STEAMSHIP MUTUAL

newsletter

Sea Venture

issue 8

Contents

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

Introduction

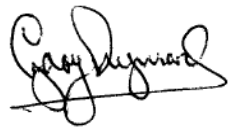
"An extremely good investment performance has ensured that the Club will make an operating profit for the year...."

The Club enjoyed a very satisfactory 2007 Renewal. In terms of tonnage over the year as a whole, an additional 3.76 million tons entered and 1.78 million tons left the Club (including 440,000 tons that was not offered renewal terms); a net increase of 1.98 million tons year on year. We were pleased to welcome seventeen new Members to the Club, who between them entered 2.91million tons, while twenty two Members increased the proportion of their fleets entered with the Club. The Board had set a general increase of 9%. In the event an increase of 8.6% (including change of terms) was achieved. Given the market environment the Managers believe that this is a very encouraging response from the membership as a whole.

After the Board announced the general increase some Members expressed surprise that it was at the higher end of the level of increases set by International Group Clubs. However, it was already clear that 2006-07 was a high claims year mainly in the excess US$ 1 million layer and more particularly for the claims in the International Group Pool. Although Steamship Mutual had one claim which is forecast to fall on the Pool, albeit not substantially, the claims brought by other clubs were such that 2006-07 was set to be a record breaking year. An extremely good investment performance has ensured that the Club will make an operating profit for the year notwithstanding these claims, which will result in a pure underwriting loss for the first time in four years. Nevertheless, it is important that the Club returns to a pure underwriting surplus as soon as possible, preferably in the current year. To that end the 9% general increase is a vital contributor to the Club's continuing strong financial position.

The Managers' responsibility, as always, is to ensure that new tonnage joining the Club pays a reasonable rate. It is not in the long term interests of any owner if the Club jeopardises its financial base by accepting entries at unrealistic rates - even if all Members naturally seek to achieve the lowest possible rates for their vessels. As the recent renewal has demonstrated, however, the Club's Members also recognise that premium levels should fairly reflect claims experience, keeping pace when claims rise. The Managers will endeavour to ensure that this policy is adhered to, throughout the year and at the next renewal.

Gary Rynsard



21st May 2007.

"Clash of the Titans" - House of Lords v European Court of Justice

The House of Lords decision in the *"Front Comor"* has failed to resolve the question of whether an anti-suit injunction should be granted in support of arbitration proceedings where the competing proceedings are within Europe. Whilst making their views very plain, the Lords have referred to the ECJ the following question:

"Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an Arbitration Agreement?"

In an article on the Steamship Mutual website:

www.simsl.com/ FrontComor0407.html

Sian Morris **(sian.morris@simsl.com)** reviews the law on anti-suit injunctions, the impact of EC Regulation 44/2001 as it currently stands and the implications of the referral to the European Court of Justice.

Steamship Mutual News

We are pleased to make the following announcements:

Mr Gary Field and Mr Rajeev Philip have both been appointed Directors of Steamship Insurance Management Services Limited.

Mike McAleer and Tim Lection have both been promoted to Syndicate Manager - Claims, respectively in the Americas and Eastern Syndicates.

Sarah Chase has been promoted to Syndicate Associate - Underwriting in the European Syndicate. This follows Sarah's dual achievements in being awarded the Insurance Institute of London's Lloyd's prize for Marine Insurance underwriting, as reported in Sea Venture issue 6, and her recent completion of the Advanced Diploma in Insurance, for which she was awarded the International Underwriting Association Marine prize.

With effect from 20th May, there will be a reorganisation of syndicate responsibilities with Stephen Martin becoming Head of Syndicate and Gary Field Head of Underwriting in the Americas Syndicate, and Colin Williams becoming Head of Syndicate and Jonathan Andrews Head of Underwriting in the Eastern Syndicate. The structure of the European Syndicate is unchanged.

Also with effect from 20th May, Mr Edward Lee has been appointed the Managing Director and Mr Rohan Bray has been appointed a Director of Steamship Mutual Management (Hong Kong) Limited.

Indian Law: Arrest for Security for Foreign Arbitration Award

The recent judgement of a three member Bench of the Bombay High Court in the case of *J.S. Ocean Liner LLC v m.v. "Golden Progress"* provides clear guidelines to those who wish to secure their claim in foreign arbitration proceedings by the arrest of a vessel in Indian Waters. The case concerned a claim by charterers in respect of alleged breach of the speed and consumption warranties in the charterparty. Charterers arrested the *"Golden Progress"* in India in order to obtain security for their claim. Owners sought an order for the parties to be directed to refer their disputes to arbitration in London, in accordance with the charterparty, and for the Indian proceedings to be unconditionally stayed. After consideration of the authorities and relevant domestic and international legal framework, it was held that the High Court could order the arrest of a vessel as security for a foreign arbitration award and that security would be dealt with in accordance with Article VII of the Arrest Convention 1999. This judgment is discussed in more detail in an article by Raman Walawalkar of Bhatt & Saldanha on the Steamship Mutual website:

www.simsl.com/GoldenProgress0407.html

Carrier Beware - Transfer of Risk Not Title

The High Court of Hong Kong recently decided a case where the defendant carrier was sued by an "FOB" seller of cargo for misdelivery as a consequence of delivering cargo to the buyer without production of the original bills of lading.

