

SHIPPING BULLETIN



Welcome to the January edition of our Shipping Bulletin.

This month, our Bulletin leads with a piracy update. It considers the Best Management Practices 4 which was issued recently in relation to Somali based piracy, the topical issue of armed guards, and the US Executive Order 13536 (Somalia) of which those involved in the payment or reimbursement of ransoms should be aware. The issue of armed guards is considered further in a second article considering the UK government's approval of armed guards on board UK registered ships.

Still on the theme of piracy, our third article looks at the CONWARTIME 2004 clause and the test for determining whether a master is entitled to take a different route from the one he is ordered by his charterers. The nature of this test was recently clarified by the English Court in *Pacific Basin IHX Ltd v Bulkhandling Handymax AS*.

Our fourth article reviews the recent decision in "The Wren", in which the English Court reviewed the applicable measure of damages in the event of a vessel's early redelivery in circumstances where a market does not exist at the time of redelivery, but subsequently revives.

The effect of the Amwelsh form strike clause, and its relationship with a WIBON provision, was considered by the English Court in *Carboex SA v Louis Dreyfus Commodities Suisse SA*. Our fifth article reviews that decision.

Finally, the revision to the Inter Club NYPE agreement in September last year is discussed in our sixth article. The revision is intended to enable parties facing a cargo claim to obtain security for a recourse action under the ICA before the cargo claim is resolved and paid.

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Piracy latest

Following the end of the monsoon season we have seen a resurgence of pirate activity in the Indian Ocean, culminating in the hijacking in the last few days of the "ENRICO IEVOLI" on 27 December 2011 and the "SAVINA AL-SALAAM" on 3 January 2012. Prior to these recent successful attacks there had been only 3 hijacked vessels of significance, the "MV JUBBA" on 16 July 2011, the "FAIRCHEM BOGEY" on 20 August 2011 and the "LIQUID VELVET" on 30 October 2011. The "FAIRCHEM BOGEY" was of particular note as it was hijacked just outside the port of Salalah. It is fair to say that attacks have increased in the past weeks and as a result we have seen an increase in successful attacks over the Christmas period as has been the case in previous years. According to EUNAVFOR, as of 28 December 2011, there are seven vessels held with around 194 hostages.

Best Management Practices 4

On 18 August 2011, the 4th version of the Best Management Practices for Protection against Somali Based Piracy ("BMP 4") was issued following consultation with many of the world's leading maritime organisations. For the first time it is being issued in pocket form for easy access. BMP 4 is a fundamental document which all owners and operators of vessels in the Indian Ocean should be fully familiar with.

BMP 4 highlights three issues in particular which have always been part of the guide but are now described as Three Fundamental Requirements:

1. Register with MSCHOA using a Vessel Movement Registration Form.

2. Report to UKMTO using a Vessel Reporting Form - Initial Report.
3. Implement the Ship Protection Measures described in the BMP as a minimum.

BMP 4 goes on to provide owners and Masters with an aide-mémoire to avoid being a victim of piracy. It lists six steps for mariners to keep in mind whilst transiting at risk areas. BMP 4 goes on to detail the methods of attack and relevant factors to consider when undertaking a risk assessment of a vessel. This is expanded into a Company Planning checklist and a Master's Planning checklist. Protection measures are considered in detail as is what to do in the event of an attack and/or military action.

Armed guards

Armed guards continue to be a contentious topic for vessels transiting the Indian Ocean and with increased demand comes an increased number of lower quality operators in this industry. It is more important than ever that owners consider in detail the ramifications of placing armed guards on board their vessels and fully vet the companies they employ. There is little regulation in this industry making it incumbent on owners to investigate the credentials of the contractors they choose. Membership of the British Association of Private Security Companies may provide some guidance and on an international level there is also the recently established Security Association for the Maritime Industry ("SAMI"). SAMI aim to provide credibility, trust and respect in the industry by setting quantifiable standards for security companies. This is part of what appears to be a wider acceptance of armed guards by Flag States including Germany, the UK and Norway.

In the meantime, owners can undertake their own investigations by requesting details of a contractor's liability insurance, selection process of personnel and corporate information such as their solvency, legal incorporation and status of Directors.

