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THE PRESIDENT'S CORNER

We mourn the passing of Harry Hunter, a loyal and long time member of the SMA. Our condolences have been passed to his family.

The first quarter has been a busy and rewarding one for the SMA. In January our Charles L. Measter and Austin Dooley participated in a stimulating one-day seminar at the lovely SUNY Maritime College campus at Fort Schuyler on CUTTING EDGE ISSUES OF SHIPPING, sponsored and organized by the University. It was a well attended affair.

Then in February, the SMA conducted its second annual two-day educational course on MARITIME ARBITRATION IN NEW YORK, with ten international participants attending. By all accounts the course was a great success. Thanks are in order to Prof. Jeffrey Weiss and our Austin Dooley, Ph.D. for the thorough and well presented course and workshop.

Later in February, I participated in a vivid "Fire Side Chat" discussion about an expanded role for the International Tribunal of the Law of the Sea (ITLOS) in the Maritime Dispute Resolution arena, which took place on its spectacular campus in Hamburg, Germany. ITLOS, better know as the International Sea Court, was set up by the United Nations, to resolve maritime disputes between states, involving for example, fishing or seabed mining rights issues. Having state-of-the-art court facilities and a high profile international staff of judges, the Court had invited some 20 leading representatives from a wide range of the international maritime industry (shipowners, charterers, classification organizations, marine insurance and P&I Clubs, admiralty lawyers and arbitration societies, salvage and shipowners' associations) to explore potential benefits it could offer the world of maritime dispute resolution, should it expand its activities into private party disputes. It certainly was a most stimulating evening and is now an ongoing work in process. We all shall hear more about this in the future.

I then attended the always spectacular Annual Dinner of the LMAA in London and had many fine exchanges regarding arbitration in general.

March saw many of our members attending the 2006 CMA Shipping Conference, probably the best annual venue for "net-working" and catching up with old friends or making new ones among the Who's Who in the shipping business.

Looking forward, dedicated committees from the SMA and NYMAR are busily organizing a joint one-day conference, to showcase New York and its tri-state area as the foremost center of excellence and expertise for conducting business in the international maritime industry. The event is scheduled for October this year. Stay tuned, you will hear much more about this very soon.

Finally, with time flying by so fast these days, keep ICMA XVI in mind in your forward planning - to take place in Singapore, February 26 to March 2, 2007.

Wishing you all a good spring,

Klaus Mordhorst

MAY CLASS ACTIONS BE BROUGHT IN MARITIME ARBITRATION?

Jack A. Greenbaum, Esq.

According to the United States Supreme Court, the answer to the above question is: "Yes, if that is what the parties intended in their agreement." In June 2003, the Court held it is for the arbitrators, not the Courts, to determine whether the parties intended to submit to class arbitration. *Green Tree Financial Corp. v. Bazzle*, 593 U. S. 444 (2003). The decision was a landmark not only for that holding, but also because it implicitly overruled federal and state court decisions that when an arbitration clause is silent about the subject, it precludes class arbitration. Additionally, it is tacit in the decision that class arbitration is indeed permissible, which the Court had previously merely implied.

Less than four months after *Bazzle* was decided, the American Arbitration Association published its "Supplementary Rules for Class Arbitrations." In February 2005, JAMS published its "Class Action Procedures." Both procedures require the arbitrators to determine as a threshold matter whether the contract permits the arbitration to proceed on behalf of or against a class, and allow the parties time to apply to Court to confirm or vacate the "Clause Construction Award."

The shipping community's attention was drawn to this subject by a number of class action suits filed by liquid chemical shippers against several carriers, asserting anti-trust claims for price fixing. The Second Circuit granted the ship owners' motion in one of the cases to stay the action pending arbitration under the ASBATANKVOY arbitration clause. *JLM Industries, Inc., v. Stolt-Nielsen S.A.*, 387 F. 2d 163 (2d Cir. 2004)

JLM decided several issues, but there was no ruling about class arbitration, because no one asked for it. The plaintiffs resisted arbitration altogether. The main issues decided were that the arbitration clauses were not unenforceable contracts of adhesion, and anti-trust claims can be subject to arbitration. The Court rejected as speculative an argument that the large number of London arbitration clauses would subject many class members to a forum hostile to American anti-trust claims.

The plaintiffs questioned "the wisdom of arbitrating the claims of '500 to 700 customers.'" The Second Circuit did not construe this as an argument that the assertion of class claims barred arbitration, and said: "We would likely view such an argument skeptically because 'federal courts . . . have consistently enforced arbitration provisions in the context of class action lawsuits when federal statutory claims have been at issue.'"

Pursuant to *Bazzle*, it would be for the arbitrators in the *JLM* case to determine whether the charters permit class arbitrations if the plaintiffs so demanded when the action was stayed. However, those arbitrations are being conducted in strict confidence.

Arbitrators should take into account what a class action is and how it operates in considering whether the parties' intent was to permit class arbitration.

A class action is representative. Named plaintiffs or defendants represent a defined class of "absent class members." Any judgment or settlement in favor of the named plaintiffs is shared among the entire class, and any adverse judgment is binding on the absent class members. In either case, the absent class members may not pursue their individual claims

in another action unless they have opted out of the class action.

Arbitrators will want to consider the questions raised by the representative nature of a class action. Did the parties intend to arbitrate numerous claims with one "agent" for all charterers, before one panel? Is a class arbitration a consolidation of many arbitrations, or is it one arbitration with one party, notwithstanding the decision will decide the damages of an entire class?

Arbitrators should also consider the policies and criticisms for and against class actions in determining the parties' intent. Does the policy in favor of class claims argue for a liberal interpretation, or is it entirely irrelevant to maritime commercial disputes?

Class actions are used most often where matters of public interest are involved, and the individual claims are small or non-monetary relief is sought; typically consumer cases, securities fraud, anti-trust claims, and employment disputes. The cost in money, time, and energy, would discourage most people from pursuing small claims individually. Therefore, class actions serve the public interest by providing means to obtain compensation for wrongdoing, and to deter it. Additionally, they are theoretically efficient, because they save judicial resources by concentrating all litigation in one action and avoiding inconsistent results and confusion about the parties' rights and obligations.

On the other hand, class actions have been criticized as a means of extorting unfair settlements of weak claims from defendants who want to avoid the high cost and potentially enormous judgments associated with class litigation. They have also been criticized as serving the interests of lawyers more than those of class members, given the huge legal fees they generate and the small sums received by individual class members.

Due process of law is a central concern in class actions, because absent parties will be bound by judgments and settlements. Their interests must be protected in determining whether a class action is appropriate, guaranteeing the representative parties and lawyers adequately represent the interests of the class, making certain that appropriate notices are provided to absent class members, and approving any settlement.

By reason of due process concerns, many early class action arbitrations were "hybrids," with the Courts retaining supervision of class certification, notices, and approval of settlement. That has not been the case more recently, especially after *Bazzle*.

In federal court, class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Arbitrators should know generally what the Federal Rules provide if you are called on to conduct a class arbitration and protect absent parties' due process rights. The AAA and JAMS Rules track the requirements of Rule 23.

Rule 23 covers, first, the prerequisites to a class action: (1) "numerosity" that makes joinder of all class members impracticable; (2) common questions of law or fact; (3) claims or defenses of the representative parties as typical of those of the class; and (4) fair and adequate protection of the interests of the class by the representative parties.

Next, the Rule provides class actions may be maintained if separate actions would risk inconsistent or varying adjudications and incompatible standards of conduct, or if adjudications with respect to individuals would as a practical matter be dispositive of the interests of non-parties, or the party opposing the class has acted on grounds generally applicable to the class, or the court finds common questions of law or fact predominate over any questions affecting only individuals and "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Rule 23 then prescribes the procedures intended to guarantee due process.

As mentioned previously, *Bazzle* implicitly overruled decisions which construed arbitration clauses that were silent about class arbitration to preclude it. Those decisions relied largely on earlier cases which precluded *consolidation* of arbitrations in the absence of an express agreement. The parties to a contract agree to arbitrate with each other, not with third parties. However, the analogue may not hold in the case of class arbitration, where a party has in fact agreed to arbitrate directly with each of the class

members. *Bazzle* posed the issue as *how* the arbitration(s) will be conducted.

Early on, many companies saw arbitration as a way to avoid small consumer claims altogether, in any forum, on the rationale that class law suits must be stayed pending arbitration, "silent" arbitration agreements do not permit class arbitration, and plaintiffs would not arbitrate small claims individually. However, the judicial decisions regarding "silent" arbitration clauses were not uniform, and *Bazzle* ultimately undercut the cases that denied class arbitration. Therefore, contract provisions are sometimes imposed that *expressly* preclude class arbitration and class litigation.

There are conflicts in the decisions on the enforceability of class action waivers. Some hold a preclusion of class claims altogether is unconscionable, at least in contracts of adhesion and cases involving statutory rights. Some add that class action waivers lack mutuality, as corporations are not likely to bring class suits against consumers.

Some commentators suggest that, depending on the wording, a prohibition of class arbitration (without mention of litigation) could be interpreted to carve out an exception to arbitration and free a party to resort to the Courts to pursue class claims.

However, the majority of cases enforce agreements barring class arbitration, and require individual arbitration. A waiver of class arbitration and litigation in a charter party is likely to be enforced, in my view, because the parties are sophisticated commercial people, and *JLM* rejected the argument charters are contracts of adhesion.

The AAA has issued a policy statement that it will administer class arbitrations if the agreement is silent with respect to class claims, consolidation, or joinder of claims. However, because the law about class action waivers is unsettled, AAA requires parties to obtain a judicial ruling if the contract contains a bar to class claims.