Three "To Order of Shipper" freight collect bills of lading were issued to the plaintiff seller but the buyer did not pay the purchase price.

The carrier sought to defend the claim arguing:

1. That because property in the goods passed to the buyer on shipment it followed that even without presentation of the bills of lading the carrier was bound to release the goods on demand, and
2. The claim was time barred on the basis of the nine month limitation period in the bill of lading.

The decision, and the arguments advanced by the carrier, are discussed in an article on the Steamship Mutual website:

www.simsl.com/StarLight0407.html

by Sam Tsui of Tsui & Co., Solicitors, Hong Kong.

Towage or Salvage?

Salvage, although often determined by the provisions of a contract, the Lloyds Open Form (LOF) being an example, is a right in law to receive remuneration in exchange for saving property at sea. In order to encourage salvage services, whether by professional salvors, or fellow seaman, or any party for that matter, the courts, or arbitrators in the case of the LOF, will look favourably on those providing salvage services when determining the value of an award, provided the award is proportionate to the value of the property saved.

For there to be a right of salvage four main prerequisites need to exist. First, it must be a marine adventure that is at risk, that is a ship, its apparel, cargo or freight. There must be danger which is real and not just a possibility, but that danger need not be imminent; a rudderless ship drifting in open sea is in danger to the extent that given time it will run aground on a coastline. The services provided are to be offered voluntarily and there must be a degree of success. This latter point is important as a principle of salvage. There must be some benefit to the owner of the salved property failing which there is no award, hence 'no cure - no pay'.

Applying these principles, the English Admiralty Court recently addressed the question of whether a service provided by a tug amounts to ordinary towage or salvage in circumstances where those services were rather modest in scope.

In the *"Tramp"* (2007) EWHC 31, the tug "Sea Tractor" responded to a call for assistance to a small coaster, the "Tramp", that was encountering difficulties manoeuvring. The "Tramp", in ballast, had departed its river berth with the intention of turning downstream to exit the port, the master having decided not to use a tug despite the pilot's recommendation to do so. A strong wind combined with tide and the ship's own light condition prevented the ship from completing its turn within the river, despite numerous attempts to do so. Eventually the assistance of a tug was called for and the local workboat/tug "Sea Tractor" (of modest power 340 hp) responded arriving 15 minutes later. A line was taken from the ship, its head quickly turned downstream, the tug released and the ship proceeded on its voyage.

The claimant tug owners brought a claim for salvage. The defendant ship owner disagreed contending this was nothing more than ordinary towage services to be recompensed at the tug owners' normal tariff rates.

In deciding the case the Court rejected the claimants' contention that the ship was already aground, or nearly aground. Equally the Court rejected the defendants' contention that had they so wished the ship could have chosen a number of options open to it, such as to return to its berth, anchor mid-stream, or simply continue to manoeuvre to maintain its station within the river waiting for slack water or a change in the wind.

The Court came to the conclusion that the ship was sufficiently impeded in its ability to manoeuvre that it was to all intents and purposes immobilised and this constituted sufficient danger to found a salvage claim. The act of calling the tug itself was evidence of the financial and physical risks faced by the ship.

The salvage service provided, although modest in scope, was quickly executed and successful in extracting the ship from a difficult predicament. The Court considered that the "Tramp" was unable to do so itself. Following the principle of encouraging mariners to provide salvage services the Court awarded claimants £12,500 against what otherwise would have been a tariff service of £625.

Article by Ian Freeman
(ian.freeman@simsl.com)

From Misdeclaration to Limitation - a Carrier's Problem

Cargo misdeclaration is a problem. It is a particularly acute problem for operators of container vessels. It impacts on freight revenue, it puts at risk personnel, container handling equipment and stowage integrity. At its most extreme, misdeclaration of dangerous cargo has been alleged to be the cause of the serious fires/explosions on the "Aconcagua", "CMA Djakarta", "Hanjin Pennsylvania" and "Hyundai Fortune", to name a few, each resulting in losses estimated at well over US$ 75 million.

Given the nature of containerisation and the ever increasing size of container vessels, container carriers are peculiarly exposed to the consequences of misdeclared dangerous cargo. In catastrophic fire/explosion incidents, carriers can often deploy the "fire defence" under Article IV, Rule 2(b) of the Hague/Hague-Visby Rules. However, carriers should be mindful of the developments in the United States and elsewhere in relation to container/cargo screening. The defeat in the United States Senate in March 2007 of an amendment to the Improving America's Security Act, which proposed that 100% of containers entering the United States be screened for weapons of mass destruction, is a warning shot to carriers that the political climate and level of "due diligence" that might be required of them under the Hague/Hague-Visby Rules might be advancing.

These issues, together with the limitation regimes available to carriers are discussed in an article on the Steamship Mutual website by Richard Neylon of Holman Fenwick & Willan Solicitors.

www.simsl.com/Misdeclaration 0407.html

Risks in Launching and Recovery of Lifeboats

"...many accidents occurred during routine drills and maintenance activities at the human/ mechanical interface."

