omens

MAYANS have prophesied that 2012 would be a hell of a year. With all due deference to the god Itzamma, there are omens of better things in store this week.

You have to be slightly addled to see them, but optimists tend to win occasionally or, as Tom Petty and the Heartbreakers put it, even the losers get lucky sometime.

As mighty Torm hovers on the brink of bankruptcy, John Fredriksen was busy telling the Financial Times that he was mulling buying "hundreds of millions of

Frontline. But how it looks to be the start of a new sort of company altogether, in which Mr Fredriksen plans to invest in new ships now that newbuilding prices for tankers are at market lows.

Mr Fredriksen has the financial firepower, of course, to make such a remarkable turnaround play out of Frontline 2012. He infused, through his investment vehicle Hemen, $225m into the company, for a 90% stake. The idea is that new VLCCs will save the company money, bought at lower rates and with better energy saving designs.

About 8,000 miles away in Taiwan, CK Ong of U-Ming, a company that owns bulkers and a single VLCC, took a similar bet on a big, currently ailing ship class. U-Ming announced an order for up to 10 capesize vessels for a total of $500m, if all the options are taken. Mr Ong was succinct about the opportunity

foolish to suggest that both of these ideas will turn out to be winners. But Mayan doomsayers aside (and they do seem to come and go), Tom Petty had a point.

Time to move on

IN THE Asia-Europe trades, container lines have announced their proposed freight rate increases individually, since they are no longer permitted to co-ordinate price actions in that trade lane. But with carriers still enjoying antitrust immunity in the US they have been able to announce collective guidelines for proposed mid-March rate rises under the umbrella of the Transpacific Stabilization Agreement.

But whether operating in trades where they can

followed by any further search by Brussels for evidence of unlawful actions by lines. That, the industry hopes, suggests that nothing suspicious has been found.

It is easy for the lines to follow each other once one carrier has announced a general rate increase or some more creatively named price hike. But surely it would be better to put that creative energy into new carrier-shipper relationships than to devise fancy names for rate rises. Index-linked pricing is an obvious answer and this year's transpacific contract renewals will be interesting to watch.

Neither side really benefits from pricing behaviour that does not seem to have moved on, despite Brussels' efforts to reform the container shipping industry. ■

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Industry Viewpoint

Julian van de Velde

Take care when trying to limit liability

Owners seeking to limit liability in marine casualties need to keep a close eye on local law

IN THE wake of a maritime casualty involving substantial damage, the first question for owners or insurers is how the owner can limit liability for an amount lower than the actual claims and — if this is possible — where to try to do this.

This line of thinking was amply illustrated in proceedings before the Court of Rotterdam dated November 30, 2011, in the case of *Neptune Marine Towage BV v Safmarine Container Lines NV* (the case is not yet published).

As it turns out, the case illustrates the complex business of seeking to limit liability even in a jurisdiction with favourable laws — and the care that should be taken to understand those laws.

On May 28, 2009, the vessel *Safmarine Nuba*, owned by the Belgian company Safmarine Container Lines, was lying at anchor near the pilot station close to the port of Douala, Cameroon. At that time the tug *Neptun 9*, which is owned by the Dutch company Neptune Marine Towage, was towing the barge UR97 and sailing towards the direction of *Safmarine Nuba*.

Due to a manoeuvre on board *Neptun 9*, the unmanned barge UR97 hit the bow of *Safmarine Nuba*.

The subsequent question was whether Neptune could limit its liability for an amount lower than the losses claimed by Safmarine. In the Netherlands, the lower limits of the Convention on Limitation of Liability for Maritime Claims 1976 applied until January 1, 2011.

On January 1, 2011, the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of November 19, 1976 (1996 Protocol) entered into force. This means that the limits of the 1996 protocol apply to incidents that occurred after January 1, 2011, when shipowners are limiting their liability in the Netherlands.

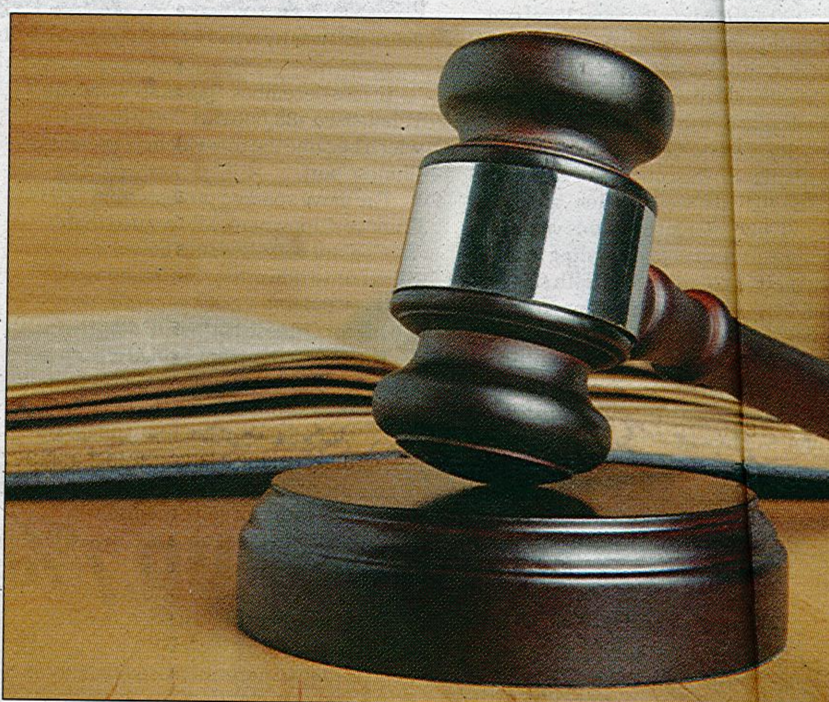
The present incident occurred on May 28, 2009. Consequently, the limits of the LLMC would apply, if Neptune could successfully limit its liability in the Netherlands.