JAMS at first announced it would not enforce class arbitration waivers in consumer agreements, but later said it will decide the issue on a case by case basis.

The SMA may have a special interest in the enforceability of class arbitration waivers, because you may find waivers in post-*JLM* charters. In fact, you may want to encourage parties to include waivers. If you believe most marine contracts do not contemplate class claims, you might even add something to the SMA Rules to the effect that agreeing to the Rules will be construed as an intention *not* to arbitrate or litigate class claims, unless the contract affirmatively states otherwise. At the same time, you can draft rules of procedure in the event an agreement does encompass class arbitration.

The *Bazzle* decision needs further discussion with respect to interpreting charter party arbitration agreements, which typically are silent on the subject of class claims. *Bazzle* involved consumer loans and security agreements. The plaintiffs filed class actions in South Carolina State Court, alleging the lenders illegally failed to inform them they could use their own lawyers and insurance agents. The trial Court certified a class and referred the case to arbitration. The same arbitrator decided two class arbitrations, and awarded each class about $10 million. The trial court confirmed the award and the South Carolina Supreme Court affirmed that judgment, holding a broad arbitration agreement that is silent about class arbitration must be construed to authorize it.

A plurality of four members of the U. S. Supreme Court reversed on the basis the Federal Arbitration Act preempts State law, and it is within the arbitrators' purview to determine whether the arbitration clause encompasses class arbitration. The plurality held the dispute about what the arbitration clause means is one "relating to this contract," and the resulting "relationships," covered in the *Bazzle* arbitration clause. The issue was not the validity of the arbitration clause or its applicability to the underlying consumer claim, which would have been questions for a Court. "Rather the relevant question is what *kind of arbitration proceeding* the parties agreed to," which the plurality characterized as a matter of contract interpretation and arbitration procedure.

Justice Stevens would have held the issue is a matter of State law, and the State Court's decision was correct, but he concurred in the plurality's decision to avoid a tie.

Chief Justice Rehnquist wrote on behalf of three dissenters that they saw the issue as "*what* to submit to the arbitrator, which is a matter for the Court, not the arbitrator." The dissenters would have held the arbitration clause's requirement of "one arbitrator selected by *us* with consent of *you*" limits an arbitration to the two contract parties. The dissent emphasized the choice of an arbitrator is an important component of the agreement, and the lender could reasonably have exercised a right to appoint different arbitrators for each of the 3,734 individual claims "in order to avoid concentrating all the risk of substantial damages awards in the hands of a single arbitrator."

The plurality in *Bazzle* responded to Justice Rehnquist's opinion about the words "us" and "you" by saying the clause is not that clear. They said the class arbitrator *was* selected by the lender with the consent of the named plaintiffs and of all the class members who agreed to proceed in class arbitration. They acknowledged the lender did *not* independently select *this* arbitrator to arbitrate its disputes with the *other* class members. But, they said, the literal terms of the contract do not state a requirement the lender shall select an arbitrator for this dispute and no other (even identical) dispute with another customer. At the same time, the plurality did not automatically accept the State Court's interpretation of the contract. They held the interpretation was for the arbitrator.

A fourth dissenter, Justice Thomas, would have let the State Court's judgment stand because the Federal Arbitration Act does not apply to proceedings in State courts.

There was a California Superior Court decision in November 2005 that is of interest with respect to arbitrators' interpretation of a "silent" arbitration clause. In *Directtv Inc. v. Cable Connection Inc.*,an Oklahoma Court ordered, pursuant to *Bazzle*, that the parties arbitrate the threshold question whether the contract permits class arbitration. The majority of a AAA panel held the arbitration clause was silent about class arbitration and did not forbid it. A Court in Los Angeles vacated the award and held, under California law, the arbitrators added a term to the arbitration agreement and thereby exceeded their powers, and did not "draw on the essence of the agreement." The Court further held the arbitrators should have admitted extrinsic evidence regarding intent. The holding is curious, because extrinsic evidence is admissible to construe an ambiguous clause, but the Judge did not seem to think it was ambiguous. The case is also puzzling because a number of pre-*Bazzle* decisions in California held class arbitration is authorized if the agreement is silent on the subject.

What are the arguments for and against a construction that the typical charter party arbitration clause reflects an intent to submit to class arbitration?

Probably the strongest arguments in favor of interpreting clauses to permit class arbitration are: 1) the policy to resolve any doubts about the scope of a broad arbitration clause in favor of arbitration; 2) the requirement to construe an agreement according to the objective meaning of its words; 3) the policy favoring class resolution of numerous modest claims, and 4) the argued unconscionability of clauses forbidding class proceedings. Further, AAA decisions almost uniformly order class arbitration, although those may involve distinguishable small consumer-type claims and contracts of adhesion.

The most practical argument *against* an interpretation in favor of class arbitration is that it is highly questionable whether foreign parties could possibly have understood or intended they were agreeing to what they would see as a draconian American litigation-style procedure. The reasons for agreeing to arbitrate include expeditious and economic resolution of disputes, and protection from unfamiliar legal procedures in foreign jurisdictions. Can anyone doubt most foreign – and probably most American - ship owners and charterers, such as major oil companies and grain companies, would reject New York arbitration if they understood it exposed them to class liability?

Further, parties choose their charter forms, not specifically their arbitration clauses, and most arbitration clauses were written before class actions became common. If the parties gave no thought to the specifics of their arbitration agreement, or the drafters of the arbitration clause decades ago did not even know of the concept of class actions, how can there have been an intent to submit to class arbitration?

A rebuttal to these arguments is that either parties' subjective intent is immaterial (unless they both admit to having had the same intent). Only the objective intent to be drawn from the words used is relevant. Arbitration clauses, like the U. S. Constitution, are living documents, adaptable to changing times, so a broad clause arguably may encompass a class procedure that may not have existed when the clause was written.

Arguably, *Bazzle* undercuts the argument about "objective interpretation." The arbitration clause in *Bazzle* was broader than the typical charter party arbitration clause, but the plurality nevertheless ruled it was "not as clear as The Chief Justice believes.". If so, then the clause was ambiguous, and extrinsic evidence would be admissible to aid in ascertaining the parties' intent, including, for example, expert testimony.

Nevertheless, the plurality did not foreclose interpreting the "objective words" as Justice Rehnquist advocated, as did the Courts which barred consolidation unless it was expressly agreed. It can still be strongly argued that the words "you" and "us," or "owner" and "charterer," and "disputes arising out of *this* charter," show an intent to arbitrate one-on-one with the named party.

As an aside, it is questionable whether the rulings on consolidation are still good law, because *Bazzle* can be read to require the arbitrators to decide if the intent of the arbitration clause encompasses consolidation.

Finally, failing a complete defeat of class arbitration in a given case, there remains the argument that the defined class may not include charters with London arbitration clauses, which seem to be the majority these days. The class members may be happy to have a class representative arbitrate their claims in New York, but the defendants should not be required to have their liability adjudicated in an arbitral forum other than the one to which they agreed.

Mr. Greenbaum, a partner in the New York maritime law firm of Healy & Baillie delivered the foregoing at the February 15, 2006 SMA luncheon. He may be reached at jgreenbaum@healy.com.

CRIMINAL LIABILITY OF THE MARINER (AND HIS EMPLOYER)

by Jeffrey S. Moller, Esq.

In recent years, federal prosecutors have pursued criminal charges against shipping companies and their employees with increasing energy. This trend is alarming not only because it targets both denizens of the wheel-house and the executive suite alike, but because it relies upon criminal statutes that are out of step with traditional tenets of criminal law and employs prosecutorial tactics which often lead to the distortion of facts and the loss of attorney-client privileges. Recent cases provide a "word-to-the-wise" and at the same time cry out for Congressional remedy.

As one might expect, oil pollution cases are by far the most attractive to prosecutors. Another type of attractive case is collision or allision resulting in passenger death or injury, such as the October 2003 Staten Island Ferry disaster. Both types of cases are covered loudly by local (and sometimes national) media. Each involves injury to either the environment or innocent members of the voting public. Prosecutors, whether at the federal or state level, are inevitably political creatures who enjoy the exposure which comes with the pursuit of justice against polluters or others whose actions have harmed the innocent.

It has often been said, only half in jest, that a grand jury, which is essentially led and fed by the prosecutor without input from criminal defense attorneys, would indict a ham sandwich. Not only do they hear only one side of a story, but members of a grand jury feel comfortable in knowing that an indicted citizen will have the benefit of a full and prompt criminal trial before actually receiving punishment. And grand jurors enjoy the vicarious satisfaction of bringing polluters to justice or assisting innocent victims. As a result, pollution cases or vessel casualty incidents resulting in passenger deaths can usually lead a grand jury to issue an indictment.

As is well known, incidents that occur on the navigable waters of the United States are primarily regulated by federal law. There are a number of federal statutes which can be used to impose criminal fines and imprisonment for incidents occurring on ships and boats. Maritime pollution incidents can bring into play any one of three federal criminal statutes: the Migratory Bird Treaties Act, the Clean Water Act, and the Act to Prevent Pollution from Ships. Cases involving the deaths of crew members or passengers can bring into play a federal statute popularly known as the Maritime Manslaughter Statute. First-year law students learn that traditional notions of fairness require proof of two basic elements before a person can be sent to jail: *Actus Reus* and *Mens Rea*, which are Latin phrases meaning proof that a defendant actually performed a prohibited act and that he did so with a degree of criminal intent. The most controversial aspect of the employment of the above described criminal statutes is the fact that the statutes, as written, allow conviction based upon a showing of no more than "simple" negligence.