Accidents involving the launching and recovery of lifeboats which result in loss of life and serious injury continue to occur, despite industry-wide efforts to address the problem.

Industry studies and accident investigations over the past decade recorded an unacceptably high number of accidents and identified common contributory factors. Ironically, there was a common consensus that many accidents occurred during routine drills and maintenance activities at the human/mechanical interface.

SOLAS chapter III and the International Life-Saving Appliance (LSA) Code provide the statutory requirements for lifeboats, as adopted by flag states. The IMO has progressively introduced a number of amendments to the regulations. On 1 July, 2006 the latest recommendatory guidelines approved by the IMO's Maritime Safety Committee (MSC) came into force, designed to assist in preventing accidents during drills and inspections. The IMO MSC Circular 1206 seeks to address many of the concerns as to how lifeboats should be maintained, operated and their crews trained. MSC Circular 1206 can be accessed via the Steamship Mutual website at:

www.simsl.com/Articles/Lifeboats0606.asp

It is anticipated that once fully adopted by flag states, the revised procedures will lead to an amelioration of the high number of lifeboat accidents. In the meantime, the industry is coming to terms with some of the issues raised following implementation, including infrastructure for lifeboat servicing, operational practicalities for test lowering and re-hoisting unmanned lifeboats and the scope for re-design of on-load release systems. These issues are discussed in more detail by Paul Amos **(paul.amos@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Lifeboats0407.asp

The Club has also produced a number of training DVDs on this topic as part of its loss prevention programme. Details of DVDs available can be found at:

www.simsl.com/dvds-videos-and-cds.html

Without Prejudice or Not? - Lia Oil S.A. v ERG Petroli S.P.A.

Can a re-sent without prejudice communication amount to an acknowledgement of indebtedness or legal liability for the purpose of s29(5) Limitation Act 1980, in order to re-start the time limit for a claim?

The sellers under a sale contract commenced arbitration in December 2005, despite the fact that discharge had been completed in June 1999, on the basis that the buyers had on their own calculations acknowledged as due part of the demurrage claimed in a message of May 2000. The buyers disagreed. Their laytime calculations were first produced at a without prejudice meeting and, they argued, the calculations retained this character when subsequently re-submitted in May 2000, despite the fact that there was no without prejudice heading.

The Court concluded that it would not always be the case that a document which is first produced on a without prejudice basis would retain this status when provided at a later date. However, in the circumstances of this case, neither the laytime calculation that had been produced at the without prejudice meeting, nor the re-submitted calculation, which had been sent without any accompanying statement that could amount to an acknowledgement, constituted an acknowledgement of the buyers' indebtedness or legal liability and therefore, the claim was time barred.

This case has important implications in the context of charterparty demurrage claims and the application of contractual or statutory time limits. A full discussion of this case by Laura Woodhead **(laura.woodhead@simsl.com)** can be found on the Steamship Mutual website at:

www.simsl.com/LiaOil0407.html

Clausing Bills of Lading by Incorporation of Survey Reports

An increasingly common practice in shipping is the endorsing of mate's receipts by attaching copies of a pre-loading survey or a summary of the findings of a pre-loading survey. This is particularly common in the carriage of steel cargoes, which have always presented problems of notation in respect of cargoes that are partly rusted.

However, if a mate's receipt merely refers to a pre-loading survey report, and a bill of lading is issued in strict conformity with that receipt will that be sufficient to protect the carrier against claims by the cargo receiver for pre-shipment damage that was recorded in the pre-load survey report? If not, will the carrier have the protection of the pre-load survey report only if it is attached to the bill of lading, or will it be necessary to clause the face of the bill of lading with the pre-load surveyor's observations? These issues, and best practice, are discussed in an article by Dominic McAleer of MFB solicitors on the Steamship Mutual website at:

www.simsl.com/PreLoad0407.html

Michigan - Ballast Water Control Permits

In July 2005 an article on the Steamship Mutual website alerted Members to new state legislation introduced in Michigan to address Ballast Water Management issues:

www.simsl.com/Articles/Michigan_Ballast0705.asp

The permit system implemented by the legislation came into force on 1 January 2007. All oceangoing vessels must apply for a permit from the Michigan Department of Environmental Quality before being allowed to use Michigan ports. To qualify for a permit vessels must prove either that they will not discharge ballast water or that they are equipped to prevent discharge of aquatic nuisance species.

