STEAMSHIP MUTUAL

newsletter

Sea Venture

issue 11

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

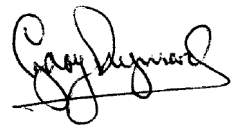
Introduction

The immediate background to the 2008 renewal was another high claims year in 2007, following 2006 which was an historically high claims year for claims on the International Group Pool. Fortunately the Club's Board read the signs early, decided to increase premiums and set a 9% standard increase at the 2007 renewal. This enabled the Board to set a standard increase of 15% for the 2008 renewal, lower than some of the other International Group Clubs. Naturally Members never like to see premium increases but there is a general understanding that the current vibrant shipping market and the attendant high level of claims inevitably requires higher premiums. A premium increase of 13%, inclusive of change of terms, was achieved on renewing business. The Board believes that this is an appropriate response to the current circumstances.

Going forward it is difficult to predict anything other than a continuation of the current level of claims whilst the shipping markets remain strong, the fleet continues to expand and the demand/supply equation for experienced, competent crew remains under stress. Premium rates will have to reflect the level of claims. More than ever the onus is on the Club to ensure that Members are treated fairly. Members are entitled to know exactly how their premium is calculated and how the costs of claims and reinsurances are allocated. Transparency allied to a considered approach to risk retention should ensure that the Club and the Members work together to achieve an acceptable and appropriate premium level for the fleet.

Over the 2007 year the Club's owned entered tonnage increased by 3.3 million GT, approximately 7.5%. Together with chartered tonnage, total entered tonnage was approximately 72 million GT. Perhaps more importantly the Club returned to a pure underwriting surplus for the financial year with free reserves increasing to US$185.8 million. Given the continued high level of claims the result confirms that the Club is pursuing the right course. Financial strength and stability will be the overriding objectives of the Club.

Gary Rynsard



30th May 2008

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Realising India's Maritime Potential

Steamship Mutual wishes to congratulate Mr. S. Hajara, Chairman & Managing Director of Shipping Corporation of India Ltd, who received an Emeritus Honorary Membership of The Institute of Chartered Shipbrokers (ICS) at the inaugural Realising India's Maritime Potential seminar held in Mumbai on 15 April 2008.

The Right Honourable Lord Mayor of the City of London is greeted by the Chairman and Managing Director of Shipping Corporation of India, Mr S.Hajara.

The event, considered a resounding success with over 150 attendees, was designed to acknowledge the innovation taking place within India's maritime industry and to consider how to maintain healthy growth across the sector in conjunction with ICS and Maritime London.

In addition to various presentations on risk-management, port expansion and the problems of organising ship finance in the current global financial climate, Jonathan Andrews, Director and Head of Underwriting in the Eastern Syndicate, presented a paper on the International Group of P&I Clubs' position in the Indian market.

India, of course, has a special and longstanding position in the history of Steamship Mutual, with Indian shipowners being amongst the first of the Club's non-UK based Members.

Loss Prevention

The current high levels of activity in the shipping market and the acknowledged shortage of experienced officers and crew have played a significant part in the claims that Steamship Mutual and other Clubs have experienced in the last two years. With the growth in the industry that is forecast for the next few years the risk of incidents caused by "human error" or crew claims seems unlikely to diminish. In view of this the significance of loss prevention cannot be over-emphasised. One element is crew training. In this respect Steamship Mutual has continued to work with Videotel Marine International in the production of onboard training programmes. During 2007 new programmes were completed dealing with:

- Engine Room Waste Management
- Container Stowage and Securing
- Ship Husbandry
- Working with Tugs

In addition, two programmes in the Personal Safety series, Personal Safety: *The Shipboard of Management Role* and *Personal Safety on Tankers*, were updated. To re-emphasise the importance of crew training in loss prevention an updated version of *Training Matters* in DVD format was also published. In conjunction with Videotel, Steamship Mutual's innovative magazine *Sea News* was also published in DVD format. The objective of *Sea News* is to inform seafarers on matters of topical interest. We are pleased to report that both *Sea News* and *Training Matters* were the recipients of media industry awards.

Further information about loss prevention materials can be found on the Steamship Mutual website at:

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

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California – On Off Enforcement of CARB Regulation

The status of the Californian Ocean-Going Vessel Auxiliary Diesel Engine Regulation has proved to be a moving target in recent months.

With effect from 1 January 2007 the regulation required all ocean going vessels calling at Californian ports to use Marine Gas Oil (MGO) or Marine Diesel Oil (MDO) with 0.5% or lower sulphur content by volume for powering diesel electric engines and diesel auxiliary engines. The regulation was, however, challenged on the basis that the Federal Clean Air Act pre-empts regulations adopted by individual states and that prior consultation with and authorisation from the U.S. Environmental Protection Agency (EPA) was required prior to implementation.

On 30 August 2007 an injunction was granted preventing CARB from enforcing the regulations. CARB appealed the decision and on 24 October 2007 the Ninth Circuit Court ordered a hold on the injunction, thereby allowing CARB to enforce their regulations pending the appeal.

However, on 27 February 2008 the Ninth Circuit decided the regulation was pre-empted by federal law. CARB suspended enforcement of the regulation while considering the next step, but subsequently appealed and on 10 March, because the injunction had not been reinstated, issued a Notice announcing its decision to continue to enforce the regulation.

