

SEA VENTURE



Oasis of the Sea – Largest Cruise Ship in the World
Deck Cargo – Exception and Limitation of Liability
Hong Kong – Delivery under Straight Bills of Lading
Loss Prevention Initiatives
Liquidated Damages – Penal or Compensatory
When is a Delivery Notice Binding
Implied Terms in Sale of Goods Contracts
James Stockdale Retires

1909 – 2009
SM

STEAMSHIP MUTUAL

100
A century of service to shipping



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Sea Venture is available in electronic format. If you would like to receive additional copies of this issue or future issues in electronic format only please send your name and email address to seaventure@simsl.com. Feedback and suggestions for future topics should also be sent to this address.

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INTRODUCTION



Gary Rynsard

This edition of Sea Venture includes an interview with James Stockdale who retired as CEO on 20 August. James' retirement after over 30 years service highlights the fact that many of Steamship Mutual's staff stay with the Club for much of their professional careers. Indeed, Simon Boyd, Rosemary Fowler, Mark Dawson and Mark Underhill have all recently completed 20 years with Steamship (see page 19). Continuity and experience are essential elements in the provision of quality service to the Membership. A key challenge for the Club will be to continue to attract and retain

talented and committed individuals in the face of the increased mobility in recent years of the world's labour market. The Club is fortunate to have attracted such employees from many different countries speaking most of the world's languages, including the European languages, Arabic, Senegalese, Urdu, Mandarin, Korean and more. In an international business with the emphasis on service that must be a good thing. The development of the Club in this way is illustrated in an article on page 11 by Dr Helen Doe of the University of Exeter.

Shipping and the provision of services to shipping, including P&I insurance, offer the possibility of fascinating careers partly because they exist within a challenging business environment that is constantly changing – never perhaps more so than today. Following the crisis in the financial world the real economy is suffering a downturn. This comes at a time when ships are being delivered from yards in record numbers. When shipowners face difficult times there is an added responsibility on the Club to ensure that its services in all areas including claims handling, the speedy provision of guarantees, and assistance on loss prevention, is as good as it can be. The Club must also ensure that it is sensitive in its handling of premium calculations. Part of this will be to ensure that the Rules governing laid-up returns are appropriate for current circumstances.

Recessions in the past have often been accompanied by a reduction in claims levels. The early indications for the current policy year are that this may well be happening during the current recession. Caution is always necessary since pressure on budgets and falls in markets for goods can sometimes give rise to claims. However, it is possible that the spotlight will move from claims levels to investment returns and premium issues over the next year or two. Be that as it may, the focus as ever will be on trying to understand the risk inherent in the business. Perhaps if there is a lesson to be learnt from the events of the past it is that every business faces more risk than it realises and it is unsafe ever to believe that risk is fully understood.

As ever the editorial team of Sea Venture are grateful to those that have contributed to this issue of Sea Venture, and in the centenary year of the Club it is the staff of Steamship Mutual to whom my appreciation is directed.

Gary Rynsard

6 October 2009



James Sto



As James Stockdale steps down as CEO he looks back over the years he has spent working for the Club.

Steamship Biography

James joined the Club as a senior FD&D adjuster on 1 April 1978. His previous career was as a barrister with a practice in common law. Despite a lack of previous experience in P&I, shipping or insurance he made good progress: the year after joining James was appointed Head of Far East Claims and in 1981 he became a salaried partner in Alfred Stocken. At that stage he became responsible for investments, US claims, and personal injury claims worldwide. Full partnership followed in 1983. From 1991 onwards James had the role of Chief Financial Officer with responsibilities for investment, finance and accounts. He also dealt with corporate regulation and IT matters. James became Chief Executive Officer of SIMSL in 2003, a role he retained until last month. He was succeeded by Gary Rynsard on 20 August 2009 but remains as a consultant, until the end of this year, to ensure a smooth handover.

How things have changed

Staff: In 1978 there were around 90 staff compared with a peak of over 200 in recent years.

Premium and Tonnage: US\$32m and 21m GT in 1978 compared with US\$290m and 75m GT in 2009.

Offices: 1978: 201/211 Bishopsgate. The building was on the edge of an embankment above Liverpool Street station and considered to be on the fringe of the City. Spitalfields market was then a produce market: flowers, vegetables and poultry

2009: The advent of the Broadgate development in 1987 led to the move to Bell Lane, just outside the City limits. The

surrounding area is now very different with many purpose-built high-rise office blocks housing well-known companies, designer shops and restaurants.

Technology: In 1978 communication was by letter and telephone. Telex was only really used for short or urgent messages. An exchange of correspondence, with the Far East for instance, could take 2-3 weeks.

Letters were still dictated and typed by a bevy of typists. The first fax machines arrived in the FD&D department in the early eighties. Email came with the first PCs around 1995 but even then faxes predominated until the early part of this century. With each innovation came an expectation of ever faster response with email ushering in the era of instant communication.

Throughout his 31 years with the Club there has always been the possibility of out of hours contact but now there is an expectation of 24/7 contact. It is the current culture. The advent of mobile telephones and PDAs means the user is always contactable wherever they go. It is a much more pressurised environment. Working life in 1978 was slower, less rushed – a much more leisurely pace.

Travel: In the early years visiting Members meant travelling 4 times a year for up to 3 or 4 weeks at a stretch and seeing all Members in an area. Now travel is faster and generally cheaper, trips are more frequent but for shorter periods.