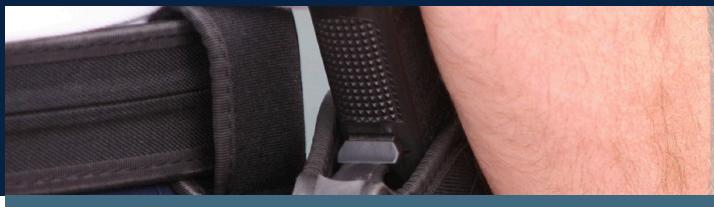
For more details on the latest from the UK government on armed guards, please see the article on page six of this Bulletin.

US Executive Order 13536 (Somalia)

On 29 July 2011, the Office for Foreign Assets Control in the USA added two new names to their Specially Designated Nationals list, that of Omar Hammami and Hassan Mahat Omar. These are both identified by OFAC as being key al-Shabaab figures, one of whom is alleged to be involved in recruiting for al-Shabaab in the USA. Those involved in the payment or reimbursement of ransom should undertake due diligence to establish that none of the individuals (or al-Shabaab) who are listed on the revised Executive Order are involved in a hijacking.

Despite uncorroborated assertions to the contrary, there is still no evidence to suggest a link between Somalia pirates and terrorism. This was confirmed by Major General Howes, Operational Commander of the European Union Naval Force Somalia, when he gave evidence to the House of Commons, Foreign Affairs Select Committee on Piracy off the Coast of Somalia in June 2011, and his view was endorsed by Dr Campbell McCafferty, Head of Counter-Terrorism and UK Operational Policy, Ministry of Defence before the same Committee.

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How much to claim in damages?

The normal measure of damages that a shipowner or charterer can hope to recover in the event of early repudiation of a time charter, as set out in *The Elena D'Amico*¹, is assessed by reference to the difference between the rate agreed in the charter and the market rate for a reasonably similar fixture at the time of the repudiation. Implicit in that assessment is that the wronged party has mitigated its loss and that there is a causative link between the repudiatory breach and the loss suffered. Such an approach draws a line under the matter and promotes certainty of result.

However, if there is no available market at the time of repudiation, another method of assessment is clearly required. Arguably closer to the contractual requirement that damages should compensate the victim of a breach of contract for the loss of his contractual bargain, the compensatory principle seen in *The Gripairon (No. 2)*² fills this gap. Here, the focus is on the actual loss suffered, rather than on the deemed loss by reference to market rates.

Subsequent cases have sought to add nuance to the two contrasting mechanisms for the assessment of damages. For example, in *The Golden Victory*³, in which the relevant charterparty contained a provision permitting the termination of the charter in the event of war breaking out between certain countries, it was held that supervening events such as the commencement of the Second Gulf War subsequent to the termination of the charter, but prior to

the end of the contractual charter term, could be taken into account when assessing damages. Thus, on the basis that no performance under the charter would have been required after war broke out (as the charterparty would in all probability have been terminated), the owners were unable to recover damages in respect of the period after that point.

However, the extent to which supervening events can and should be taken into account was called into question in the recent case of *The Wren*⁴. The vessel was chartered for a minimum of 36 months. As a result of the collapse in the market in the wake of the 2008 financial crisis, the charterparty was terminated in November 2008. At the time of termination, there was no available market for a period charter of a duration that corresponded to the balance of the charterparty. Eight months later, in July 2009, an available long-term charter market for the equivalent of the unexpired period of the charter emerged.

The question therefore arose as to the correct measure of damages to be awarded. In arbitration, the owners claimed damages based on their actual losses up to the date when the available long-term market emerged and, thereafter, by reference to the market rate. The arbitrators agreed with this approach. The charterers appealed the award, objecting to the "windfall" profit that the owners would make as a result and pointing to the lack of any case authority to support such an approach.

Taking into account another recent case, *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd*⁵, the

Court in *The Wren* reversed the arbitrators' ruling, holding that it would constitute a departure from the principle that the owners were entitled to damages such as would put them in the same financial position as if the contract had been performed if an assessment of damages was made by reference to a late-emerging market, rather than by reference to the owners' actual losses. Further, while it was also held that "*the revival of the market at a later date may be a factor to take into account in calculating future loss*", that revival is quite unrelated to the position at the time of termination and is thus an arbitrary and potentially unfair point at which to fix the level of remaining damages.

