# SEA VENTURE

STEAMSHIP MUTUAL

ISSUE 21

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# INTRODUCTION

Gary Rynsard

Welcome to the latest Sea Venture publication which contains the usual mix of recent legal decisions and topical issues.

### Renewal 2013

The Board set a standard increase of 7.5%, seeking to achieve the appropriate balance between the need to increase the level of premium in the light of the current level of claims, and the fact that most shipowners are trying to cope with a distressed freight market. In the event the achieved increase was in excess of the standard increase reflecting the adjustment of terms for fleets based on their individual records. This result should put the Club in a position to improve the operating performance going forward.

At the renewal there was a small increase in entered tonnage which, taken together with tonnage entered during the year, has increased the entry to 101.25 million GT. This represents an increase of approximately 5% year on year. Most of the increase came by way of additions to fleets already entered in the Club. At present, the growth in the Club's business is coming mainly from the east and the Americas, reflecting the difficult circumstances in the European economies and for shipping companies based in this region. The Club has always believed that a policy of diversity, both in geographical area and by vessel type, is beneficial in terms of spreading the risk as well as ensuring that strategic targets are met.

The depressed condition of the freight markets is now in its fifth year. It is clear that more and more shipping companies are experiencing real financial stress. The longer the situation persists the greater the difficulties that are likely to result. In such a demanding environment the Club will strive to ensure financial stability and to provide the Members with the highest and most efficient levels of service.

As ever we are grateful to all Sea Venture contributors and hope you find this issue of interest.

Gary Rynsard

28 June 2013

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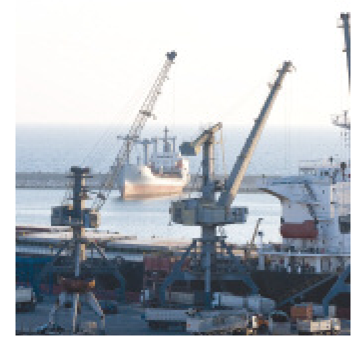
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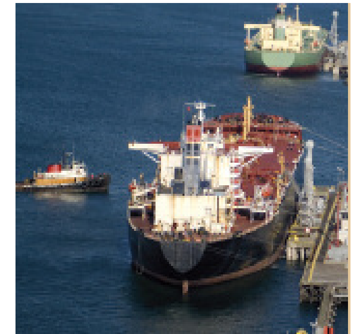

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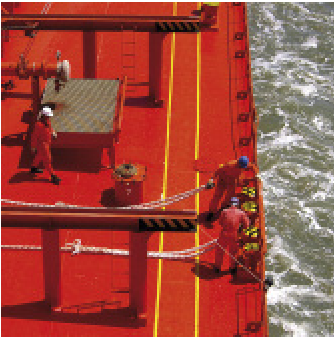
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Off-Hire Clause

# Net Loss of Time?

In *Minerva Navigation Inc v Oceana Shipping AG (the "Athena")* the Commercial Court upheld the appeal by owners against an arbitration decision which concluded that the vessel was off-hire under an amended clause 15 of the NYPE 1946 form.

The fact that clause 15 is a "net loss of time" off-hire clause is well-established. However, this decision has confirmed that charterers need to demonstrate that there was, in fact, a net loss of time to the chartered service in order to benefit from the clause, as opposed to a mere loss of time in performance of the services immediately required of the vessel.

The cargo had been rejected at the discharge port in Syria and was then ordered by charterers to Libya. However the vessel was

STS Transfer

# Withholding Consent

Owners chartered the "Falkonera", a VLCC, to charterers on an amended BPVOY4 form. Clause 8.1 of Part 2 provided:

*"Charterers shall have the option of transferring the whole or part of the cargo … to or from any other vessel including, but not limited to, an ocean-going vessel, barge and/or lighter … All transfers of cargo to or from Transfer Vessels shall be carried out in accordance with the recommendations set out in the latest edition of the ICS/OCIMF Ship to Ship Transfer Guide (Petroleum)."*

The charter also contained an additional clause dealing with STS lightering which provided: *"if charterers require a ship-to-ship transfer operation or lightening by lightering barges to be performed then all tankers and/or lightering barges to be used in the transhipment/lightening shall be subject to prior approval of owners … not to be unreasonably withheld."*

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stopped outside Libyan waters on owners' orders so that they could discuss with charterers the fact that the bills of lading were issued for discharge in Syria, not Libya. The vessel drifted for a period of around 11 days in international waters until the bills of lading were reissued to allow discharge in Libya. The vessel then proceeded to Benghazi for discharge.

Charterers said the vessel was off-hire for the period when drifting outside Libyan waters. Owners argued that there had been no net loss of time as the vessel would not, in any event, have berthed at Benghazi any earlier than, in fact, it did.

In arbitration, the Tribunal agreed with charterers that under the clause 15 it was sufficient to demonstrate that there had been an immediate loss of time. In their view, clause 15 was not concerned with the time the vessel would have waited at Benghazi before berthing. On appeal, the Commercial Court held that the test for clause 15 of NYPE is to determine whether there has been a net loss of time to the performance of the charter service overall. Therefore, the vessel remained on-hire.

■ While charterers have been given leave to appeal, the Commercial Court decision is discussed in an article by Yasmeen Rouhani (**yasmeen.rouhani@simsl.com**) on the Club website at: **www.steamshipmutual.com/Athena0613.htm**

Charterers chose to discharge by way of STS transfer and nominated two VLCCs to receive the cargo. Owners withheld their approval of those two vessels and the cargo was subsequently discharged into other, smaller, vessels.

Charterers claimed that owners' withholding of approval led to delays and increased costs. They argued that the withholding of approval was a breach of charter and so those delays and costs should be for owners' account. The Court found in favour of charterers, holding that owners had unreasonably withheld their approval.

Sian Morris

The judgment in *Falkonera Shipping Company v Arcadia Energy PTE Ltd (the "Falkonera")* is discussed in further detail in an article by Sian Morris (**sian.morris@simsl.com**) on the Club website at: **www.steamshipmutual.com/Falkonera0613.htm**

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Non-Payment of Hire

# Right to Withdraw

In *Kuwait Rocks Co v AMB Bulkcarriers Inc (the "Astra")* Mr Justice Flaux, whilst hearing charterers' application for permission to appeal under s.69 Arbitration Act 1996, took the opportunity to deal with the issue raised by owners in their Respondents' Notice.

The question was whether the Tribunal should also have decided that owners were entitled to recover substantial damages for charterers' non-payment of hire on the basis that Clause 5 NYPE *"… (whether on its own or with the anti-technicality Clause 31 and/or the Compensation Clause in the two addenda) was a condition, breach of which entitled the Owners to recover not only unpaid hire at the date of withdrawal but damages for future loss of earnings"*.