The appeal failed and the injunction was reinstated. Accordingly, on 7 May 2008 CARB issued a further Notice stating that enforcement would be discontinued. The Notice can be found at:

www.arb.ca.gov/ports/marinevess/documents/Auxenforce050708.pdf

CARB now plans to submit a request to EPA for authority to enforce the existing regulation.

In the meantime, CARB encourages ship operators to use 0.5% sulphur MDO or MGO within 24 nautical miles of California to reduce the significant adverse health impacts from human exposure to the air pollutants emitted by ocean-going vessels in California waters.

Further details are available in an article by Naomi Cohen **(naomi.cohen@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/CARBReg0508.html

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Profit Sharing Agreements in Long-Term Time Charters

The case of *Golden President Shipping Corp v Bocimar NV* concerned an appeal to the High Court by the owners of the "Channel Alliance" against an arbitration award in favour of charterers. The court had to consider whether a profit sharing agreement within an NYPE charter applied to the extended charter period exercised at charterers' option.

Bocimar NV, the charterers, had chartered the vessel for 5 years on an NYPE form charter with an option to extend for a 6th and 7th year. The dispute arose in relation to Clause 98(6) which provided that *"For profit sharing purposes, optional year(s), if declared to be considered on their own"*. Charterers contended that the effect of this sub-paragraph was to exclude the optional years from the profit sharing agreement. Not surprisingly, owners argued to the contrary that the optional years were to be included in the profit sharing agreement. However, the arbitrators sided with charterers and decided that the optional years could not be considered for profit sharing purposes.

On appeal, Mr Justice Cooke agreed with owners' argument. He held that both on a proper construction of the clause and from a commercial perspective it was clear that the optional years, if exercised, were to be considered in the context of the profit sharing agreement and that owners were therefore entitled to 50% of profits earned from the 6th and 7th additional years.

This judgment is considered in detail in an article by Mahtab Khan **(mahtab.khan@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/GoldenPresident0508.html

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US Cruise Lines - Forum Selection Clauses

It has long been common practice for cruise lines operating out of the United States to include forum selection clauses in their passenger tickets dictating that any claims must be brought in a specified state. The provision might also specify a particular federal district court as the exclusive venue for bringing suit.

There are practical differences between the state and federal courts which a cruise line operator should bear in mind when considering the benefits of using such a clause. These include: the judicial appointment system, procedural differences, speed, costs and the right to a jury trial.

In an article written for the Steamship Mutual website, Paul Brewer **(paul.brewer@simsl.com)** considers the relative merits of the two systems:

www.simsl.com/CruiseForum0508.html

Thailand - Developments in Maritime Law

In the past five years Thailand has enacted three new maritime laws. These laws are the General Average in Maritime Adventure Act, B.E. 2547 (2004), Civil Liability and Damages Arising from Collision of Vessels Act, B.E. 2548 (2005) and the Marine Salvage Act, B.E. 2550 (2007).

Each of these three laws can be considered the fruit of development in the maritime law system of Thailand, which aims to harmonise Thai national laws with universal maritime practices and principles, as set down by international conventions and rules which are accepted worldwide. Some of these laws also incorporate additional criteria to suit the socio-economic conditions of Thailand. The Intellectual Property and International Court in Bangkok is designated as a specialised court for handling of disputes relating to maritime laws, including the aforesaid three new laws. Special attention should be paid to the time limits laid down for claims under each new law. In addition, the Thai government has a policy to ratify CLC 1992 in the near future.

Pramual Chancheewa of Pramuanchai Law Office has prepared an article for the Steamship Mutual website in which these recent developments are discussed in more detail:

www.simsl.com/ThaiDevelopments0508.html

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Cargo Hold Fatality

During a ballast voyage from Tuticorin, India, to Dampier, Australia, the crew were engaged in hold cleaning in preparation for loading a cargo of salt. The first stage of the process involved spraying the hold surfaces with a 31% hydrochloric acid in water solution to help remove rust. This solution is left for a period of time prior to being washed off using sea water.

Two crew members had been engaged in spraying no. 3 hold with the hydrochloric acid solution. The two men proceeded to depart the hold, one using the forward access ladder and the other the aft access ladder. Both ladders were of the "Australian" type with intermediate platforms between the tank top and the deck, although the aft ladder had an inclined staircase at its mid section making it easier to climb. As the seaman on the aft ladder reached the top he heard a loud thump and turned to see his colleague lying on the tank top near the base of the forward access ladder.

As is often the case, the death of an experienced able seaman on board this

geared handy sized bulk carrier was the result of a number of contributory factors; the possible impact of fatigue, tropical heat, personal protective equipment, non-adherence to Safety Management System procedures and lack of awareness of Material Safety Data Sheets. The relevance and interplay of these factors are discussed in an article by Captain Simon Rapley **(simon.rapley@simsl.com)** of the Club's Loss Prevention Department on the Steamship Mutual website at:

www.simsl.com/ HoldClean0408.html

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Time Charterers and Third Party Liabilities

The recent decision in the US Court of Appeals for the Fifth Circuit concerning the case of *Norwegian Bulk Transport v International Marine Terminals* demonstrates the difficulties a charterer can face when pursuing recourse actions against third parties for losses it has incurred under a charterparty.