In fact, in a prosecution under the Federal Migratory Bird Treaty Act, the government does not even have to prove carelessness. The literal language of the statute, as drafted in 1918, states that the mere act of killing a bird, regardless of the means or the intent of the actor, is punishable by up to a $15,000 fine and/or six months in prison. Even though the Migratory Bird Treaty Act was originally intended to prohibit hunting, which unmistakably involves an intent to kill, the Act is inevitably used by federal prosecutors when pursuing criminal charges against a mariner and/or his employer in an oil spill case. Many species of water fowl are protected by the MBTA and any sizeable spill of crude oil or heating oil in a coastal area generally results in the death of one or more birds. The low threshold of proof under the MBTA is irresistible to any prosecutor.

In a well-publicized grounding incident resulting in the discharge of 98,000 gallons of #6 oil into Buzzard's Bay, the simple negligence provisions of the Clean Water Act and the strict liability provisions of the Migratory Bird Treaty Act were the foundation of charges brought by the U.S. Attorney against both the mate and his employer. Each eventually pled guilty. The employer was ordered to pay a $10 million fine, $7 million of which was designated by the court to be used in certain wetlands conservation projects in the area of the spill. In that particular case, the mate would most likely have been subject to punishment even under a proper criminal negligence standard because the spill was proven to have been caused by his decision to leave the wheelhouse completely unattended while underway. But the company was far less culpable from a criminal point of view. Not only was it subjected to the strict liability provisions of the MBTA, but it was also charged with simple negligence, not for the particular act of the mate, which was contrary to established company policy, but for having negligently hired the mate in the first place.

The simple negligence standard found in the Maritime Manslaughter statute (18 U.S.C. Sec. 1115) has been employed by federal prosecutors in at least two recent cases, with differing results. That statute subjects a vessel officer or crew member to punishment of up to ten years in jail if his negligence causes the death of any person. The statute imposes a higher prosecutorial burden for the conviction of Shore side executives of the ship owning company who may be punished if they "willfully and wantonly" allowed the shipboard negligence to take place.

In the well-publicized Staten Island Ferry disaster of October 2003, the U.S. Attorney for the Eastern District of New York (Brooklyn) charged the licensed vessel operator under the simple negligence provision and the ferry system's supervisor of operations, the pilot's shore-side boss, under the latter provision. Each pled guilty.

However, in a recent, less-publicized case, a tank ship's Chief Mate was acquitted by a jury in a criminal prosecution involving the Maritime Manslaughter Statute arising out of the death of a crewman who had been sent into an empty (but not gas-freed) cargo tank. At first, the judge decided that under the broad plain language of the statute (drafted in 1905), nothing other than simple negligence was required to be proven. This prompted a guilty plea by the Chief Mate. However, in a surprise move, the

judge reversed himself and decided that, in keeping with what he had learned in law school, gross negligence was at least required. The Chief Mate immediately retracted his plea and the case proceeded to trial where the prosecutor failed to prove to a jury's satisfaction that the Chief Mate had been so grossly negligent as to infer the existence of criminal intent.

By far the most popular type of maritime environmental crime is the violation of the federal Act to Prevent Pollution at Sea (APPS) which essentially incorporated into U.S. law the well-known provisions of an international treaty. For some reason, probably having to do with either sloth or cost, Chief Engineers continue to pump oily bilge or ballast water over-board. The statute prohibits this behavior and requires any transfer of oily waste to be recorded in the vessel's Oil Record Book. When a vessel sails into a U.S. port, its Oil Record Book is supposed to be complete and accurate, and signed by the Chief Engineer. If prosecutors get wind of the fact that some amount of oil was pumped over-board without the event being documented, the inevitable prosecution for a falsified Oil Record Book is pursued. Since the falsification of documents is involved, the Oil Record Book violation can result in a greater penalty than the act of pollution itself. And, the U.S. Department of Justice has taken the position that if a vessel calls upon more than one U.S. port, the same omission in its Oil Record Book counts as a separate criminal act for each port visited, allowing the U.S. Attorneys for each district to bring their own cases and extract separate and duplicative fines and penalties.

Of course, the prosecutors must have proof that the pollution event actually occurred. In this they are aided by the "whistle blower" provision of APPS which encourages conscientious crew members (or those with a profit motive or a grudge against the ship's officers) to come forward and report the pollution in exchange for receipt of a percentage of the criminal fine recovered. The whistle blower's payoff can be as much as 50%, which amounts to hitting the lottery if the Justice Department succeeds in extracting a multi-million dollar fine.

One significant related development is the increasing tendency for prosecutors to bring charges for obstruction of justice. As Martha Stewart found out, lying to a federal investigator can result in jail time even if the conduct being concealed would not have been a crime itself. In the APPS cases, obstruction of justice has been charged not only based upon a falsification of the Oil Record Book, but by the mere existence of an overboard diverter pipe, even if it is never proven that the pipe was actually used for the purpose of by-passing the ship's oily water separator equipment.

Obstruction of justice charges can even arise where a company investigator, rather than a federal law enforcement official, has been deceived by an employee. And in a remarkable trend, federal prosecutors are offering reduced punishment to corporate defendants in exchange for their agreement to waive the attorney-client communication privileges which would otherwise protect the notes and records kept by an attorney who has conducted an investigation. This means that an employee who speaks candidly to a company lawyer while under the impression that the conversation would be subject to privilege can be exposed to criminal prosecution if the company itself decides to waive the privilege and allow its lawyer to testify as a witness to the admissions made by the employee. Moreover, if the employee was less than truthful with either the lawyer or some other internal company investigator, an employee can be subject to obstruction of justice charges just as if the company investigator or lawyer was a deputized federal official.

Although these trends are likely to keep mariners and shipping company executives awake at night, there are one or two important lessons. First and foremost, honesty is far and away the best company policy. The punishment for lying to investigators and falsifying documents is often much more serious than the punishment for the behavior being covered up, if, indeed that behavior was criminal at all. Secondly, charges based upon statutes which seem to allow criminal punishment on a strict liability or simple negligence basis ought to be vigorously opposed. The specter of jail time can give prosecutors tremendous leverage in plea negotiations,

but federal judges are increasingly uncomfortable with imposing criminal penalties without proof of the *Mens Rea* or criminal intent element. Pressing judges to make a decision by challenging indictments or forcing trials under the Maritime Manslaughter Statute or the Migratory Bird Treaty Act can help hold back the tide. What is really wanted, however, are clarifying Congressional amendments to these statutes to assure that only actual criminals can be subjected to jail time. Of course, finding a legislator who is courageous enough to introduce such legislation at the risk of being castigated in his next campaign as being "soft" on polluters is however a tall order.

Mr. Moller, a partner in the Maritime Practice Group of Blank Rome LLP, a law firm with major offices in New York, Philadelphia and Washington, D.C. delivered the March 15, 2006 SMA luncheon address based on the above article which appeared in the September 2005 issue of MarineNews. He can be contacted at moller@blankrome.com.

WHEN DOES AN ARBITRATOR'S AWARD DISREGARD THE LAW?

By Raymond A. Bragar And Paul D. Wexler

For decades, the conventional wisdom was that courts would rarely, if ever, overturn arbitration awards in commercial matters. The conventional wisdom was especially prevalent in circumstances where the subject matter of the arbitration touched upon Interstate commerce, and thus the awards were subject to the Federal Arbitration Act (the FAA).

However, a series of cases from state and federal courts in New York have cast doubt on this conventional wisdom. In these cases, courts have overturned commercial arbitration awards on the ground that the award was made in manifest disregard of the law.[1] To be sure, in most cases, the courts continued to routinely affirm awards,[2] but the trend of courts to examine the factual and legal basis tor the arbitration awards is striking. In defiance of this trend, the pendulum may be shifting back if a recent Court of Appeals case is any indication,[3]

Manifest Disregard of Law

This article examines the developing law of arbitration awards arising from commercial disputes in the New York courts. We conclude that the courts are far more likely to confirm arbitrators' rulings where the decision involves one or more mixed questions of law and fact. However, where the validity of the award raises pure questions of law, the courts will overturn awards where they believe that outcome-determinative legal issues have been ignored and incorrectly decided. The cases are not clear as to the difference between a "mere error" of law as opposed to a "manifest disregard of the law." However, from the cases it appears that manifest disregard arises when the error is crucial to the result and the arbitrators confronted the principle but still misapplied it.

The standard for confirmation of arbitration awards is different under New York law than under the FAA.[4] The FAA, by its terms, is applicable where the "arbitration agreement relat[es] to transactions affecting interstate commerce."[5] As virtually every commercial transaction arguably affects interstate commerce, the FAA is deemed to apply to most commercial contract arbitrations.[6]

In the past, courts regularly upheld commercial arbitration awards.[7] The reviewing standard was that arbitration awards would be upheld if there was any rational basis for doing so anywhere in the record, whether or not articulated by the arbitrators as the basis for the decision.[8] These courts also uniformly held that an arbitrator could not be deemed to have manifestly disregarded the law unless the party making the challenge had specifically argued the legal issue to the arbitrators.[9]

The shift away from this well-established law was triggered, in part, by the U.S. Court of Appeals for the Second Circuit opinion in *Halligan v. Piper Jaffray* [10] In *Halligan*, the court held that a reviewing court should examine the record and may refuse to confirm an award that is in manifest disregard of the evidence presented to the arbitrators, especially where the arbitrators did not articulate the reasons for their decision. Every litigator understands that there is a fine line between a case where the arbitrator acted in manifest disregard of the evidence and a case where the court simply comes to a different conclusion than did the arbitrator on the same evidence. The cases that follow illustrate the difficulty of finding that line.