Flaux J determined that the obligation to make punctual payments of hire (whether in clause 5 on its own or in clause 5 in conjunction with clause 31) is a condition of the contract, breach of which entitles the owners to withdraw the vessel *and* claim damages for loss of bargain.

This means that it is no longer necessary for owners, where charterers have failed to pay hire, to find a further repudiatory breach of contract evincing an intention no longer to be bound on the part of the charterers in order to claim damages.

In an article written for the Steamship Mutual website, Reed Smith LLP (solicitors for the successful owners in the *"Astra"*) consider whether a single hire default entitles owners to withdraw and to claim loss of profits for the remaining charter period, as well as the impact of the decision on charterers' ability to deduct from hire.

■ Their article can be found at: **www.steamshipmutual.com/Astra0613.htm**

# Bank's Right to Recover

This decision of the Admiralty Court in *Standard Chartered Bank v Dorchester LNG (2) Limited (The "Erin Schulte")* has confirmed (if confirmation was needed) that caution is to be exercised if a party elects to deliver cargo against the production of a letter of indemnity. The decision also addresses the sometimes convoluted involvement of banks in a letter of credit transaction and its interplay with a bill of lading contract.

The court had to consider which party has title to sue under 5(2) COGSA 1992 as lawful holder of the bills of lading when the bills have been endorsed. Section 5(2)(b) provides:

> *"References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say-[…]*
>
> *(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill…."*

The bills of lading were endorsed to SCB. Therefore, the question was whether SCB could recover its losses from the shipowner caused by delivery of cargo without its consent on the basis that SCB was the lawful holder of the bills of lading. SCB had honoured the letter of credit.

The judgment clarifies whether a bank can be considered as lawful holder of the bill of lading when receiving the bills of lading within the context of a letter of credit. Following *the "Aegean Sea"*, which clarified that an endorsement of bills of lading is a bilateral act requiring possession and acceptance, the decision examines the transmission of bills of lading and the requirements of acceptance when bills of ladings are endorsed.

Juan Zaplana

The court held that in these circumstances the financing bank is a lawful holder of the bill of lading within the meaning of section 5(2) COGSA 1992.

■ The decision is discussed in an article by Juan Zaplana (**juan.zaplana@simsl.com**) on the Steamship Mutual website at: **www.steamshipmutual.com/ErinSchulte0613.htm**

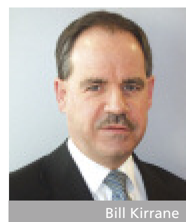


# Is Notice Required?

In *Greatship (India) Ltd v Oceanografia SA de CV* the English Commercial Court has held that under the standard wording of clause 10 of the BIMCO SUPPLYTIME '89 charterparty, an owner does not have to give notice or wait for a grace period before temporarily suspending performance when hire is due but not paid. While the clause requires owners to allow 5 banking days' notice after a failure to pay hire before withdrawal from the charterparty, it was decided that this grace period requirement does not apply to the temporary suspension of performance under the SUPLYTIME '89 charterparty.

In her decision, Mrs Justice Gloster appears to have gone to some length to consider, and rule out, every potential argument against her finding. She followed the recent Supreme Court decision in the "*Rainy Sky*", where it was held that: "*if the contract has used clear and unambiguous language, the court must apply it, however surprising or unreasonable the result might be.*" (See website article at: **www.steamshipmutual.com/RainySky1212.htm**)

The judge rejected an argument that it should be implied into the contract that the owners were obliged to allow a grace period and did not accept that it would be unreasonable for owners to suspend performance without notice. Indeed, in this case Mrs Justice Gloster said that the language of the clause was unambiguous and, in those circumstances: *"it was not permissible in effect to re-write the Charterparty on so-called grounds of commerciality"*.



Bill Kirrane

■ The judgement is discussed in more detail by Bill Kirrane (**bill.kirrane@simsl.com**) in a Steamship Mutual website article at: **www.steamshipmutual.com/Greatship0613.htm**

California Vessel Fuel Standards

# Fines for Violations

Naomi Cohen

The California Air Resources Board (ARB) has been able to enforce the *Regulation on Fuel Sulphur and Other Operational Requirements for Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline* since 1 December 2011. This issue has been discussed in previous issues of Sea Venture – most recently, issue 19 – and in several articles on the Club website, such as *California – Enforcement of Vessel Fuel Standards up to 24 Miles from Coast*: **www.steamshipmutual.com/CaliforniaFuel1111.htm**

The list of case settlements on the California ARB website shows that alleged violations of vessel fuel standard regulations are investigated on a very regular basis: A succession of settlements in recent months record fines of anywhere between $4,500 and $50,000 for "*failure to operate on compliant distillate fuel upon entry into Regulated California Waters*". (In each case, however, ARB recorded that the companies involved had taken "*prompt action after being notified of these violations and under ARB's supervision began operating in a compliant fashion*".)

One case which stands out is recorded in a Settlement Agreement and Release dated February 2013 in which penalties totalling $299,500 were agreed for alleged violations. The vessel in question allegedly failed to complete fully regulatory operational requirements on 34 occasions. In particular, it was alleged that the vessel failed to perform the required switch-over to low-sulphur distillate fuels for its main and boiler engines before entering regulated waters.

The total penalty of $299,500 was agreed between the parties, calculated as follows:

- $238,000: $7,000 per day for 34 days of alleged violation
- $45,500: equivalent to the Non-Compliance Fee (the figure an owner/operator/charter can elect to pay instead of performing a fuel switch-over, for each port visit, but should be paid before leaving port)
- $16,000: believed to be the fuel cost saving made by the shipping company by not performing the fuel switch over.

(The Settlement and Release document records the fact that the company assisted ARB fully in the investigation.)

The settlements show that the California ARB is taking its enforcement obligations very seriously. A fine approaching $300,000 (in a case where owners assisted in the investigation process) should serve as a salutary reminder of the importance of compliance.

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

Charterparty Indemnities

# Express or Implied?

The charterers of any vessel will seek to engage the ship in the most profitable manner. This will occasionally result in competing interests where, in following the charterers' orders, the vessel becomes exposed to certain risks that may result in losses or damages being incurred by the owners. Commercially, therefore, it makes sense that charterers should bear the cost of any consequences suffered by owners that arise out of charterers' employment of the vessel.

Charterparty indemnities, express or implied, are owners' way of seeking recourse for losses they may suffer in complying with their charterers' instructions. Unsurprisingly, the interpretation of indemnities is often the subject of much debate when a loss has been incurred. In applying such indemnities, consideration will always be given to the context of the charterparty as a whole so that it is construed in a manner to give business efficacy to the contract. For any loss to fall within the scope of an indemnity it will have to flow from the orders so as not to break the chain of causation.

