STEAMSHIP MUTUAL

newsletter

Sea Venture

issue 9

Contents

Editorial Team
Sue Watkins
Malcolm Shelmerdine
Naomi Cohen

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

"Steamship Mutual has always attached great importance to loss prevention... Over the last fifteen years a comprehensive selection of onboard training programmes has been produced in association with Videotel Marine International"

The high level of claims encountered by all of the Clubs in the International Group in the 2006 year has been widely reported and discussed. While the average value of claims in the attritional layer has been increasing as a consequence of inflationary pressures, it was the frequency of high level claims in 2006 that was most eye catching. In such an environment, and with the continuing growth of shipping activity, the importance of loss prevention cannot be overstated.

Steamship Mutual has always attached great importance to loss prevention. In 1992 the Ship Safety Trust was established by the Managers to promote safety at sea and to develop high quality loss prevention and training materials. Over the last fifteen years a comprehensive selection of onboard training programmes has been produced in association with Videotel Marine International. Further details of the Club's loss prevention work can be found on the Steamship Mutual website

www.simsl.com/loss-prevention-and-safety-training.html

but this issue of Sea Venture focuses on a number of recent and forthcoming Club initiatives. These range from award winning magazine format DVDs for the educational benefit of seafarers, incorporating case studies of events with the potential to give rise to serious claims, to training programmes and loss prevention posters.

In addition, in this issue there are contributions from solicitors in England, and lawyers in Italy, Germany, France, Hong Kong and the United States covering a wide variety of interesting recent court and arbitration decisions.

The topic that is on the minds of most owners and, perhaps even more so, charterers, is the question of the correct measure of damages for breach of charter when a vessel is redelivered late. The appeal from the English High Court decision in the *"Achilleas"* was heard in late May. Readers will recall that the vessel was redelivered 9 days late with the consequence that owners were forced to agree a reduced hire rate for the vessel's follow on fixture which resulted in a loss of profit on the fixture of US$1.36 million. The High Court upheld the majority arbitrators decision that owners were entitled to recover their loss on this basis as opposed to the more conventional loss of use approach. The significance for charterers was a liability in damages of over US $150,000 for each of the 9 days the vessel was redelivered late in comparison to damages of US$158,301 for the overrun period under the loss of use approach. On 6th September the Court Of Appeal dismissed the charterers' appeal. The decision, and whether as some commentators have suggested the case will be of limited application, is covered at page 10 of this issue of Sea Venture.

Malcolm Shelmerdine

17th September 2007.

France - Owners' Duty of Care to Cargo

On the 27th July, 2007, the Chambre Arbitrate Maritime de Paris issued an award in favour of a vessel owner and denied a cargo claim pursued on the basis of an alleged breach of a duty of care owed by owners. The case raised a number of novel issues.

The cargo claimants alleged shortages and damage to cargo discharged at Matadi. Security was provided to release the vessel from arrest on behalf of the owner, but the bills of lading had been issued by charterers who were the contractual carriers.

After initially commencing arbitration against the owner for claims under the bills of lading the claimants acknowledged their mistake and changed the basis of their claim against the owners to a tortious claim alleging a breach of owners obligations under the charterparty.

In an article on the Steamship Mutual website at:

www.simsl.com/FrenchTort0807.html

Henri de Richemont of Richemont Nicolas & Associés, Paris, discusses the award.

Naming of Ports and Safe Port Warranty - Recent Decisions

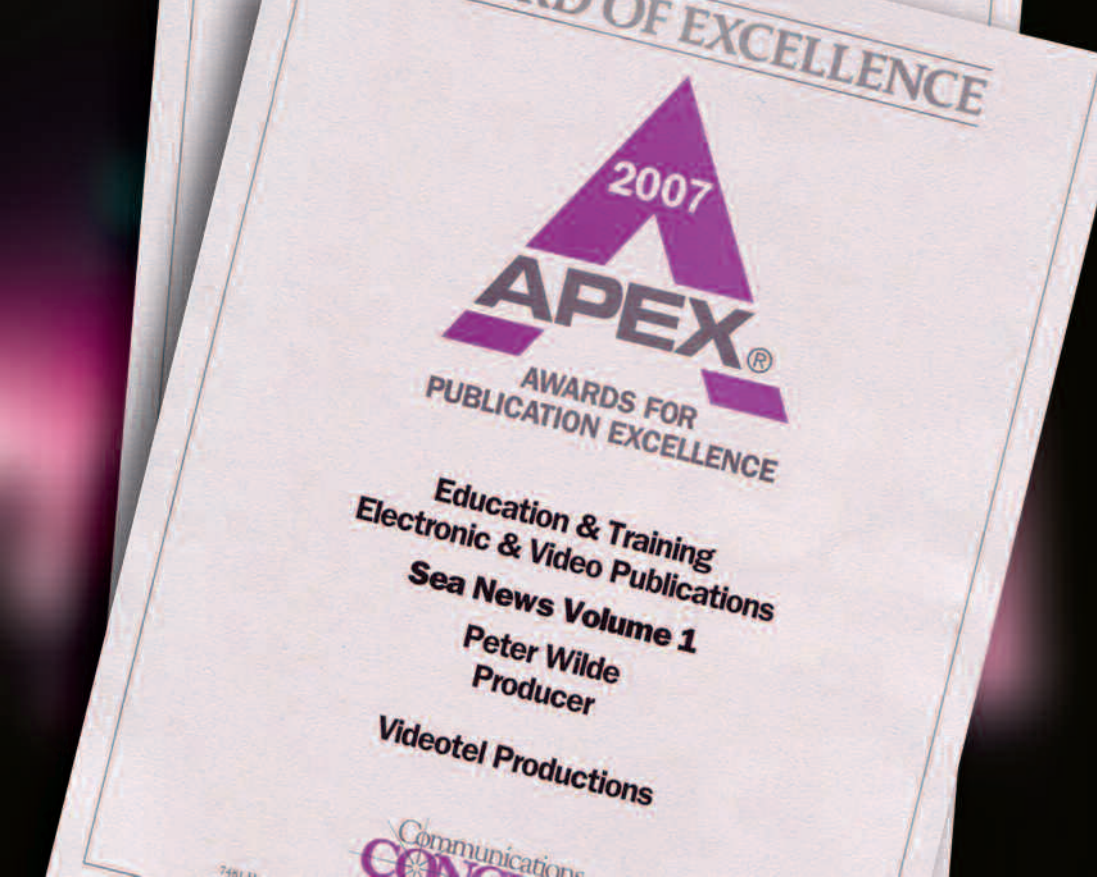
The High Court has recently considered in quick succession two cases relating to the impact of an express safe port warranty where the port is named in the charterparty. By warranting the safety of a named port had the parties agreed the port was safe or had charterers warranted it was safe for the vessel? Surprisingly, there had been no previous direct authority on this point.