Sands Brothers & Co., Ltd v. Generex Pharmaceuticals[11] represents a case where it appears that the courts were simply substituting their judgment for that of the arbitrators'. In *Sands,* the First Department remanded back to the arbitrators in a securities case an award granting the issuance of certain warrants because the court found that certain terms of the award were too vague to be enforced. The court held that the arbitrators could cure the defect and supply the missing terms upon a finding of competent evidence that the missing language was simply boilerplate that could be determined by reference to common standards in the industry. The court also ruled that if the arbitrators could not supply those missing terms by reference to industry standards, it could award money damages in lieu of the warrants. Upon remand, the arbitrators made a specific finding that industry standard boilerplate terms would complete the agreement, but the Appellate Division essentially took a *de novo* view of the record and affirmed the trial Judge, finding that the award was irrational. Although neither the trial court nor the Appellate Division employs the phrase "manifest disregard of the facts," it is clear that both courts were simply substituting their judgment for that of the arbitrators.[12]

In *Wallace v. Butter,*[13] the Second Circuit retreated a bit from *Halligan.* In *Wallace,* the court held that although a reviewing court may overturn an award on the ground that the arbitrator exhibited a manifest disregard of the law,[14] it could not do so if there is merely a manifest disregard of the facts.

The New York Court of Appeals seems to have followed that lead. In *Wien v. Malkin,* the U.S. Supreme Court reversed a judgment upholding an arbitration award under New York State law because the lower courts had applied the Civil Practice Law and Rules (CPLR) standard and not the FAA standard. The Supreme Court remanded the case back to the New York Supreme Court to determine if the award should be confirmed under federal standards. The trial court affirmed the award, but the Appellate Division reversed finding that the arbitrators had manifestly disregarded the terms of the contracts that were the subject matter of the dispute.

The Court of Appeals determined that the Appellate Division erred when it found there was a manifest disregard of the law. In the Court of Appeals' view, the arbitrators simply had construed the facts differently than the Appellate Division would have liked. As a factual dispute represented an insufficient basis to overturn the arbitrators' findings, the Court of Appeals reinstated the trial court's determination upholding the award.

These cases leave ambiguity in the interpretation of "manifest disregard" of the law. The Second Circuit has long held that a "mere error in law" is not sufficient to vacate an arbitration award. [15] And in its most recent pronouncement, the court interpreted manifest disregard of the law to mean "more than error or misunderstanding with respect to the law."[16]

New York Practitioner

What is the New York practitioner to make of all of this? Is there a difference between an "error of law" and a "manifest disregard of the law"? It seems to depend on context. Where the issues involve mixed questions of fact and law, courts generally will ignore errors of law and confirm the award. That finding tends to occur in questions like the arbitrators' interpretation of a contract. "Where the court finds that the arbitrators have improperly interpreted or applied a purely legal issue that is independent of factual findings, the court is likely to characterize it as a "manifest disregard of the law" and vacate the award. A good example of that is a question concerning vicarious liability or corporate form.

The *Wallace* case itself provides a useful illustration. In *Wallace,* the respondents sought to vacate the award arguing that the arbitrators applied the wrong standard for control person liability under federal law. While the Second Circuit agreed that the arbitrators had misinterpreted federal law, it nevertheless confirmed the award because the facts supported the imposition of control person liability under state law. Thus, reasoned the court, the arbitrators' award had an independent ground for confirmation and was not in manifest disregard of the law.

These types of issues often arise in customer disputes with securities firms where the claimant seeks to impose liability on employers or employees under the respondent superior doctrine.[18] If the arbitrators impose liability on the brokerage house on

the basis of respondent superior, but not on the broker individually, some courts have held that the award is in manifest disregard of the law.[19] These courts have reasoned that the brokerage firm cannot be liable as a matter of law unless the broker himself was liable. Thus, an award that penalizes the firm but not the broker is in manifest disregard of the law. In contrast, if the award itself does not recite the reasoning of the arbitrator, but the result is the same, i.e., liability imposed against the firm but not the individual broker, this award can be sustained if there is any legal reason in the record to support it. For example, the firm could be liable for falling to properly supervise the broker and thus the award can be sustained on that basis.[20] If the panel gives an independent basis for the brokerage house to be liable that makes legal sense, then that award can be confirmed as well.[21] At bottom, as long as it is conceivable for a legitimate rule of law to be applied on the facts in the record, the award is confirmed.

Courts have also differed as to whether arbitrators can ignore the corporate form when they believe it is appropriate to do so. For example, can arbitrators fashion their award to the individuals who are the 100 percent shareholders of a corporation, which has no debt, when the claim legally belongs to the corporation?

This is what the arbitrators did in *Spear, Leeds & Kellogg v. Bullseye Securities, Inc.,*[22] but the First Department vacated the award and remanded the matter to the arbitrators. *Bullseye i*nvolved a claim by a trading company and its 100 percent shareholders against a brokerage firm and the trader at the firm who handled the claimants' account. The arbitrators made an award to the individual shareholders of the trading company, but not to the trading company itself. Upon remand the arbitrators justified their award by pointing to an agreement directly between the brokerage firm and the shareholders coupled with the brokerage firm's negligent supervision of the trader.

Once again, the New York Supreme Court vacated the award on the grounds that public policy precluded an award to individuals for damages sustained by a corporation, even though the arbitrators had specifically articulated the reasons why it did so. The First Department reversed, accepting the arbitrators' explanation and confirming the award.[23]

Conclusion

There are obvious, cogent reasons for requiring arbitrators to adhere to well-developed rules of law, while affording them greater latitude in finding facts. Yet, there is no guide-line to distinguish between rules of law that are significant and those that are trivial. Only by strictly requiring compliance with clear rules of law can courts rationally review awards.

Since the courts (a) are supposed to treat as waived any rule of law not clearly presented to the arbitrators, (b) not supposed to question any finding of fact made by the arbitrators, and (c) are obliged to search the record for any possible fact and rule of law on which to support an award, they have ample grounds to sustain awards without having to abrogate pure rules of law clearly presented to the arbitrators and not properly applied by them.

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1. *Sands Brothers & Co., Ltd. v. Generex Pharmaceuticals Inc,* 298 A.D. 2d 307, 749 N.Y.S.2d 17 (1st Dept. 2002); *Spear, Leeds & Kellogg v. Bullseye Securities Inc.* 291 A.D.2d 255,738 N.Y.S. 2d 27 (1st Dept. 2002); *Wien & Malkin LLP v. Helmsley-Spear lnc.* 12 A.D. 3d 783, 783 N.Y.S. 2d 339 (1st Dept. 2004).

2.Morgan Stanley DW Inc. v. Afridi 13 A.D.3d 248, 788 N.Y.S.2d 11 (1st Dept. 2004); *Roffler et al v, Spear, Leeds, & Kellogg,* 13 A.D.3d 308,788 N.Y.S. 326 (1st Dept. 2004); *Banc of America Securities v. Knight,* 4 Misc.3d 756. 781 N.Y.S.2d 829 (Sup. Ct. N.Y.Cty. 2004).

3. Wien & Malkin LLP v. Helmsley-Spear Inc. _NY3d_. _NYS2d_ (Feb. 21,2006) ("*Wien v. Helmsley"*)

4. Compare CFLR §7511 with FAA §l0, 9 *U.S.C.* §l0; See, Elsberg, Federal Arbitration Act *vs.* New York State Arbitration Law. N.Y.L.1, May 6, 2005.

5. *Morgan Stanley DW Inc. v. Afridi,* 13 A.D.3d 248, 249, 788 N.Y.S. 2d 11,12 (1st Dept. 2004) and cases cited therein.

6. See, *Wien v. Helmsley, in.* 8; *The Citizens Bank v. Alafabco Inc.,* 539 U.S. 52,123 S.Ct, 2037 (2003) and *Wien & Malkin LLP v. Helmsley-Spear Inc. 540* U.S. 801,124 S.Ct 222 (2003). New York courts have been struggling with whether or not to use the manifest disregard standard. See discussion in *America Securities v. Knight,* 4 Misc.3d 756,781 N.Y.S.2d 829 (Sup. Ct. N.Y.Cty. 2004),

7. *Willemijn Haudstermaatchappij v. Standard M*icrosystems *Corp.*, 103 F.3d 9,12 (2d Cir, 1997); *The Wackenhut Corp. v. Amalgamated Local 515, et al,* 126 F.3d 29,32 (2d Cir. 1997).
8. *Willemijn Haudstermaatchappij, BV. v. Standard M*icrosystems *Corp.* 103 F.3d 9,13 (2d Cir. 1997); *Lew Lieberbaum & Co. Inc v. E. Tate Randle, et al., 8*5 F. Supp. 2d 123 (F.D.N.Y. 2000).
9. *DiRussa v. Dean Witter Reynolds Inc.* 121 F3d 818, 821 (2d Clr.1997).
10.148 F.3d 197 (2d Cir. 1998).
11. 298 A.D.2d 307,749 N.Y.S.2d 17 (1st Dept. 2002) and earlier opinion in the same case at 279 A.D. 2d 377,720 N.Y.S. 2d 450 (2001).
12. Commentators have recognized the "nitpicking" nature of this decision. See Young, "Courts Are Intervening in Arbitration Cases More," NYL1,2/24/2003. 13. 378.F.3d 182,192-193 (2d Cir. 2004).
14. There are other statutory, and even non-statutory grounds for upsetting arbitration award under the FAA. They are, however, beyond the scope of this article.
15. *I/S Stavborg v. National Metal Converters Inc,* 500 F2d 424, 431 (2d Cir. 1974).
16. *Wallace v. Buttor,* 378 F3d 182,189 (2d Cir. 2004),
17. New York cases that find arbitrators not bound by substantive law also refer to contract interpretation. E.g. *Gleason v. Michael Vee Ltd.,* 284 A.D.2d 666,726 N.Y.S. 2d 493 (3rd Dept 2001).
18. *Hardy v. Walsh* Manning *Securities LLC,* 341 F.3d 126 (2d Cir. 2003).
19, *Hardy v.. Walsh Manning Securities LLC,* 341 F.3d 126 (2d Cir. 2003)
20 *Perpetual Securities Inc. v. Tang,* 290 F3d 132,139-140 (2d Cir 2002); *Morgan Stanley DW Inc. v. Afridi,* 13 A.D.3d 248, 788 N.Y.S.2d 11 (1st Dept. 2004).
21, *Roffler et al. v. Spear Leeds & Kellogg,* 13 A.D,3d 308, 788 N.Y.S.2d 326 (1st Dept. 2004).
22. 291 A.D.*2d. 2*55,256,738 N.Y.S.2d 27,28 (1st Dept. 2002).
23. *Roffler et al v. Spear Leeds & Kellogg,* 13 A.D.3d 308, 788 N.Y.S.2d 326 (1st Dept. 2004).

