankers enacted by the State of Washington in the U.S. *(INTERTANKO v. Governor Locke)*. It was argued that these were pre-empted by U.S. federal laws. The case was ultimately decided by the U.S. Supreme Court in 2000, which ruled unanimously in favour of the shipping industry. That decision has become the bedrock of U.S. jurisprudence on issues as to pre-emption by Federal laws. That decision helped to reduce the proliferation of laws enacted by U.S. coastal States. Such an issue is once again before the U.S. courts this time concerning the State of Massachusetts and their Oil Spill Prevention Act of 2004. The District Court held in favour of the Shipping industry ruling that the law was pre-empted by federal law. The State of Massachusetts has filed an appeal and the matter is now before the U.S. Court of Appeals for the First Circuit.

It is hoped that the decision of the ECJ will provide clarity in the law, provide guidance on the bounds of the EU's competence and confirm the pre-eminence of international law as laid down in treaties. The court's decision is awaited with great interest from commentators, States and the shipping industry.

We are grateful to John C. Fawcett-Ellis, General Counsel, INTERTANKO for this article. For further information see:

www.intertanko.com

Master's Duty to rescue Persons at Sea and recent IMO Amendments

Every year, thousands of migrants and asylum seekers undertake perilous journeys at sea in search of safety, refuge from persecution, or simply better economic conditions. Under international maritime law, vessel masters have an obligation to render assistance to those in distress at sea. In most circumstances, the embarkation of distressed persons present numerous logistical and political considerations for masters, owners and Charterers, which prevent timely disembarkation to a place of safety. In recognition of this dilemma, the International Maritime Organization (IMO) has recently adopted amendments to two relevant maritime conventions.

The 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) obliges the

"master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so…"

The 1979 International Convention on Maritime Search and Rescue (SAR Convention) obliges State Parties to:

"…ensure that assistance be provided to any person in distress at sea… regardless of the nationality or status of such a person or the circumstances in which that person is found"… and to *"provide for their initial medical or other needs, and deliver them to a place of safety."*

On 1 July 2006, amendments to the SOLAS and SAR Conventions concerning the treatment of persons rescued at sea entered into force. The SOLAS amendments add to and clarify the existing obligations to provide assistance, adding the words: *"This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found."* Of further significance to vessel masters, owners and charterers, is the amendments to the SOLAS and SAR Conventions mandating Contracting States to (1) coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligation with minimum further deviation from the ship's intended voyage; and (2) arrange disembarkation as soon as reasonably practicable.

To the benefit of owners and charterers alike, these amendments firmly obligate Contracting States to assist vessel masters. The overwhelming majority of member states of the IMO have adopted the SOLAS Convention. While not as popular as SOLAS, many member states have additionally adopted the SAR Convention. When making arrangements to disembark persons rescued at sea, vessel owners, Charterers, insurers and local correspondents would be well advised to engage immediately nearby Contracting States at the onset of rescue efforts.

In the event that Contracting States appear unsure of their humanitarian obligations, the United Nations' refugee agency, UNHCR, and other local refugee relief agencies should be consulted for additional assistance. To further assist Contracting States and vessel masters, the IMO published Resolution MSC.167 (78), *"Guidelines on the treatment of persons rescued at sea,"* providing that assisting vessels, serving as a temporary place of safety, should be relieved of this responsibility as soon as alternative arrangements can be made. The new amendments help resolve ambiguities and clarify obligations surrounding the rescue of distressed persons while serving as an incentive to vessel masters to fulfill their obligations under international maritime law.

We are grateful to Dan Carr, Assistant General Counsel for Stolt-Nielsen Transportation Group Inc. Don Murnane and Daniel Fitzgerald of Freehill Hogan & Mahar, New York for contributing this article.

A version of this article, which includes references to SOLAS, SAR and IMO sources, can be found on the Steamship Mutual website at:

www.simsl.com/Rescue0107.asp

Club's Lien on Vessel for Unpaid Premium upheld by United States Eleventh Circuit Court Of Appeals.