The position, following these two cases, is that where a charterparty includes a named port and a safe port warranty, the risk of safety falls on the charterers.

The position is not finally settled as one of the two cases is the subject of an appeal. However, these decisions do highlight the necessity for careful consideration of charterparty terms dealing with port descriptions and safe port warranties; if owners want charterers to bear the burden of safety of the port, they should say so explicitly to avoid subsequent disputes.

The cases are considered in detail in an article by Jessica Pollock of Eversheds on the Steamship Mutual website at:

www.simsl.com/NamedSafePort0807.html



"Sea News" Wins APEX Award

Volume 1 of Sea News has received an Award for Excellence in the APEX 2007 Competition. The APEX awards recognise achievement in graphic design, editorial content and overall communications excellence.

In the 19th annual competition Sea News won an award in the Education & Training, Electronic & Video Publications category against strong competition. Further details can be found on the Apex Awards website at:

www.apexawards.com/A2007_Win.List.pdf

Sea News has been designed to keep seafarers informed on matters of topical interest and to examine case studies of events giving rise to liability, loss or damage. It is produced by the Managers in association with Videotel Marine International, with the support of the Ship Safety Trust. As publicised in Club circular B.460, volumes 1 and 2 of Sea News are now available and can be obtained through Videotel (details below). Members are entitled to special concessionary rates.

Volume 1 features:

- the ILO Maritime Labour Convention
- a casualty involving a pilot and poor bridge teamwork
- the benefits of computer based training and
- the problems which can arise with the use of target tracking devices

Volume 2 focuses on environmental issues including:

- the effects of climate change on maritime operations
- the work of IMO on environmental matters
- MARPOL violations involving Oily Water Separators
  and also
- Seafarer safety within the dock area

For further details about pricing and how to place orders contact:

Videotel Marine International
84 Newman Street
London W1P 3LD
Tel: +44 207 299 1800
Tel: +44 207 299 1818
Email: mail@videotelmail.com
Website: www.videotel.com

Economic Tort - Division Restored

OBG Ltd and others v Allan and others; Douglas and another v Hello! Ltd and others; Mainstream Properties Ltd v Young and others [2007] UKHL 21

On 2 May 2007, the House of Lords restored the division between the economic torts of "inducing breach of contract" and "causing economic loss by unlawful means", each now to be treated as independent, with its own conditions for liability. This (restored) division has implications for the shipping industry and indeed many of the cases considered were shipping cases (including, for example, *Stocznia Gdanska S.A. v Latvian Shipping Co.* [2002] 2 Lloyd's Rep 436 which concerned a claim advanced by shipbuilders that the buyers' parent company had induced the buyers to breach their contracts with those shipbuilders).

Liability for "inducing breach of contract" was established in *Lumley v Gye* (1853) 2 E & B 216, on the basis that a person who procured another to commit a wrong incurred liability as an accessory on the basis of "accessory liability"; The person procuring the breach of contract was held liable as accessory to the liability of the contracting party. Liability depended upon the contracting party having committed an actionable wrong.

The tort of "causing economic loss by unlawful means", however, has a different history and involves no accessory, but rather "primary liability". The defendant's liability is primary; for intentionally causing the claimant(s) economic loss by unlawfully interfering with the liberty of others.

The "unified theory" was adopted by the Court of Appeal in *D.C. Thomson & Co. Ltd. v Deakin* [1952] Ch 646 by treating procuring breach of contract (the old *Lumley v Gye* tort) as one species of a more general tort of actionable interference with contractual rights.

In Lord Hoffmann's May 2007 opinion, it was time for the unnatural union between "the *Lumley v Gye* tort" and the "tort of causing loss by unlawful means" to be dissolved. They should be restored to the independence which they enjoyed at the time of the House of Lord's majority decision in *Allen v Flood* [1898] AC 1.

The tort of "inducing breach of contract" is based on intention. To be liable, the defendant must know that he/it is inducing a breach of contract. Intention extends to recklessness but not to negligence (even gross). But if the breach is neither an end in itself nor a means to an end, but merely a foreseeable consequence, it will not be deemed to have been intended.

With regard to "causing economic loss by unlawful means", acts against a third party count as "unlawful means" only if they are actionable by that third party. This principle is, however, qualified if the only reason that the act is not actionable is that the third party has suffered no loss. In such a case, the "unlawful means" requirement is satisfied despite the absence of any loss.

Rupert Talbot-Garman of Reed Smith Richards Butler discusses the case in an article written for the Steamship Mutual website at:

www.simsl.com/EconomicTort0807.html

Gregory Mitchell QC, of 3 Verulam Buildings, was Counsel in the case of OBG v Allan & Ors [2007] UKHL 21 and wrote an article on the case which was published on 29 June 2007 in the New Law Journal, on which this article is largely based.

Loss Prevention Publications

Engine Room Waste Management

This training programme, available in DVD and workbook format, or as a Computer Based Training Course, has been designed to assist Members with MARPOL compliance against a background of growing concern for the marine environment. The programme covers:

- Oily Water and Separators
- The Oil Record Book
- Sludge and the Incinerator
- Sewage and Waste Water Management

Produced in association with Videotel Marine International and with the support of the Ship Safety Trust, the programme can be obtained from Videotel (see page 5 for details). Concessionary rates are available for Members.

Guide for correct entries in the Oil Record Book

Following the success of the first edition of this Intertanko publication in 2004, the Guide has been updated. In June 2007 Members received a complimentary copy of the revised publication with Club circular B.457.

With increasingly rigorous Port State Control review of oil and oily water management, and rising penalties for irregularities, ensuring that the proper procedures are not only followed but correctly recorded has become more important than ever.

Loss Prevention Posters

In addition the Club will also be distributing within the next few weeks the first of a series of loss prevention posters for use onboard entered vessels. These will address safe working practices with a view to minimising the risk of unnecessary claims for personal injury, and also ship husbandy issues that, if neglected, have the potential to give rise to P&I claims.