This article appeared in the Wednesday, March 22, 2006 edition of the NEW YORK LAW JOURNAL.
Raymond A. Bragar *and* **Paul D. Wexler** *are members of Bragar Wexter & Eagel, specializing in commercial litigation. Mr. Bragar was the appellants' counsel in "Roffler v, Spear Leeds" after unsuccessfully representing appellants in the earlier, related case of "Spear Leeds v. Bullseye,"*

RECENT COURT DECISIONS

WHO DECIDES CONTRACT ILLEGALITY, COURT OR ARBITRATOR?

In a recent decision the U.S. Supreme court decided whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality. The following is excerpted from the syllabus prepared by the Reporter of Decisions:

BUCKEYE CHECK CASHING, INC. *v.* CARDEGNA ET AL.
CERTIORARI TO THE SUPREME COURT OF FLORIDA
No. 04-1264. Argued November 29, 2005 - Decided February 21, 2006

For each deferred-payment transaction respondents entered into with Buckeye Check Cashing, they signed an Agreement containing provisions that required binding arbitration to resolve disputes arising out of the Agreement. Respondents sued in Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida laws, rendering it criminal on its face. The trial court denied Buckeye's motion to compel arbitration, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void *ab initio.* A state appellate court reversed, but was in turn reversed by the Florida Supreme Court, which reasoned that enforcing an arbitration agreement in a contract challenged as unlawful would violate state public policy and contract law.

Held: Regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court. *Prima Paint Corp.* v. *Flood & Conklin*

Mfg. Co., 388 U. S. 395, and *Southland Corp.* v. *Keating,* 465 U. S. 1, answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. See *Prima Paint,* 388 U. S., at 400, 402—404. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. See *id.*, at 403—404. Third, this arbitration law applies in state as well as federal courts. See *Southland, supra,* at 12. The crux of respondents' claim is that the Agreement as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge. Because this challenges the Agreement, and not specifically its arbitration provisions, the latter are enforceable apart from the remainder of the contract, and the challenge should be considered by an arbitrator, not a court. The Florida Supreme Court erred in declining to apply *Prima Paint*'s severability rule, and respondents' assertion that that rule does not apply in state court runs contrary to *Prima Paint* and *Southland.* Pp. 3-8. 894 So. 2d 860, reversed and remanded.

ARBITRATOR LIABILITY

The district court in Finland has brought to conclusion a series of proceedings over arbitrator partiality lasting almost seven years.

The Finnish supreme court had ruled that the chairman of an arbitration tribunal had breached his duty to disclose circumstances that were likely to give rise to justifiable doubts as to the arbitrator's impartiality and independence, and found him liable for damages caused to the plaintiff. The supreme court further ruled that the compensation payable should be based not on the Tort Liability Act - which in effect would have excluded compensation for damages - but on contractual liability. As the district court had not ruled on the issue of damages in its original decision, the supreme court returned the case to the district court, which has now announced its decision.

The plaintiff claimed damages in the amount of 167,000 euros plus penal interest, as well as legal costs. The claim was based on the contention that, as the first arbitration proceeding was annulled due to the fact that the chairman had breached his duty to disclose, the chairman should compensate for the unnecessary legal fees incurred. Therefore, the sum consisted of witness and expert fees and secretarial services, as well as attorneys' fees. The attorneys' fees were the single largest part of the costs.

The chairman argued that the majority of the claimed damages should be refused and that the penal interest should be adjusted. The district court found that some of the costs had not been proven, finding that the actual costs were approximately 145,500 euros. It also found that fifty per cent of the witness and expert costs could be utilized in later proceedings, and that thirty per cent of the attorneys' cost could be utilized. Thus, the incurred damage was found to be approximately 97,550 euros.

Finally, the court considered that some of the incurred legal fees were unnecessary and unreasonable. Thus, the court found the damages to be 80,730 euros. The court found no grounds to adjust the penal interest, but ruled that the parties were liable for their own legal costs. The ruling remained final as no appeal was filed.

This summary appeared in the March 7, 2006 issue of Maritime Advocate Online. It was contributed by Marko Hentunen and Anders Forss, of Castren & Snellman, to the International Law Office website:www.internationallawoffice.com/

AWARD DIGESTS 5 & 6

The CD-ROM combining Award Digests 5 and 6 remains available for purchase from the SMA. The files, in .PDF format, are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds, net of all banking charges. We would be happy to provide our banking instructions for wiring payment direct to our account.

ICMA XVI

The Sixteenth International Congress of Maritime Arbitration, to be held in Singapore, 26 February - 2 March 2007, less than a year away. Their website, http://www.icma2007.com, which is currently under development, will contain up to date information as the Congress dates approach.

IN MEMORIAM

HARRY HUNTER

April 4, 1923 / March 10, 2006

It is with much regret that Southern Star Shipping announced the sudden passing of Mr. Harry Hunter. Mr. Hunter was a graduate of the U.S. Merchant Marine Academy at Kings Point and spent his entire working life in the marine industry. He joined Southern Star Shipping in the early 1980's after a long career including many years with Delta Steamship. Mr. Hunter retired from Southern Star in 1999 as Vice-President of the Liner/Chartering Department. Upon his retirement he moved to South Carolina to be closer to one of his sons and grandchildren.

Mr. Hunter was a well known and respected member of the shipping community both as a broker, arbitrator and friend of many. His warm smile, vast knowledge of shipping, and strong hand-shake always left a lasting impression on all with whom he dealt.

He will be missed by many.

Mr. Hunter was interred in the family plot in Fort Lauderdale, Florida on March 13, 2006 with a grave side service.

POEM FOR THE QUARTER

WAITING CATHERINE

A thick white fog came swirling in
and covered all the shore,
while in the distance a fog horn moaned
and a surf roared in the fore.

A gull cried out somewhere unknown
as a balmy breeze blew in,
while Catherine here stood on the beach,
and faced the misty wind.

Is this the lot of women who wait,
to stand upon a beach
with a thousand miles of rolling sea
and a lover beyond her reach?

By William (Bill) Orr

EDITOR'S NOTE

Due to the SMA's 6 consecutive year Chairmanship rule, I will be stepping down as Editor of THE ARBITRATOR. It has been a great pleasure bringing you news about maritime arbitration from New York, the United States and around the world. Thank you for your backing and encouragement. I will be ably succeeded by Mr. Manfred Arnold. Please give him your support.

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

My best wishes to all for a healthy, happy and hopefully prosperous New Year. We have certainly begun this year with a bang.

Bob Gruendel's excellent presentation on "**NYMAR – The New York Advantage**" to a capacity crowd at the SMA January luncheon, culminated a stimulating and educational series of luncheon presentations, highlighting the predominant position of New York as a port, a market place and a commercial maritime hub like no other.

In November Captain Schoenlank, President of the United New Jersey Sandy Hook Pilots, reviewed the "**Vessel Traffic Calling New York/New Jersey**" by explaining the complexities of ship types and sizes; cargoes dry, wet and/or boxed; terminals, berths and draft to reach them; equipment to service all of this and the multitude of manpower required to make it all work.

In December Captain Glenn Wiltshire, USCG Commander, Sector New York and Captain of the Port, very effectively tackled the intricacies of "**Maintaining Port Efficiency While Enhancing Port Security**", so current a topic in light of the ever increasing security regulations and mandates.

Which brought us to January's speaker, Bob Gruendel, a partner of the international law firm Curtis Mallet-Prevost Colt & Mosle and head of its maritime practice. Bob provided the audience with a fascinating up-date of NYMAR (New York Maritime), an organization which he currently chairs.

Founded by a group of forward thinking New York admiralty attorneys and incorporated in 2004, NYMAR is now gearing up to accept membership from all sectors of the New York maritime cluster,

including financial organizations, insurance providers and P&I Groups, brokers and maritime consultants. It plans to serve as a comprehensive networking organization for and in everything maritime. As it grows it hopefully will become New York's maritime window to the rest of the world.

The SMA has of course been a participating supporter of these efforts from the beginning. The January lecture ably drew on the preceding presentations to emphasize NYMAR's mission by presenting New York's maritime excellence as the result of the joint contributions and the close cooperation of all of its maritime industries. Contact the SMA office for the informative booklet NYMAR – The New York Advantage.

More good things are in the works for the coming months. Following up on the success in 2005, Professor Weiss and Austin Dooley, Ph.D. will again conduct the comprehensive two-day seminar on "**Maritime Arbitration in New York**" to be held on February 9 and 10. For further information as well as other up-coming events please contact the SMA office or visit our website at www.smany.org.