Jamie Taylor

This issue was discussed most recently by the Supreme Court in *Petroleo Brasileiro S.A. v. E.N.E. Kos 1 Limited (the "Kos")*: what are owners' rights to be indemnified after the ship has been lawfully withdrawn for non-payment of hire? (The Court of Appeal decision in this case was reviewed in issue 16 of Sea Venture and on the Steamship Mutual website at: **www.steamshipmutual.com/Kos0910.html**)

■ Charterparty indemnities generally, as well as the Supreme Court decision in the "Kos", are discussed in more detail in an article written by Jamie Taylor (**jamie.taylor@simsl.com**) for the Steamship Mutual website at: **www.steamshipmutual.com/Kos0613.htm**

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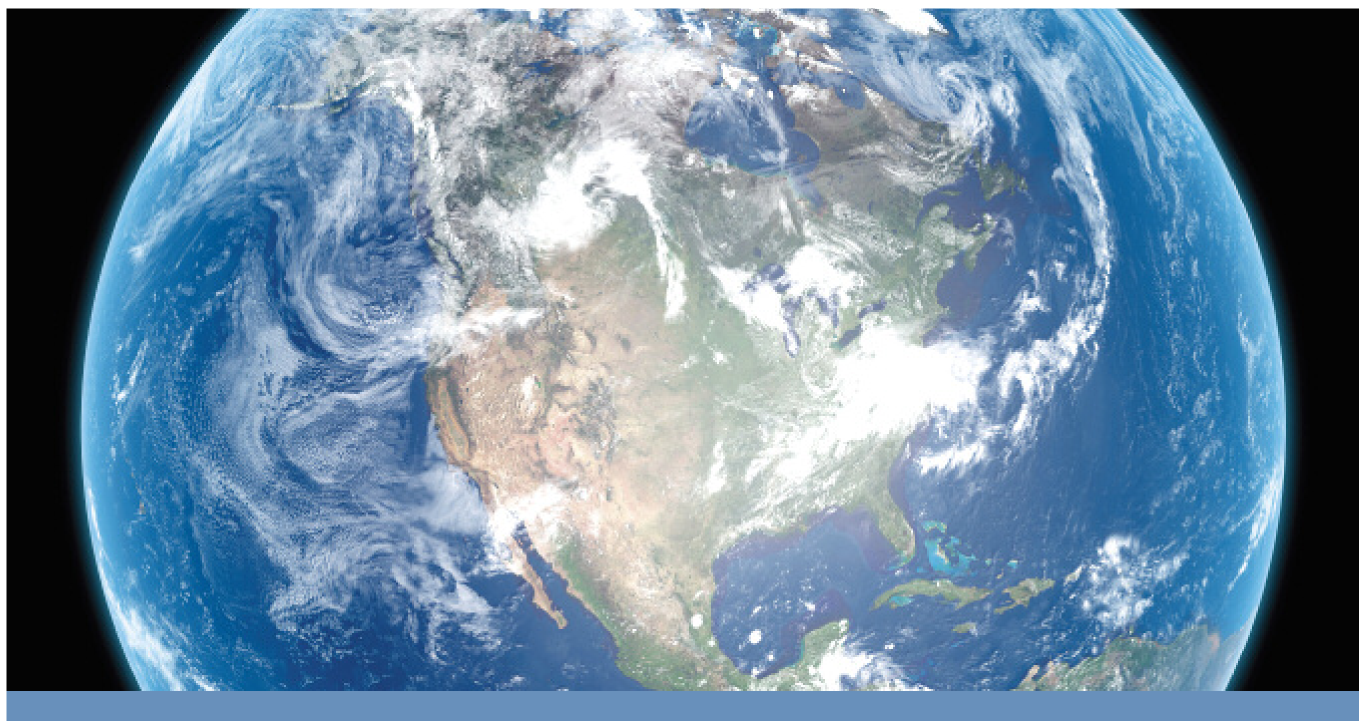
# From "Magic Pipes" to "Magic Fuel"?



In light of similarities in the newly imposed recordkeeping and air emissions requirements of MARPOL Annex VI and those contained in Annex I (prevention of oil pollution) and Annex V (garbage management), one cannot help but wonder: will the stricter fuel requirements expose vessels and vessel interests to criminal and civil liability the way oily water separator ("OWS") cases have to date?

After all, in the last five years alone, U.S. criminal investigations and prosecutions of alleged OWS related misconduct and Oil Record Book log entries have resulted in hundreds of millions of dollars in criminal fines and community service payments, and thousands of months of criminal probation for vessel owners and operators, including the mandatory implementation of expensive environmental compliance monitoring programs by many of these entities for their fleets, as well as many months of incarceration for vessel crewmembers.

The revised Annex VI to MARPOL which came into force in July 2010, placed new limitations on the emissions of sulfur oxides. The first set of new standards imposes a "global cap" for the sulfur content of fuel, progressively lowering the permissible level of sulfur in fuel through 2020. The second set of new standards creates new Emissions Control Areas that regulate and cap the emission of sulfur oxides and other substances for vessels transiting the new areas.

The new Annex VI emissions standards, which have been implemented by the United States in the Act to Prevent Pollution from Ships (or the "APPS"), also entail a number of official recordkeeping obligations for vessels. The APPS is the law relied upon by the U.S. for the investigation and prosecution of suspected MARPOL Annex I (oil) and V (garbage) violations and provides for both civil and criminal penalties for vessels calling at U.S. ports. In the 30 years since the enactment of APPS, U.S. governmental agencies have refined their *modus operandi* for investigating APPS matters and improved their coordination, leading to more frequent and successful criminal prosecutions under the statute, which in turn deliver substantial fines and positive publicity to the government. The stakes in such cases are high, as corporate entities such as vessel owners and operators face large corporate criminal fines (up to $500,000 per count proven or plead to) for the unlawful acts of their employees, and individual crewmembers face the prospect of jail and other penalties (such as fines of up to $250,000 per count proven or plead to).

As such, it is clear that the jurisdictional and other legal bases associated with enforcing MARPOL Annex VI closely resemble those relied upon by the U.S. government with OWS and Oil Record Book violations (commonly referred to as "magic pipe" cases), which continue to be aggressively investigated and prosecuted. Accordingly, with the implementation of Annex VI into U.S. law, shipping interests can expect additional scrutiny of their vessels and records, which will, undoubtedly, continue to result in costly detentions in the U.S. for alleged violations of the MARPOL and APPS provisions, especially, in respect to failures to maintain accurate and complete Oil Record Books and other required vessel records.

■ Further information, including steps that may be taken to reduce the risks identified above, can be found in the full version of this article by Chalos O'Connor LLP on the Club website at: **www.steamshipmutual.com/MARPOLVIChalos0513.htm**

Maintenance and Cure

# No Automatic Restitution under McCorpen

Stuart Crozier

Since 1968 shipowners based in the U.S., and employers of Jones Act seamen in particular, have relied on the case of *McCorpen v Central Gulf Steamship Corporation (5th Cir Court of Appeals)* as a legal tool to protect themselves against paying maintenance and cure to injured or ill seamen should it be proven that the seaman intentionally misrepresented or concealed material medical facts during a pre-hire medical examination and/or questionnaire. This is commonly known as the "McCorpen Rule".