Italy - Delivery of Cargo Without Production of a Straight Bill of Lading

The principle under Italian law is that if the bill of lading is specifically endorsed non-negotiable, the carrier must deliver the cargo evidenced by that bill of lading only to the consignee named in the bill of lading and can do so without production of that bill of lading. In these circumstances the bill of lading is not a document of title but serves as a record of the receipt of the cargo and evidence of the agreement to carry and deliver the cargo to a specific destination and consignee in return for payment of freight. The rationale for this principle, which is different to that under Hong Kong and English law (see page 15 of this issue) is discussed in an article written for the Steamship Mutual website by Aldo Mordiglia of Studio Legale Mordiglia, Genoa:

www.simsl.com/ItalyDelivStraight0807.html

Due Diligence - Obligation to Maintain

During the period of a long term time charter which party bears the risk of a change in international regulations which have the effect of restricting the cargoes that the vessel can carry?

This was the issue at the heart of a dispute, decided by the English High Court in early August 2007, that arose as a consequence of the MARPOL regulations concerning the carriage of fuel oil in double hulled vessels that came into effect in April 2005 and, more particularly, the exemption for vessels with *"double-sides not used for the carriage of oil and extending to the entire cargo tank length."*

If the vessel did not fall within the exemption were the owners under an obligation to exercise due diligence to maintain or restore the vessel to those conditions? The charterparty required owners to deliver a vessel *"in every way fit to carry crude and/or dirty petroleum products"* and to be *"tight, staunch, strong, in good order and condition, and in every way fit for the service..."*

Sian Morris **(sian.morris@simsl.com)** discusses the issues raised in this case in an article on the Steamship Mutual website at:

www.simsl.com/GoldenFleece0807.html

Theft, Undeclared High Value Goods and CMR

In the case of *Datec Electronic Holdings Limited & another v United Parcels Service Limited* the House of Lords rejected UPS's appeal against a Court of Appeal decision holding them liable for the full value of goods lost from their custody. The case arose from the loss in transit of high value goods that were being carried by UPS from the UK to Germany by air and then to the Netherlands by road.

The main question before the Court was whether the Convention on the Contract for the International Carriage of Goods by Road ("CMR") would apply to goods that did not conform to the carriage agreement by virtue of being above the standard US$50,000 limit which UPS would ordinarily agree to carry. UPS had sought to argue that, due to this non-conformity, the consignments were either not "goods" or, alternatively, that there was no contract of carriage.

In this case, described as "unusually difficult" for its subject matter, the House of Lords held that the CMR regime did apply despite the cargo's value not having been properly declared. This resulted in the carrier being unwittingly liable to the full extent of the value.

This case is discussed by Jeff Cox **(jeff.cox@simsl.com)** in an article which can be found on the Steamship Mutual website at:

www.simsl.com/Datec0807.html

LNG Seminar - Tehran

Steamship Mutual hosted a very successful LNG Seminar in Tehran in May, together with shipbrokers Barry Rogliano Salles ("BRS").

The seminar was inaugurated by Mr Souri, the Chairman of the National Iranian Tanker Company and a Director of the Club, who presented a paper on the LNG industry and the position of Iran.

In addition to papers on the LNG market, and Technological Developments in Ship Design from BRS, Steamship Mutual presented papers on P&I Issues affecting LNG operators and the management of risk under LNG contracts. For further details contact Rajeev Philip **(rajeev.philip@simsl.com)** or Shahab Mokhtari **(shahab.mokhtari@simsl.com).**

Flat Racks on Deck - Deviation and Club Cover

As a basic principle, without clear words to the contrary, a bill of lading implies below deck carriage. In an age of containerisation and advanced ship design, however, it is not too controversial to suggest that it has become a custom of the trade to carry standard enclosed containers on the deck of a vessel fitted for the carriage of containers on deck, provided that there is no special requirement or instruction that would make deck carriage inappropriate. This is more so if there is an appropriate liberty clause in the bill of lading allowing the carrier the freedom to stow containers on deck without notice to the shipper.

Such customary acceptance of carriage on deck, however, is not likely to extend to all forms of containers. A prime example is the flat rack container which offers less protection to cargo than a closed container. Stowing such containers on deck may not be 'customary' and in many jurisdictions it may also be doubtful that even a clearly worded liberty clause purporting to allow carriage of such containers on deck will protect the carrier.

When dealing with flat racks it is the Club's recommendation that bills of lading should always be endorsed on their face to reflect carriage on deck regardless of whether or not there is a clear liberty clause purporting to allow stowage on deck. Without such specific clausing, carriage of flats racks on deck may constitute a deviation under the contract of carriage and may result in the loss of Hague/Hague-Visby Rules defences and package limitation, with potential prejudice to Club cover.

This issue is discussed in more detail by Louise Ashdown **(louise.ashdown@simsl.com)** in an article on the Steamship Mutual website at:

www.simsl.com/RacksOnDeck0807.html

Damages Following Late Redelivery - The "Achilleas" Affirmed

The Court of Appeal, with Lord Justice Rix giving the only judgment, has recently dismissed an appeal from the well publicised and widely discussed judgment of Christopher Clarke J in *Transfield Shipping Inc v. Mercator Shipping Inc.*

www.simsl.com/LateRedelivery0107.asp

In doing so Rix LJ confirmed that following late redelivery it was possible for an Owner to claim not only the difference between the market rate and the contractual hire rate for the period of the overrun, but also lost earnings under subsequent fixtures lost, or in this case varied.

A number of commentators on the High Court decision have argued that it would be of limited application, requiring the coincidence of particular facts. However, through a detailed review of the relevant authorities and consequent fleshing out of principles, Rix LJ arguably crystallised the findings at First Instance into a clearer set of general principles which will be relevant not only to the majority of disputes involving late redelivery in a falling market, but also potentially to any number of cases involving lost profits.

A full discussion by Rajeev Philip **(rajeev.philip@simsl.com)** of the Court of Appeal judgment and its implications can be found on the Steamship Mutual website at:

www.simsl.com/AchilleasAppeal0907.html

Crane Breakdowns - "Net Loss of Time" or "Period"?

A London arbitration tribunal has recently delivered an award which highlights the differences between net loss of time and period off-hire clauses.