Again, with my best wishes for a great 2006.

Klaus Mordhorst

MAINTAINING PORT EFFICIENCY WHILE ENSURING PORT SECURITY

On December 14, 2005, Captain Glenn A. Wiltshire, U.S. Coast Guard Captain of the Port of New York and Commander, US Coast Guard Sector New York, addressed the SMA luncheon audience on the challenges of balancing safety, security, and facilitation of commerce within the Port of New York/New Jersey. He began by providing an overview of the range of missions carried out by his command in the New York area and extending up the Hudson River to the Port of Albany. These include search and rescue, maintaining aids to navigation, law enforcement, environmental protection, enforcing maritime safety laws and regulations applying to both US and foreign flagged vessels, ice breaking, and ports, waterways, and coastal security.

The responsibilities are carried out by 575 active duty Coast Guard men and women, 390 reservists, 72 civilian employees, and almost 2000 volunteer Coast Guard auxiliarists from their command located at Fort Wadsworth on Staten Island and at other locations in Sandy Hook and Bayonne, NJ and Kings Point and Saugerties NY. These men and women operate a full range of Coast Guard cutters and small boats to carry out their broad missions. However, it was noted that their responsibilities are much greater than the local resources available, so they work very closely with other "port partner" agencies such as the New York City Police Department Harbor and Aviation Units, U.S. Customs and Border Protection, the Federal Bureau of Investigation, New Jersey State Police Marine Unit, Port Authority, and Sandy Hook Pilots Association, to name a few.

Captain Wiltshire stressed the importance of teamwork and coordination among the various agencies and organizations to ensure the continued vitality of the Port of New York/New Jersey, noting that the port is the largest on the East Coast with over $114 billion in commerce in 2004, third in the country for container movement with over 4.4 million TEU moved in and out in 2004, and the largest for movement of refined oil products by water.

With the potential transit strike looming, he also highlighted the importance of commercial ferries (public and private) that move almost 110,000 people a day between Manhattan, Staten Island, and New Jersey, and the potential threats that are addressed by the Coast Guard.

He went on to describe the types of maritime security activities the Coast Guard leads in the port. These include screening vessel, crew, and cargo information on each of the 5,400 large commercial vessel arrivals that occur each year, carrying out security boardings on certain "high interest vessels" before they enter the port, patrolling security zones and around critical infrastructure throughout the port, ensuring that vessels and waterfront facilities are in compliance with both international and domestic

safety and security requirements, and investigating reports of suspicious activity.

He then spoke of two local efforts that directly relate to balancing security and commerce: identifying "harbors of safe refuge" for vessels that may have safety or security issues, and establishing a process for "port reopening decision-making." A safety or security incident involving a vessel either en route the port or within it could directly impact that vessel as well as others, and he used a security threat last summer involving a shipment of lemons from South America aboard a container ship to illustrate the complexity of the issues that need to be addressed. These two complementary efforts being worked on by the New York/New Jersey Area Maritime Security Committee are intended to identify alternative locations to anchor or berth a vessel that may pose a threat to the port, or if the port is closed because of a natural or man-made disaster or security incident, identify steps necessary to return commerce to normal as quickly as possible.

He closed by reinforcing the importance of presence and vigilance as the primary tools to prevent or deter a terrorist attack and the critical importance of teamwork. He reminded all that to be successful we must be right 100 percent of the time, the terrorist need only be right once!

ARBITRATION NOTICE BY E-MAIL RULED PROPER

A charterer that listed only a general "info@xxx" e-mail address in the Lloyd's Maritime Directory could not later claim that an e-mail sent to that address to serve notice of arbitration was ineffective, an English court has ruled. The case involved a dispute over hire payments between the charterer, Bernuth Lines Ltd, and the owner of the vessel, Eastern Navigator.

The charter party contained a London arbitration clause. In May 2005, lawyers for the owner sent an e-mail to the charterer's general e-mail address (info@bernuth.com), inviting it to settle the amount of US$34,100 to avoid arbitration proceedings. The e-mail went on to say that once arbitration proceedings were commenced, the owner would seek to recover the full outstanding hire with compound interest and costs, and asked the charterer to agree to the appointment of a sole arbitrator.

The e-mail address "info@bernuth.com" had not appeared on any previous communication from the charterer. Nevertheless, it appeared as the charterer's e-mail address in the 2005 Lloyd's Maritime Directory and the charterer's Internet website. Another eight e-mails were later addressed or copied to the charterer by the owner's lawyers, the London Maritime Arbitrators Association, and the arbitrator. All e-mails from the owner received electronic delivery confirmation receipts.

In July, the arbitrator issued his final award. It was e-mailed to "info@bernuth.com" and a copy was also posted to the charterer. This was the first communication on the arbitration that was sent to the charterers other than by e-mail. In his award, the arbitrator said that no submission was received at any time from the charterer but he was satisfied the charterer was aware of the proceedings and had reasonable time to serve defense submissions. The arbitrator awarded the owner US$40,221 plus interest and costs.

In August, the charterer's lawyers wrote to the arbitrator and the owner's lawyers expressing their client's surprise at receiving the award and stating that their client had been unaware of the proceedings until they received the award by post. Three days later, the charterer appointed an arbitrator in respect of its counter-claims amounting to some US$100,000 and invited the owner to appoint its arbitrator to start the proceedings afresh. The charterer then applied to the English Commercial Court to set aside the award on the basis that the original arbitration that was purportedly commenced by e-mail was not effectively served.

Under the UK's Arbitration Act 1996, arbitral proceedings are commenced when one party serves on the other party written notice to appoint or agree to the appointment of an arbitrator. A notice may be served by any effective means. The charterer argued that the "info@bernuth.com" e-mail address was only intended for cargo bookings and not legal notices. A

clerical officer had received the May e-mail but ignored it as spam because no serious legal matter would normally be sent to that e-mail address.

Justice Christopher Clarke in the English Commercial Court ruled that the provision in the Arbitration Act that a notice could be served by "any effective means" meant service will be effective as long as it is done through a "recognized means of communication."

"There is no reason why delivery of a document by e-mail - a method habitually used by businessmen, lawyers and civil servants - should be regarded as different from post, fax or telex," said the judge.

Having said that, the judge also pointed out that merely clicking on the "send" icon did not automatically amount to good service. The e-mail must be despatched to what is, in fact, the e-mail address of the intended recipient. The e-mail must not be rejected by the system and if the sender does not require confirmation of receipt, he may not be able to show that receipt has occurred, said the judge. There may also be several e-mail addresses for a number of different divisions of the same company, possibly in different countries, in which case, despatch to a particular e-mail address may not be effective service, Justice Clarke added.

"But none of those difficulties arise in the present case," said the judge, who stressed that the e-mail of May 5 and all subsequent e-mails were received at an e-mail address that was "held out to the world as the only e-mail address of the charterer." The fact that someone looked at the e-mails and decided that they could be ignored is no different to the receipt at a company's office of a letter or telex, which some clerk at the company decides to discard, said the judge.

The judge pointed out that if service under the Arbitration Act is effective when a notice is delivered by post to the relevant postal address, there was no reason why a notice delivered to a company's e-mail address has to be treated any differently. "Having put 'info@bernuth.com' into the current Lloyd's Maritime Directory as its only e-mail address, (the charterer) can scarcely be surprised to find that an e-mail inviting it to agree to the appointment of an arbitrator in a maritime matter was sent to that address," said the judge. [Bernuth Lines Ltd vs High Seas Shipping Ltd, 2005 EWHC 3020 (Comm), Dec 21, 2005, (www.bailii.org)]

(Summarized from *The Business Times Online* which can be accessed at http://business-times.asia1.com.sg.

RECENT CASES

PRIVATE VERSUS COMMON CARRIAGE

Charterer sought to recover damages of approximately $100,000 from Owner while the vessel was performing under a Time Charter on the NYPE form. Owner counterclaimed for approximately $40,000 for cargo damage and related costs.

The vessel performed a voyage from South Africa to Morocco with a cargo of coal. During discharge water was found in one hold and some 1,100 tons of cargo in that hold were found to be contaminated by sea water. The master issued a Note of Protest stating that the contamination was the result of stevedore damage to the ballast tank top, side hoppers or piping in way of the hold. The receivers refused to accept the contaminated cargo. The vessel was ordered off the berth on completion of discharge of the remaining uncontaminated cargo.

Being unable to tender for its next scheduled cargo to Morocco, Owner accepted a lesser rate for another charter to Brazil. While en route to Brazil, Owner, after having obtained the necessary permissions, arranged to have the crew jettison the contaminated cargo at sea. Subsequently, after alerting Charterer of their intention, Owner settled a claim from the receivers for the undelivered 1,300 tons of coal for $30,000 for which they claimed indemnification, plus related disposal costs, loss of subsequent fixture and miscellaneous fees

Charterer claims Owner had a legitimate claim against the receivers/stevedores since the Bill of Lading incorporated charter party terms and thus the receivers, and not Charterer, were responsible for any damage caused by the stevedores. The Bills of Lading Clauses read in relevant part:

> Clause 61 - The New Both-to-Blame Clause, the New Jason Clause and Conwartime 1993 as attached are all to be considered as part of this Charter and all Bills of Lading shall be subject to all said clauses. The USA/Canadian Clause Paramount as applicable or the Hague Rules as enacted in countries other than the U.S.A. and Canada as applicable to be incorporated in all Bills of Lading.
>
> Clause 62 - If required, the Charterers may have their own Bills of Lading. With reference to Lines 76/77 of the Charter Party, the Charterers and/or their agents are hereby authorized by the Owners/Master to sign on Owners'/Master's behalf all Bills of Lading, as presented, in strict conformity with Mate's receipts without prejudice to this Charter Party, providing Master/Owners have been given the opportunity to review same.