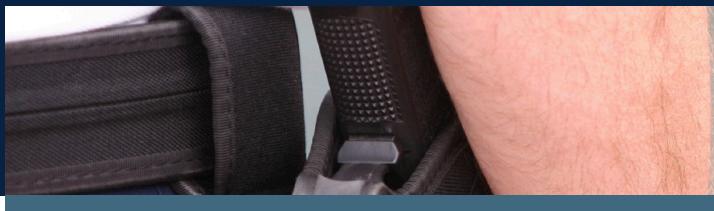
While we understand the judgment to be under appeal, *The Wren*, even as it currently stands, provides a useful summary of the English law position in relation to the complex issue of the damages awardable for repudiatory breach of charter where there is no available market at the date of termination, but such a market revives at a later date.

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"The question therefore arose as to the correct measure of damages to be awarded."

1. [1980] 1 Lloyd's Rep. 75
2. [1994] 1 Lloyd's Rep. 533

3. [2007] 2 Lloyd's Rep. 164
4. [2011] EWHC 1819 (Comm)
5. [2010] EWHC 903 (Comm)



Strikes - who pays for delays? Time to revisit your charter wording

Strikes are part of the commercial risks associated with sea transport, but with a spate of recent strikes causing costly delays to shipping in a number of Australian ports and the threat of ongoing maritime union action in Australia in coming months, a recent case in the English Commercial Court¹ comes as a timely reminder to owners and charterers to revisit their charter terms. With tight margins and the risk of potentially lengthy delays, owners and charterers need to check who bears the risk if a vessel is delayed due to strike action: has berth or port charter been agreed? What does the specific strike clause cover? What are the laytime provisions and are they relevant to strikes? The longer a strike lasts, the higher the cost of delay, the more inventive contract partners can become in their interpretation of charter clauses and how they inter-relate.

The recent English Commercial Court case involved a berth charter on an amended AmWelsh form.

AmWelsh form clause 9 of the charter provided:

"in case of strikes, lock outs, civil commotions or any other causes including but not limited to breakdown of shore equipment or accidents beyond the control of the Charterer's consignee which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage."

A typed additional clause 40 provided:

"at port of discharge... if the berth is not available when vessel tenders Notice of Readiness but provided vessel/Owners not at fault in relation thereto, then lay time shall commence twelve (12) hours after first permissible tide, Notice of Readiness received and accepted, whether in berth or not whether in free pratique or not whether..."

Both parties agreed on the facts that the vessel arrived as the strike ended and was unable to berth due to congestion caused by the strike.

Owners argued that the combined effect of clauses 9 and 40 meant that charterers were only protected against strike if the strike occurred once the vessel had berthed. The central issue was the effect of the inclusion of the "WIBON" (whether in berth or not) provision in the laytime provision at clause 40, which allowed NOR to be served and laytime to run whether the vessel was in berth or not. Owners argued that the WIBON provision indicated the risk of delay due to congestion at the discharge port, including congestion caused by strike, was for the charterers' account because the strike clause had to be read in conjunction with the laytime clause. They argued that, because of clause 40, unless the vessel was actually in the berth and delayed at the berth due to the strike, clause 9 did not apply. It was argued that the wording of clause 9 was not wide enough to interrupt the running of lay days where the vessel was unable to berth due to congestion caused by strike.

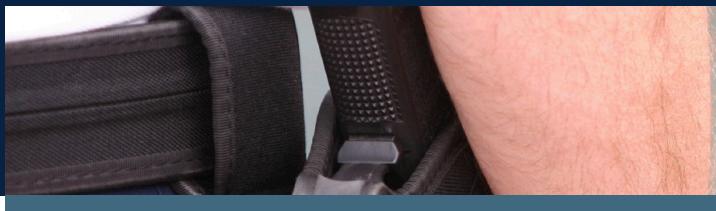
Charterers argued that clause 9 should be read as a standalone provision that was clearly designed to protect charterers of a vessel that could not berth due to congestion caused by strike. It should be read in the ordinary sense, without reference to the content of the separate laytime provision, which should not be interpreted as overriding the standard form strike clause.