Where a net loss of time approach is adopted, charterers may deduct from hire only if, following the occurrence of the qualifying off-hire event, the charterer has actually suffered a loss of time. A period off-hire clause provides that the charterer can treat the whole of the period during which the qualifying event is in existence as off-hire irrespective of whether a loss of time has actually been suffered. The financial consequences for owners and charterers can make the difference between a successful and unsuccessful charter.

In (2007) 719 LMLN 4 a dispute arose as to how off-hire should be calculated following a crane breakdown. As well as the net loss of time provision at clause 15 of the standard NYPE form, the charter contained two additional clauses which were open to conflicting interpretation. The tribunal ultimately held in favour of the charterers, resulting in owners having to bear responsibility for loss of time where the extent of time actually lost to the charterer was open to doubt.

A full report on this case by Sacha Patel **(sacha.patel@simsl.com)** can be found on the Steamship Mutual website at:

www.simsl.com/TimeLoss0807.html

Redelivery Notices - Good Faith and Reasonableness

The issue of redelivery notices under time charters has recently been considered by two London arbitration panels.

In one (2007 713 LMLN (London Arbitration: 3/07) the vessel was redelivered late and the Tribunal took the view that because of the importance to owners in fixing future employment for the vessel the charterers should make appropriate enquiries to ensure the redelivery notices served were as accurate as possible. That is charterers obligation was not limited to an estimate in good faith.

In the other (2007 715 LMLN (London Arbitration: 5/07) the vessel was redelivered early but the Tribunal's view was that because there is always uncertainly in relations to vessel operations "margins" were built into charter periods and redelivery notices were given on approximate and expected terms.

These contrasting decisions are discussed by Sian Morris **(sian.morris@simsl.com)** in an article on the Steamship Mutual website at:

www.simsl.com/RedelNotice0807.html

Deadfreight - a Surprise for Owners

In *AIC LTD v Marine Pilot Ltd* (2007) The Commercial Court allowed an appeal from the Charterers of the *"Archimidis"* following the decision against them by a panel of arbitrators. The appeal, addressed two points:

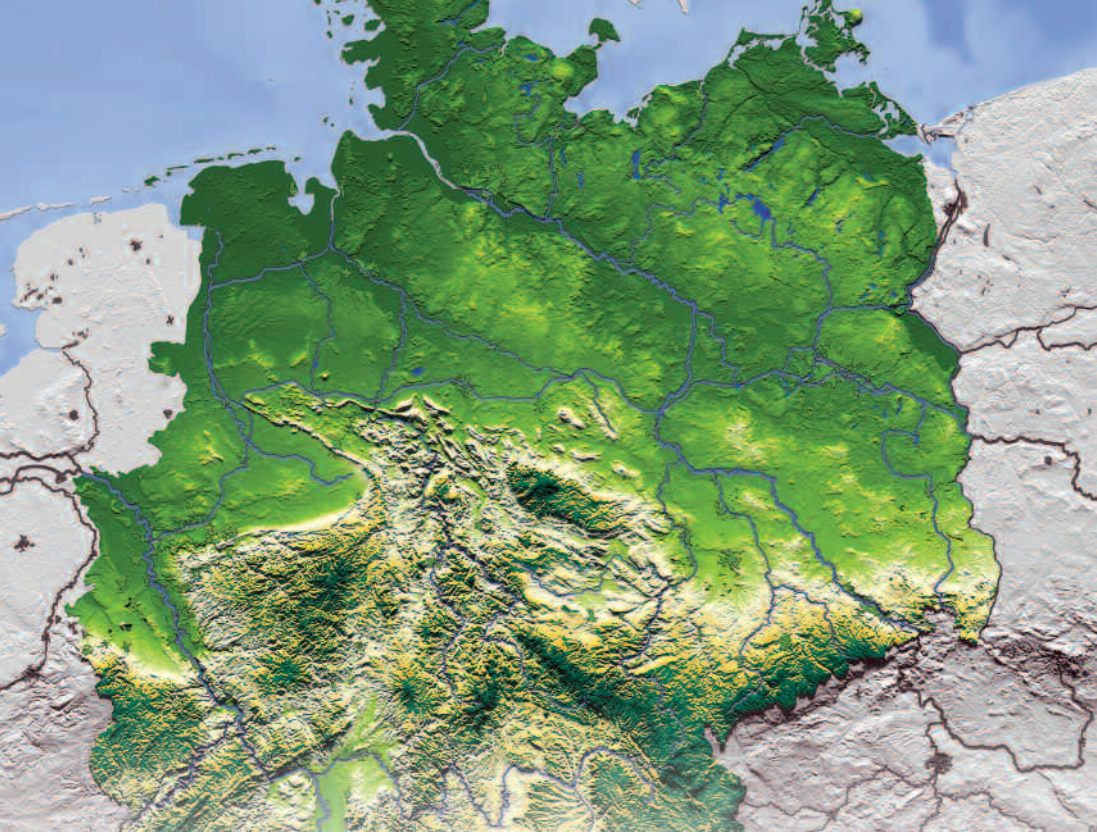
1. A question on which there was no previous case law in relation to the safety of the load port, which is discussed at page 4 of this edition of Sea Venture, and
2. Whether the charterers were liable to pay deadfreight to owners in circumstances where a full cargo had been tendered by charterers but could not be loaded for reasons of safety at the nominated loadport.

This latter question and decision on appeal is discussed in an article by Sarah McGuire **(sarah.mcguire@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/MarinePilot0807.html

Briefly the facts of the case were that the master had served a notice of readiness stating that he did not expect safely to be able to load a full cargo because silting of the dredged channel had led to draught restrictions. In the event the vessel loaded slightly more than the NOR figure but not the full cargo tendered by the charterers. The arbitral tribunal decided owners were entitled to deadfreight notwithstanding the tender when the parties were all aware that it was not possible at that time for the vessel to load a full cargo.

Surprisingly Gloster J disagreed.



Germany - Detention of Cargo for Trade Mark Violation

The detention of containerised goods by the German Custom Authorities as a means to counter trade mark violations has been on the increase for a number of years. The parties involved are the vendor and purchaser of the goods, the companies involved in their transport as well as the trade mark proprietor, who seeks the destruction of the goods.

Most cases concern the import and export of goods. As to goods in transit the European Court of Justice ruled in 2006 that the trade mark proprietor can prohibit the transit of protected goods through a Member State only if the goods are put on the market in that state.

The German Customs Authorities follow EC Regulation 1383/03, which overlays national law. Generally, an application must be made to the courts for the detention of goods and a number of well known companies have lodged precautionary applications. Under certain circumstances, Customs can also act upon suspicion.