A panel majority found that, while the Bill of Lading was designed to incorporate Charter Party terms, Charterer's agent, which signed the Bills of Lading on the Master's behalf as allowed under Clause 62, failed to specify any charter party. Thus, the Bill of Lading served as a contract of common carriage, and not private carriage governed by the Charter Party as claimed by Charterer. The Hamburg Rules, those enacted in Morocco for application of the Hague Convention, and not the Canadian/US Rules as stipulated in the Charter Party, therefore apply. Thus, Charterer and not the receivers are responsible for the damages. [See **EVDOXOS - SMA 3897**]

TERMINATION UNDER SHIPMAN

Ship Manager, PGM, sought to recover damages of approximately $350,000, plus interest, attorney's fees and costs from Owner/Charterer, ARC, arising from the management of several vessels under BIMCO Standard Ship Management Agreements (SHIPMAN). The parties began their business relationship with respect to the management of a single vessel. Since this vessel was not part of the MARAD program at that time, it was not necessary to use the MARAD-approved SHIPMAN agreement. Thus, the original contract between the parties simply provided with respect to termination:

> 10.(b) Following termination and expiration of this agreement, the Technical Manager shall complete all current affairs (including, but not limited to, handling of claims) in return for a remuneration corresponding to the management fee for three months commencing on the date of termination or expiration of this Agreement....

Eventually ARC decided to consolidate management of their five MARAD program vessels under PGM's management, and the parties agreed that they enter into agreements for the vessels under terms consistent with their existing agreement. Accordingly, the parties entered into five identical SHIPMAN agreements consistent with their original agreement, which provided in pertinent part with respect to termination:

> 15.3 In the event of the appointment of the Managers being terminated by Owners or Managers . . . in accordance with Clause 23 other than by reason of default by the Managers, or if the Vessel is lost, sold or otherwise disposed of, the Management Fee payable to the Managers according to the provision of subclause 15.1 shall continue to be payable for a further three calendar months.

The original Clause 23.1 of the SHIPMAN form was deleted in its entirety and replaced in an addendum to each agreement with the following:

> 23.1 This Agreement shall come into effect on the date stated in Box 4 and shall continue in effect through 31 December 2003 subject to the terms of Clauses 15.3, 23.2, 23.3, 23.4, 23.5 and the following conditions:

> (a) Owners may terminate this agreement and any extended term of this agreement as described in (b) below at any time without cause and without penalty by providing written notice of such termination to Managers not later than ninety (90) days prior to the termination date specified in the notice.

In July, 2004, ARC decided that a larger ship management company would better serve their interests and plans for future expansion. They provided 90 days notice and PGM turned the vessels over to the new managers in October without incident. PGM also turned over relevant documents and materials necessary for vessel operations but retained purchase orders and requisitions, open vessel Custom entries and outstanding insurance claim files. PGM offered to handle to conclusion any open or unsettled issues on behalf of ARC after the termination dates for an additional hourly payment.

ARC contended that PGM's agreement to provide post-termination wind-down services for a further three month period after termination was the *quid pro quo* for ARC's payment of the management fee. The original contract specifically required post-termination services from PGM in return for a remuneration corresponding to the management fee for three months. Although PGM proposed carrying this language forward in the SHIPMAN agreements, both parties agreed to minimize MARAD resistance by using the SHIPMAN form with minor modifications. Further, ARC argued, BIMCO's Explanatory Note to the SHIPMAN agreement supports their view:

> 15.3 Even if the Agreement may be terminated according to the provisions of Clause 23 or, for instance, because the Vessel is lost, it has been considered reasonable that the Management Fee should continue to be payable for a further 3-month period after termination. This is so because, even after termination of the Agreement, in most cases the Managers will be engaged in settling outstanding matters such as, for instance, freight and demurrage claims and crew, cargo or average claims.

PGM countered that the clear and unambiguous language of the agreements does not refer in any way to post-termination services. While the previous original agreement required PGM to perform post-termination services and gave both PGM and ARC the right of termination, the termination provisions in the subsequent SHIPMAN agreements exchanged PGM's obligation to perform post-termination services for their right to terminate the agreements without cause. The BIMCO explanatory note refers to the unmodified SHIPMAN form. The agreements in question contain an altered termination provision as set forth in the appendix. The real *quid pro quo* was a trade-off of the benefit of PGM's post-termination services for the assurance that, absent ARC default, PGM would be bound by the agreement for the entire contractual period.

The panel found that the amended SHIPMAN agreement, unlike the original agreement, did not provide that PGM complete all current affairs in return for remuneration corresponding to the management fee for three months commencing on the date of termination, and PGM's entitlement to liquidated damages was not conditioned on their performance of post termination services. The panel awarded PGM the termination fees. However, in the absence of ARC's explicit agreement, the panel denied PGM's claim for payment of post-termination services billed at an hourly rate. [See **SMA 3891**]

Full details of these cases and all issued SMA Awards may be found in the SMA Award Service available by subscription at http://www.smany.org/sma/smaaward.html

RECENT COURT DECISIONS

The three following case summaries were printed in the winter edition of **CLIENT ALERT!**, the newsletter published by the law firm DeOrchis & Partners, LLP. They can be contacted at dp@marinelex.com.)

MORE ON ARBITRATORS' SUBPOENA POWERS

Appeals Court Rules Arbitrators Can Subpoena Third Parties to Hearing

The Second Circuit Court of Appeals has ruled that arbitrators can subpoena and require testimony and production of records of an on-party at an arbitration hearing.

A group of chemical carriers had begun an arbitration proceeding against various other chemical carriers for alleged price-fixing. The claimants asked the Panel to issue subpoenas to a non-party chemical company and its former counsel. The non-party petitioned the panel to quash the subpoenas, which also called for production of documents. The District Court issued an order to compel compliance, and denied the non-party's motion to quash the counsel's subpoena.

The non-party, Stolt-Nielsen, argued that the subpoenas were "beyond the scope of Section 7 of the Federal Arbitration Act." Section 7 provides that arbitrators may summon "any person to attend before them or any of them and in a proper case to bring with him or them any [document] which may be deemed material" in the case.

The plaintiff claimed that the scheduled hearing was only a "preliminary hearing" and not a regular hearing on the merits, which it argued was the requirement of Section 7. The Court noted that, "In sum. [the non-party] alleges that the claimants and the arbitration panel have conspired to circumvent Section 7's limitation through the contrivance of conducting its discovery in the presence of arbitrators."

The Appeals Court had left open in another case the issue of whether arbitrators can subpoena witnesses solely for discovery purposes of a party, i.e., not for a hearing. The court declined to rule on the discovery issue because all that Section 7 requires is that any witness can be called as long as it is for the purpose of testifying before the arbitrators. Section 7 makes no distinction between preliminary hearings and hearings on the merits. *Stolt-Nielsen SA v. Celanese Chemicals Europe GmbH, et al*, (2d Cir., Nov. 21, 2005).

COURT HOLDS SHIPPER OF HAZARDOUS CARGO STRICTLY LIABLE UNDER U.S. COGSA §4(6)

Who is responsible when the shipper declares hazardous cargo in conformity with the IMDG Code and the U.S. regulations, and the carrier stows the dangerous cargo in accordance with the code and regulations, but the cargo explodes, destroying other shipments as well as the vessel itself?

In a recent case decided by the Southern District Federal Court in New York, manufacturers shipped 300-pound drums of calcium hypochlorite hydrated ("cal-hypo") in ten not refrigerated containers on the DG HARMONY from the U.S. to Brazil. Cal-hypo will decompose at room temperature, and the higher the temperature the higher the rate of decomposition. When cal-hypo is stored in drums, heat is retained inside the drums. The larger the mass, the harder it is for the heat to escape. Shipping large drums of cal-hypo in containers doubles the problem. At a certain point, the cal-hypo will self-ignite, the reaction becomes circular, "runs away," and the material explodes.

That is what happened according to the Court. The shipper claimed the plaintiff slot-charterers, who planned the stowage, had recklessly stowed three of the containers next to a heated side bunker tank and directly above a bottom bunker tank. The tanks were heated each time fuel was transferred. One of the slot charterers and a container underwriter were represented by the Firm's Vincent M. **DeOrchis** and William E. **Lakis,** who argued that stowage in accordance with the IMDG Code equals due diligence.

The Judge found from the evidence of investigators that the explosion of the cargo had occurred in another container stowed three containers in from the port side tank and two up from the bottom tank. On the other hand, the Court found that "the transportation of cal-hypo in 300-pound drums was a relatively new and untested phenomenon."

The Court ruled that the shipper failed to give proper warnings and instructions on the transportation of the cal-hypo in containerized 300-pound drums.

The Judge recognized that the shipper, like the carrier, "did not have actual or constructive pre-shipment knowledge of the true nature of the cargo or the full extent of the danger presented." But the Court found that "the hazard was foreseeable" and the shipper should have investigated further in view of its past experience with the product.

The Appeals Court ruled that the COGSA section should be read as making the shipper "strictly liable" because compared to a carrier, "a shipper can be expected to have greater access to and familiarity with the goods and their manufacture before those goods are placed in maritime commerce." (The British House of Lords has also construed Article 4(6) of the Hague Rules as meaning strict liability).

The Court noted the rationale for applying strict liability in this case was even more compelling because the shipper was also the manufacturer. "A manufacturer's duty is to the public in general," and privity of contract with the injured parties is irrelevant.