In the leading case of *Robins Dry Dock,* as well as in *Norwegian Bulk Transport*, the court ruled that, in the absence of a contract, claims for economic damages are not recoverable in maritime law by a charterer with no ownership interest in the vessel and where the third party being sued was not involved in the contract out of which the economic damages arose.

In an article by Aneeka Jayawardena **(aneeka.jayawardena@simsl.com)** the limited instances when a charterer may recover economic loss from third parties, under both US and UK law, and the pre-emptive steps charterers can take to protect their position are discussed:

www.simsl.com/NBT0508.html

Dogs that Didn't Bark - *The "Achilleas"*

In issue 9 of Sea Venture Rajeev Philip **(rajeev.philip@simsl.com)** discussed the Court of Appeal decision in *The "Achilleas"* and its implications:

www.simsl.com/AchilleasAppeal0907.html

More recently, in an article published in the February 2008 edition of Lloyd's Maritime and Commercial Law Quarterly ("LMCLQ") John Weale, Vice President of Fednav Limited, Montreal, explored the commercial aspects of the decision and the manner in which the case was pleaded. We are grateful both to John Weale and LMCLQ for allowing us to publish the article in full on the Steamship Mutual website at:

www.simsl.com/AchilleasWeale0508.html

The appeal to the House of Lords was heard in mid-May 2008. A further Sea Venture article will address the decision when handed down by the House of Lords.

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US COGSA - What Constitutes a Package?

On 28 January 2008 the Fourth Circuit Court of Appeal handed down its decision in the case of *Maersk Line Ltd v United States of America*. The judgment concerned the application of the US COGSA per package limit of $500 to a Halvorsen aircraft loader (K-loader) transported by Maersk from the US to Oman on a flat rack container.

The Military Surface Deployment and Distribution Command (SDDC), acting on behalf of the United States, claimed that the K-Loader was not a package within the meaning of US COGSA and that therefore a higher per ton adjustment of damage should instead apply.

The Court of Appeal upheld the summary decision of the District Court. It was held firstly that the K-Loader did fall within the broad definition of a package set down by the Second Circuit in *Aluminios Pozuelo Ltd v S.S. Navigator* and re-affirmed in *Catepillar Overseas SA v Marine Transport Inc.* as *"a class of cargo…to which some packaging preparation for transportation has been made which facilitates handling…"*. In this instance the K-Loader had to be loaded onto a flatrack to enable it to be loaded onto the vessel. Secondly, it was held that examination of the contracts themselves revealed that the parties had intended each K-Loader to constitute a package.

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

www.simsl.com/MaerskPackage0508.html

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China - Delivery Without Bills of Lading

"...where a holder sought to assert his title under the bill of lading outside the port of discharge he was required to produce all three originals"

The Shanghai Maritime Court (PRC) recently found in *Zhongcheng Ningbo Import and Export v Shanghai Asia Pacific International Containership Warehousing and Transport Co. Ltd* that a claim for delivery without bills of lading was defective where claimant holders of a negotiable bill of lading were only able to produce one original bill in support of their claim.

The plaintiff, the seller and the shipper under the bill of lading, delivered the goods to the defendant at Shanghai for carriage to Australia. The defendant purported to be a forwarder appointed by and acting as agent of the carrier. The defendant issued a bill of lading "as agent of the carrier".

The court held that whilst the lawful holder of a negotiable bill of lading may be capable of taking delivery of cargo against one bill at the discharge port, where a holder sought to assert his title under the bill of lading outside the port of discharge he was required to produce all three originals in support of his claims. In the instant case the claimant was unable to do so. It was noted that where a negotiable bill of lading was concerned there was a possibility of competing title claims.

The court was also asked to consider when, in accordance with legal principles of agency, a party purporting to act as a forwarder in fact, by their conduct, assumed the role of non-vessel owning carrier. In the instant case the decisive factors were held to be (1) that defendants were unable to produce evidence to show that the party named as carrier had authorised its issue, and (2) that the defendants, in fact, exercised a degree of control over the cargo in excess of that which would normally be expected in the case of an issuing agent.

This decision is discussed in detail in an article prepared by Greg Yang and Mei Tong of Chinese law firm Hai Tong & Partners for the Steamship Mutual website at:

www.simsl.com/Ningbo0508.html

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UNCITRAL - International Carriage of Goods Wholly or Partly by Sea

The United Nations Commission on International Trade Law (UNCITRAL) has been developing a convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, based on text originally drafted by the Comité Maritime Internationale. Representative bodies of the transport industry as a whole, including ICS, Bimco, World Shipping Counsel (WCS), NIT League, FIATA, IUMI and the International Group of P&I Clubs have been encouraged to attend the UNCITRAL Working Group sessions, together with government delegations, in order to put forward their views.

The UNCITRAL Working Group has now finalised a text for a draft convention which will be considered by the UNCITRAL Commission in June 2008. It seems unlikely that the June session will result in changes of substance to the Convention, although drafting changes may be made to improve clarity. If approved by the Commission, the Convention will be passed to the UN Assembly for adoption in November 2008. The United States has participated very actively in the drafting process and it appears that a significant body of United States shippers and carriers support the latest draft. The Convention will enter into force 12 months after 20 states have ratified it. If the United States and other key trading nations ratify early, then a significant number of other states may follow.