If an application to detain goods is granted the Customs Authorities suspend the surrender of goods or retain the goods. The decision is communicated to the proprietor of the trade mark, who must react within ten working days.

According to EC Regulation 1383/03 the simplified procedure for the destruction of goods can only be pursued with the consent of the possessor or owner of the goods. Otherwise, civil court proceedings aimed at the order of an interlocutory injunction have to be initiated which will decide either the destruction or the release of the goods.

The trade mark proprietor bears the costs of the proceedings. Carriers and freight forwarders can only be liable, if they caused the trade mark violation but what this means, as well as the potential exposure and practical solutions for the carrier that has issued the relevant bill of lading are discussed in detail in an article on the Steamship Mutual website by Pandi Services J&K Brons and Dr. Schackow & Partner Rechtsanwälte on the Steamship Mutual website at:

www.simsl.com/GermanyTMViolation0807.html

Misdelivery and Conversion - Assessment of Damages

At the end of July 2007 the Court of Appeal handed down judgment in *Mediterranean Shipping Company SA v Trafigura Beheer BV "MSC Amsterdam"*, a claim by cargo owners involving fraud, misdelivery and assessment of the resultant losses.

Briefly, the cargo owners sued the ship owners for conversion and breach of contract in relation to a cargo of copper stowed in 18 containers and shipped from Durban to Shanghai. Fraudsters, said to be employees of the owners' agents in Durban, arranged for a false bill of lading, against which owners gave a delivery order. With this, they paid customs duty and VAT but were prevented from taking delivery only by the fact that the genuine bill of lading holder arrived a day later and the owners managed to prevent delivery to the fraudsters.

Proceedings in the Chinese courts have kept matters tied up since and the cargo remains uncollected with no prospect of the rightful owners obtaining delivery. Those owners then claimed against the vessel owner in the English courts. The dispute raised a number of interesting issues including which rules govern the contract of carriage, whether those rules apply to the period after discharge of the cargo from the vessel, which monetary limitation the vessel owner can invoke and whether cargo owners can recover hedging losses.

The decision is discussed in detail by Sian Morris (sian.morris@simsl.com) in an article written for the Steamship Mutual website at:

www.simsl.com/Amsterdam0807.html

Delayed Issue of Bill of Lading - For Whose Account?

As a matter of English law, once loading of cargo has been completed both the owner and charterer are under an obligation to ensure that the vessel can be promptly despatched upon her voyage and, for the sake of commercial efficacy, both parties will be allowed a reasonable time to complete those formalities.

In a recent case referred to arbitration in London, the tribunal was asked to consider which party was responsible for delays that ensued after cargo had been loaded in India for carriage to Vietnam as a result of (i) time spent resolving a dispute as to the description of the condition of the cargo to be inserted into the bills of lading, (ii) time during which owners considered charterers' request for the issuance of ante-dated bills of lading and (iii) delay releasing "freight prepaid" bills of lading pending receipt of freight into owners' account.

The charterers were held responsible for the delays arising as a result of all three causes. A detailed article by Sacha Patel (sacha.patel@simsl.com) on the decision can be found on the Steamship Mutual website at:

www.simsl.com/BillDelay0807.html

U.S. - Medical Malpractice Law

The vast majority of modern day cruise liners carry a doctor or other medical staff onboard. Ordinarily such physicians are independently contracted and recent litigation in the 11th Circuit has focused on whether the ship owner should be held vicariously liable for the doctor's negligence.

For years the leading case in this arena has been *Barbetta v Bermuda Star 848* F.2d 1364 1998 which held that the ship's physician was an independent medical examiner engaged on the basis of their professional qualifications, with passengers being free to contract with them for medical services they may require. *Barbetta*, and many cases since, have held that a ship owner cannot be held to be vicariously liable for the negligence of a shipboard doctor given the ship owner does not possess the expertise required to supervise physicians who are carried onboard as a convenience to the passengers.

However, the 3rd District Court of Appeal ("3rd DCA") in the case of *Carlisle v Carnival Cruise Lines* set a new precedent when ruling that a ship's doctor is, in essence, held out as an agent of the cruise line and, consequently, any negligence on the part of that doctor can be imputed to the ship owner.

Carnival appealed this decision to the Florida Supreme Court which, in February of this year, overruled the 3rd DCA. Whilst the Court found merit in the plaintiff's argument because this was a maritime case the Court had to adhere to the federal principles of harmony and uniformity when applying federal maritime law. When the case was decided by the 3rd DCA, with one case only to the contrary, the federal maritime law was that a ship owner is not vicariously liable for the negligence of the shipboard physician.

With that in mind it was held that the ship owner was not vicariously liable under the principle of *respondeat superior* for the medical negligence of the shipboard physician. This is a success for the cruise industry. However, it should be noted that the plaintiff has now requested an audience with the US Supreme Court. Further updates on this case will be provided in future editions of Sea Venture.

Article by Paul Brewer
(paul.brewer@simsl.com)

Australia - New Maritime Crew Visa

With effect from 1 July 2007 foreign crew on commercial vessels calling at Australian ports will need a Maritime Crew visa (MCV). The new visa requirements replace the Special Purpose visa (SPV) system although transitional provisions will apply until 31 December 2007 to ensure that any foreign crew who arrive in Australia without a MCV may still be eligible for the SPV.

The visa:

- is free of charge
- is valid for 3 years
- allows multiple entries to Australia
- must be applied for and granted prior to arrival

Applications can be made via the internet, or by mail/courier to the Brisbaine Global Processing Centre. For internet applications go to:

www.immi.gov.au/skilled/air-sea/mcv/index.htm

Owners and agents can apply for visas on behalf of crew. Owners must ensure that each crew member onboard vessels calling at Australian ports has a MCV. The new requirements become mandatory with effect from 1 January 2008 when transitional provisions will no longer apply. Crew without the appropriate visa may be detained and owners fined.

Further information is available at:

www.immi.gov.au/sea/mcv/index.htm

Hong Kong - Conflicting Decisions Resolved and More

In issue 7 of Sea Venture and associated website article the conflicting decisions handed down by the Hong Kong courts in relation to delivery of cargo under straight bills of lading were discussed:

www.simsl.com/BrightFortune0107.asp

The appeal in *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* was handed down by the Hong Kong Court of Appeal on 13 July 2007. The Court of Appeal overruled Stone J's first instance decision on the issue of exclusion clauses and the applicability of the Hague-Visby Rules to the facts of the case, but upheld the decision on the question of delivery without production of a straight bill of lading.