Important Innovations

- The introduction of no fault compensation for longshoremen in 1972 under the U.S. Longshore and Harbor Workers' Compensation Act greatly reduced what had previously been a major claims exposure. The Act resulted in a substantial reduction in the volume of US personal injury claims
- The entry into force of the Hague-Visby Rules in 1977
- The International Group Agreement in 1985
- The US Oil Pollution Act in 1990
- The introduction of the ISM Code from 1998
- IBNR: the calls crisis in the late 1980s which was caused by an unexpected and rapid escalation in claims, resulted in the

ckdale Retires



James receiving presentation from Club Chairman, Otto Fritzner, at Hamburg Board meeting in July

eventual introduction of IBNR (Incurred But Not Reported) claims projections into the calculation of liabilities and statistical claims forecasting leading to a much sounder basis for underwriting. That could be viewed as when P&I clubs changed from being slightly amateurish quasi-captives for the shipping industry to highly skilled professional insurers in their own right.

- FSA regulation: Until 2001 P&I Clubs had been regulated by the Department of Trade and Industry. FSA regulation and corporate governance requirements were definitely a wake-up call to the P&I industry and ushered in the movement from a records-based to a risk-based approach to underwriting, which became fully mature with the advent of Solvency II.

Memorable People

More than almost any other industry, shipping is full of charismatic individualists. But after all these years what James finds most memorable is charm and individual kindness. In particular, he remembers: Christian F. Ahrenkiel, who was chairman of the finance committee when James first became responsible for investments. A very senior and influential figure in the shipping world, he was extremely kind and supportive to a young lawyer trying to find his way in a field in which he was relatively inexperienced. David Claribut: "the quintessential city gentleman", Sandie Struthers: "very charming with a wonderful sense of humour" and C Y Tung: "a great Chinese entrepreneur, very impressive but also very approachable".

Memorable Places

Prior to joining the Club James had never been to the Far East. He saw, for the first time,

the great cities of Hong Kong, Beijing and Shanghai. One of the things that has made the greatest impression on James is the way that China has changed over last 20 years. For instance, he has been to Shanghai roughly every five years since 1990: In 1990 Shanghai was a city of bicycles, very few cars and the city centre buildings were a mix of turn of the century western style and Communist era concrete slabs with very few high rise blocks. Each subsequent visit has brought amazing change. He observed that there are now probably more high-rise buildings there than in New York, multi-lane highways and state of the art public transport. The pace of change seems to get ever faster.

Memorable Cases

"Frotaleste": A US\$34m claim for punitive damages involving a Brazilian seaman who lost a leg. The claim started in 1975 and is still running. It is the Club's oldest open Pool claim.

Any advice for his successor, Gary Rynsard?

"Keep a sense of humour and perspective, and don't forget to relax and de-stress when you can."

Last word

James explained that his joining Steamship was "serendipitous"; the position was available at a time when he needed a more regular salary than a barrister's erratic fees afforded; he was then married and his first child was on the way. Even so, and with the benefit of hindsight, he would definitely do it again:

"Insurance is often perceived as a boring industry but once you add in the shipping dimension, one of the last bastions for the individualist, P&I becomes very absorbing. It has undoubtedly been the people who have made the job as enjoyable and fulfilling as it has been."



Naomi Cohen

- Interview by Naomi Cohen (naomi.cohen@simsl.com)



U.S. – Punitive Damages in Maintenance and Cure Cases



Richard Allen

The U.S. Supreme Court issued an important decision on 25 June 2009 regarding

the availability of punitive damages in maintenance and cure claims.

The court considered a scenario in which an injured seaman's employer wilfully and capriciously disregards an obligation to pay benefits to a crewmember who has sustained injury or become ill while in the service of a vessel. In a 5-4 split, the Court ruled in *Atlantic Sounding v Townsend* that punitive damages are available in such a circumstance.

The ruling is hugely significant. The receipt of financial support for the payment of reasonable medical bills and living expenses while incapacitated is the basic remedy available to a Jones Act seaman. In ruling, the Supreme Court has sent out a clear message that an unsubstantiated and deliberate failure by a vessel owner to protect its employee will be punished.

Any decision as to the refusal or termination of maintenance and cure benefits must be given careful and intelligent consideration. A failure to pay benefits which is not supported by a sound and recognised argument may result in significant expense to a ship owner by way of the application of punitive damages.

- Richard Allen (richard.allen@simsl.com) considers this decision in greater detail in an article written for the Steamship Mutual website at:

www.simsl.com/Townsend0909.html

Corporate Manslaughter Legislation – Publicity Orders



Paul Brewer

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force in April 2008.

The Act introduces the offence of corporate manslaughter in England, Wales and Northern Ireland and corporate homicide in Scotland where there has been a gross failing throughout an organisation in the management of health and safety resulting in death.

The provisions of the Act were summarised in Sea Venture issue 11 and can be found in further detail at: www.simsl.com/CorpManslaughter0508.html

Under this legislation deaths on UK registered ships and on all ships in UK territorial waters will come under scrutiny. This new law applies to all companies operating in, or in connection with the shipping, shipbuilding, energy and offshore industries.

An unexpected and ground breaking aspect of the Act further highlights the need for

those involved in maritime trade to ensure that their safety procedures are beyond reproach. In addition to the financial penalties which can be imposed, in the event of a conviction judges will soon be given the power to inflict deliberate “reputational damages”; the court can order that the offending organisation makes public the details of the offence together with details of the conviction and any remedial action which has been ordered.

These publicity provisions are expected to enter into force in the near future following the issue of sentencing guidelines. During the consultation process it was proposed that a publicity order should be imposed on every organisation convicted of corporate manslaughter.

The court will decide how the publicity is to be displayed. This could be extremely damaging. For example, a cruise operator might be ordered to display details of the offence in advertisements, brochures or on their website. No owner or operator would welcome such publicity in this day and age when public image and reputation is of vital importance.

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



Deck Cargo – Exception and Limitation of Liability

The question when or how a carrier may have a potential liability for loss or damage arising from deck carriage is important not only because the Member will want to determine any potential exposure to liability but also whether there is P&I cover for that liability.