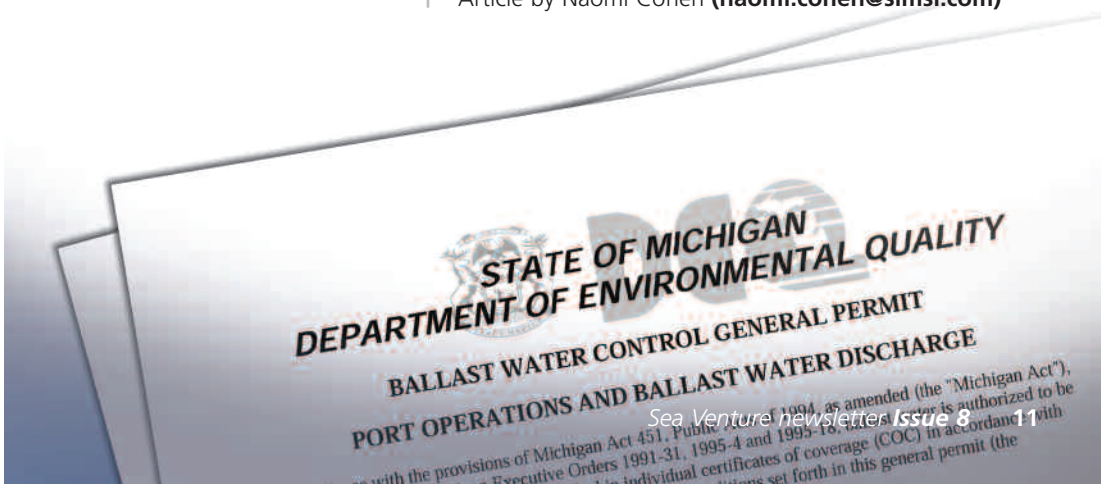
Ballast water exchange is not considered to be an effective treatment method for the purposes of the Michigan legislation. The following methods are considered to be "environmentally sound and effective" in the treatment of ballast water and comply with the legislation:

- Hypochlorite treatment
- Chlorine Dioxide treatment
- Ultra Violet radiation treatment proceeded by suspended solids removal
- Deoxygenation treatment

Further information about the ballast water control permit system can be found on the Michigan Department of Environmental Quality website at:

http:www.michigan.gov/deq/o,1607,7-135-3313_3682-153446--,00.html

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



A Blow for Certainty in Commercial Affairs?

Golden Strait Corporation v Nippon Yusen Kubishiki Kaisha [2007] UKHL 12

The Court of Appeal decision in this case was discussed in Sea Venture issue 4 and on the Steamship Mutual website:

www.simsl.com/Golden Strait0507.html

The matter was referred to the House of Lords and the decision handed down on the 28th March 2007.

The issue between the parties - at what date the quantification of damages is to be made - has divided practitioners and scholars alike. Most recently Professor Sir Guenter Treitel QC in his article "Assessment of Damages For Wrongful Repudiation" (2007) 123 LQR, commented on the Court of Appeal judgment. Amongst other observations he considered the issue of certainty in commercial affairs - best elaborated on by Robert Goff LJ (as he then was) in *"The Scaptrade"* [1983] QB 529:

"the English Courts have time and again asserted the need for certainty in commercial transactions - for the simple reason that the parties to such transactions are entitled to know where they stand and to act accordingly."

In his article, Treitel, reflecting on the Court of Appeal judgment makes the following observation:

"The Golden Victory" seems to impair such certainty..: the shipowners, as it turned out, could not "know where they [stood]" when their right to damages accrued; the value of that right fluctuated in the light of later events for which they were not responsible and which when the right accrued, were "merely a possibility" and not "inevitable or probable". In this respect certainty was subordinated to the greater importance of the compensatory principle…"

In their judgment of 28th March the House of Lords upheld the decision of the Court of Appeal by a majority of 3:2. Interestingly the two dissenting judgments came from Lords Bingham and Walker - the only members of the Appellate Committee with "commercial" backgrounds.

The Lords all began from the same starting point; (i) repudiation by one party to a contract, if accepted by the other, brings a contract to an end, (ii) that the innocent party is thereafter entitled to damages to compensate him for that loss and he is to be placed by those damages in the position he would have been had the contract been performed - the compensatory principle, (iii) as a general, although not invariable, rule damages are to be assessed at the date of breach and (iv) so far as repudiation of a charterparty is concerned, where there is an available market, the basic rule is that loss is to be measured at the date of acceptance of the repudiation.

Ultimately the majority preferred the general compensatory principle primarily justified by reference to *Bwllfa and Merthyr Dare Steam Collieries (1891) Limited v Pontypridd Waterworks Company* [1093] AC 426; where a Court is assessing damages and has knowledge of what actually happened, it need not speculate but rather base itself on known facts. In the words of Lord Brown, *"But not history; the Court need not shut its mind to that."*

The majority declined to accept that the finding of Megaw LJ in *"The Mihalis Angelos"* [1971] 1 QB 164, that reliance could only be placed on subsequent events when it could be shown such events were certain to occur at the time of the repudiation, was meant to operate as a general rule limiting consideration of subsequent events to only those predestined at the date of repudiation.

And as for certainty, Lord Scott said *"there is, in my opinion, no such principle. Certainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle."*

He took the view that certainty in commercial contracts is best achieved by settled principles of contract law and not by framing principles that can be employed by litigants as delaying tactics. In supporting this approach Lord Carswell took the view that Courts and Arbitrators are able to prevent such abuse if asked to proceed with dispatch.

The majority view is concisely summed up by Lord Brown in his assertion that the owners' case, that they were entitled to damages assessed on the full term of the charterparty, sought to extend the available market rule at the expense of the fundamental principle that the purpose of damages is to restore the innocent party to the same position he would have been but for the breach, not to improve upon that position by asking the Court to ignore subsequent events.