If a successful McCorpen defence is established, why should a shipowner who has acted in good faith in paying maintenance and cure not be able to recover those costs from the seaman who intentionally lied in order to gain employment and receive benefits?

This issue was discussed in the recent case of *Boudreaux v Transocean Deepwater Inc*. The Fifth Circuit United States Court of Appeal overruled the previous District Court's decision that Transocean's successful McCorpen defence automatically established its right to restitution.

The Court of Appeal held that not every successful *McCorpen* defence generates a cause of action permitting the employer to recover benefits previously paid to the seaman. The Court cited two reasons; first, recognising the cause of action would be contrary to the purpose of maritime law, which is to protect seamen and second, an employer who establishes the defence does not necessarily demonstrate the seaman possesses the same level of intent required for common law fraud. The Court of Appeals declined to create an automatic right to restitution.

This decision is an important one and if ultimately upheld would limit the prospect of recovery (in the Fifth Circuit) of maintenance and cure expenditure incurred by an employer in the event of a successful McCorpen defence.

■ The case is considered in further detail by Stuart Crozier (**stuart.crozier@simsl.com**) on the Steamship Mutual website at: **www.steamshipmutual.com/Boudreaux0513.htm**

MARPOL Annex VI

# North American ECA

The North America Emmission Control Area (ECA) established by IMO under the provisions of MARPOL Annex VI became effective from 1 August 2012. Vessels operating within this area (as with other ECAs) must comply with more stringent provisions relating to the emission of SOx, nitrogen oxide (NOx) and particulate matter. Several articles on this subject have been published on the Club website. These include reports on how the possible non-availability of compliant fuel oil would be handled in the U.S. and a recent announcement that the Environment Protection Agency are conducting overflights to test plume emissions:

*North America ECA Effective 1 August 2012 - EPA Guidance on Non-Availability:* **www.steamshipmutual.com/NAmECA_EPAGuidance0612.htm** and

*North America ECA - Electronic Fuel Oil Non-Availability Disclosure Portal (FOND)*: **www.steamshipmutual.com/NAmFONDInstructions0413.htm**

*North American ECA – Overflights Test Plume Emissions:* **www.steamshipmutual.com/publications/Articles/NAmECAOverflights0613.htm**

After an initial delay in implementation in Canada, the regime is now also in force there. However, unlike the U.S., the Canadian regulations do not seem to allow for the possibility of non-availability of compliant fuel oil and owners and operators of vessels visiting Canadian waters should assume that full compliance is therefore required:

*North American ECA - Canada Enforcement Commences*
**www.steamshipmutual.com/NorthAmECACanadaInForce0513.htm**

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

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Arrest

# Off-Hire Event?

Stuart James

In *NYK Bulkship (Atlantic) NV v Cargill International SA (The "Global Santosh")* the Commercial Court considered the construction of a familiar additional off hire clause providing for hire to be suspended for any period during which the vessel is arrested or detained *"unless such… arrest is occasioned by any personal act or omission or default of the Charterers or their agents…".*

The case concerned a period during which the cargo on board the "Global Santosh" and, mistakenly, the vessel itself were arrested by a sub-voyage charterer in order to secure a claim for demurrage due from the cargo buyers. The sub-voyage charterer had sold the cargo and under the sale contract the cargo buyer was responsible for unloading and liable for any demurrage. As a result of the arrest order, the cargo could not be discharged and the vessel's time charterer withheld hire for the period of the arrest. In the subsequent London arbitration between the vessel owner and time charterer the Tribunal found, by a majority, that the vessel was off hire during this period. The owners appealed to the Commercial Court.

In what many may consider a somewhat surprising decision, the court held that the failure of the buyer to unload the cargo within the laydays specified in the sale contract was an act, omission or default in the course of performing the obligation to discharge, as delegated by the charterer and, as such, the vessel remained on hire.

■ The decision is discussed further by Stuart James (**stuart.james@simsl.com**) in an article on the Steamship Mutual website at: **www.steamshipmutual.com/GlobalSantosh0613.htm**

Breakaway

# Norwegian

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# Style

## One of the benefits of working for a P&I Club is that staff are sometimes invited to launch events for new vessels entered with the Club.

Such was the case when Martin Turner and Paul Brewer of the Amercias Syndicate were invited to attend the Southampton-based celebration for the latest Norwegian Cruise Line vessel – the "Norwegian Breakaway". Paul describes the experience:

*"After a very smooth embarkation and some tasty light refreshments we began to explore the ship. With so much on offer it was a task in itself choosing where to begin. Starting from the top and working our way down, we were instantly impressed by the huge aqua park which is the top deck's centre piece. The temptation to try one of the drop slides was resisted with the aid of the Fat Cats Jazz Club and refreshments while enjoying the view overlooking Southampton port. With so much more still to see we continued our tour. This beautifully turned out ship has 15 restaurants, 9 bars and lounges, 6 entertainment venues, casino, aqua park, sports centre, gym, spa and kids club! Every area of the ship was immaculately turned out and the variety of options on offer was extremely impressive."*

The "Norwegian Breakaway" was built by Meyer Werft GMBH and entered service in April 2013. A 146,600 tonne ship, with an overall length of 1062 feet, width of 130 feet, 18 decks, cruise speed of 21.5 knots and capacity to carry 4000 passengers and 1595 crew. The ship is one of two 4000-passenger vessels scheduled for delivery within 12 months; the "Norwegian Getaway" is under construction for delivery in January 2014. An even larger ship, the "Breakaway Plus", is scheduled for delivery in autumn 2015.

The "Norwegian Breakaway", which features eye-catching hull artwork by legendary pop artist Peter Max, is currently the largest vessel to homeport year-round in New York. She sailed to Bermuda for the summer in May 2013.

Norwegian Cruise Line has a 46-year history in the cruising industry. The company's first entries with the Club date back to 2001.

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# New Capesize for CMT

## Chinese Maritime Transport ("CMT"), a long time loyal member of the Club, took delivery of the latest addition to its fleet of modern Capesized bulkers on 2 April 2013.

The vessel, named "China Fortune" at a ceremony on 30 March 2013, was built in Shanghai Waigaoqiao Shipyard and measures 106,884GT. She set sail for Australia on her maiden voyage.

CMT has a long history in shipping. It was founded by the late Mr. C.Y. Tung in 1946 in Shanghai and moved to Taiwan in 1950. CMT has grown from strength to strength over the decades and is renowned for its high standard of operation and its commitment to maritime safety.