So far as P&I cover for cargo carried on deck is concerned Club Rules 25 xiii (iii) and (x) are relevant. The former excludes cover for liabilities, costs and expenses which arise “in consequence” of a deviation and thus to the extent that the carriage of cargo on deck is unauthorised, and that liability is not

excluded or limited by any exemption clauses contained in or endorsed on the bill of lading, there is no cover. The latter excludes cover unless the cargo and vessel are suitable for on deck carriage but always provided that the bills of lading comply with the provisos to the Rule.

Thus an understanding of the carriers’ ability to avoid or limit liability in these circumstances is crucial. At common law the parties to a contract of carriage are free to negotiate their own terms on exception and limitation of liability. If the Hague/ Hague-Visby Rules regulate the contract of

carriage and apply to carriage of cargo on deck, the exceptions are contained in Article IV rule 2 (a)-(q), and the right to limitation in Article IV rule 5. Under the Rotterdam Rules a totally new scheme of liability applies to deck carriage

■ The issue of liability arising from deck carriage was discussed in a paper given by Dr Susan Hodges of the Cardiff Business School, Cardiff University, to the Logistics Research Network annual conference in early September. We are grateful to Dr Hodges for a copy of her paper which can be found on the Steamship Mutual website at: www.simsl.com/DeckLiability0909.html

CENTENARY YEAR: Board Meetings



Amsterdam

The centenary website also features images of people, vessels and events from the Club's first one hundred years. If you have any images that you would like to have published on the site please contact Naomi Cohen (naomi.cohen@simsl.com).

Board meetings yet to take place:

2009: 26/27 October – London

2010: 25/26 January – Hong Kong

Details and images from the board meetings which have taken place this year in Amsterdam, New York and Hamburg are featured in the News & Events section of the Club's centenary website at:

<http://centenary.simsl.com/news.htm>



Dinner at the New York Yacht Club's Clubhouse

Tank Cleaning



Christine Vella

– The Scope of Implied Indemnities Flowing from Charterers' Orders or Requests

When it comes to the employment of a vessel operating under a time charter, the charterer will utilise the vessel in such a way as to maximise the vessel's profit-earning capacity during the course of the charter. In this respect the master is required to follow the charterers' orders or instructions as to employment.

In these circumstances the general principle is that in return for complying with the charterers' legitimate orders as to the

employment of the vessel, and as long as there is an unbroken chain of causation and no charterparty terms to the contrary, the owner will normally be entitled to an implied indemnity from the charterers against his loss/liability. However, in a vessel tank cleaning dispute in which the Club was recently involved a distinction was made between charterers' orders and requests; whilst an owner may be entitled to an implied indemnity where the master has followed charterers' lawful orders does the same hold true if there is a mere request or if the master follows an order which charterers are not entitled to give?

■ These issues are discussed in an article by Christine Vella (christine.vella@simsl.com) on the Steamship Mutual website at: www.simsl.com/TankClean0909.html



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Hong Kong – Delivery under Straight Bills of Lading Clarified



Sue Watkins

The first instance decision in *Carewins Development (China) Ltd v Bright Fortune Ltd* concerning whether delivery under a straight bill of lading required production of an original bill was reported in Sea Venture issue 7: www.simsl.com/BrightFortune0107.asp

This decision threw the issue into confusion in Hong Kong as it conflicted with an earlier decision of Mr Justice Waung in *The "Brij"* in July 2000. The issue has now been addressed following appeal of the *Carewins* decision to the Hong Kong Court of Final Appeal.

In reaching his decision that production of an original bill of lading was a condition precedent to delivery under a straight bill of lading Stone J relied on the Singaporean case of *Voss v APL Co Pte Ltd* and obiter

dicta comments of the House of Lords in the *"Rafaela S"*. Stone J also went as far as to affirm the obiter comments of Lord Bingham and agree that, if necessary, he too would find presentation of an original bill of lading to be a condition precedent to delivery even where there was no express provision to that effect within the bill.

The leading judgment of the Hong Kong Final Court of Appeal was handed down by Mr Justice Ribeiro. He relied substantively on the same authorities as Stone J in finding that *The "Brij"* had been incorrectly decided and in recognising the role of the bill of lading as a document of title in modern day international trade.

The judgment of Justice Ribeiro also offers an

interesting discussion on the legal principles related to exclusion of liability clauses in bills of lading and their application; the carriers sought to argue that even if presentation were necessary for delivery they were relieved of liability via an exclusion clause on the reverse of the bill of lading.

■ Further discussion of this decision can be found in an article by Sue Watkins (sue.watkins@simsl.com) on the Steamship Mutual website at:

www.simsl.com/BrightFortune0909.html

Charterparty Chains – Exposure to Costs

It is a recognised *modus operandi* for charterers, in the middle of back to back charterparties, to pass submissions up and down the line. However there are inherent risks with this tactic; an intermediary party has to be careful that it does not incur a costs exposure which it cannot then pass along the charter chain.

In a recent case the sub-charterers commenced arbitration against charterers alleging an off-hire event arising out of an unlawful refusal to load cargo. The charterers, in turn, commenced arbitration against the head owners relying on the same grounds. The case was ultimately determined in the sub-charterers' favour and thus the charterers' claim against the head owners also succeeded.

The problem for the charterers was that they had incurred a costs liability to sub-charterers (which happened to be in a similar amount to the claim itself) and could not pass this up the charter chain as a separate head of damage. This was because, as the arbitrator held, the costs liability incurred to sub-charterers was caused not by the illegitimate refusal to load cargo but by charterers' decision to defend the claim brought by sub-

charterers in circumstances where the charterers had every means of knowing and deciding the merits of the sub-charterers' claim for themselves. The decision sounds a cautionary note to intermediate charterers and is a reminder that care should be taken when deciding whether or which arguments to adopt up or down a charter chain.