In stark contrast to the majority view Lord Bingham comments at the outset: *"A majority of my noble and learned friends also agree with that [Court of Appeal] decision. I have the misfortune to differ. I give my reasons for doing so, unauthoritative though they must be, since in my respectful opinion the existing decision undermines the quality of certainty which is a traditional strength and major selling point of English commercial law, and involves an unfortunate departure from principle."*

Whilst accepting the "Bwllfa principle" Lord Bingham distinguishes this on the basis that none of the cases in which this principle - that when assessing damages, if a Court has knowledge of what actually happened it need not speculate and may base it's decision on known facts - concerned the accepted repudiation of a commercial contract where there is an available market. He also distinguished those cases where the compensatory principle gives way to the date of breach principle, such as personal injury claims, or those cases where it was reasonable for a party to defer steps to mitigate loss and so reasonable to defer assessment of damages.

Further, and in considering those cases involving repudiation of commercial contracts, Lord Bingham clearly finds that the date of breach rule has been upheld in each of those decisions, notwithstanding any appearance to the contrary at first blush.

So far as *"The Mihalis Angelos"* is concerned, the Court of Appeal may seem to have looked to a subsequent event but in Lord Bingham's reading have viewed the case from the date of breach rule and, in fact, did not take account of later events but rather recognised that the value of what owners had lost was nil. The charter was bound to be cancelled lawfully only some three days after repudiation. As Megaw LJ put it:

"…and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events."

This decision was followed by *"The Wave"* [1981] 1 Ll. R 521 in which Mustill J declined to look to whether charter rates at a later date than repudiation would have had any bearing on the exercise of a *"three months more or less option"* as to the period of the charter. And by *"The Noel Bay"* [1989] 1 Ll. LR 361 when the Court of Appeal expressly approved Megaw LJ, as quoted above.

As for *"The Seaflower"*, which Mr Gaisford felt constrained him to find in charterers' favour, Lord Bingham felt (i) early termination was *"clearly predictable on the date when the repudiation was accepted"*, (ii) that Walker J had only relied on later events to fortify his conclusion, and (iii) a different decision would not have been reached had evidence of those later events not been before Walker J.

In concluding, Lord Bingham has scant regard for charterers' contention that owners would have been over-compensated if damages had been awarded for the remaining four years of the charter. Contracts are made to be performed not broken, he opines, and had charterers promptly honoured their obligations to pay damages an assessment would have been disposed of long before the second Gulf War took place.

Ultimately, Lord Bingham has real concern about the effect this judgment will have on the issue of certainty in commercial contracts.

A Blow for Certainty in Commercial Affairs? *- continued*

In the Court of Appeal decision in this matter, Lord Mance, as he now is, held

"Certainty, finality and ease of settlement are all of course important general considerations. But the element of uncertainty, resulting from the war clause, meant that the owners were never entitled to absolute confidence that the charter would run for its full seven-year period…There is no reason why the transmutation of their claims to performance of the charter into claims for damages for non-performance of the charter should improve their position in this respect."

And to that Lord Bingham responds

"I cannot, with respect, accept this reasoning. The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law….Professor Sir Guenter Treitel QC read the Court of Appeal's judgment as appearing to impair this quality of certainty…and I respectfully share his concern."

Article by Sian Morris
(sian.morris@simsl.com)

Seafarers - Changes to the Race Relations Act

In an article written for the Steamship Mutual website Laurence Rees and Michael Smith of Reed Smith Richards Butler LLP examine the UK Government's proposals to change the law which currently permits shipowners to discriminate against foreign nationals who apply for or are engaged to work outside Great Britain on British registered ships. Such discrimination is only permissible on the grounds of nationality and then only in relation to pay.

The Department for Transport has begun a public consultation on the proposed changes to the law following a complaint made to the European Commission that in this respect the UK legislation infringes EU law. The options considered in the consultation paper are: (1) to maintain the current position (thus exposing the UK to heavy fines for infringing EU law); (2) amending the law so that discrimination would be permitted only against seafarers not from the EEA and other designated countries; or (3) repeal the law so that no discrimination at all would be permitted.

The article, which examines these options for reform and considers the impact those various options are likely to have on ship owners of British registered ships, can be found at:

www.simsl.com/Seafarer Discrimination0407.html

Performance Warranties - the Whole Picture!

London Arbitration 1/07 (2007) 710 LMLN 4

An interesting decision from the LMAA on the subject of performance claims and under-consumed bunkers and something for charterers to bear in mind.

The charter performance warranty read as follows:

"In good weather and smooth sea,… about 14.0 knots (ballast) 13.5 knots (laden) on about 32.5mt IFO at sea…"

The charterers sought damages for breach of the speed warranty but accepted that owners must conversely be credited for bunkers under-consumed due to the slow steaming. Both parties worked on the assumption that a margin of 5% had to be applied to the warranted bunker consumption as a result of its qualification by the word "about". The question was how to calculate that credit. The charterers contending for 32.5 mts less 5% and the owners arguing for 32.5 mts plus 5%.