The original arbitrators accepted the owners' arguments, but the court preferred the charterers' interpretation of the strike clause as a standalone clause to be read independently and confirmed that the WIBON provision in the laytime clause did not operate to restrict the application of the strike clause. Laytime did not therefore commence until the congestion caused by the strike cleared and the berth became available.

The court's decision affirms what had been the general understanding of the application of the AmWelsh strike clause, but the decision may operate to deter similar attempts to argue for alternative interpretations of commonly used standard form clauses. In any event, it is a reminder that parties need to be alert to potential conflict where tailor made clauses are introduced into standard form charters.

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¹ *Carboex S A v Louis Dreyfus Commodities Suisse SA* [2011] EWHC 1165



Revision to the Inter-Club NYPE agreement 1996

The International Group of P&I Clubs have amended the 1996 version of the Inter-Club New York Produce Exchange Agreement (the “ICA”) with an important change made regarding the ability to seek security for a claim under the agreement.

By way of background, the principle behind the ICA is that it provides a straightforward self contained code for apportionment of cargo claim liabilities between an owner and charterer under the NYPE or Asbatime time charters (although it can be incorporated into other charters) which apportions liability depending on the cause of the cargo claim.

However, one issue with the 1996 version of the ICA is that it is not possible for the party who faces the cargo claim to seek security for their cargo claim recourse action until the underlying cargo claim has itself been settled or compromised. This follows from *The Holstencruiser* decision [1992] 2 Lloyd's Rep 378 where it was held the ICA only applied to claims that have been paid or settled. This has led to issues where a party who faces a cargo claim has to post substantial security to secure the cargo claim but then cannot in turn seek security for their recourse claim under the charterparty/ICA. They may however nevertheless try and arrest assets in an alternative jurisdiction to force the provision of security.

The new amendment to the ICA has come into effect from 1 September 2011 and creates an entitlement to security based on reciprocity. That is once one of the parties to the charter

has provided security in relation to a cargo claim then they are entitled to be secured (subject to the 2 year time bar contained at clause 6 of the ICA being complied with), although they must provide security to their opponent in an equivalent amount if requested to do so.

The security provision is included at clause 9 of the new agreement and provides as follows:

“Security”

(9) If a party to the charterparty provides security to a person making a Cargo Claim, that party shall be entitled upon demand to acceptable security for an equivalent amount in respect of that Cargo Claim from the other party to the charterparty, regardless of whether a right to apportionment between the parties to the charterparty has arisen under this Agreement provided that:

- a. written notification of the Cargo Claim has been given by the party demanding security to the other party to the charterparty within the relevant period specified in clause (6); and*
- b. the party demanding such security reciprocates by providing acceptable security for an equivalent amount to the other party to the charterparty in respect of the Cargo Claim if requested to do so.”*

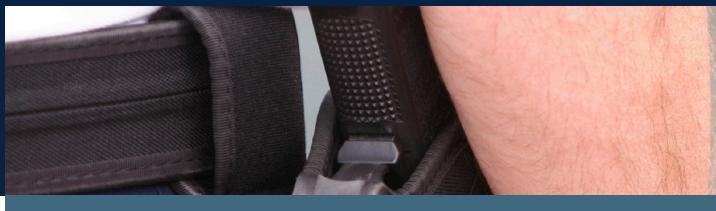
We suspect there may be some uncertainty regarding the application of the new agreement. For example we would foresee disputes between parties as to the meaning of “acceptable security” and “equivalent amount”.

While it would be assumed that a first class bank guarantee or International Group P&I Club LOU would be acceptable security we can imagine that a party may offer security from a parent company guarantee, a non International Group insurer or their local bankers and may assert this is “acceptable”. There may also be disputes about wordings and what is acceptable.

In relation to the wording of “equivalent amount”. This does not make clear whether the party seeking security under clause 9 is entitled to seek security for their costs incurred in pursuing the recourse action on top of the sum provided to cargo interests to secure their claim. We would suggest the answer is that it may not, as it does not specifically say so and that the use of the word equivalent is included to allow for rounding or currency issues. Although it may be possible to argue for a wider interpretation of the word “equivalent”.