■ In an article prepared for the Steamship Mutual website Darryl Kennard of Thomas Cooper reviews a recent arbitration where these issues were considered: www.simsl.com/ChainCosts0909.html

The decision in the *"Vakis T"*, which dealt with the same issues, was discussed in Sea Venture issue 1 and in further detail on the website at:

www.simsl.com/articles/arbcosts_charterchain0804.asp

Maritime London Officer Cadet Scholarship

As reported in Sea Venture issue 12, Steamship Mutual is currently sponsoring the training of an officer cadet under the administration of the Maritime London Officer Cadet Scholarship (MLOCS) scheme.



The Club's sponsored cadet, Gregory Taylor, is making excellent progress with his training. Under the MLOCS scheme, cadets are given seagoing experience with a variety of ship operators and ship types. By coincidence, Gregory's seagoing service at the end of last year was undertaken on one of the Club's entered vessels - the passenger vessel "Discovery" - and involved a voyage that stretched from the Baltic Sea to Antarctica, via the Mediterranean and Black Seas, Brazil and Argentina and which involved calls at a large number of extremely interesting ports and locations. At the Russian port of Sochi,

shortly before departure, Gregory found a stowaway onboard and thereby helped the Club's Member avoid a P&I claim for the costs that would otherwise have been incurred in disembarking and repatriating this individual. We are all very grateful to Gregory for his vigilance. The accompanying photographs depict Gregory onboard the vessel during the course of what was clearly a very stimulating voyage.

We wish Gregory success in the remainder of his training and look forward to being able to report further details of his experiences.

Oasis of the Seas – Largest Cruise Ship in the



When she launches in December 2009, Caribbean International's Oasis of the Seas will be the largest and most revolutionary cruise ship in the world. An architectural marvel at sea, she will span 16 decks, encompass 220,000 gross registered tons (GRT), carry 5,400 guests at double occupancy, and feature 2,700 staterooms.

Oasis of the Seas will be the first ship to tout the cruise line's new neighbourhood concept of seven distinct themed areas, which includes Central Park, Boardwalk, the Royal Promenade, the Pool and Sports Zone, Vitality at Sea Spa and Fitness Center, Entertainment Place and Youth Zone. The ship will sail from her home port of Port Everglades in Fort Lauderdale, Florida.

Sea trials took place in June. Richard Fain, chairman of Royal Caribbean Cruises Ltd,

was on board for the tests and reported on the event in his blog (www.oasisoftheseas.com/chairmans-blog/). The tests for handling included the ship's ability to make sharp turns at high speed. Everyone was warned to hold on. Mr Fain reported:

"I remained on the bridge watching the instruments and waiting for the expected



World

heeling. And then NOTHING happens. The instruments show we are making a hard starboard turn and my eyes confirm the bow has swung suddenly to the right. But there is very little sensation of movement. The ship handles the turn like a trooper and the navigation officers are overjoyed."

Weekly "webisodes" (which can be seen at: www.oasisoftheseas.com) give a behind-the-scenes look at what it takes to bring a cruise ship as technically advanced as Oasis of the Seas to life.

Oasis of the Seas is entered with Steamship Mutual along with 22 other RCCL vessels, including 10 large passenger cruise vessels, comprising approximately half of their fleet.



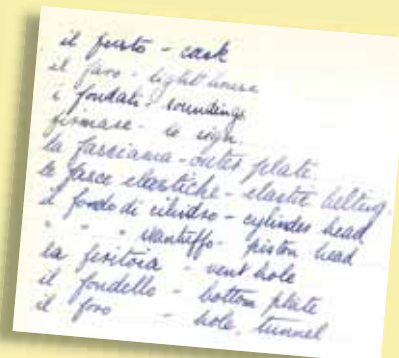
Steamship Mutual as an International Club



"Minerva", Neptune Line

Within Steamship Insurance Management Services the number of languages spoken by staff is extensive ranging from Gujarati, Serbo Croat, Korean, Japanese, Hindi, Arabic, Mandarin and many others in addition to the standard European languages. This is not surprising in such an international business today but the requirement for a range of languages was a different matter in the early twentieth century.

Until the Second World War most of Steamship's Members had been operating in the British coastal trade. This had expanded during the 1930s into some short haul trade but this was still largely with the near continent. War changed the situation considerably and several factors helped Steamship Mutual to move into the global market. War torn European countries needed to rebuild their merchant fleets and when India gained its independence, Indian shipowners looked to create new fleets. The US had a major surplus of shipping so the 'Victory' ship and the T2 tanker became available. The financing of these ships included clauses that insisted on P&I insurance so British P&I clubs offered cover. Steamship was particularly active as it saw the opportunity to expand its Membership. The first Indian owned ship was entered in 1945 and the first German and Italian ships in 1950. By 1951 Steamship insured 20 percent of the Italian Fleet, 12 per cent of the German fleet, 7 per cent of the Brazilian fleet and 9 percent of the Commonwealth fleet. Language skills became more important and Sally Moore, who had been to a school in Lausanne and spoke at least five languages, was recruited in 1950 as a secretary/translator. The shipping world, especially the world of P&I insurance, was new to her and so she created her own dictionary. In her book she carefully wrote the various specialist



Extract from Sally Moore's "dictionary"

maritime words then needed and their equivalents in German, French, Spanish and Italian.

By 1952 the first non-British shipowners became Committee Members. Franz Stickan of Neptun Line, Ernesto Fassio, Achille Lauro and Count Salvatore Tagliavia of Italy were eventually joined by Mr Sheth of Great Eastern in 1958. In 1960 Steamship appointed its first Non-British resident chairman, Dr Kurt von Laun. Steamship Mutual was then truly international and had moved well away from its British roots to a greater extent than many other clubs.