" …the Club's lien included the total value of the premium payable for the insurance provided…"

Owing to the mutual nature of a P&I Association, it is in the interest of all the Members to ensure that the premium agreed by any particular Member for entry in the Club is paid in full and the Managers of the Club have a duty to take steps to ensure that recovery is made from defaulting Members. The Club Rules, which form part of the Member's contract of insurance, endorse this by stipulating that the Club shall have a contractual lien over each ship owned by the Member, for outstanding premiums and any other sums whatsoever due to the Club in respect of that ship, or any other ship, entered by the same Member. This contractual lien is in addition to any other rights available to the Club, including any maritime lien or right in rem available by statute or other law of any jurisdiction.

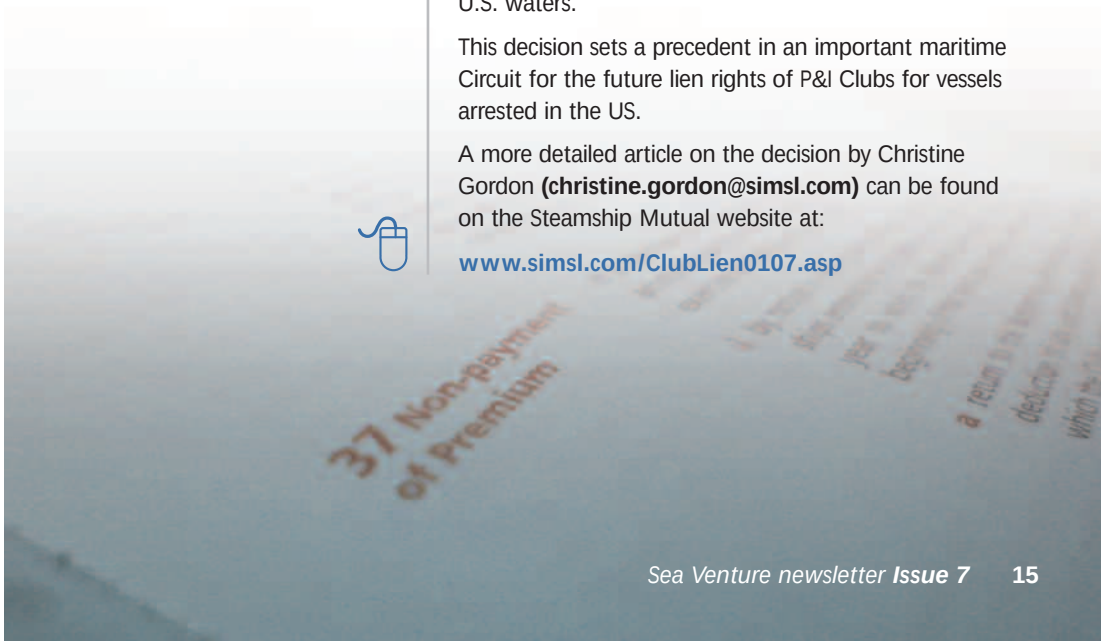
In the context of the bankruptcy of a former Member of the Club, the United States Court for the Southern District of Florida upheld the Club's lien on an owned vessel for amounts due to the Club in respect of unpaid P&I premiums on the vessel. The Court held there were two separate rights of lien available to the Club: a maritime lien on the vessel for necessaries in accordance with United States statute (the Federal Maritime Lien Act, "FMLA"); and a contractual lien as conferred by the Club Rules.

An issue remained in respect of quantum which the United States 11th Circuit Court of Appeals has recently resolved in the Club's favour, finding that the maritime lien arises from the time the necessary (insurance) is provided to the vessel at the inception of the policy period, not when invoiced. The Court found accordingly that the Club's lien included the total value of the premium payable for the insurance provided to the vessel before her arrest and reversed the lower District Court's finding that the lien only attached to the amount of the premium which the Club had invoiced at the time of the arrest, which, because premium had been debited in instalments, was a significantly lesser sum. The lower Court had also rejected the ship's mortgagee's argument that the lien be pro-rated for the period the vessel was in U.S. waters.