The UNCITRAL work has taken place against a background of initiatives by the European Union and the USA to develop their own regional liability regimes, and proposes a Convention which aims to be more broadly international in scope.

From a shipowners' perspective, the current text of the draft Convention will increase considerably the liability of carriers. In particular, the navigational fault defences have been removed and the carrier is liable for unseaworthiness during the whole of the carriage by sea, not just at the commencement of the voyage. The draft Convention also establishes a right of control by shippers over the goods, which includes a unilateral right to demand delivery at a place other than that provided for in the transport document.

A further controversial provision is the option given to a shipper/consignee to pursue a claim against the registered owner of the vessel where the contracting carrier is not identified in the transportation document, as well as against a maritime performing party – essentially a party for whose acts the carrier is liable. The jurisdiction and arbitration provisions reflect those in the Hamburg Rules.

A more detailed overview of the provisions of the draft Convention prepared by the IG UNCITRAL Working Group can be found on the Steamship Mutual website:

www.simsl.com/IGUNCITRAL0508.html

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Named Ports, Safe Ports and Deadfreight

Two decisions of the High Court covering safe port warranties were discussed in Sea Venture issue 9. In both cases the charterers were held to have warranted the safety of the load ports that had been named in the charterparties.

The decision in one of these cases, *The "Archimidis"*, was appealed to the Court of Appeal. There were two issues on appeal:

1. Whether the charterers were liable for dead freight when the vessel could not load a full cargo because of draught restrictions. The arbitrators had found "*that the owners are in principle entitled to claim dead freight in respect of the difference between the minimum contractual quantities …. and the quantity of cargo loaded ……*". Surprisingly the High Court disagreed. Gloster J's reasons were discussed in an article on the Steamship Mutual website at:

www.simsl.com/NamedSafePort0807.html

2. Whether the charterers had warranted the safety of the port.

In a unanimous decision the Court of Appeal held in favour of owners on both issues. The decision is discussed in an article by Malcolm Shelmerdine **(malcolm.shelmerdine@simsl.com)** and Sarah McGuire **(sarah.maguire@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Archimidis0508.html

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UK - Corporate Manslaughter

The new Corporate Manslaughter and Corporate Homicide Act 2007 introduces a new offence in the UK, enabling companies to be prosecuted where there has been a failure in health and safety management, resulting in death.

The Act has been brought in because of the perceived difficulty under the old law of prosecuting companies who cause deaths. Currently, under the old law, a controlling director must be found to have been responsible for the death in his capacity as the "will and mind" of the company. The result has been that only smaller companies with hands-on directors have been convicted and there have only been seven convictions to date.

An understanding of the new regime is critical for companies, their directors particularly and also their public and employer liability insurers who might be asked to provide legal expenses support in the event of investigations or prosecutions.

The Act came into force on 6 April 2008. In an article written for the Steamship Mutual website Rachel Butlin of Holman Fenwick & Willan reviews the new legislation and considers its implications:

www.simsl.com/ CorpManslaughter0508.html

US COGSA - Liability for Dangerous Goods

The United States Court of Appeals for the Second Circuit recently issued an important decision which clarifies the standard used to determine the liability of shippers and carriers transporting hazardous cargo under US COGSA.

Following the ruling in *In re M/V DG Harmony* shippers will not be held strictly liable for damage caused by hazardous goods if both the shipper and the carrier had pre-shipment knowledge of the dangerous nature of the cargo, even if the carrier lacked information about the precise characteristics of the cargo and its hazards. Instead, in such a case the shipper's liability will be determined on negligence principles. In particular, where the carrier alleges that the shipper failed to warn the carrier adequately about the characteristics of the particular shipment, the carrier must show:

that the shipper had a duty to warn because the cargo presented dangers of which the carrier could not reasonably have been expected to be aware, that the shipper failed to provide adequate warning and that this failure caused the relevant damage

The background to this case and the decision itself are reviewed in an article by Thomas H. Belknap, Jr, LeRoy Lambert and Brian S. Tretter of Blank Rome on the Steamship Mutual website at:

www.simsl.com/ Harmony0308.html

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Sale of Goods - Jurisdiction Issues under EU Regulations

The case of *Scottish and Newcastle International Limited v Othon Ghalanos Limited* considers the circumstances in which the English Court has jurisdiction to entertain an action in the case of the sale of goods. On the facts of this case, the issue turned on the interpretation and application of article 5(1)(b) of the EU Regulation. Ordinarily, article 2(1) of the Regulation provides that persons domiciled in a member state must, irrespective of their nationality, be sued in the courts of their home state. However, this is qualified by a special rule in article 5(1) of the Regulation, which provides that in matters relating to a contract, a party may be sued in the "*place of performance of the obligation*", which includes the place where, under the contract, the goods were delivered or should have been delivered. Therefore, the question which arose in this context was whether, under the contract in question, the goods were or should have been delivered in England. This necessitated a consideration of established principles of English commercial law as to what was the contractually agreed place of delivery: this is not limited to the terms of the contract, but includes the arrangements between the parties as to the transportation and carriage of the goods.
Siiri Duddington of Reed Smith reviews the case in an article written for the Steamship Mutual website at:

www.simsl.com/Scottish0508.html

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Japan - New OPRC-HNS Regulations