We are grateful to Dr Helen Doe of Exeter University (h.doe@exeter.ac.uk) for preparing this article. Dr Doe is currently researching the history of Steamship Mutual and will be publishing a book later this year to commemorate the Club's centenary.



Sian Morris

Liquidated Damages Clause – Penal or Compensatory?



The case concerned an appeal pursuant to s.69 Arbitration Act, leave having been granted on the ground that the matter was one of general public importance.

The question was whether a clause that provided for the hire rate, not only for the overrun period but also for the last 30 days of a time charter period, to be increased to the higher prevailing market rate in the event of late redelivery of the vessel, constituted a penalty and was thus unenforceable.

The vessel was on time charter for three to five months at \$29,500 per day. Rider clause 101 of the charter provided as follows:

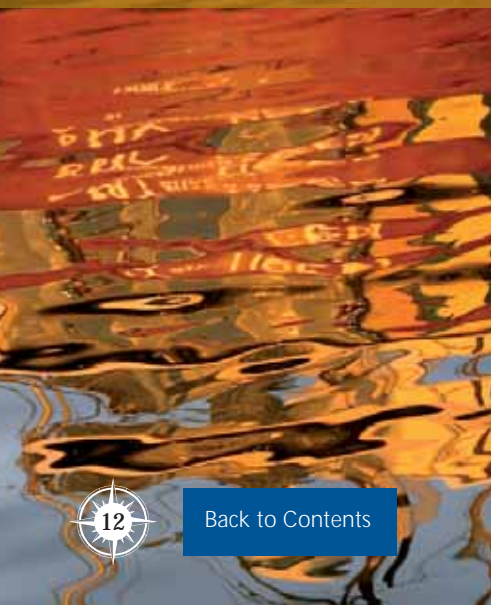
"The Charterers hereby undertake the obligation/responsibility to make thorough investigations and every arrangement in order to ensure that the last voyage of this Charter will in no way exceed the maximum period under this Charter Party. If, however, Charterers fail to comply with this obligation and the last voyage will exceed the maximum period, should the market rise above the Charter Party rate in the meantime, it is hereby agreed that the charter hire will be adjusted to reflect the prevailing market level

from the 30th day prior to the maximum period date until actual redelivery of the vessel to the Owners."

The vessel was redelivered some six days late but with increasing rates the additional claim owners pursued for a 36 day period was US\$471,603 above the amount that charterers had paid.

■ In an article written for the Steamship Mutual website Sian Morris (sian.morris@simsl.com) considers the decision in further detail: www.simsl.com/LiquidatedDamages0909.html

Safe Berth – Implied Warranty



The High Court decision in *Mediterranean Salvage & Towage Limited v Seamar Trading & Commerce Inc "The Reborn"* was discussed in Sea Venture issue 13 and can be found on the Steamship Mutual website at: www.simsl.com/Reborn1208.html

The issue in dispute was whether a safe berth warranty can be implied into a voyage charter when a specific load port is named in the charterparty.

In the High Court Aikens J found there was no need to imply such a warranty into the "Reborn" charterparty. The charterers' only

obligation under the charterparty was not to nominate an "impossible berth". The charterers were not in breach and owners' appeal against the original arbitration award was dismissed. However, owners were given leave to appeal.

■ The decision of the Court of Appeal is discussed in an article by Domenico Ferrara (domenico.ferrara@simsl.com) and Duncan Howard (duncan.howard@simsl.com) in an article on the Steamship Mutual website at: www.simsl.com/RebornAppeal0909.html

Loss Prevention Initiatives

As part of its ongoing commitment to assist Members in claims prevention matters the Steamship Mutual Loss Prevention Department (LPD) continues to work on many projects in support of this aim. Recent initiatives include:



SST DVD

To mark the Club's centenary year, a DVD has been produced which describes the work of the Ship Safety Trust and highlights the important contribution that it has made to many areas of loss prevention and safety. A trailer for the DVD, which features Edward Stourton (presenter), Stephen Martin and Chris Adams (Directors, SIMSL), Dr Karen Purnell (Managing Director, ITOPI), and Julian Parker (formerly of the Nautical Institute) can be seen on the Steamship Mutual website at: <http://www.simsl.com/SSTDVD.htm>

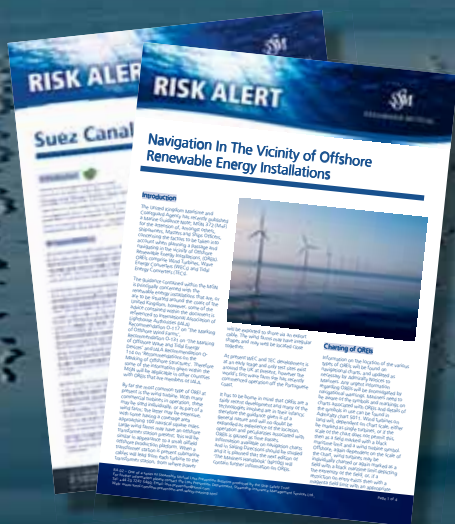
Members received a complimentary copy of the DVD with Club circular B.489 of April 2009. Further copies can be obtained via the website.

Awards for Steamship Mutual Training Materials

The Club continues to produce onboard training programs in association with Videotel Marine International. Two programmes, completed last year, recently received awards: *When One Thing Leads to Another* and *Working with Tugs* both received Awards of Excellence at the National Association of Film and Digital Media Artists Insight Awards 2008.

Other recent programme titles include:

Personal Safety on Chemical Tankers and Good Housekeeping, a 3-part programme covering ship husbandry in relation to On Deck, Engine Room and Accommodation Areas.



Risk Alerts

July 2009 saw the publication of the first *Risk Alert* – a new LPD bulletin – on the subject of *Suez Canal Navigation*. The second and third Risk Alerts featuring *Navigation in the Vicinity of Offshore Renewable Energy Installations* and *CIC on Lifeboat Launching Arrangements* have just been issued.