This decision sets a precedent in an important maritime Circuit for the future lien rights of P&I Clubs for vessels arrested in the US.

A more detailed article on the decision by Christine Gordon **(christine.gordon@simsl.com)** can be found on the Steamship Mutual website at:

www.simsl.com/ClubLien0107.asp



Regional Cooperation Agreement on Combating Piracy and Armed Robbery in Asia (ReCAAP)

The United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as an act that takes place on the "high seas" outside the jurisdiction of any state. International Maritime Organisation ("IMO") statistics demonstrate that most attacks occur whilst a vessel is at anchor or in berth and within a state's territorial waters. Legally, such attacks are classified as armed robbery and fall under the jurisdiction of the coastal/port state in which the attack occurs.

Both piracy and armed robbery at sea are, though, threats to international trade. IMO compiles monthly reports on such incidents, from which it is apparent there are a number of global hot-spots. In particular, the Malacca Strait, Singapore Strait and South China Sea are identified as the areas most affected in Asia.

Given the level of trade transiting these waterways, and the strategic importance of the Malacca and Singapore Straits the threat to the global economy cannot be underestimated. It is important that this threat is actively challenged by the littoral states and other stakeholders.

IMO has played a pivotal role in developing initiatives to address the problem. It publishes recommendations to Governments for the prevention and suppression of piracy and armed robbery and actively promotes co-operation between littoral states and stakeholders in the areas most affected.

The Regional Co-operation Agreement on Combating Piracy and Armed Robbery against ships in Asia (ReCAAP) was concluded in Tokyo on November 2004 by 16 countries. Following ratification by the majority the Member states, ReCAAP entered into force on the 4 September 2006.

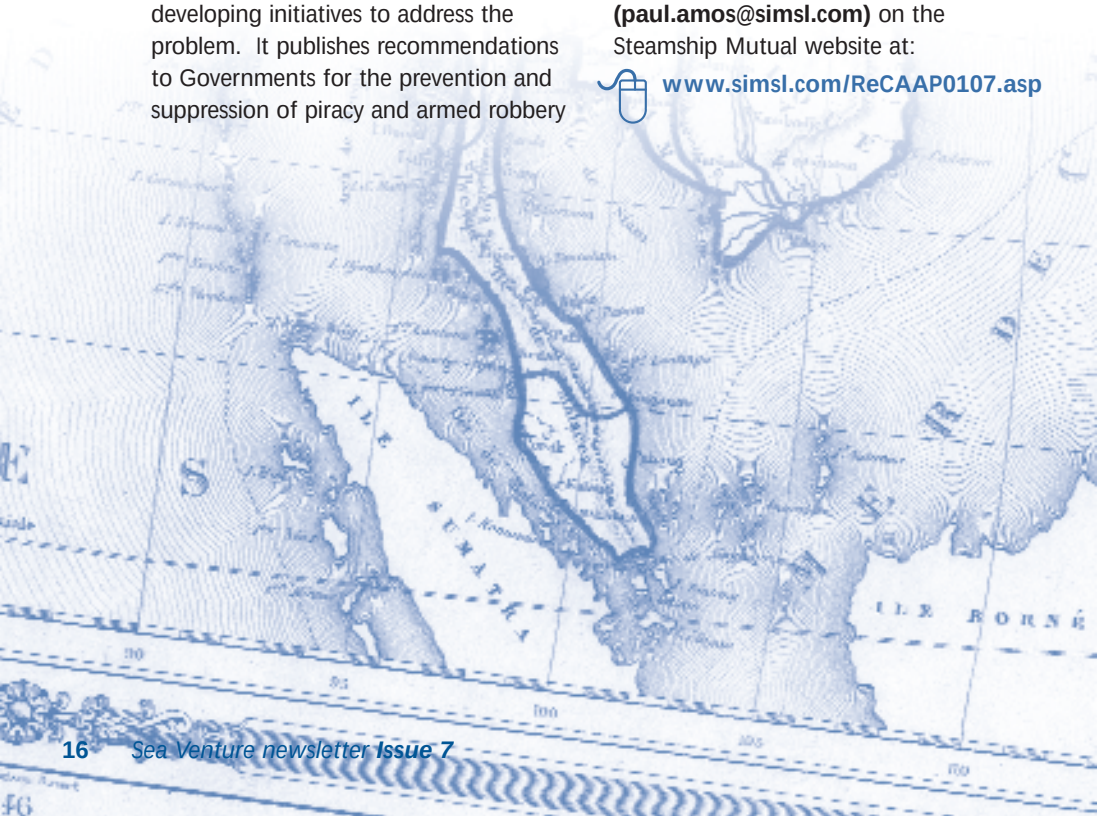
Given the increased co-operation in the region, there is cautious optimism that the co-ordination of the anti-piracy measures will lead to an appreciable reduction in the number of attacks. The latest figures published by IMO and International Maritime Bureau (IMB) appear to suggest such an improvement is underway. These figures and the IMO recommendations can be found at:

www.imo.org/includes/blastDataOnly.asp/data_id%3D16408/93b&w.pdf

www.icc-ccs.org/main/news.php?newsid=76.

Further information on ReCAAP is given in an article by Paul Amos **(paul.amos@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/ReCAAP0107.asp



Contracts of Affreightment - Nomination Terms

Given the long term nature of the contract, a Contract of Affreightment ("COA") is almost always tailor made to meet the specific needs of the parties concerned. These parties are the shipper or buyer of the cargo who is often motivated by requiring certainty for the costs of transportation, and the shipowner who is concerned with providing assured long term employment and flexibility for his owned or Chartered in tonnage. COAs enable shipowners to be flexible and allow vessels to be fitted into a pattern of trade. However, it is rare that a COA makes the acceptance of the nomination of a vessel the essence of the contract, when delay in acceptance can have substantial consequences for the party nominating a vessel, particularly in a rising market.

These issues are discussed in an article by Janet Ching **(janet.ching@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/COANomination0107.asp

Misdelivery of Cargo

Liability arising from delivery of cargo without production of bills of lading is not as of right covered under the Rules of the P&I Clubs.

In consequence, a carrier faced with a claim for misdelivery of cargo will be particularly concerned to know whether he can limit his liability under the package limitation provisions in the relevant bill of lading.

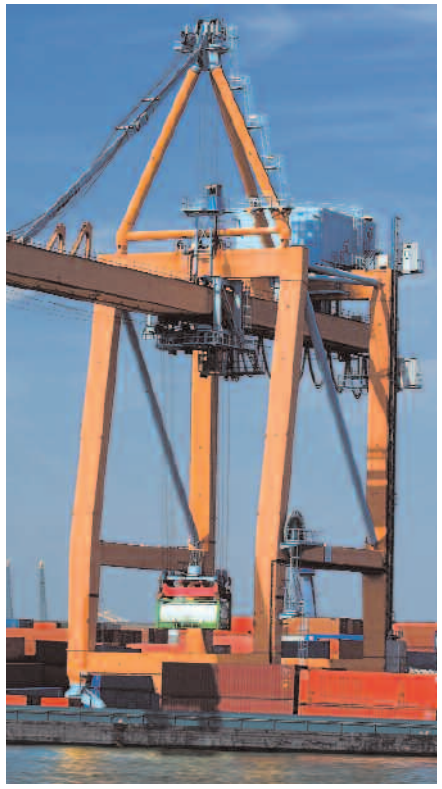
Until recently the generally accepted view was that a carrier who misdelivered cargo could not limit his liability under the Hague or Hague-Visby Rules. However, that view now appears to be in doubt.

In an article written for the Steamship Mutual website at:

www.simsl.com/Misdelivery0107.asp

David Morriss of Holman Fenwick & Willan considers the current state of the law, and how a Carrier may be able to limit or even avoid liability where there has been a misdelivery of cargo.