Finally, what will be the remedy if a party refuses to provide security? Clause 9 of the ICA is a promise to provide security with the result that the refusal would entitle the innocent party to claim damages. However this may not be a very useful remedy. The innocent party may try to obtain a court order for specific performance or try to arrest assets to obtain security. However, whether they can arrest is uncertain as the underlying cargo claim will not have been resolved. Will the cause of action under clause 9 be a maritime claim/lien? Different jurisdictions may adopt varying approaches.

The new agreement is called Inter-Club New York Produce Exchange



Agreement 1996 (as amended September 2011).

The new ICA applies to all charterparties entered into after 1 September 2011 that refer to the called Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011) or "ICA 1996 or amendments thereto" or such similar wording. Owners/charterers are advised to check their standard cargo claim clause wording to ensure it refers specifically to the full title new ICA (and any future amendments) or at last ICA 1996 (as amended).

If the intention is to incorporate the new ICA into older long-term charters then the parties will need to do this by way of an addendum to the charter. It will clearly be in the interests of the party issuing bills of lading, and hence most likely to face cargo claims, to make this amendment as soon as possible.

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UK government approves armed guards on board UK registered shipping

David Cameron announced on 30 October 2011 that UK registered ships can be licensed to have armed guards on board, should the shipowners or operators choose to do so. This is in direct contrast with previous government policy, which was that the carriage and use of firearms on board UK registered ships was strongly discouraged, the reasoning being that the carriage of firearms

could escalate an already dangerous situation and the firearms on board could themselves become the target or purpose of an attack.

The announcement itself was not new - the change in policy and introduction of new legislation has been reported for some time - but a declaration of this kind by the Prime Minister is encouraging because it suggests that the change in legislation is imminent and also that the issue of piracy, and Somali piracy in particular, is finally on the radar at a high government level.

The prime minister did not go into any detail on the new legislation to be introduced but it is expected that it will resolve the issues arising from the carriage of firearms on board UK commercial vessels under the Firearms Act 1968 and also clarify exactly which licenses private security companies and ship owners/operators will need to obtain in order to carry firearms, ammunition and other equipment on board UK registered vessels.

In his announcement, Cameron endorsed the use of armed guards as an effective anti-piracy measure, with the evidence showing that ships with armed guards on board do not get attacked or hijacked. Whilst it is widely reported that no vessels with armed guards on board have been successfully hijacked, it should be noted that the presence of armed guards does not appear to deter pirates from continuing to make every effort to attack and capture vessels. Accordingly, the risks of the escalation of pirate tactics and the increase in the use of violence remain very real concerns.

Cameron was challenged during

his announcement that the UK government would effectively be licensing non-military UK civilians to shoot to kill. This raises the important point that whilst the UK government policy will change, there has been no suggestion so far that the government will take any steps to regulate the maritime private security industry which means, in effect, the industry must continue to regulate itself. Shipowners and operators must continue to carry out due diligence to carefully vet private security companies. Importantly, a private security company's Rules for the Use of Force must be carefully analysed to ensure they provide for the legal and proportionate escalation of force.

Cameron made it clear in his announcement that the placement of armed guards on board commercial vessels was intended as a short-term measure and not the solution to piracy. The government will continue to focus efforts on Somalia, currently the world's most failed state, to tackle the causes of piracy. It was also implied that the UK would assist other countries, the Seychelles and Mauritius in particular, to detain and prosecute pirates. In the meantime, the UK government's position now appears to be that the fastest and most effective anti-piracy measure available to UK registered ships is the deployment of armed guards on board.

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CONWARTIME 2004 - Was the long way round the wrong way round?

Pacific Basin IHX Limited v Bulkhandling Handymax AS

Regrettably piracy attacks and hijacks of ships remain a significant threat to world shipping. A recent English High Court judgment provides guidance on the test to be applied when considering whether, under the terms of the CONWARTIME clause, a voyage or routing order given under a time charter is invalid and can be rejected because of the risk of piracy that it entails. In *Pacific Basin IHX Limited v Bulkhandling Handymax AS* [2011] EWHC 2862 (Comm), on appeal from arbitration, the main issue before the court concerned the nature of the test for determining whether, in the reasonable judgment of the master, the vessel may be or is likely to be exposed to acts of piracy on the proposed voyage.

