

# soundings

In this issue: Financial Results 2008/9 | “To” Shanghai or “towards” Shanghai | Penalty or not?



## Financial Results 2008/9

A summary of the Association's financial results for the year ended 20th February, 2009 is now available on the Association's website. Key points to note are that the Association's free reserves have increased from £17.7 million to £19.8 million with total assets having increased from £48.4 million to £54 million. The investment return for the year totalled £4.3 million, £1.6 million better than in 2007/8. The Association's Report & Accounts will be sent to all Members prior to the September AGM.

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## TS Singapore - “To” Shanghai or “towards” Shanghai...

**In a recent case which involved the Association (TS Lines Ltd. V Delphis NV [2009] EWHC 933 Comm). The English High Court ruled that if a ship is proceeding in the same direction as she has been ordered, but is ultimately heading for somewhere else, she cannot be on hire.**

The facts of the case were rather unusual. Having loaded a cargo of containers at Yokohama, Japan the charterer instructed the TS SINGAPORE to proceed to Shanghai. However, the ship then collided with a breakwater during a typhoon. After a period of delay, the ship's classification society imposed conditions which required the ship to proceed to Hong Kong to discharge all of her cargo and then to a repair yard in China, which the ship duly did.

The charterparty contained a clause whereby it could be terminated if the ship was off-hire for more than 20 consecutive days. By the time discharge had been completed in Hong Kong, it was more than 20 days since the collision with the breakwater and the charterer therefore terminated the

charter, claiming that the ship was off-hire since the time of the collision.

The owner accepted that the ship was off-hire during the delay following the collision. However the initial routes from Yokohama to Hong Kong and to Shanghai were identical and the owner claimed that the ship therefore came back on hire for 1.5 days following departure from Japan, and that the 20 day period had been interrupted.

The question to be resolved was whether during that 1.5 days the ship was performing the service that was required of her under the charterparty.

Two distinguished London arbitrators decided that she was, on the basis that for the first part of the voyage to Hong

## Penalty or not?

**In a recent decision of the English High Court, *Lansat Shipping –v- Glencore* ([2009] EWHC 551) which involved a Member of the UK Defence Club, the Court was asked to consider whether a clause in a charterparty designed to compensate an owner for losses as a consequence of late redelivery operated as a penalty clause and therefore was unenforceable. This clause was specifically agreed when market rates were high and were set to increase further.**

The clause in question - referred to as the last voyage clause - provided that if the charterer failed to make proper investigations when giving its last voyage orders, and the last voyage exceeded the maximum charter period, as a result the rate of hire for the last 30 days of the agreed charter period would be adjusted to cover any increase in the market hire rate.

The ship was in fact redelivered over 6 days late, and the owner claimed damages of approximately \$470,000 under the last voyage clause. The charterer accepted it had to pay a market hire rate for the overrun period, but argued that the last voyage clause was a penalty clause which was not enforceable under English law.

A London arbitration tribunal accepted the charterer's arguments and dismissed the owner's claim. The owner was however granted permission to appeal to the English High Court.

The owner's argument was that if it became aware that any last voyage orders were illegitimate, it would immediately be able to bring the contract to an end and refix the ship at a higher market rate. This would in many cases put the owner in a better position than under the clause - the average length of voyage for this sort of ship was 60 days, whereas in the owner's view the 30 days mentioned in the clause reflected a sensible middle position. In a nutshell, the clause was simply designed to compensate the owner for the loss of an opportunity to take the ship back earlier and trade in a better market.

The English High Court however disagreed. The Court took the view that if an illegitimate last voyage order was given, the owner had the option of either performing the order or refusing it. If the owner chose to accept that order, his loss when the charter exceeded the maximum agreed period was limited to the market rate for the overrun period, as had been confirmed by the House of Lords in the *ACHILLEAS*. The Court also noted that if the ship had been delivered only one hour late, the clause would still have applied and very substantial damages would be payable. In the Court's view this was unfair and it concluded that the clause was indeed a penalty clause.

This however is not the end of the story, as the owner is now pursuing a further appeal. The Managers will report further as soon as the judgment of the Court of Appeal is available.

## “To” Shanghai or “towards” Shanghai continued

Kong, the ship was on the route she would have followed for Shanghai - where the charterer wanted her to go. During that time she was therefore doing what the charterer required of her, namely heading in the direction of Shanghai. However the arbitrators noted that they had reached this conclusion with some hesitation.

The charterer appealed and High Court overturned the award. The Court concluded that the important question was not what the ship was doing at that particular moment, but rather what instructions she was operating under. The charterer required the ship to proceed to Shanghai rather than just towards Shanghai. Although she had initially travelled on the same route that she would have taken if she had not been damaged, she was not carrying out the charterer's instructions, because she was under the orders of class to discharge the entirety of the cargo somewhere else, namely in Hong Kong, and then to proceed to repairs. Therefore the ship was off-hire from the time of the collision through to the time repairs were completed in China, and the charterer's cancellation was lawful.

The facts of this case were fairly unique however it does suggest that the courts are prepared to adopt a pragmatic approach in applying the law to a particular situation so that the commercial purpose of a contract is maintained.

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