Distinguishing Cargo Loss and Damage Claims in Charterparty Disputes



It is important that ship owners are aware of potential pitfalls and problems which may be encountered when delivering cargo when specific contractual steps have been taken to try and protect their position as against cargo claims under the Charterparty. Some of these issues were raised in a recent dispute when Charterers agreed to indemnify owners against any cargo losses caused as a result of following Charterers' orders to call at Yemen. An addendum to the Charter provided that the normal Inter-Club Agreement apportionment of cargo claims between owners and Charterers would not apply so that cargo shortage claims, even if caused by owners' fault, would be for Charterers' account.

After the vessel had been detained by cargo receivers cargo claims for shortage and wet damage were settled by owners. Disputes arose under the Charterparty in respect of liability for the cargo shortage and damage claims, as well as unpaid hire covering the period of the vessel's detention. The disputes were arbitrated in London.

A summary of this case by James Foot of MFB Solicitors can be found on the Steamship Mutual website at:

www.simsl.com/Indemnity0107.asp

Freight Deduction under Tanker Voyage Charter

To circumvent the well-established principle of English law that the owner has an overriding right to be paid freight, tanker voyage Charters often contain clauses purporting to allow Charterers to make deductions from freight payment.

Whether Charterers were entitled to rely on such clause in circumstances where there was a short outturn of cargo when the cause of the shortage was not established was recently decided by arbitration in London. The clause was titled "cargo clingage", and gave Charterers a right to deduct for shortage in excess of 0.5% of the bill of lading quantity. However, the Charterers were unable to establish the short outturn was related to clingage and the Tribunal decided in favour of the owners.

The reasoning of the Tribunal is discussed in an article by Sacha Patel **(sacha.patel@simsl.com)** which can be found on the Steamship Mutual website at:

www.simsl.com/Clingage0107.asp

China - Validity of Arbitration Agreements

"…PRC Arbitration Law is quite different from that in other common law countries…"

On 8 September 2006, the People's Court of the PRC provided an interpretation on several issues of PRC arbitration law ("interpretation"). The current law was implemented in 1994. Even though the drafting of the current law on arbitration was influenced by the UNCITRAL model law, PRC Arbitration Law is quite different from that in other common law countries and has been criticised for not being able to cope with the rapid economic development in China in recent years.

The recent interpretation sought to clarify certain ambiguities. It consolidated previous judicial interpretations and focused on three key issues in arbitration, namely, (i) the validity of arbitration agreements, (ii) applications for setting aside and appealing against arbitral awards and (iii) the enforcement of arbitral awards. The Interpretation reconfirms that the intentions of the parties should be recognised when deciding on the validity of arbitration agreements and looks at the procedures to be applied when validity is in question. It also clarifies when arbitral awards may be set aside and/or where an appeal may be made to the Court against an award. The Interpretation represents a concerted attempt by the Chinese judiciary to rationalise the law on arbitration and to move Chinese arbitration procedure into line with International practice. However, the interpretation did not deal with the status of foreign arbitration bodies or their ability to conduct arbitration in China.

The recent interpretation is discussed in detail by Connie Lee **(connie.lee@simsl.com)** in an article written for the Steamship Mutual Website at:

http://www.simsl.com/ChinaArbitration0107.asp

Noxious Liquid Substances in Bulk - Strict Enforcement of MARPOL Annex II in Paris MOU Ports

The revised MARPOL Annex II "Regulations for the control of pollution by noxious liquid substances in bulk" enter into force on 1 January 2007. Under the revised system substances are divided into four categories - X, Y, Z and "Other". The classification of a substance as either a major hazard to marine resources and human health, a hazard, a minor hazard or as posing no threat, will dictate whether discharge is prohibited, restricted (to a greater or lesser degree) or permitted.