With respect to the latter issue, Hong Kong law is now more or less settled; even if a straight bill of lading does not expressly provide for presentation before delivery of cargo, a carrier who delivers cargo other than against production of the relevant bill of lading runs the risk of a claim for misdelivery brought by the party in possession of the bill of lading and to whom delivery should have been made. This marks a development beyond English law, albeit that in the *"Rafaela S"* Lord Bingham said obiter *"... But like Lord Justice Rix I would, if it were necessary to do so, hold that production of the bill of lading is a necessary pre condition of requiring delivery even where there is no express provision to that effect"*.

A report on the *"Rafaela S"* can be found at:

www.simsl.com/Articles/RafaelaS0405.asp

The Court of Appeal's decision is also of interest in relation to bill of lading exclusion clauses and the applicability of the Hague-Visby Rules. These issues are discussed in detail in an article by Sam Tsui of Tsui & Co, Solicitors, Hong Kong, on the Steamship Mutual website at:

www.simsl.com/BrightFortuneAppeal0807.html

Dependency and Loss of Society in the Fifth Circuit

Generally speaking, United States' courts have held that loss of society is not recoverable in maritime wrongful death actions. Despite this general trend, there currently remains one area of United States maritime law where loss of society damages can still be awarded: death of a longshore or harbour worker in state territorial waters. It has long been unclear, however, whether financial dependency is required to claim those damages. The Fifth Circuit has now removed any remaining uncertainty that dependency is required (at least in the states comprising the Fifth Circuit) in their recent decision *In re Am. River Transp. Co. v U.S. Maritime Servs., Inc.*

The decision is discussed in an article by David Walker and Rachel A. de Cordova of Royston Rayzor Vickery & Williams LLP, Houston. The article can be found on the Steamship Mutual website at:

www.simsl.com/ReAm0807.html

Port Waste Reception Facilities - European Commission Takes Action

In a press release dated 27 June 2007 the European Commission announced its decision to act against Germany, Spain and Estonia for failure to respect EU legislation on better availability and use of port reception facilities for ship-generated waste and cargo residues. Action will be taken through the European Court of Justice.

Directive 2000/59/EC, adopted in 2000, aims to reduce discharges of ship-generated waste and cargo residues into the sea from ships using ports in the Community; it provides for better availability and use of the facilities designed to receive and treat such waste and residues, thereby enhancing the protection of the maritime environment.

Member States should have established waste reception and handling plans for all their ports by 27 December 2002.

The Commission's action was prompted by insufficient implementation of the obligation to develop, approve and implement waste reception and handling plans relating to all national ports, including fishing ports and marinas. These plans are essential in ensuring that port reception facilities meet the needs of the ships normally using the ports. They are also important for ensuring respect of other key principles of the Directive, in particular that fair, transparent and non-discriminatory fees are applied.

For further information on Directive 2000 /59/EC see the Official Journal entry at:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_332/l_332200001228en00810089.pdf

The UK "Port Waste Reception Facilities Regulations 2003" is an example of how the Directive has been implemented by a member state. These can be found on the UK Maritime and Coastguard Agency website at:

http://www.mcga.gov.uk/c4mca/mcga-3-mgn_253-port_waste_reception_facilities.pdf

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

SCOPIC

SCOPIC - the Special Compensation P&I clause was introduced in August 1999 to provide an alternative to Article 14 of LOF in order to allow a simplified method for dealing with special compensation under salvage contracts.

The clause provides that the SCR committee (comprising 3 representatives from ship owners, salvors, property insurers and the P&I Clubs) should review the SCOPIC rates for personnel and equipment on an annual basis.

In order to ensure that salvors undertake salvage work, and thereby protect the environment, in cases where the chances of saving property are doubtful, it has always been the intention that SCOPIC rates be generous and encouraging and, in that sense, "profitable".

As reported in Sea Venture issue 5, reviews in previous years had resulted in a 10% increase in personnel rates with effect from 1 January 2006 and a moratorium on SCOPIC rate increases for tugs and portable salvage equipment until September 2006 to allow time for a review as to the actual daily cost of this equipment.

Whilst it was not possible to obtain any meaningful information as to tug rates, information was provided regarding portable salvage equipment which suggested that an increase in rates was appropriate and that the current market rates for tugs was far in excess of current SCOPIC rates.

Accordingly, following prolonged discussions between all relevant sectors of the industry, it was agreed that SCOPIC rates for tugs be increased by 25%, SCOPIC rates for portable equipment be increased by 15%, and SCOPIC rates for personnel be increased by a further 5%. These new rates apply to LOF Agreements entered into after 1 July 2007 and are fixed until at least 31 December 2010.

In addition, it was agreed that Article 18 of the 1989 Salvage Convention - which enables claims to be made against the salvor in the event of his negligence during a salvage operation - would be incorporated into the SCOPIC Clause.

Finally, it was agreed in the recent discussions that the parties to the SCOPIC Clause will work to introduce a mutually acceptable review procedure in good time for the next review, so as to hopefully avoid the problems which delayed the current review.

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

Bunker Wars - The Burden of Proof Strikes Back!

Bunker quality disputes have traditionally focused on whether or not the bunkers supplied to a vessel accorded with the charterparty specification. Claimants in such a dispute, normally the owner or disponent owner, would have the dual burden of showing not only that the respondent suppliers of the bunkers had supplied bunkers outside of the contractual specification, but also, and often a more difficult burden to overcome, that the specific quality of the bunkers supplied rendering them off specification actually "caused" the damage complained of to the vessel's main engine.

Whilst the first burden of proof was often easy to establish through evermore sophisticated sample collection methods at the vessel manifold and sampling procedures, the second burden of proof would almost inevitably require extremely complicated expert evidence of both an engineering and chemical nature to prove that the specific off specification quality of the bunkers actually caused the specific damage to the engine and the consequential losses that flowed there from.

With a less than perfectly maintained and regularly overhauled main engine and component parts, and in the absence of faultless on board bunker management procedures, it was often easy for the charterer, or the ultimate physical supplier of the bunkers, to raise alternative possibilities as to the cause of the damage. For example, improperly maintained purifiers or improper bunker management through co-mingling of bunkers or cylinder liners exceeding their life expectancy.