Mr. Y.K. Pang, Chairman of the CMT Group, presided over the ceremonies (5th from the right in the photograph) and amongst the guests of honour is Mr. C.H. Tung (4th from the), eldest son of the founder Mr. C.Y. Tung and former Chief Executive Office of the Hong Kong Special Administrative Region.

The Club wishes the "China Fortune" many safe and prosperous voyages in the years to come.



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Family at Sea

# "Ranjan" to the Rescue

The "Ranjan" to the rescue of the "Innuoa". The Berger-Enfraze family Mickael, Elodie and Tomoe with the "Ranjan" crew

The master of container vessel "Ranjan" recently had some extra hands on deck when a family on a sailing holiday found themselves in difficulty off the coast of the Dominican Republic and were rescued at sea, Members Rohden have reported.

Captain Zaytsev Stanislav reported that a distress call was received from the sailing yacht "Innuoa" which was proceeding from Maria de Porte, Cuba, to Ile Veche, Haiti, when she ran into heavy weather and suffered damage to her mainsail and mast.

Having notified the U.S. and Puerto Rican Coast Guard stations, Captain Stanislav came alongside the "Innuoa" and the young, French family - mother, Elodie, father, Mickael and 4 year-old daughter, Tomoe - boarded the "Ranjan" while their yacht was placed on a tow line.

Before the family were safely disembarked at Rio Haina, the crew posted a "team photo" and notwithstanding an unscheduled stop on the family's trip, were able to record a statement of facts with a happy ending!

Contracting Parties Beware

# Arbitration Clause Not Implied

*Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* involved an application to the Commercial Court pursuant to s.67 Arbitration Act 1996 on the basis that the Tribunal did not have jurisdiction to hear the claim brought before it.

Terms & Conditions

The dispute arose out of an agreement between a company offering drydocking and repair facilities, and the owners of a fleet of vessels. The contract between the parties made no provision for arbitration, nor

Sarah McGuire

did it incorporate the vessel repair company's general terms and conditions which specified London arbitration. The Tribunal had accepted jurisdiction in the matter on the basis of arguments put forward that such was the close relationship between the contract and the general terms and conditions, that they must be read together and, consequently, the arbitration clause in those terms and conditions would be incorporated by implication.

However, the Commercial Court held that the intention of the parties at the time of entering the contract must be examined. It was held that there were no grounds to establish an intention to incorporate such a clause, thereby reinforcing the principle that the court will not imply terms into a contract into which the parties have entered freely.

The lesson for parties when contemplating any agreement is to ensure that the contract is comprehensive and covers, as far as possible, the main terms. These should include dispute resolution which may be far from mind at the time of a deal but which, unfortunately, will be required in many cases.

■ The judgment is discussed in more detail in an article written for the Club website by Sarah McGuire (**sarah.mcguire@simsl.com**) at: **www.steamshipmutual.com/Lisnave0613.htm**

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# Permissible Method of Service

The vessel was chartered on an amended BPVOY3 form. Disputes arose in relation to demurrage and were referred to arbitration. Standard printed clause 19 of the BPVOY3 form provided:

*"Clause 19*

*(a)….. Notice of Readiness may be given either by letter, facsimile transmission, telegram, telex, radio or telephone (and if given by radio or telephone shall subsequently be confirmed in writing and if given by facsimile transmission confirmed by telex) …"*

On the determination of a preliminary issue, the majority of the arbitrators held that email was a contractually permissible method of serving notices of readiness under the charterparty.

Charterers appealed, submitting that email was not a contractually permitted method of serving notices of readiness. Poppelwell J held that the language of clause 19(a) was prescriptive and defined the form in which a notice of readiness (NOR) had to be given. It was obligatory, not permissive. The word "may" connoted what was permissible. The list of six identified methods which followed confined the methods of giving notice which were permissible to those which were enumerated. The list was exclusive and an email was not a permitted method which could constitute a valid NOR. It is notable that owners did not appear before the Commercial Court.

The judgment in *Trafigura Beheer BV v Ravennavi SpA (the "Port Russel")* is discussed in more detail in a website article by Sian Morris (**sian.morris@simsl.com**) at: **www.steamshipmutual.com/PortRussel0613.htm**



# Is "Satisfactory Quality" Implied?

Does clause 11 of a memorandum of agreement ("MOA") on the Norwegian Saleform 1993 exclude the term as to satisfactory quality implied by s.14(2) Sale of Goods Act 1979 (as amended) ("SOGA")? This was the question before the Commercial Court in *Dalmare SpA v Union Maritime Limited and Valor Shipping Limited (the "Union Power")*

Pursuant to an MOA dated 4 September 2009 Dalmare agreed to sell and Union Maritime and Valor Shipping agreed to buy the "Union Power". Clause 11 of the MOA provided, in the standard form, that the *"Vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted."*

The vessel passed an underwater survey. Following delivery, the vessel was drydocked and a special survey was undertaken, as she was changing class. She also passed that survey. Both inspections failed to inspect or note that the no.1 crankpin was damaged. On a ballast voyage from Turkey to Malta the main engine broke down and it was found that the no.1 crankpin bearing had failed. Evidence before the tribunal led to the conclusion that the failure of the no.1 crankpin was the cause of the main engine breakdown and that, at the time of delivery of the Vessel, the no.1 crankpin bearing was likely to fail within a short time period under normal operating conditions.

The buyers contended, amongst other things, that the sellers were in breach of a term as to satisfactory quality, implied by s. 14(2) SOGA. The tribunal found in favour of the buyers in this regard. Sellers appealed. The appeal, on a question of law, was as follows: *"Whether a term as to satisfactory quality is implied into the Contract/MOA by Section 14 of the Sale of Goods Act 1979?"*

The Commercial Court decision, including the discussion of "as she was" in Clause 11, is reviewed in an article by Damien Magee and Tom Burdass of Campbell Johnston Clark on the Club website at: **www.steamshipmutual.com/UnionPower0513.htm**