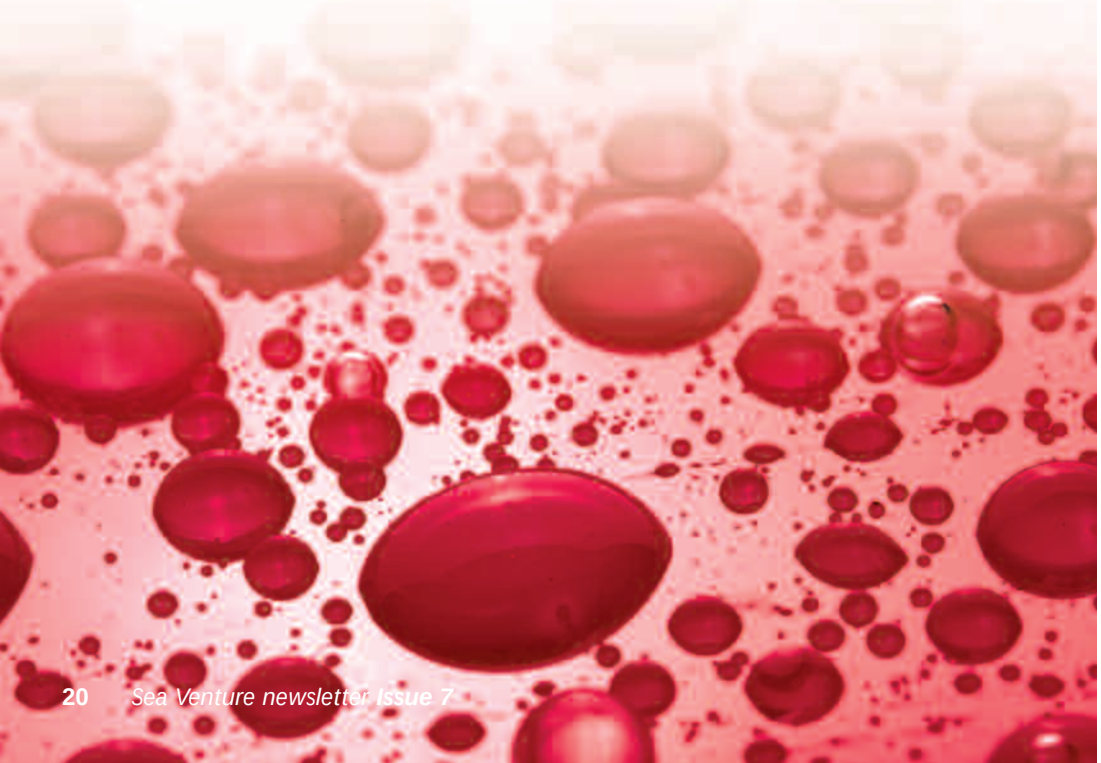
The potential for marine pollution posed by thousands of chemicals has been evaluated by the Evaluation of Hazardous Substances Working Group at IMO, giving a resultant GESAMP2 Hazard Profile which indexes the substance according to its bio-accumulation; bio-degradation; acute toxicity; chronic toxicity; long-term health effects; and effects on marine wildlife and habitats.

The revision of MARPOL Annex II is a significant step forward in the prevention of marine pollution. The Paris MOU has announced its commitment to the enforcement of the new requirements: With effect from 1 January 2007 port state control inspections in the Paris MOU region will include, but not be limited to, verification of:

- Validity of the Certificate of Fitness (CoF) for the Carriage of Liquid Chemicals in Bulk;
- Validity and approved Procedures and Arrangements Manual on board;
- Products on board in accordance with the CoF and as per revised list;
- New operational requirements followed and recorded;
- STCW requirements regarding the relevant and appropriate certificates and endorsement of duly authorized certificates in accordance with Reg. V-1 and 2

Vessels which are deficient in any of these aspects may face action by port state control officers, including detention.

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



Ship-Shape and Bristol Fashion

"…the highlight of the course was the 360º ship handling simulator"

Early October saw five Steamship Mutual lawyers and underwriters travelling north to Liverpool to attend Taylor Marine's ship familiarisation course.