The burden of proof was a "burden" in a very real sense.

Recent bunker quality disputes have become ever more complicated and the focus has very much been on the dual obligation of the bunker supplier not only to supply bunkers that were on specification but also fit for the purpose (and for the specific engine onboard the vessel supplied) intended.

Arguably though, the "fitness for purpose test" represents a swing too far in the burden of proof in owners favour. Indeed, absent any other cause of an engine failure if there was some "defect" with the bunkers, and even though that "defect" did not necessarily render the bunkers off specification, for example poor ignition quality, it was open to a Tribunal to decide on a balance of probabilities (i) that those bunkers were unsuitable for use in that particular vessel's engine, and (ii) the damage must have been caused by those bunkers. That is there was a risk to charterers of a finding of liability when there was no actual proof that a specific quality of the bunkers (be it ignition quality or anything else) had caused the specific damage concerned.

As a consequence of the focus on ignition quality and unfitness for purpose owners were able to attribute any and all engine damage to alleged poor quality of bunkers, and because of the costs and risk of defending a claim charterers and/or bunker suppliers were more minded to settle rather than risk an adverse finding of fact by a tribunal, which was unappealable.

Subsequent to a recent arbitral decision the pendulum has swung back towards charterers and the requirement that a claimant discharge the burden of proof placed upon it both as to breach of the specification and/or the obligation to supply bunkers fit for the purpose intended, and as to causation. The charterers defence in this dispute was handled by Mark O'Neil of Reed Smith Richards Butler who, in an article on the Steamship Mutual website

www.simsl.com/Bunkers0807.html

sets out the history and shifting balance of the burden of proof in bunker disputes.

Dispute Resolution Clauses in Shipbuilding Contracts

The current high volume of activity in the shipbuilding market has drawn attention to the ways in which disputes under shipbuilding contracts can be resolved in the most satisfactory manner. There is particular focus upon disputes which arise during the construction phase, when there is often considerable pressure for a speedy resolution in order to keep to a minimum any delays in the construction and delivery of the vessel. For those contracts governed by English law and jurisdiction there is a choice between referring disputes to court or arbitration, and quite often arbitration is chosen as there is potential for greater procedural flexibility. However, the standard arbitration provisions are often too slow for dealing with disputes which arise during construction and which can have the effect of slowing and even halting construction until they are resolved.

One solution commonly employed is for "technical disputes" to be referred to a technical man. However, there are some potential pitfalls in adopting this approach, such as whether such a person (i) is qualified to decide associated legal issues and (ii) will not, unless otherwise directed, be constrained by the rules of natural justice so that he does not even have to consider the arguments of the parties and can decide the dispute in whichever way he wishes.

One way of avoiding these difficulties is to include a provision in the shipbuilding contract for a short form arbitration procedure which is designed to enable pre delivery disputes to be resolved in the minimum time.

Some of the points to bear in mind when drafting a short form arbitration provision are dealt with more fully in an article written by Peter Jago of MFB solicitors for the Steamship Mutual website at:

www.simsl.com/ShipbuildDRC0807.html

Jones Act - FELA Causation Standard

In *Norfolk Southern Railway Company v Sorrell* the Supreme Court was presented with the issue of whether the lower courts in Missouri erred in determining that the causation standard for railroad employee contributory negligence under the Federal Employers' Liability Act (FELA) differs from the causation standard for railroad employers' negligence. Since the Jones Act expressly incorporates by reference FELA's liability standard, this case has a direct impact on US maritime personal injury claims.

Sorrell was injured while working for Norfolk Southern Railway (Norfolk). He sought damages for neck and back injuries under FELA. Both Sorrell and the railroad had been negligent in the incident and Norfolk argued that under FELA the "causation standard" - the standard for attributing fault for an incident - was the same for both the employee and the railroad. According to Norfolk, any damages awarded to Sorrell for the railroad's negligence had to be reduced by the amount of damages that was attributable to Sorrell's own negligence.

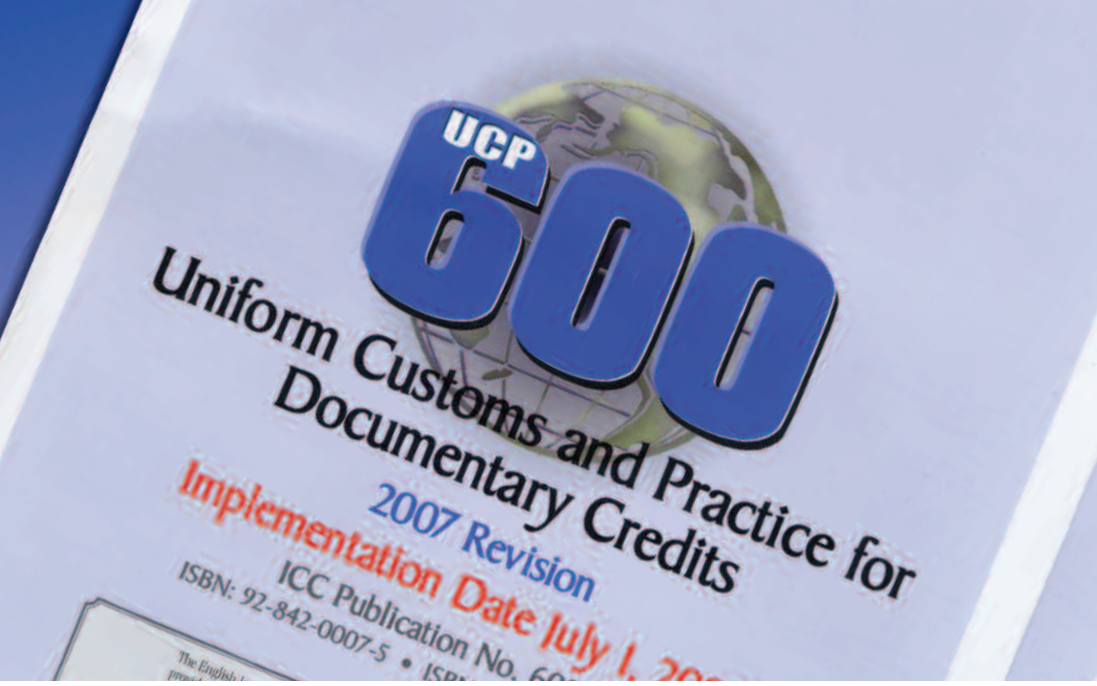
At first instance the Court ruled that the causation standards were different. It held that Norfolk was responsible for any negligence that contributed to the accident, but that Sorrell was only responsible for negligence that directly caused damage. Under this more lenient standard for employee negligence, the trial court awarded Sorrell US$1.5 million.