The Tribunal held that whilst performance warranties usually involve a charterer complaining about under-performance in terms of speed and over-consumption in terms of bunkers, the only way in which to give proper effect to a performance warranty and "about" was to apply it in both directions, in other words as plus/minus.

As the claim by charterers was one for damages, they were only entitled to be put in the same position as if owners had performed their minimum obligations. The vessel had consumed 629.6 mts. If one applied a consumption of 32.5 mts plus 5% over the entire voyage of 519.7 hours, the vessel could have consumed 738.95 mts and still been within warranty. The vessel only consumed 629.6 mts and so owners were entitled to a credit in respect of 109.35 mts.

Article by Sian Morris **(sian.morris@simsl.com).**

Philippine Law - Permanent Disability Rule Part-Clarified

The Philippine Supreme Court has recently clarified it's controversial ruling on the "120 days issue".

The Supreme Court had held in *Crystal Shipping* that on Philippine Labour law principles a seafarer unable to perform customary work for more than 120 days is permanently disabled. The Court had declined to consider the POEA standard employment contract. As a consequence a seafarer unable to work for 120 days was entitled to a contractual disability payment of US$60,000. (This decision was reported in Sea Venture issue 6. See Steamship Mutual website at:

www.simsl.com/Articles /Filipino0906.asp

The decision had caused considerable concern, not least because of the consequent costs of employing crew from the Philippines. Various manning organisations intervened in the subsequent *Remigio* case to stress the importance of the issue to the industry.

In it's recent resolution on a Motion for Clarification in *Crystal Shipping* the Court has now stated "*admittedly POEA Memorandum Circular No. 55, series of 1996 does not measure disability in terms of number of days but by gradings only*".

Therefore, the latest ruling in Crystal Shipping provides room to argue that disability cannot be measured in terms of the number of days during which the seafarer is ill or injured or is unable to work but should be assessed dependent on the views of a doctor and based on the POEA Schedule of Disability.

At present the *Remigio* case is still pending resolution. However, taking a cue from the new resolution in *Crystal Shipping,* it is to be hoped that the Court will take the opportunity of the *Remigio* case to address fully the "120 days issue" and to apply the grading approach to the assessment of claims for disability.

We are grateful to Ruben Del Rosario of Del Rosario and Del Rosario for this article.

Can Delay Make a Port Unsafe?

The law on unsafe port claims is relatively settled. However, a recent appeal from an arbitration award to the High Court raised an interesting issue when the owners of the vessel claimed damages for breach of the charterers' safe port warranty, not as a consequence of any physical damage to their vessel but for a delay of about four days caused when two other vessels grounded at the port of Beira blocking the channel to the port. Charterers sought to rely on the Court of Appeal decision in the *"Hermine"* that any delay caused by a temporary obstacle must be unreasonable and sufficient to frustrate the charter as a whole in order to render a port unsafe.

The High Court upheld the decision of the Tribunal that the port was unsafe. The reasons for the decision in the *"Count"* are discussed in more detail by Sue Watkins **(sue.watkins@simsl.com)**

in an article on the Steamship Mutual website:

www.simsl.com/Count0407.html

Shipyard's Delivery Option

In *Ravennavi Spa v New Century Shipbuilding Company Limited [2007] EWCA Civ 58* the Court of Appeal upheld a decision in 2006 from Gloster J in the English Commercial Court (2006 EWHC 733) to the effect that a shipyard's obligation under an option agreement to make available an earlier delivery date for a vessel should one become available was not intended to be a continuing obligation; the shipyard was only obliged to offer the purchaser an earlier delivery date if one became available prior to the exercise of the option.

The purchaser, an Italian shipowner, had ordered 8 product tankers from a Chinese yard, with an option to purchase the last 2 vessels for delivery by particular dates. The purchaser exercised the option and separate shipbuilding contracts automatically came into effect with particular delivery dates. Having exercised the option the purchaser subsequently discovered that the yard was offering earlier delivery dates to other shipowners. The Judge's decision was based on a clause in the shipbuilding contract which extinguished all the parties' obligations under the option agreement when the shipbuilding contract came into force. This is an important decision given the high level of current activity in the new building market, particularly in the Far East.

Article by Duncan Howard **(duncan.howard@simsl.com).**

Market Volatility - Importance of Contractual Certainty

Recent volatility in the freight markets, and in particular the Bulker market, has resulted in dramatic shifts in the stances taken by parties to charter negotiations. In the event of a sharp turn in the market, where one party stands to suffer substantial losses they would naturally seek to withdraw from negotiations. Sometimes, however, it is too late to do so as a binding agreement has already been reached. At that point, alternative approaches have to be considered and in recent months the Club's Defence adjusters have had to advise Members on how to deal with a variety of arguments used by counterparties looking to get out of (or bind) agreements. These arguments range from the highly technical to the more "imaginative" and speculative.