The gross tonnage of the *Neptun 9* is lower than 500 tonnes, which means that the limitation of liability for property claims based on the LLMC is SDR167,000 (about $259,000). The losses suffered by Safmarine by far exceeded this amount. Therefore, Neptune was seeking ways to limit its liability in the Netherlands.

Article 11, Paragraph 1, LLMC provides that any person alleged to be liable may constitute a fund with the court in respect of claims subject to limitation. This provision is very clear.

However, you can only limit your liability if legal proceedings are brought against you seeking claims subject to liability. The Dutch Supreme Court elected to give a broad interpretation to the words "legal proceedings".

According to the Dutch Supreme Court, "legal proceedings" does not only mean commencing proceedings on the merits, but also filing a petition to grant leave to take legal action by a party who claims to have a claim that is subject to limitation,



Seeking to limit liability, even in a jurisdiction with favourable laws, can be a complex business.

for example an arrest petition or the petition to order witness hearings.

No legal proceedings were instituted by Safmarine in the Netherlands. However, the Dutch time charterers of *Neptun 9* filed a petition with the Court of Rotterdam to order witness hearings. The respondent mentioned in this petition was Neptune.

In the time charterers' petition, it was set out that Safmarine claimed from Neptune and that in its turn Neptune would claim an indemnity from the time charterers. In the petition, it was not set out that the time charterers were claiming losses or an indemnity from Neptune. Attached to the petition was a copy of the time charter party.

The charter party contained a knock-for-knock clause, meaning that the owners and charterers would each bear their own losses and damages.

Subsequently, Neptune filed a petition with the Court of Rotterdam to limit its liability arising out of the collision based on the LLMC. Neptune stated in the petition that the time charterers' petition to order witness hearings should be regarded as legal proceedings in the meaning of Article 11 LLMC.

In the defence submissions, Safmarine disputed that Neptune could limit its liability, because the time charterers' petition could not be regarded as legal proceedings commenced by a party that is claiming to have a claim against Neptune that is subject to limitation. In that

Article 11, Paragraph 1, LLMC provides that any person alleged to be liable may constitute a fund with the court in respect of claims subject to limitation

respect, Safmarine referred to the fact that the time charterers did not set out in their petition that they were claiming their losses or an indemnity from Neptune.

Further, Safmarine pointed out that the charter party contained a Knock for Knock Clause and that the time charterers therefore should not be able to claim from Neptune.

During the court hearing Safmarine, Neptune and the time charterers all testified. However, the court held that the requirements of Article 11, Paragraph 1 LLMC were not fulfilled.

In that respect the court referred to Safmarine's argument that the time charterers were not a party that alleged to have a claim against Neptune which was subject to limitation and that such a claim also not arise in the time charterers' petition. In fact, the time charterers did not touch on the relation between their alleged claim and their petition during the court hearing.

In view of these circumstances the court concluded that the time charterers' petition could not be regarded as legal proceedings in the meaning of Article 11, Paragraph 1 LLMC. Neptune's request to limit its liability was therefore rejected by the court.

Due to the fact that the 1996 protocol entered into force in the Netherlands it is no longer as favourable for shipowners to try to limit their liability there in respect of incidents that occurred after January 1, 2011. However, there are still some attractions to the Dutch jurisdiction for such shipowners.

The case involving Neptune underscores the careful reading of local law required to succeed in cases to limit liability in all jurisdictions, even favourable ones. ■

Julian van de Velde is an attorney at the Rotterdam-based law firm Smallegange.

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Maritime Blogspot

We must find the culprits to blame for IT failures

Craig Eason

WHY should a shipowner be held liable when a piece of complex, onboard modern technology fails to work?

That is a question I am beginning to hear quite a lot of at the moment. The systems and solutions that are being developed by the shipbuilders, system makers and integrators are of such a high level, there is no chance crews can effectively monitor and maintain them.

Let us ignore the complexity of the modern electronically controlled diesel engines for a moment, as enginemakers are now selling lucrative service packages to owners. Instead, let us focus on all the ancillary technology on board, particularly the environmental stuff.

We hear all the time how designers and manufacturers market their products as eco-friendly, green and beneficial. If manufacturers really had the silver bullet and were so sure of it, having gained the type approval from a class society — a class society that may also be keen to be seen as green — they should have the guts to back this up in the contract with the owner.

Intertanko technical manager Dragos Rauta pointed out the case of the oily water separator. This is a piece of equipment that has been riddled with problems in the past, despite systems being "type approved" for onboard use. So much so, it led to the creation of a whole new terminology when engineers created bypasses known as magic pipes.

Mr Rauta is concerned that when a manufacturer gets given the type approval from a recognised organisation of a maritime administration, it wins carte blanche to rebuild hundreds of copies of this single approved prototype, using different manufacturing facilities, with cheaper and quicker production methods, many of which are outsourced.

His implication is clear. Are these copies as good as the original that the company made itself, with a vested interest in the test results?

Whether it is the ballast water systems, the scrubber technology, other fuel optimisation tools or even the monitoring technology, there is a good argument to have each bit of kit tested for compliance before it is handed over to the shipowner; because if the equipment fails, it is the shipowner that is fined, or sees the ship detained, not the manufacturer of a supposedly approved system.

As Mr Rauta points out, other heavy transport industries do not have such a system whereby those that have no understanding, knowledge or capability to meet the rules are the ones that get punished when these rules are broken. Mind you, the manufacturers will have something to say about being liable for thousands of systems on thousands of ships when they may have nothing more to do with them once installed. ■

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