Risk Alerts will cover a wide variety of topics such as:

- Highlighting areas of concern where claims experience has led the Club to believe that detailed guidance is required to mitigate the potential for further claims.
- Promoting good seamanlike and industry best practice.
- Analysis of case histories and the identification of root causes.
- Promoting material produced by Flag States in relation to best practice.
- Promulgating advice regarding new regulatory requirements.

Risk Alerts can be viewed and downloaded via the Steamship Mutual website at: www.simsl.com/RiskAlert.htm

Collision Avoidance Posters

The latest posters in the series focus on Collision Avoidance. The first set of four posters feature guidance on Look Out, Safe Speed, Narrow Channels and Traffic Separation Schemes under COLREGS Rules 5, 6, 9 and 10 can be found at:

www.simsl.com/CollisionAvoidancePosters.htm

The second set of 4 posters, focussing on the Steering and Sailing Rules, will be issued shortly.

Implied Terms in Sale of Goods Contracts



Mahtab Khan

The Commercial Court was recently asked to consider the issue of implied terms in sale agreements in relation to an FOB agreement for the purchase of gas oil where buyers brought a claim against defendant sellers for damages for breach of contract in respect of the quality and contractual specification of the goods.



The contract specified that the "*quality and quantity...[was] to be determined by a mutually agreed independent inspector at the loading installation... such determination shall be final and binding for both parties*". It further stated that "*There are no guarantees, warranties or representations, express or implied, or (sic) merchantability, fitness or suitability of the oil for any particular purpose, which extend beyond...this agreement.*"

In accordance with the agreement composite samples of the product were taken at the load port and analysis results showed the product to be on-spec; however, upon arrival at the disport the product was analysed again, after discharge, and found to be off-spec. This resulted in the receivers rejecting the consignment.

The claimants alleged that the product had arrived after an incident free voyage and, as such, defendants were in breach of an implied term that the goods would remain of a satisfactory quality and/or fit for their purpose following a normal voyage, pursuant to s.14(2) and s.14(3) Sale of Goods Act 1979 ("SOGA"), and/or a term should be implied at common law that the gas oil would be of satisfactory quality and/or comply with contractual specifications following a normal voyage and for a reasonable time thereafter.

Following the trial for preliminary issues, it was held that, in the absence of any inconsistency, a term under s.14(2) SOGA would be implied and the goods should be of a satisfactory quality not only when the cargo was delivered on to the vessel but

also for a reasonable time thereafter. The court considered what may constitute a reasonable time, taking into account the particular circumstances of the contract in question, the nature of the goods and any special knowledge the shipper may have as to the buyer's intention for the product. Such a term would also be implied at common law and this was not precluded by Clause 18 of the agreement.

■ This decision is considered in more detail in an article by Mahtab Khan (mahtab.khan@simsl.com) on the Steamship Mutual website at: www.simsl.com/SoGImplyedTerms0909.html



Common Sense

– Clarity of Language

The decision of the Court of Appeal in *Gearbulk Holdings Ltd v Stocznia Gdynia SA* has prompted a flurry of articles with several criticising the decision on commercial grounds and others asserting that the decision leaves the law in an uncertain state.

In reality the decision affirms and reinforces two existing and well established principles of English law and provides a commercially sensible answer on an area of uncertainty created by a previous Court of Appeal decision and the decision of the First Instance Court in this matter. In the context of the dispute these were:

1. Whether the material contracts excluded an innocent party's right to claim damages at common law;

2. Whether termination by the innocent party of two of the contracts by sole reference to a contractual right of termination could also be an effective termination of the subject contracts at common law;

A third issue dealt with by the Court of Appeal was

3. Whether the exercise of contractual rights by the innocent party after termination could amount to an affirmation of the contracts such that the innocent party should lose any common law rights arising out of the termination.

■ Michael Stockwood, of Ince & Co, who acted for the successful party in the case, discusses these issues in further detail in an article written for the Steamship Mutual website at:

www.simsl.com/Gearbulk0909.html



Security for Costs – Litigation v Arbitration



Sarah McGuire

The receipt of a claim is never a welcome thing, not least because the defence of

a claim may lead to substantial costs being incurred.

Security for costs may offer some comfort to the defendant, particularly in circumstances where they are ultimately found not liable. It can also be an important tactical weapon. Query though – is there any advantage in this respect for the potential defendant in choosing arbitration rather than court proceedings and does one offer an easier route to protecting their ability to recover costs?

■ This question is discussed by Sarah McGuire (sarah.mcguire@simsl.com) in an article written for the Steamship Mutual website at: www.simsl.com/SecurityCosts0909.html



Proceeding Towards Off-Hire?

This case involved an appeal on a question of law pursuant to s.69 Arbitration Act, the charterers having terminated the charterparty pursuant to clause 81, which said:

"Unless caused by Charterers' servants, if the vessel is off-hire...for a period of 20 consecutive days... then the Charterers have the option to re-deliver the vessel when next cargo-free."

The vessel had departed Yokohama, the intended next port being Shanghai. After hitting a breakwater, class required her to proceed to Hong Kong to discharge her cargo and then sail to Guangzhou for

repairs. Charterers terminated the charter after a 20 day period whilst owners claimed the 20 day consecutive period had not been reached as the vessel had come back on hire when she left Yokohama for 1.5 days whilst she followed a common route to Hong Kong and Shanghai even though she was destined for Hong Kong and not Shanghai.

■ The Tribunal found for owners and charterers appealed. This decision is discussed in more detail by Sian Morris (sian.morris@simsl.com) in an article on the Steamship Mutual website at: www.simsl.com/OffHireTSLines0909.html

Under the Skin of The "Darya Radhe"

In the recent case of *Bunge SA v ADM Do Brasil Ltda and Ors (The "Darya Radhe")*, the English High Court was asked to revisit the principles governing a shipper's obligation not to ship dangerous cargo.