An example of the tactics parties may deploy to extricate themselves from a bad bargain can be found in a very recent English High Court judgment. In *Front Carriers Ltd. v Atlantic & Orient (the "Double Happiness")* the vessel, which was due to be delivered in September 2005, was fixed by charterers for two years. The fixture was made on 7 March 2005 with a US$ 31,500 daily rate of hire. By the end of March the market had gone up to US$ 39,000 a day. In early April, the market began to fall, and by August, the market had fallen to US$ 10,000 per day - a potential US$ 15m loss for the charterers.

In mid-July the charterers sought to argue that no valid contract had been agreed on the basis that the individual negotiating on their behalf did not have authority to do so and then, subsequently, that there was no binding agreement because the party named in the recap as owners did not exist (the recap referred to Front Carriers Inc. rather than Front Carriers Ltd.).

At the hearing in the High Court the authority point was not pursued and the Court, in dismissing the argument regarding the identity of the owners, concluded that there was a binding agreement.

A detailed discussion of this case and its implications can be found on the Steamship Mutual website at:

www.simsl.com/Double Happiness0407.html

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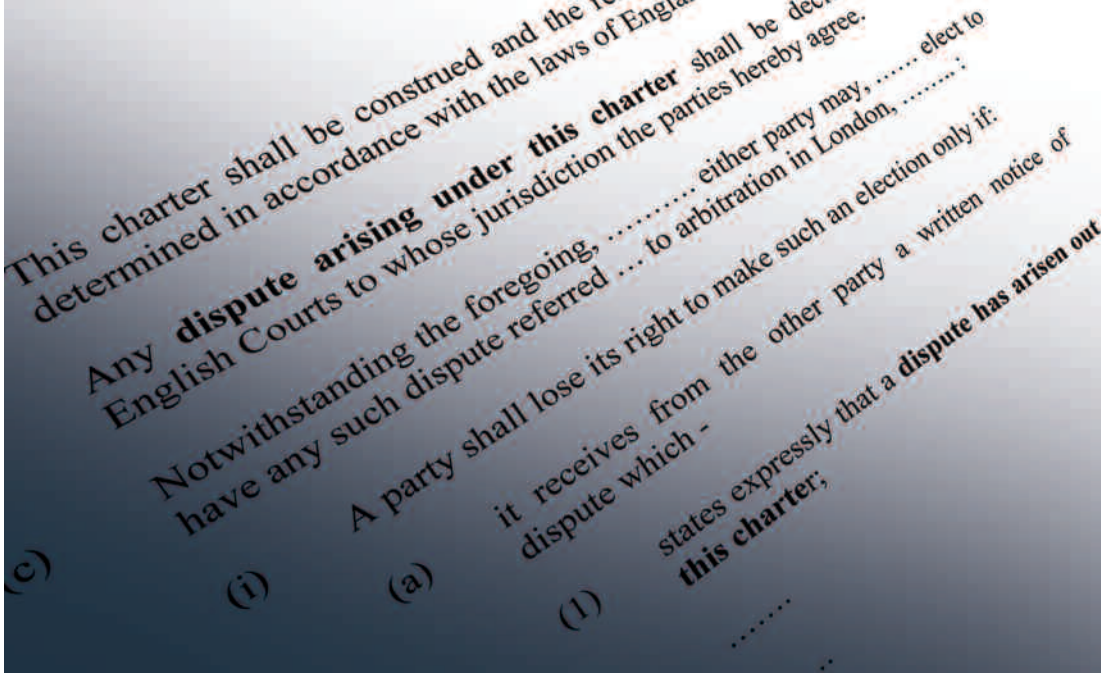

Disputes Arising "Under" or "Out of" a Charter

If a party rescinds a contract that they claim they were induced to enter by bribery, and that contract provides for disputes (i) "arising under this charter" to be decided by the English Courts, and (ii) gives either party the right to elect to arbitrate disputes that "have arisen out of this charter", should a dispute as to right to rescind in these circumstances be referred to the Court or Arbitrated?

Fiona Trust & Holdings Corp. v Yuri Privalov involved intricate and complex litigation pursued by a number of claimants seeking damages for the tort of deceit as well restitution as a result of the payment of bribes, compensation for breach of fiduciary duty and claims that eight charterparties had been validly rescinded.

The charters sought to enforce their rights by way of arbitration but owners applied to restrain the arbitration because they had rescinded the charters and that, in any event, the arbitration clause did not apply to a dispute about rescission.

In the High Court owners succeeded but the Court of Appeal agreed with charterers. The issue will now be heard by the House of Lords when a final view should be handed down. The questions whether rescission meant the agreement to arbitrate had fallen away so that arbitration was not contractually possible, or if not whether the words "arisen out of" were sufficiently wide in scope to cover disputes as to rescission for fraud or bribery are discussed in an article by Malcolm Shelmerdine **(malcolm.shelmerdine@simsl.com)** on the Steamship Mutual website at:

www.simsl.com/Fiona0407.html

The Pitfalls of the Carriage of Coal

The inherent dangers in shipping coal are well documented and should be known to ship owners engaged in the carriage of this type of cargo. The main dangers to which owners should be alert are the emission of methane and self-heating. Coal carried in bulk can emit methane, which is a flammable gas when mixed with air. Self-heating of coal cargoes may lead to spontaneous combustion. It is important that owners are aware of the main characteristics of a particular type of coal and its propensity to emit methane or self-heat in advance of loading. In an article produced for the Steamship Mutual website Richard Sheridan **(Richard.sheridan@simsl.com)** and Rohan Bray **(rohan.bray@simsl.com)** discuss some of the important steps which ought to be taken by owners during loading and throughout the voyage to monitor and protect coal cargoes (and the vessel) against the consequences of methane emission and self-heating.