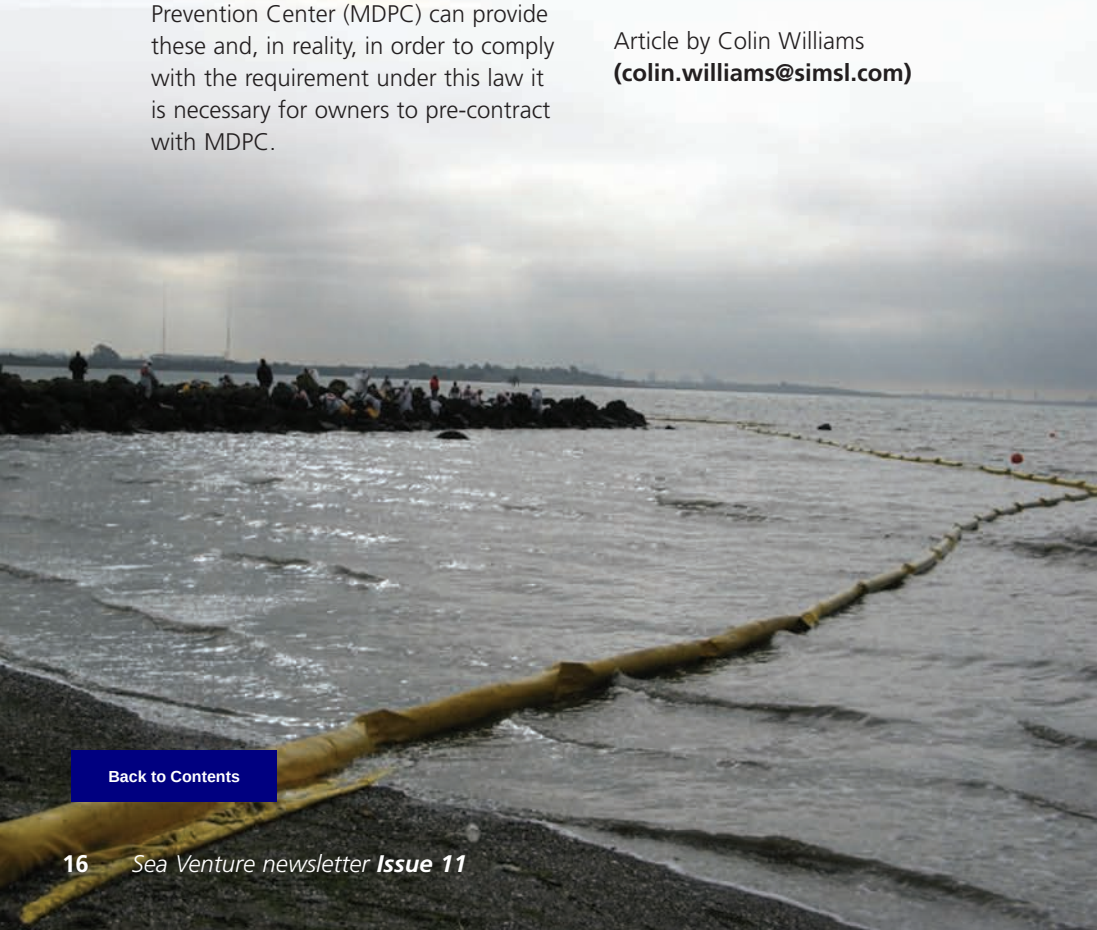
Parties to the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC) are required to establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries. A protocol to extend the Convention to apply to pollution incidents by hazardous and noxious substances (HNS) was adopted in 2000 and entered into force in certain countries, including the UK and Japan, on 14 June 2007 (OPRC-HNS).

Pursuant to the 2006 Japanese law relating to the Prevention of Marine Pollution and Maritime Disaster, with effect from 1 April 2008, tankers over 150 gt carrying liquid HNS products, including kerosene, naphtha, jet oil, gas oil and noxious substances, when sailing in certain specified areas in Japan (Tokyo Bay, Ise Bay, Seto Inland Sea including Osaka Bay) are required to have access to materials, equipment and experts necessary for the prevention/elimination of HNS spills. The Maritime Disaster Prevention Center (MDPC) can provide these and, in reality, in order to comply with the requirement under this law it is necessary for owners to pre-contract with MDPC.

The 2006 law is similar to that applying to tankers carrying persistent oil when calling at Japanese ports. Owners must pre-contract with MDPC in order to have access to the appropriate response equipment etc. MDPC is in effect acting as a spill response organisation. The latest MDPC contract has been reviewed by the International Group. Unfortunately, it does not conform with the Group's guidelines for OSRO contracts.

As a temporary measure, and to allow time for discussions with MDPC, the International Group brokers have arranged additional insurance to cover the increased liability, details of which can be obtained from the Club Managers.

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



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US Ports - Conditions of Entry

The Maritime Transportation Security Act of 2002 imposes an obligation on the US Coast Guard to evaluate the effectiveness of anti-terrorism measures in foreign ports and provides for the imposition of conditions of entry on vessels arriving in the United States from countries that do not maintain effective anti-terrorism measures.