The "Darya Radhe" loaded a shipment of soyabean meal at Paranagua in January 2004 with destination Iran. The cargo was supplied by nine different shippers and all bills of lading incorporated the Hague Rules. Live rats were sighted at the loadport and the authorities ordered a routine fumigation. The vessel had also loaded a cargo of maize, where there was no evidence of infestation. At the time the charterers and issuers of the bills of lading (Bunge) feared rejection of the cargo, and ordered the vessel to proceed to Lisbon for re-inspecting and re-fumigation of the

soyabean meal. Following this exercise, the vessel sailed to Iran where the cargo was discharged and accepted by the receivers without any complications.

Bunge, further to an unfavourable arbitration award, appealed to the High Court, claiming losses in excess of US\$ 2m from the shippers. In his judgment, Mr Justice Tomlinson, considered the legal issues arising from the *The Giannis NK* in relation to whether the cargo posed a physical danger in the context of the Hague Rules. Tomlinson J also considered the common law principle of 'legally' dangerous cargo as established in *Mitchell Cotts & Co v Steel Bros & Co Ltd* in affirming the findings of the arbitration tribunal.

■ This judgment and the issues raised in relation to dangerous cargoes are discussed in more detail in an article by Francis Vrettos (francis.vrettos@simsl.com) on the Steamship Mutual website at: www.simsl.com/DaryaRadhe0909.html



When is a Redelivery Notice Binding?



A time charterer will only be able to fix firm employment for a vessel once he knows when the vessel will be at his disposal. Similarly, an owner needs to know when his ship will be returned to him, so that he can fix a follow-on charter with a minimum of downtime between fixtures.

When the market is rising or falling, late or invalid notice of redelivery can make a significant difference to the profitability of a vessel's next employment. It is for this reason that charterparties contain detailed notice clauses requiring delivery and redelivery notices to be given at staged intervals, commencing with approximate notices which are then transformed into a

series of definite notices as the date approaches.

■ We are grateful to David Semark and Alex Andrews of Reed Smith who discuss these issues in the context of the recent High Court decision in *"The Zenovia"*, in an article which can be found on the Steamship Mutual website at: www.simsl.com/Zenovia0909.html

Award of Costs in Collision Cases



Mark Dawson

In June 2009, Mr Justice David Steel handed down liability and costs judgments in the *"Western Neptune"*. This case related to a collision in September 2007 in the Gulf of Mexico between a container vessel *"St. Louis Express"* and streamers being towed by the seismic survey vessel *"Western Neptune"*. The *"Western Neptune"* was towing a spread of ten streamers and six gun arrays. Each streamer extended for about 8,030 metres and the total width of the spread was some 1,080 metres.

Steel J considered in detail the conduct of the respective vessels in the lead up to the collision including the diving of the seismic array by the survey vessel. Liability was apportioned one third/two thirds in favour of *"Western Neptune"*.

The subsequent judgment in relation to costs demonstrates the degree of flexibility the court has in exercising discretion in relation to costs. Even though it was generally accepted that the claimants were the *"successful party"*, their costs recovery was compromised for a number of reasons. It was relevant that the defendants offered to settle the case on 60/40 terms in April 2008 before the bulk of costs had been incurred. In contrast the claimants' offer to settle at 80/20 was made nearly a year later and only shortly before the commencement of the trial. A substantial amount of late disclosure by the claimants was also factored in by the court in arriving at the decision to limit the claimants' recovery of costs to 65%.

■ This decision is discussed in more detail in an article by Mark Dawson (mark.dawson@simsl.com) which can be found on the Steamship Mutual website at: www.simsl.com/WesternNeptune0909.html

Internship Programme 2009



Steamship interns outside the Lloyd's building

Following on from the success of the first Steamship Mutual Internship Programme the second one week programme was held in July 2009.

The Programme was initially presented to students at Southampton, Plymouth and Cardiff University careers fairs and was open to applications from LLM Maritime Law students coming to the end of their studies. The demand for places was extremely high. Seven of the thirty two students interviewed were invited to join the internship programme.

Each of the successful candidates spent the week working on two case studies in one of the Club's three syndicates –

Americas, Eastern or European. In addition, they had the opportunity to attend a seminar each day presented by a Director or Manager on a specific area of the Club's business. The programme also included time for a visit to Lloyd's of London and for the students to socialise with staff informally outside the office.

At the end of the week, the students were asked to evaluate their time with the Club. Their responses were extremely positive and referred to the benefit derived from the seminars, the opportunities to ask questions at the seminars as well as whilst working alongside staff within the syndicates, and insight into the issues faced and addressed by the Club and the Membership on a daily basis. The only regret was that they would have liked to stay longer.



Impossibility of Notifying Place of Delivery – Revisited



Francis Vrettos

The preliminary ruling of the High Court in the case of *Mansel Oil Ltd and Another v Troon Storage Tankers SA (The "Ailsa Craig")* concerning charterers' entitlement to

cancel a time charter if the vessel was not at charterers' disposal by the cancellation date by reason of charterers' failure to nominate a delivery port was discussed in Sea Venture issue 13 and can also be found in further detail at: www.simsl.com/Ailsa1208.html.

The High Court found that charterers, notwithstanding the obligation to nominate, were allowed to exercise their right to cancel. Owners appealed the preliminary ruling.

Owners argued on appeal that since the charterparty envisaged a mechanism of estimated and definite notices for the vessel's arrival at the delivery point, the charterers were under an obligation to nominate the port of delivery at least 31 days (i.e. 1 day before the first estimated notice) before the earliest agreed delivery date. In this connection, owners' counsel argued that the right to cancel was dependent on charterers having nominated a delivery port in order to allow owners the

opportunity to commence dispatching the required notices.