The article also discusses some of the legal issues which may arise following incidents involving this type of cargo. Charterparty provisions governing loading operations, dangerous cargoes and the implied indemnity given by a time charterer will often operate to render charterers liable for the consequences of damage caused by coal cargoes. However, owners should remain cautious that if the necessary precautions pertaining to the carriage of coal, including those detailed in this article, are not observed they may find themselves exposed to claims that the vessel was not cargoworthy (and by extension not seaworthy) or that they failed to properly care for the cargo in accordance with the Hague/Hague-Visby Rules. Such arguments may also be raised in defence of owners' claims for vessel damage:

www.simsl.com/Coal0407.html

Customs Fines in Belgium for Undeclared Cargo in FCL/FCL Containers

The Club was recently involved in a case where a shipowner carried a 20' container "said to contain" 433 bags of rice from the Persian Gulf to Antwerp. It was later found that, in fact, the container only contained 286 bags of rice and behind these bags were a total of 1,800,000 cigarettes.

The Antwerp Customs Authority commenced criminal proceedings against, *inter alia,* the vessel's agents, the shippers and the consignees for importing a container of cigarettes contrary to Article 202 of the European Community Customs Code.

It was the owner's position that their agent, acting on the owner's behalf, had no reasonable means of checking the contents of the container either prior to or following loading and that they should not be held liable.

Although the Court of first instance agreed with the owner's position, the Antwerp Criminal Appeal Court has overturned this judgment. The Court stated that the carriers had not exercised due diligence in verifying the contents of each and every container carried on board which, in their opinion, would be expected of a prudent agent.

It must be noted that this decision is only relevant to smuggling cases and should not have any bearing on carrier's liability for other claims made under the bills of lading.

This case is discussed in further detail in an article by Neil Watson **(neil.watson@simsl.com)** which appears on the Steamship Mutual website at:

www.simsl.com/BelgiumCustoms0407.html

The Big One - an Overview

Modern day container casualties give rise to large claims and complex disputes. The issues often include most of the legal disputes that arise in the ordinary course of commerce. Thus owners will find themselves having to pay salvage, deal with off-hire periods, defend claims from bill of lading holders, consider indemnity claims against them and those that they can make, all at the same time as managing the casualty and dealing with local and statutory enquiries and personnel issues, whilst not losing sight of the end game. An overview is important because a wrong step can lead to consequences, often in unlikely places.

In an article written for the Steamship Mutual website Richard Gunn of Reed Smith Richards Butler examines the main claims and the usual areas of dispute.

Theses include the steps to take to ensure that owners (and others) are suitably protected and the issue of security and counter-security so that pro-active and early consideration can be given to ways forward, thereby preventing delay and retaining the commercial relationship between shipowner, time charterer, slot charterer and cargo interests.

www.simsl.com/CasualtyOverview0407.html

When Off-Hire is not Off-Hire?

In an interesting appeal to the Commercial Court Morison J. was asked by the time charterers of a vessel to decide if they had been entitled to cancel the charterparty because the vessel had been off-hire for more than 30 days. They had agreed to give the vessel back to the head owners for a period of 15 days that immediately preceded the vessels dry docking with the consequence that the vessel was not available to the charterers for a period in excess of 30 days. The charterparty gave the charterers liberty to cancel if the vessel was off-hire for more than 30 days.

This decision is discussed in a Steamship Mutual website article:

www.simsl.com/HamburgBulk0407.html

by Sian Morris **(sian.morris@simsl.com)**.

Ship Management and SHIPMAN 98

In *PICC Shanghai Branch v Grand Fleet Navigation Ltd. And Others* reported in Sea Venture issue 6 and on the Steamship Mutual website at:

www.simsl.com/Articles/GrandFleet0906.asp

the issue of whether a ship manager could be held liable as "carrier" for cargo damage was considered.

The contractual relationship between owners and managers and apportionment of liabilities is considered in an article written for the Steamship Mutual website by Ana Pestana of BIMCO. The article focuses on the BIMCO SHIPMAN contract and explains its origins, scope and features:

www.simsl.com/Shipman98.html

Recent Publications

Circulars

- Blue Card - Gas Carriers

  Circular B.454 of February 2007 reported on a growing trend of Blue Cards being requested for gas carriers and the practice of some International Group clubs to provide these. For the purposes of CLC 92 gas carriers are not "ships" and Blue Cards should not be issued for them.

  www.simsl.com/Circulars-Bermuda/B454.pdf

Website Articles

- Port of Colombo - Restricted Zones

  www.simsl.com/colombo-restricted-zones.html

- Turkey - New Regulation Relating to Environmental Offences and Fines

  www.simsl.com/TurkeyPollutionNewReg0407.html

STEAMSHIP MUTUAL

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