Cuba is the most recent addition to a list of countries deemed by the Coast Guard not to be maintaining effective anti-terrorism measures. The list also includes Iran, Syria, Indonesia (with some ports excepted), Cameroon, Equatorial Guinea, Guinea-Bissau, Liberia, and Mauritania. There are additional requirements for vessels calling at US Ports that have visited listed countries.

Full details are given in US Coast Guard Port Security Advisory (5-08) of 11 April 2008, the text of which can be found on the Steamship Mutual website at:

www.simsl.com/USEntry0308.html.

Advisories can be found on the USCG/DHS Homeport website at:

http://homeport.uscg.mil/mycg/portal/ep/home.do.

Several additions/changes to this program have been made in recent months and, accordingly, the Homeport website should be monitored on a regular basis.

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

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Australia - Tug Liability Under UK Standard Conditions for Towage

In *PNSL Berhad v Dalrymple Marine Services* the Court of Appeal of the Supreme Court of Queensland analysed the requirements for determining whether the towing period had commenced under the UK Standard Conditions at the time of a collision between a tug and a ship where the tug was approaching to attend. A secondary issue before the Court concerned whether the limitation of the tugowners' liability under the UK Standard Conditions is rendered void by reason of certain provisions of the *Trade and Practices Act 1974* (Cth) ("TPA").

The tug "Koumala" collided head-on with the starboard side of the dry bulk carrier "Pernas Arang" after suffering a steering failure when approximately 150 metres from taking up position alongside the ship. The impact caused a significant dent to the hull plating of the "Pernas Arang".

Applying a "practical common sense" approach, and approving Brandon J's analysis of the UK Standard Conditions in "*The Apollon*", the Court of Appeal ruled that the trial judge was correct in determining on the facts the "Koumala" never reached *"a point where she would have been able to accept orders directly"*. Therefore, "*towing did not commence*" and *"the collision did not occur "whilst towing" within the protection of the UK Standard Conditions."*

The Court also upheld the trial judge's finding that as a contract to provide towage services was not a contract in relation to the transportation of goods within the meaning of s 74(3) of the TPA, it was subject to a warranty implied into the contract by s74 that the services would be rendered with due care and skill.

It follows that ship owners ought to be aware that suppliers of towage services in Australia may seek to incorporate terms limiting their liability to the costs of the services provided as permitted under s68A of the TPA.

This decision is discussed in more detail in an article prepared by Gavin Vallely of Holman Fenwick & Willan, Australia, for the Steamship Mutual website at:

www.simsl.com/Koumala0508.html

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Collision - Damages for Loss of Fixture

The recent decision of the Court of Appeal in *The "Front Ace"* touched on three distinct areas of law:

1. Causation in the context of the duty to mitigate,
2. Assessment of damages for loss of a fixture, and
3. The application of "loss of chance" principles.

The case concerned a seemingly innocuous collision as the "Vicky 1" approached the VLCC "Front Ace" for lightering. Liability for the collision was admitted by the owners of the "Vicky 1" and the matter was referred to the Admiralty Registrar for an assessment of quantum. Although the cost of repairs only amounted to about US$80,000, the matter went to a hearing because, as a result of the collision, the "Front Ace" was unable to perform her next fixture to Chevron. A substantial claim was thus put forward for loss of the fixture. Initially, those damages were put at US$1.2 million but shortly before the trial they were re-assessed at about US$2.4 million.

In its decision, the Court of Appeal applied the test on causation as laid down by Lord Wright in *The "Oropesa"* and re-affirmed the House of Lords decision in *The "Argentino",* in which the right to claim damages for loss of a fixture was approved. They also rejected the Admiralty Registrar's finding that "loss of chance" principles, as set out in "*Allied Maples*", ought to apply to the assessment of hypothetical voyage earnings.

Darryl Kennard of Thomas Cooper reviews the case in an article written for the Steamship Mutual website at:

http://www.simsl.com/FrontAce0508.html

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Peril of Sea Defence - Alive and Well in United States Fifth Circuit

The recent decision of the United States Court of Appeals for the Fifth Circuit in *Corus U.K. Ltd. v Waterman Steamship Co.* demonstrates that the peril of the sea defence is indeed alive, well and readily available to a COGSA carrier; at least, to a carrier who is free of negligence.

The claim was brought by the owner of various steel products damaged aboard the LASH vessel "Atlantic Forest" during a voyage from Rotterdam to New Orleans in late November 2002. During the voyage, the vessel encountered weather conditions ranging from Force 9- 12 on the Beaufort Scale for the better part of three days. The crux of the dispute was whether the conditions the vessel encountered were sufficiently severe to constitute a "peril of the sea" within the meaning of the COGSA defence codified at 46 U.S.C. § 1304(2)(c).