The case concerned a chain of charters of a geared bulk carrier, the "TRITON LARK". It arose in relation to the refusal of the disponent owner, Bulkhandling Handymax ("Bulkhandling"), to comply with the order of their time charterer (Pacific Basin) to carry a cargo of potash in bulk from Hamburg to China via Suez, which Pacific Basin had contracted to transport (as disponent owner) under the terms of a sub voyage charter on the GENCON form. The order was refused on the grounds that the route via Suez involved transiting the Gulf of Aden which would expose the vessel, cargo and crew to the risk of attack by pirates. Instead the vessel went the long way round via the Cape of Good Hope to avoid the risk. This resulted in an extra cost of US\$462,221.40 in hire

and bunkers. Pacific Basin pursued Bulkhandling for the extra cost. The tribunal rejected their claim.

To read the full briefing, please visit: <http://www.hfw.com/publications/client-briefings/conwartime-2004-was-the-long-way-round-the-wrong-way-round>

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News

HFW hires aviation team and opens office in São Paulo

Following the conclusion of formalities, we are delighted to welcome the eight partner team formerly making up Barlow Lyde & Gilbert's (BLG) well respected global aerospace and aviation group. The eight partners will work across five office locations - London, Hong Kong, Singapore, São Paulo and Dubai - and add significantly to HFW's international commerce offering, giving it a new, leading position in the market for aerospace and aviation law.

The partners are: Sue Barham (London), Peter Coles (Hong Kong), Richard Gimblett (London and Dubai), Mert Hifzi (Singapore), Nicholas Hughes (London), Giles Kavanagh (London), Keith Richardson (Singapore) and Jeremy Shebson (London and São Paulo). In addition to the partners, 16 associates also join with them.

As a result of this team hire, HFW

has opened an office in São Paulo, providing clients with core capabilities in aviation and insurance, as well as acting as a regional hub serving shipping, oil and gas, offshore, mining and commodities clients.

HFW hires shipping Partner

We are delighted to announce the recruitment of partner **Simon Chumas**, who joins the firm's London office.

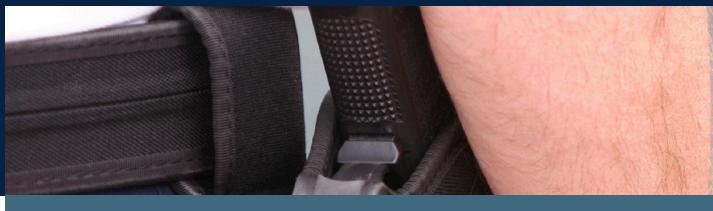
Simon, formerly a partner of 17 years with BLG, joins the firm's shipping practice. He specialises in handling marine claims and contractual disputes arising from the full range of marine casualties. He acts for shipowners and their insurers and handles both hull and P&I coverage disputes.

HFW Partner hires

HFW has made three recent Partner hires which will strengthen its energy, trade and arbitration expertise.

Susan Farmer has joined the firm's London office in the Corporate, Projects & Finance group. Susan represents clients in the energy, natural resources and electric power sectors in the structuring, negotiation and documentation of oil and gas and other natural resource project transactions, acquisitions and dispositions.

Folkert Graafsma, who has joined our Brussels office, specialises in international trade law, general EC and WTO law and customs law. He is a recognised author on international trade topics and speaks regularly at industry conferences.



Matthew Parish has joined our Geneva office. He specialises in international dispute resolution, international trade, foreign investment, emerging markets and public international law. He has represented clients in many courts and tribunals, including under ICC, LCIA and UNCITRAL rules. His practice involves a number of industry sectors, including banking, international trade, energy and infrastructure, insurance, financial services and shipping.

Conferences & Events

Blending on board: legal and practical issues

Geneva

(10 January 2012)

Jeremy Davies

Maritime London networking event

HFW, London

(11 January 2012)

Andrew Chamberlain

LMA Time & Voyage Charterparties and A Practical Guide to Laytime & Demurrage

Dubai

(29 January - 1 February 2012)

Simon Cartwright, Yaman Al

Hawamdeh, Nejat Tahsin and

Sam Wakerley

Chamber of Shipping Dinner

London

(6 February 2012)

Marcus Bowman

Tradewinds Ship Recycling Forum

Singapore

(13 March 2012)

Stephen Drury

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