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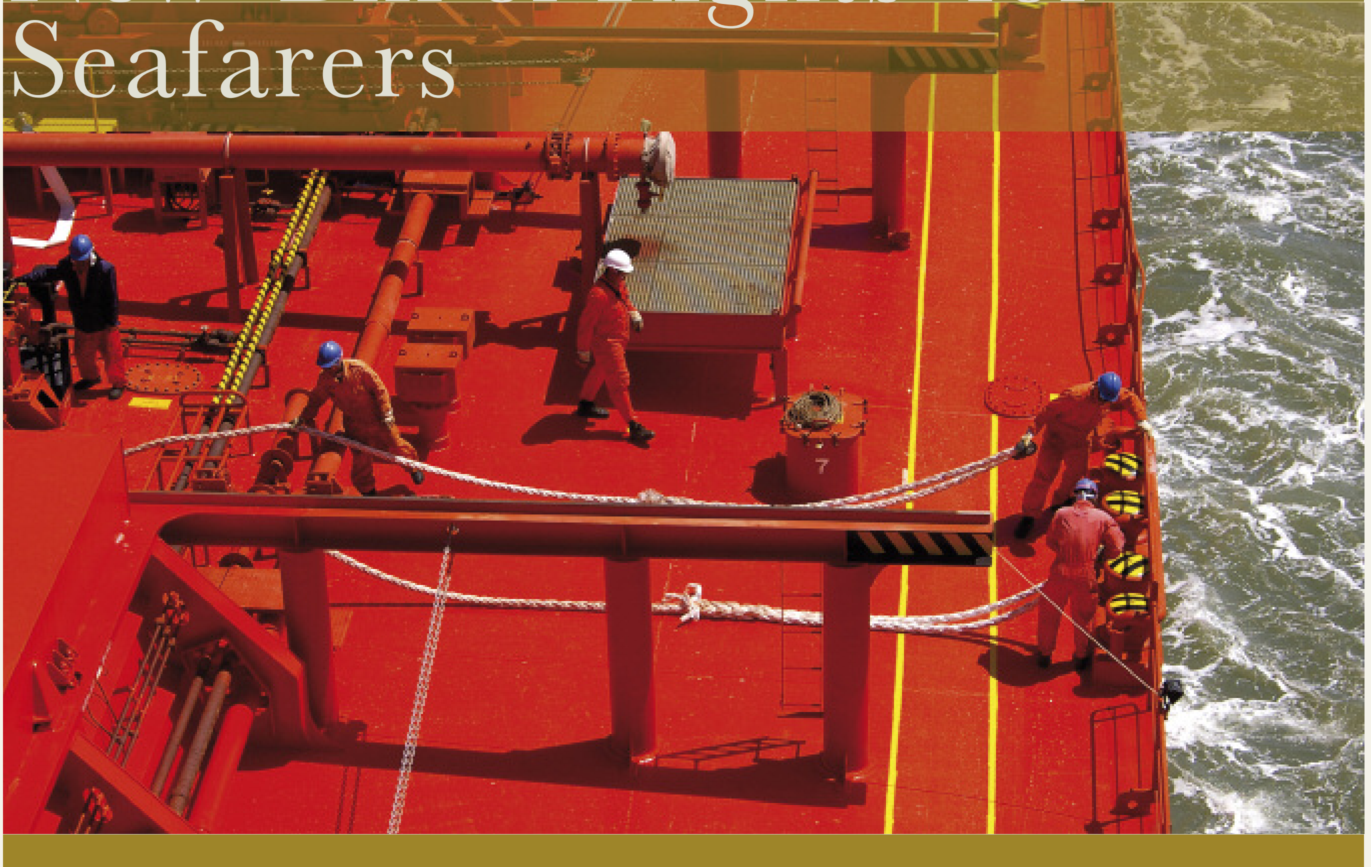
# New 'Bill of Rights' for Seafarers



The Maritime Labour Convention (MLC) will come into force on 20 August 2013 after at least 30 countries representing nearly 60 per cent of the world's shipping tonnage ratified the convention. The UK has yet to ratify, though is expected to do so before August.

The Convention will replace a significant number of existing ILO maritime conventions and will set up a new international regime of global labour standards. For the first time, it will provide a system of certification and inspection to enforce those standards.

The main aims of the MLC are to ensure decent working conditions for seafarers, as well as fair conditions of competition for shipowners.

The convention has an extended definition of "seafarers" and all seafarers will be entitled to the following key rights:

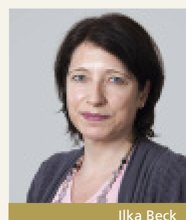
- a safe and secure workplace that complies with safety standards
- fair terms of employment
- decent working and living conditions
- health protection, medical care, welfare measures and
- other forms of social protection

From August, all vessels, whether their flag state has ratified the MLC or not, will be subject to an inspection by Port State Control in any country that has ratified the MLC.

Shipowners will be required to maintain onboard MLC documentation authorised by their flag state. Non-compliance risks delay, fines and/or detention of the vessel.

A more detailed discussion of the Convention by Ilka Beck (**ilka.beck@simsl.com**) and Alexandra Lamont (**alexandra.lamont@simsl.com**), including how to prepare, financial security and P&I cover, is available on the Steamship Mutual Website at: **www.steamshipmutual.com/MLC0513.htm**

See also Club circulars B.599 and B.605 of March and May 2013: Entry into force of the Maritime Labour Convention, 2006 (MLC): **www.steamshipmutual.com/Circulars-Bermuda/B.599.pdf** and **http://www.steamshipmutual.com/Circulars-Bermuda/B.605.pdf**



Ilka Beck

Alexandra Lamont

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Constructive Total Loss

# Frustration of Charter?

Gareth Thomson

In *Bunge S.A. V Kyla Shipping Company Limited* the "Kyla" was involved in a collision. Repair costs were estimated at US$ 9,000,000 while the market value of the vessel was US$ 5,750,000. Owners treated the vessel as a constructive total loss and tendered notice of abandonment to their H&M underwriters. Furthermore, owners sought to rely on a purportedly established legal principle that charterparties are frustrated in such circumstances in order to assert that a charterparty to which the vessel was subject was at an end.

Charterers rejected this position arguing that a warranty in the charterparty requiring owners to maintain H&M insurance to a value of US$ 16,000,000 imposed a requirement on owners to repair the vessel as the costs were within this limit. They argued that the existence of this clause precluded the charterparty from being frustrated because the owners had accepted the risk of having to repair the vessel up to this limit in the event of a casualty.

In arbitration, the Tribunal found in favour of the owners. They were persuaded that there was an established legal principle particular to charterparties that applied to frustrate the contract in the event that the cost of repairs exceeded the value of the vessel.

On appeal, the Commercial Court disagreed. It held that the existence of the continuing warranty formed an obligation to repair the vessel up to the insured value. The casualty did not radically alter the contractual obligations of the owners as the vessel was capable of being repaired within the insured value and so the contract was not frustrated.

■ This case is considered in more detail in an article written by Gareth Thompson for the Steamship Mutual website at: **www.steamshipmutual.com/Kyla0613.htm**

Exception to Laytime

# Government Interference or Not?

Liability for demurrage is governed by the terms of the laytime and demurrage provisions of the relevant charterparty. The charterparty determines the commencement and running of laytime and demurrage. It is well established that laytime, and demurrage once laytime expires, will only cease prior to the completion of the cargo operations if the charterers can bring themselves clearly within an appropriate exception. Clause 28 of the Sugar Charterparty 1999, the Strikes and Force Majeure clause, is such a clause:

*"In the event that whilst at or off the loading place or discharging place the loading and/or discharging of the vessel is prevented or delayed by any of the following occurrences: …*

*... time so lost shall not count as laytime or time on demurrage or detention."*

The occurrences generally include strikes, riots, civil commotions, lockouts of men, accidents and/or breakdowns on railways, mechanical breakdowns at mechanical loading plants, government interferences.