The court expanded upon the general rule that for a storm to constitute a peril of the sea it must be *"of an extraordinary nature or arising from irresistible force or overwhelming power which could not be guarded against by the ordinary exertions of human skill and prudence."* The court held that this required the carrier to show:

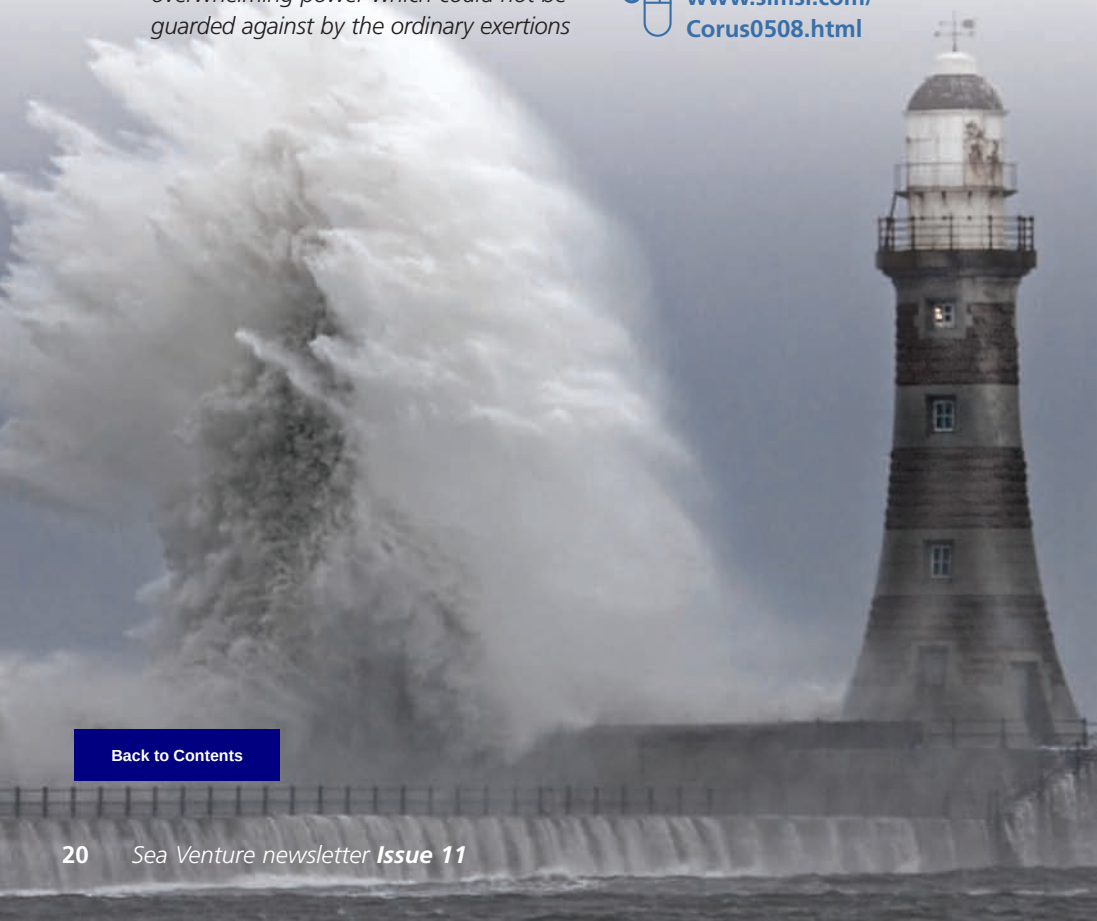
1. The severity of the storm was sufficient to constitute a peril of the sea,
2. A causal connection between the cargo loss and the peril of the sea, and
3. The carrier's freedom from fault and that the ship was not unseaworthy.

Among other reasons, the court upheld the heavy weather defence because of the extent of physical damage to the ship. In the absence of this substantial damage to the ship, the peril of the sea defence would likely not have been sustained.

Also of importance to the decision was the court's finding that the storm system which caused the damage was unforeseeable, both in terms of its intensity and its erratic and unpredictable course.

In an article written for the Steamship Mutual website Gary A. Hemphill of Phelps Dunbar, New Orleans, discusses the case in further detail:

www.simsl.com/Corus0508.html



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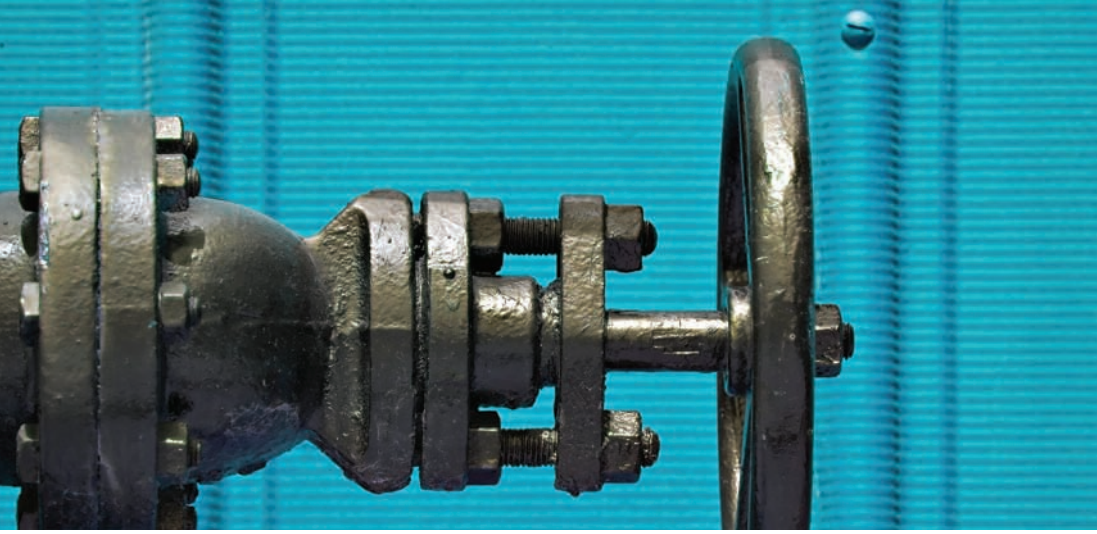