Anja Perry, Bengi Ljubisavljevic, Janet Ching, Macarena Bandres and Dan Thomas exchanged their business attire for hard hats, steel capped boots and high visibility clothing to spend three days exploring the docks and vessels.
At Mersey Docks the team scrutinised the process of containers being checked in, photographed, sealed, and the monitoring of reefer containers. They attended on board a bulk cargo vessel discharging animal feed, a tug and ro-ro vessel, and were taken on a vessel tour from the dizzy heights of the bridge to the depths, noise and warmth of the engine room, questioning the master and engineers as they went.

There was also a visit to the dry dock at Birkenhead in the pouring rain, but the highlight of the course was the 360º ship handling simulator at Lairdside Maritime Centre. It was here that our gang of five piloted vessels in and around the River Mersey with its strong current, and raced from Calais to Dover, across busy shipping lanes, all without incident.

New Mexican Law of Navigation and Maritime Commerce

After two years of discussion by the Mexican legislature the new law of Navigation and Maritime Commerce entered into force on 1 July 2006. The law gives precedence to international treaties ratified by Mexico so as to promote consistency with other jurisdictions, for example, in matters covered by the Hague Visby Rules, CLC/FUND Conventions, 1976 Limitation Convention, Salvage Convention, COLREGS, and MARPOL

There are also prescribed time limits for claims brought under specific types of contracts, provisions in relation to towage liabilities, the arrest of vessels and jurisdiction for claims secured by the arrest of a vessel, as well as a requirement that all vessels navigating in Mexican waters must have P&I insurance.

The new Mexican Law of Navigation and Maritime Commerce is discussed in an article by Luis Ongay **(luis.ongay@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/MexicoNewLaw0107.asp

Package Limitation Revisited

Steamship Mutual has recently undertaken a review of package limitations in a large number of jurisdictions. The information collated has been used to update the earlier schedule on package limitation which appeared in the June 1999 edition of Sea Venture.

In many jurisdictions there has been no change in the law as it relates to package limitation whilst in some jurisdictions changes are imminent. Rather than publish periodic reviews a "living" schedule will in future be available on Steamship Mutual's website

(www.simsl.com/PackageLimitationsurvey.pdf)

which, with the assistance of the Club's correspondents, will be updated as and when details of changes are received. In this respect, we greatly appreciate their cooperation to date and look forward to the continuing assistance of our many correspondents.

We would be very pleased to hear from those who wish to provide information of developments in jurisdictions already listed in our schedule as well as from jurisdictions which so far have not been included.

Comments should be addressed to Jane Gray **(jane.gray@simsl.com)** or to the usual Sea Venture address.

Recent Publications

2006 Mid Year Review

The Club published its 2006 Mid Year Review in December, providing Members with an update on the Club's progress in preparation for the forthcoming renewal. The Review features information about new entries, investment income, cash and investments, claims per GT, pool claims, combined pure underwriting surplus and the standard increase for 2007/08 set at 9% for all classes, with a 10% increase in deductibles for Class 1 P&I. Members received hard copies of the Review in December. It can also be found on the Steamship Mutual website at:

www.simsl.com/MidYearReview.html

Articles Published on the Steamship Mutual Website

The following are some of the articles published based on the outcome of the 55th session of IMO's Marine Environment Protection Committee in October 2006:

- Ballast Water Management - IMO Guidelines
  www.simsl.com/Ballast1106.asp
- Air Pollution - North Sea SECA in Force
  www.simsl.com/AirPoll_NSeaSECA1106.asp
- Southern South Africa - Special Area under MARPOL Annex I
  www.simsl.com/SA_SpecialArea1106.asp
- Air Pollution - Developments at IMO
  www.simsl.com/MARPOLVI1106.asp

Other articles include:

- Ukraine - New Customs Code
  www.simsl.com/UkraineCustoms0107.asp
- Dakar - Customs Fines
  www.simsl.com/Dakar_CustomsFines1106.asp
- Rescue at Sea - IMO/UNHCR Guide
  www.simsl.com/SAR_SOLASAmends_IMOLeaflet.asp
- Update/Clarification on e-NOA/D Filings
  www.simsl.com/US_eNOAD1106.asp

STEAMSHIP MUTUAL

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