Longmore LJ rejected owners' arguments on the basis that (i) nothing in the charterparty could be deemed as expressing or implying an obligation to nominate a delivery port prior to cancelling, (ii) even if such an obligation existed, the time for its fulfilment never arose and (iii) the futility of nominating on the assumption that the vessel would not have been ready on time should nullify any obligation to select a delivery port.

■ This decision is discussed in more detail by Francis Vrettos (francis.vrettos@simsl.com) on the Steamship Mutual website at: www.simsl.com/Ailsa0909.html

SIMSL News



Los Magnificos

In March and July Steamship Mutual's football teams were called into action. First, combining with Reed Smith in a tri party competition with the UK Club and victorious French touring team from CMA CGM – the renowned and humbly named Los Magnificos - and, with different players, winning the plate competition in the **Marine Challenge Football Tournament**.



l to r: Mark Underhill, Simon Boyd, Mark Dawson, Rosemary Fowler

We are happy to announce that several members of Steamship staff have recently completed 20 years' service with the company:

- **Simon Boyd** - Syndicate Manager (European)
- **Mark Dawson** - Syndicate Manager (Eastern)
- **Rosemary Fowler** - Reception Telephonist
- **Mark Underhill** - Syndicate Manager (European)

Congratulations to Rajeev Philip on winning the **City Warriors White Collar Boxing Circuit 2009 welterweight title**. Rajeev won on a points decision after three hard fought rounds.

Not for the first time Steamship Mutual had a runner in the **London Marathon** this year: Simon Kaye, of the Eastern Syndicate raising money for charity, while in late July three members of the European syndicate, Silvia Mahringer, Daniel Brand and Malcolm Sheldermine, competed in teams entered by German broker Georg Dunker in the **Hamburg Triathlon**. In late September, and for the fourth time in as many years, Dan Thomas completed the **Great North Run** – Half Marathon.

We are pleased to congratulate the following SIMSL staff on their success:

Deepesh Bhatt passed the Modelling Business Processes paper of the Information Systems Examinations Board Diploma.

Lorraine Burton passed the Association of Chartered Certified Accountants final examination.

Mahtab Khan passed the Qualified Lawyers Transfer Test.

Effie Koureta passed ICS (Institute of Chartered Shipbrokers) exams in Shipping Business, Ship Operations and Management and Marine Insurance.

Wagner Mesquita passed the ICS exams in Shipping Business, Dry Cargo Chartering and Tanker Chartering.

Janice Stevens passed the first part of the Association of Accounts Technicians qualification.



Steamship has entered a team for the **London JP Morgan Chase Corporate Challenge** for several years. Once again, Richard Harrison recorded our fastest time taking a mere 20 minutes 48 seconds to complete the 5.6km (3.5mile) run at London's Battersea Park. The rest of the 16 strong team also put in some very respectable performances and our fastest woman runner was Silvia Mahringer, at 30 minutes 56 seconds.



During the year a number of **seminars** have been given and are planned by Steamship Mutual at venues around the world, including Aqaba, Amsterdam, Athens, Cardiff, Hamburg, Ho Chi Min City, London, Manila, Mumbai Pusan, Rio de Janeiro, Taipei and Tokyo covering a diverse range of subjects – bunker disputes, collision claims, safe ports, iron ore shortage claims, claims management, the scope of P&I cover, loss prevention issues, piracy, correspondent guidelines and more.

Dedicated Piracy Webpage

Given the continuing threat of piracy and the importance to owners and operators of up to date information about this ever changing situation, a webpage dedicated to piracy was created on the Steamship Mutual website earlier this year.

The webpage gives access to advisories, bulletins, guidance and FAQs documents issued by organisations and industry groups including MARAD, EU NAVFOR, IMO, ICS, OCIMF and others and includes links to key websites which are updated on a regular basis.

Recent additions to the list of documents available to view and download via the piracy webpage include: *Industry Best Management Practice to Deter Piracy – Version 2* and *IMO's Maritime Safety Committee Circulars MSC. 1/Circ. 1332/3 and 4*.

The piracy webpage can be found at: www.simsl.com/piracy.htm



Website Articles

New articles are published on the Steamship Mutual website on a regular basis. A selection of items published in recent months includes:

Catastrophic Failure of High Pressure Hydraulic Anchor Windlasses:
www.simsl.com/AnchorWindlassMAIB0809.html

California - Regulations on Fuel Sulphur and Other Operational Requirements:
www.simsl.com/CARBSOx0809.html

OPA 90 - Limits of Liability Increased:
www.simsl.com/OPA90LimitInc0709.html

U.S. - Electronic NOI for VGP:
www.simsl.com/USENOIVGP0609.html

Club Circulars

In recent months several important Club Circulars have been issued. These were sent to Members on publication but can also be accessed via the Steamship Mutual website by following the links below:

- The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea - The "Rotterdam Rules" (B.499 of September 2009):
www.simsl.com/Circulars-Bermuda/B.499.pdf
- Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability (B.497 of July 2009):
www.simsl.com/Circulars-Bermuda/B.497.pdf

- Vessel Response Plans (VRPs) Conformity with International Group Guidelines (B.496 of June 2009):
www.simsl.com/Circulars-Bermuda/B.496.pdf
- Third EU Maritime Safety Package (B.495 of June 2009):
www.simsl.com/Circulars-Bermuda/B.495.pdf
- A Team Effort - A Guide to Casualty Investigation & Claims Handling 2009/2010 (B.494 of June 2009):
www.simsl.com/Circulars-Bermuda/B.494.pdf
- A Guide for Correct Entries in the Oil Record Book (B.493 of June 2009):
www.simsl.com/Circulars-Bermuda/B.493.pdf