In The *"Ladytramp"*, a case decided in the English High court in late 2012, the vessel's charterers relied on clause 28 when refusing to pay demurrage of just under US$ 400,000 because, among other things, the decision of the port authority to re-schedule loading amounted to "government interference".

When the dispute was arbitrated in London the arbitrators decided that "government interference" did not include simple administrative re-scheduling of cargoes but, rather, related to such

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Non-Payment of Hire

# Conduct Affirming Charterparty

The recent English High Court decision in *Kuwait Rocks Co v AMB Bulk Carriers Inc (The "Astra")* is discussed on page 5 of this issue of Sea Venture and, because the decision potentially reflects a change in the law, in many other publications. Prior to the decision it was widely recognised that, as a matter of English law, a breach of the obligation to pay hire does not constitute a breach of condition and thus the failure to pay hire does not, of itself, give a right to claim damages. It was necessary to establish a repudiatory breach by charterers in order to claim damages. However, subsequent to the *"Astra"*, that may not now be necessary if a claim for damages is to succeed.

The decision in this respect in the *"Astra"* arguably was obiter, and may not be free from doubt until the issue comes before a higher court, but what is certain is that owners still need to be cautious when dealing with their charterers' failure to pay hire on time (or at all). The recent decision in the *"Fortune Plum"* underlines this need for caution.

In this case the owners brought the charter to an end because of charterers' repudiatory breach in consistently paying hire late but only after allowing the vessel to continue discharging on the basis that discharge was to be at charterers' expense. The issue before the court was whether, in doing so, owners had affirmed the charter and, if so, was owners' withdrawal itself a repudiatory breach, or was charterers' conduct in failing to pay hire evidence of a breach that continued after the charter had been affirmed (if it had) and that could still be accepted in order to bring the contract to an end?

■ The decision is discussed by Malcolm Shelmerdine (**malcolm.shelmerdine@simsl.com**) in an article on the Club website at: **www.steamshipmutual.com/FortunePLum0613.htm**

things as embargoes and export bans. The charterers appealed on the basis that is was wrong to conclude that that expression could not extend to the actions of a port authority (i) because as long as there was interference, the precise arm of the government causing the delay did not matter and (ii) when the clause did not refer to "embargoes" or "export bans" and the tribunal did not explain their reasoning it was hard to see why the clause should be so restricted.

There is little authority on the meaning of government interference. While there is mention of the exception in *The "Forum Craftsman"*, government interference was not considered on the facts of that case. In The *"Ladytramp"* charterers' arguments were not accepted. What may amount to government interference is discussed by Anna Yudaeva (**anna.yudaeva@simsl.com**) in an article on the Steamship Mutual website at: **www.steamshipmutual.com/Ladytramp0613.htm**

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Engine Breakdown and Delay

# Who Bears the Loss?

*CHS Inc Iberica SL and Another v Far East Marine SA ("The Devon")* was a successful claim in the High Court by cargo interests against owners for losses arising from delays following an engine breakdown. Shortly after the vessel sailed from Varna, Bulgaria, the vessel's automated systems initiated a protective shutdown of the main engine due to a high lube oil temperature warning and oil mist alarm activation.

As a consequence of these events, the laden voyage to Tarragona, Spain was delayed by a total of 59 days. In that time, the condition of the cargo of corn deteriorated and, on arrival at the discharge port, about 600mt out of a total of 14,353.50mt was caked and mouldy. Cargo interests claimed compensation for the reduction in value of 3020mt of the total cargo which they sold for salvage, and other associated costs, including, notably, the legal costs they had incurred securing their claim against owners.

The essence of the dispute was whether (or not) owners had exercised due diligence to make the vessel seaworthy prior to and at the commencement of the voyage. Owners also questioned whether receivers had taken reasonable steps to mitigate their loss.

Andrew Hawkins

■ The decision is considered further in an article written by Andrew Hawkins (**andrew.hawkins@simsl.com**) for the Club website at: **www.steamshipmutual.com/Devon0513.htm**

Cargo Damage

# Containers and Exclusion Clauses

Is the clause "*…perishable goods carried at Merchant's sole risk*" sufficient to cover not only a carrier's negligence but also any default to keep the refrigeration system of a reefer container continuously in operation? This was the question for the Quebec Court of Appeal in *Mediterranean Shipping Company S.A. v Courtiers Breen Ltée*.

The cargo claimants proved that damage to a cargo of clementines was due to two lengthy power-off interruptions which were not explained nor justified by the carrier. The court followed the Federal Court of Appeal decision in *Canadian Pacific Forest Products v Belships (Far East) Shipping* which held that the clause "*on deck at shipper's risk*" was insufficient to exclude responsibility for both negligence and unseaworthiness, which has led some carriers to rephrase the exclusion to "*on deck at shipper's risk, including negligence*".

In an article written for the Club website, David G. Colford of Brisset Bishop, Montreal, reviews the decision in further detail including consideration of the classic tripartite rules set down in *Canada Steamships Lines v The King* on interpretation of exclusion clauses. His article can be found on the website at: **www.steamshipmutual.com/ContainerExclusions0513.htm**

Overpayments

# Entitlement to Refund?

Some contracts, such as the NYPE Form, make provision for repayment of sums that are not due. Others do not, and it is these that give rise to problems when an overpayment is made, regardless of whether it is made under protest.

English law does not recognise an action for the recovery of money which has been paid simply on the ground that it was not due. Instead it only recognises an action for unjust enrichment, which requires the claimant to demonstrate a ground of restitution. This means establishing that the money was paid under a mistake of fact or law, or under certain forms of compulsion.

The High Court decision in *Marine Trade SA v Pioneer Freight Futures and Armada (Singapore)* considers when a party can recover, in a claim for unjust enrichment, sums paid to another despite doubts as to whether that money was actually due.

Flaux J held that to be entitled to restitution, a party must bring themselves within one of the established categories, specifically, to prove that the money was paid by mistake. In this case, Marine Trade made the payment thinking it was probably not due. This is no mistake. While some level of doubt might be compatible with mistake, if a party makes a payment thinking that they were not liable (or more likely than not that they were not liable) there is no operative mistake.

It follows that the more certain a party is that he does not have to pay, the less likely he is to be mistaken and, therefore, less likely to be able to recover the money.

Unless the original contract has includes a provision for overpayments to be returned, where there is doubt as to whether a payment is due a separate agreement will be required to provide for that money to be returned if it is subsequently found that it was not, in fact, due.