Oil Spills During Routine Bunkering Operations

"...commercial schedules impose immense pressure on a vessel's crew to stem bunkers within limited time periods"

A recent spate of spills during routine bunkering operations has resulted in a number of significant pollution claims, raising concerns as to the lack of awareness during critical aspects of the operation and the failure to follow defined operating procedures.

Analysis shows that whilst circumstances leading to each incident were often different, common causative factors included the failure to:

- Completely close valves to tanks on completion,
- Adhere to the stipulated maximum loading rate contained in a vessel's bunker plan and agreed prior to operations commencing,
- Adhere to recognised procedures for topping off tanks, and
- Monitor the progression of loading at adequate intervals.

Bunkering is categorised as a critical operation under the ISM Code. Whilst commercial schedules impose immense pressure on a vessel's crew to stem bunkers within limited time periods, non compliance with bunkering procedures in a vessel's Safety Management System could potentially result in substantial costs, penalties and even greater delay where spillage occurs as a consequence.

Many bunker spills are small in quantity, though the resultant clean-up costs can be substantial. Shipowners are facing ever stricter regimes in liability compensation and the Bunker Convention 2001 enters into force on 21 November 2008.

In an article produced for the Steamship Mutual website at:

http://www.simsl.com/BunkerSpills0508.html

Paul Amos **(paul.amos@simsl.com)** looks at some of the common factors present in routine bunker spills and highlights the importance of implementing an effective oil transfer procedure whilst exercising continued vigilance during operations.

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China - Recent Amendments to Civil Procedure Law

Amendments to the Civil Procedure Law of the People's Republic of China ("CPL") came into force on 1 April 2008. The amendments focus on the enforcement of civil judgments and retrial procedure.

The limitation period for enforcement of civil judgments has been extended from six months to two years. In addition, this period can now be "suspended" or "interrupted" if certain conditions are met. The amended CPL also increases the options available for enforcement, which formerly fell under the sole jurisdiction of the first instance court.

These amendments are designed to improve the ease and efficiency of enforcement of judgments in the PRC. In addition, the new CPL provides the court with greater powers through increased fines, the power to attach assets without notice and other measures which may be taken against judgment debtors or defaulters.

The amendments to retrial procedures are designed to fine tune and clarify the current process by setting out clearly to which court a party may apply for retrial, setting time limits for a court to consider and respond to an application, and setting clear criteria for the acceptance or rejection of an application. In addition, the time limit for making an application for retrial has been extended and notice must now be given to the other party in order to afford the opportunity for objection to be raised.

It is hoped that the amendments will help in the development of a more efficient legal system, although there are concerns that the amendments simplifying the retrial procedure may lead to greater legal uncertainty as it becomes easier to pursue this route. It remains to be seen how the courts will interpret the amendments in practice.

An article by Zheng Yu of Rajah & Tann written for the Steamship Mutual website explains these amendments in more detail:

www.simsl.com/ChinaCPL0508.html

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Recent Publications

Circulars

- Bunkers Convention – "Blue Cards"

As highlighted in issue 10 of Sea Venture, the International Convention on Civil Liability for Bunker Oil Pollution 2001 (the "Bunkers Convention") enters into force on 21 November 2008. Registered owners of any sea going vessel over 1000GT registered in a state party, or entering or leaving a port in the territory of a state party, will be required to maintain insurance which meets the requirements of the Convention and to obtain a certificate issued by a state party attesting that such insurance is in force. The state-issued certificate must be carried on board at all times. The regime follows closely the well established liability and insurance provisions which apply to oil tankers under the Civil Liability Convention (CLC). Further details are available on the Steamship Mutual website at:

www.simsl.com/Bunkers1207.html

Club circular B.469 of April 2008 notified Members that Clubs in the International Group will issue the required Bunkers Convention "Blue Cards" to enable signatory states to issue certificates from August 2008. The Club will, therefore, issue these Blue Cards although conditions apply in relation to war risks. Further information is given in the circular which can be found on the website at:

www.simsl.com/Circulars-Bermuda/B.469.pdf

Website Articles

- Argentina - Farmers' Protests & Loading Delays - Who Bears the Costs?
  www.simsl.com/ArgentinaStrikes0408.html
- California - Hull Husbandry Reports
  www.simsl.com/CaliforniaHullHusbandry0308.html
- POEA Revise Position on Nigeria
  www.simsl.com/POEANigeria0208.html
- South Africa - We Will Tow You Away
  www.simsl.com/SAMSA0208.html
- Spain - Maritime Emergencies Evaluation Teams
  www.simsl.com/SpainMEET0208.html

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STEAMSHIP MUTUAL

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