The Missouri Court of Appeals affirmed the Court of first instance. The matter was referred to the United States Supreme Court via the Missouri Supreme Court on the question whether the causation standard for employee negligence under FELA (and thus the Jones Act) was different from the causation standard for railroad (employer) negligence.

The Supreme Court decided that under FELA the standard of causation for the defendant's negligence must be the same as the standard for a plaintiff's contributory negligence. Unfortunately, the Court did not go so far as to decide what constitutes the causation standard.

Maritime defence practitioners in the US are of the view that the decision in Sorrell will provide a platform to attempt to attack the current *"feather-weight"* causation standard that is applied in cases. The ultimate aim is for the railroad and maritime industries to be on a level playing field in which personal injury claims are decided based on common law principles of proximate causation rather than the relaxed causation standard which is currently applied. This judgement is a step in the right direction for US ship owners who are regularly involved in US employee personal injury litigation.

Article by Mike McAleer
(mike.mcaleer@simsl.com)



UCP 600 - a Step Forward

On 1 July the existing Uniform Customs Practice of Documentary Credits, or UCP 500, was replaced with the new UCP 600. The new rules, adopted by the International Chamber of Commerce (ICC) on 25 October 2006, are the result of more than three years' work and represent the first revision of the rules governing documentary credits since 1993.

UCP is a universally recognised set of rules governing the use of letters of credit in international trade and commerce. The rules have, since inception in 1933, gained almost universal acceptance worldwide and are reportedly voluntarily written into virtually every letter of credit exchanged today. The purpose of the rules is to facilitate the flow of international trade.

The new rules are leaner than their predecessors, with 39 as opposed to 49 articles. They seek to remove the scope for ambiguity and error in application by incorporating new definitions and interpretations. Many articles have been revised so that they are clearer and easier to read. Another central purpose of the revision is to reduce the frequency with which, under UCP 500, letter of credit documents were rejected on their first, and indeed subsequent, presentation. It has been estimated that under UCP 500 up to 70% of documents failed on first presentation. In addition, transport articles have been re-drafted in an attempt to remove confusion when identifying carriers and agents.

Whilst it is early days for UCP 600, it is hoped that the new rules will further facilitate transactions by simplifying procedures.

Sue Watkins **(sue.watkins@simsl.com)** discusses the new rules are in more detail in an article on the Steamship website at:

www.simsl.com/UCP6000807.html

Incorporation of Arbitration Clauses by General Words

In *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd* the English High Court was asked to decide whether the Association's arbitration provisions were incorporated into their Member's contract of insurance.

The vessel had been entered in the Hellenic Mutual War Risks Association but her owners had not given notice that the vessel would be in an additional premium area. When at Trincomalee, Sri Lanka, the vessel was damaged by an explosion said to have been caused by the Tamil Tigers. A claim was presented on a discretionary basis and the War Risks Association made a discretionary payment.

Their Member brought proceedings in Greece and New York for the full amount of their loss.

The proceedings in New York were stayed in favour of London Arbitration. However, the Member argued before the Tribunal that the arbitration provisions of the Association's Rules were not incorporated into the contract of insurance because they had not been specifically referred to in the contractual documents and correspondence when the vessel had been entered and that they were unaware of the arbitration provision.

Therefore, the issue in dispute was whether general words of incorporation, for example *"Conditions as Rules"* or *"… in accordance with the … Rules …"* were sufficient to incorporate the arbitration provisions of the Association's Rules into the contract of insurance, or whether more specific words, as are needed to incorporate the arbitration provisions of charterparties into bills of lading, were required.

Mahtab Khan **(mahtab.khan@simsl.com)** discusses the decision in a Steamship Mutual website article at:

www.simsl.com/Hellenic 0807.html

Intermediate Hold Cleaning - Owners' Duty

Ordinarily, charterparties such as the NYPE form are silent in relation to what duty the owners may have to ensure that the vessel's holds are cleaned to a particular standard for receiving the next cargo to be loaded at an intermediate stage of the charter. Subject always to a proper construction of any charterparty, the usual maintenance warranty or warranty that the vessel is fitted for charterers' cargo/trade apply to hold cleanliness on delivery or at the first load port and not to intermediate voyages during the charter period. Indeed, in *The Bunga Saga Lima* (2005) the charterers failed in their argument that the warranty as to cleanliness should also be in place for the subsequent voyages.

It is, however, entirely normal that if required by charterers owners are contractually obliged to provide *"customary assistance"* in cleaning holds in preparation for the vessel's next cargo. What constitutes customary assistance? This question was the subject of a recent and successful arbitration involving a Steamship Mutual Member and is discussed in an article by Francis Vrettos **(francis.vrettos@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/ Katerina0807.html

Steamship Mutual Website

Vessel Search Facility

As publicised in issue 7 of Sea Venture the new Steamship Mutual website went live in February 2007.

The vessel search facility is just one of several improvements featured on the new site; searches can be made by vessel name or IMO number and results include details of the claims and underwriting contacts responsible for the vessel:

www.simsl.com/list-of-vessels.html

Also included in this area of the website is the International Group Policy as regards the confirmation of cover to third parties. This will be helpful to those Members and Correspondents receiving inquiries as regards the scope of cover for an entered vessel:

www.simsl.com/confirmation_of_entry.html

Website Articles

- Concentrated Inspection Campaign on ISM Compliance - September to November 2007
  www.simsl.com/CIConISM0807.html
- North Sea SECA in Force
  www.simsl.com/NSeaSECA0807.html
- Ukraine - Minimising Deballasting Fines
  www.simsl.com/UkraineDeballast0707.html
- Ships to Carry Emergency Plans to Deal with HNS
  www.simsl.com/OPRC_HNS_Protocol0607.html
- Reporting Casualties and Safeguarding the Interests Of Indian Seafarers Serving On Foreign Flag Ships - Latest Guidelines
  www.simsl.com/IndiaGuidelines0607.html
- Drug Smuggling - Prevention Measures
  www.simsl.com/DrugPrevention0507.html

STEAMSHIP MUTUAL

For further information please contact:

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

Website: www.simsl.com