Faye Doherty

■ In an article written for the Steamship Mutual website, Faye Doherty (**faye.doherty@simsl.com**) reviews this decision in further detail: **www.steamshipmutual.com/ MarineTrader0513.htm**

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Introducing

# Mutual Service Korea

Judy Shin, Ellena Kim, Dewey Kim and Paul Lee

The Club has two correspondents in Korea – Mutual Service Korea Limited ('MSK") and Korea Universal Marine Ltd. Both work exclusively for the Club and are in effect the "eyes and ears" of the Club in Korea.

MSK were established in January 2012, with the management and staff coming from our former Korean correspondent, Mutual Marine Service Ltd. MSK have excellent knowledge of the Korean market and the individuals involved have had an important role in building the reputation for excellent service that has been the bedrock of the development of the Korean entry in the Club. Of course, in a correspondent role, MSK also assist all Members with vessels calling at Korean ports by providing advice on claims and general legal assistance.

**Dewey Kim, President:** After graduating as a Bachelor of Economics from Keimyung University, Dewey began his career as a claims handler with the Club's correspondent in 1997. He then became "Team Leader" of the P&I team and continued to work closely with the Club's claim and underwriting teams for a further twelve years (spending 3 weeks in the Club's London Office in September 2009) before setting up MSK.

**Judy Shin, General Manager:** Judy started her career with Dewey as our correspondent before joining a broker in January 2006. After obtaining experience as a broker Judy joined Dewey once again at the newly-established MSK in 2012. Judy graduated from Hongik University in February 1997, where she majored in History Education, and in 2008 was awarded the Certificate of YL-TESOL from Sookmyung Women's University. Judy is the team leader of MSK and is involved in claims handling and underwriting issues.

**Ellena Kim, Manager:** Ellena studied at the Korea Maritime University, graduating as a Bachelor of Law in 2006, and subsequently joining Dewey at MMS before moving to MSK in January 2012. Ellena assists the team with a broad range of P&I and FD&D matters.

**Paul Lee, Claims Assistant:** Paul is the team's newest member, having graduated from Dankook University in 2011, where he studied Multimedia Engineering and International Trade. Paul acts as a Claims Assistant for the team.

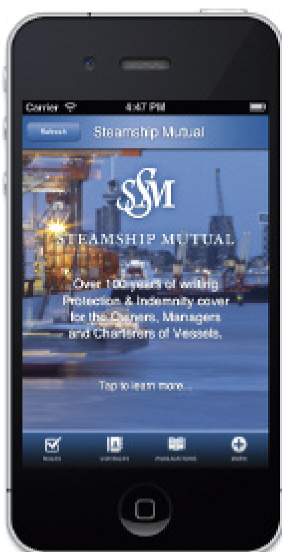
**BS Kim, Consultant:** BS has many years of experience in the Korean shipping market, including a lengthy service with Mutual Marine Services Ltd in the past. He is available to act as consultant from time to time.

Android Version

# Enhanced Mobile Apps

Android QR Code

iOS QR Code




In 2012 Steamship Mutual and The Ship Safety Trust launched a Mobile App for i-phone and i-pad which has proved very popular and enhanced the service the Club provides to its Members. An Android version of the App is scheduled for release to enable more of the Club's Members to enjoy the extra benefits of useful and up to date information on the move without the need to be on-line. The App is free and likely to be available in July. As well as providing details about the Club, the App gives access to:

- Contact details for Staff and Correspondents around the world
- Circulars
- Risk Alerts
- Club and Ship Safety Trust publications
- Information on UK, US and EU Sanctions
- Rules
- Charterer's Terms and recommended clauses
- Products such as its Super Yacht facility

Cooperation with The Ship Safety Trust to produce these Apps has again proved fruitful and reinforced the Club's commitment to service and loss prevention.

Further information is available on the Mobile Apps page of the Club website at: **www.steamshipmutual.com /mobile-apps-landing-page.htm**

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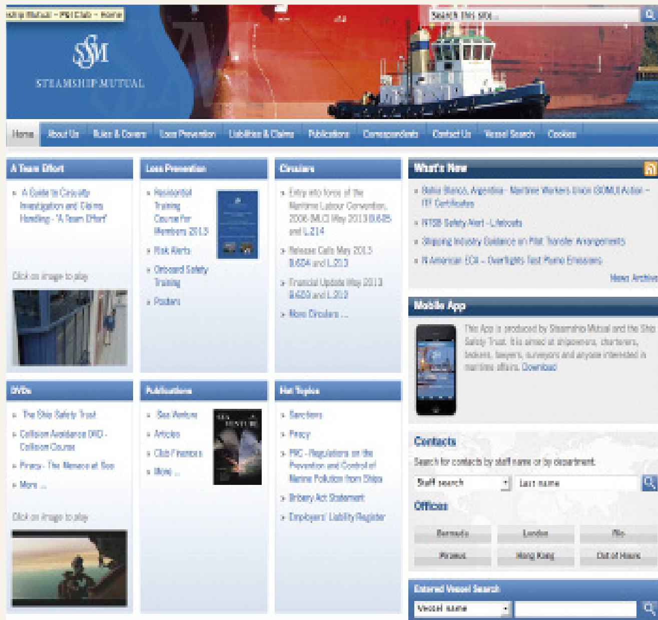
# New Steamship Mutual Website




The Steamship Mutual website (now at: **www.steamshipmutual.com**) has recently been re-launched following a full redesign. A key aim of the project was to improve accessibility of content. This has been achieved by:

- A clear, intuitive new site navigation.
- Redesigned landing pages which allow visitors to find easily what they are looking for (within 2 or 3 clicks).
- Improved functionality in the Contact Us area which allows searching for staff via office, department, surname or syndicate.
- Significant enhancements to the main site content search which now yields relevant results quickly in a layout similar to other, popular search tools.

Take a look at the refreshed site and kindly update any links on your own website to point to this new address: **www.steamshipmutual.com.**

# Agiasmos at Club's Piraeus Office

On the Greek spring morning of 4 February this year the Club's recently established Piraeus office received "The Lesser Blessing of Waters", otherwise referred to as Agiasmos. This process of sanctification is surprisingly popular among newly founded businesses and schools in Greece.

Effie Koureta Francis Vrettos

Though the origins of Agiasmos are said to be long lost, its purpose is generally accepted by the Greek Orthodox clergy to be the repelling of all evil and unwanted spirits, offering a new business a pure and healthy start. Indeed, it was with great relief that the senior management of the Club discovered the Piraeus office staff had all survived the ritual unscathed.

The photos from the event depict the Piraeus team, Francis Vrettos and Effie Koureta, receiving the blessing from Priest Markopoulos using his phosphorescent pink ceremonial bowl. Holy water, sanctified at the church of St. Nicholaos, was brought to the premises by Priest Markopoulos and was sprinkled on all mobile and immobile things at the office utilising a bundle of parsley.

With this blessed beginning, we wish the Piraeus office and team the best of luck for the years to come.

Priest Markopoulos

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