Finally, the Court also held the shipper liable on theories of failure to warn and negligence. In assessing what hazards are foreseeable, a "manufacturer is held to the status of an expert" and it should have done a better investigation. *In re M/V DG HARMONY, 98* Civ. 8394 (S.D.N.Y., 18 Oct. 2005).

DOES U.S. COGSA APPLY WHEN CARGO FOR U.S. DESTINATION IS DISCHARGED IN CANADA?

The U.S. Carriage of Goods by Sea Act, 1936, is based on the 1924 Hague Rules, but it applies to shipments made both "to and from ports of the United States." Moreover, COGSA contains a very low package limitation, $500, compared to the much higher limitation of other Hague Rules countries who have adopted the Visby Amendments.

What happens if cargo bound for the United States is loaded at a Hague Visby Rules country and discharged at another Hague Visby Rules country, so that no U.S. Port is involved in the combined transport?

The issue came up in a case when containers of auto parts bound for the U.S. were loaded at Le Havre, France, and were to be discharged at Montreal, Canada, and then forwarded by land to various U.S. destinations. Twenty-six containers were lost at sea in heavy weather, and others were damaged. The 26 containers that sank carried 4,387 auto transmissions.

Plaintiff maintained that the Visby Amendment limitation should be applied because the cargo was to be discharged in Montreal. Alternatively, it claimed each transmission should be considered the COGSA "package." Defendant argued that the bill of lading contained a provision, in capital letters, that the number of containers received by the carrier was to be counted in computing the package limitation.

The Court ruled that U.S. COGSA applied because the Clause Paramount in the bill of lading simply-said COGSA would apply to or from the United States, without requiring discharge at a U.S. Port. More importantly, the court observed that the shipper "does not appear to have paid anything extra for the alleged increases in Defendant's liability resulting from the decision to use Montreal as the Port of Discharge."

The decision implies the Visby value may have to be declared to avoid the COGSA limitation.

Finally, the court decided that the $500 package limitation applied to neither the transmissions nor the containers, but to the racks on which numerous transmissions were mounted to facilitate their transportation. *Royal Ins. Co. and Ford Motor Co. v. Orient Overseas Container Line* (U.S.D.C. E.D. Mich. S.D., Sept. 29, 2005).

AWARD DIGESTS 5 & 6

A CD-ROM combining Award Digests 5 and 6 is available for purchase from the SMA. The files, in PDF format, are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds, net of all banking charges. We would be happy to provide our banking instructions for wiring payment direct to our account.

ICMA XVI

The Sixteenth International Congress of Maritime Arbitration, to be held in Singapore, 26 February - 2 March 2007, is just about a year away. Stay tuned for more information..

SMA TRAINING COURSE

The Society of Maritime Arbitrators, Inc. (SMA) is pleased to announce a two day course:

MARITIME ARBITRATION IN NEW YORK
Dates: February 9 and 10, 2006
Location: Best Western Seaport Hotel, 33 Peck Slip, New York, NY 10038 (in the historic South Street Seaport District in Downtown Manhattan)

The Course:

The SMA offers this two day program to help further and promote the fair, just, ethical and cost efficient resolution of charter party and other maritime contract disputes via arbitration in New York. Jeffrey Weiss, Esq, Professor of Maritime Law at New York Maritime College, who has over 20 years of college and graduate level teaching experience, will be the lead instructor. Course contents will include:

Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act and SMA Rules

1. The Arbitration Award: Interim Awards; Final Awards; Majority Decision; Dissenting Opinions
2. Confirmation, Vacatur and Enforcement of Award; Panel Members and Ethical Considerations
3. Discovery in Aid of Arbitration; Hearing Procedures; Security in Aid of an Award
4. Evidentiary Considerations in Arbitration, the Federal Rules of Evidence and Related Issues
5. Time Bar, Defaults and Consolidation of Arbitrations

Course Critiques from Previous Attendees:

"The presentation as well as the printed material are of high quality and well laid out. I thoroughly enjoyed it and learned a lot about the underlying law and legal considerations. Jeff's skillful presentation certainly made it most enjoyable. These were two days well spent."

"Thanks very much for a very interesting and informative two days. Since I have not been involved with arbitrations for about twenty-five years, I found the course extremely useful, both to see how much I had forgotten as well as to learn how much has changed in the meantime. It was also gratifying to sit with such informed, interested and experienced fellow-students..."

"I would also like to express my thanks and high praises for the SMA course. Not only did I find the two-day course very informative, but also the additional comments provided by my fellow students pertaining to shipping in general. For someone new in the industry, it was a very valuable learning experience."

Who Should Attend:

This course will be especially valuable to professionals in the shipping business who are users of the maritime arbitration process. Attendees from shipowners, chartered vessel operators, maritime claims adjustors, insurers, traders and export/import companies should find the course an efficient way to gain an understanding of the current practices in New York maritime arbitration proceedings. The course will also be uniquely beneficial to newly admitted maritime attorneys or lawyers with less than two years practice experience or those seeking a more comprehensive understanding of the process.

Registration:

To register click on this link:

http://www.smany.org/sma/course/eduFlyer.html

or simply visit www.smany.org and click on the Course link. The registration form is available on-line. Or contact Sally at the SMA. But hurry for time is running out!

POEM FOR THE QUARTER

My Receptive Friend

I take my woes to the river
To a body more powerful
and
At ease than I.

In spite of my constant yearning
For tranquility,
Unwelcome intrusions
Invade my heart.

The river accepts my burden
and
Takes it downstream to the sea.

--Katherine Brand
(1952-2005)

IN MEMORIAM

Clifford R. Wise (1917-2005)

Cliff Wise, a distinguished and long time member of the Society of Maritime Arbitrators, passed away. He will be missed by his many friends in the SMA. The following obituary appeared in his local newspapers.

Clifford R. Wise, 88, died at his home in Pocasset, MA on July 28, 2005 from mesotheliorca. Born in North Attleboro, Massachusetts, Mr. Wise resided with his family in Larchmont, NY for 41 years. He attended the U.S. Naval Academy with the class of 1941, and while there, was captain of the sailing team. After 38 years with the Bethlehem Steel Company, he retired as manager of foreign and domestic sales for Shipbuilding Division.

Mr. Wise maintained his interest and support of sailing as a member of the New York Yacht Club, the Patapscut sailing association in Maryland and the Royal Norwegian Yacht Club. He was the first non-Greek president of the Hellenic American Chamber of Commerce. He was a director of the Seaman's Church Institute and a member of the Society of Naval Architects and Marine Engineers and the Connecticut Maritime Association. He was an arbitrator for, and a member of, the Society of Maritime Arbitrators, Inc. He also arbitrated cases for the New York Stock Exchange. He was a member of the technical committee for the American Bureau of Shipping as well as the Downtown Athletic Club, the Whitehall Club, the Westchester Country Club, the Chislers and the Isaac Walton Rod and Reel Chowder and Marching Society.

Mr. Wise is survived by his wife of 63 years, Regina (Glass) Wise, his two sons, Robert Mack of Bainbridge Island, Washington and Clifford Wise Jr. of Atlantic Highlands, N. J., and a brother Roger Wise of North, Attleboro, Massachusetts.

CRITICISM OF THE QUARTER

Among the more observant subscribers to THE ARBITRATOR (i.e., those that took the time to read it) were a few critics who pointed out the misuse of the word "Forward" (v. Foreword) in the HUMOR section of the initial posting of the last issue. To heap insult onto injury, at least one critic, inditing "Forward (sic)," reminded your Editor that this was not the first occurrence of this mishap.

The New Year having arrived, your Editor has resolved always to use a synonym when "Foreword" is intended, thus eluding what appears to be a genetic spelling quirk. The following words come to mind: *introduction, preamble, preface, prelude, opening, overture, prologue* and even *exordium, prelusion, proemand* and *prolegomenon.*

That should clarify the issue!

CONUNDRUM RESTATED

If a man speaks at sea, beyond the hearing of a woman, is he still wrong?

SOMETHING TO THINK ABOUT

I thought a thought.
But the thought I thought was not the thought I thought I thought.
If the thought I thought I thought had been the thought I thought I thought,
I wouldn't have thought so much.

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

Our hearts and minds are with our U.S. Gulf friends and colleagues at this difficult time of hurricanes and devastation. Please let us know if we can be of help or offer our assistance.

Now that an otherwise wonderful summer has given way to what, from the looks of it, appears to be a busy fall season, we are looking for an active participation by the SMA membership.

Our most recent SMA luncheon was held on October 12, 2005 at the Captain's Ketch, 70 Pine Street, New York City, at which Keith W. Heard, Esq., a partner at the Burke & Parsons' firm addressed the intriguing subject of **"Can the Parties Expand the Scope of Judicial Review of Arbitration Awards?"** The luncheon was followed by a seminar on **"The Principles of Writing Legal Documents",** with an emphasis on drafting arbitration awards. The featured speaker at the seminar was Richard V. Singleton, Esq., a partner of Healy & Baillie LLP and author of the book **"A Practical Guide to Legal Writing and Legal Methods."**

Our next luncheon on November 9th will feature Captain Richard J. Schoenlank, President of United New Jersey Sandy Hook Pilots, who will give us **"A Review of Vessel Traffic Calling at the Port of New York/New Jersey."**

These luncheons are designed to provide important information on current topics of interest and to offer an excellent opportunity for arbitrators, the users of the process and the maritime bar to come together and interact both professionally and socially. Please check the SMA web site at www.smany.org for dates and topics.

On October 26 and 27, 2005, IBIA (The international Bunker Industry Association) and Petrospot Limited presented **"The New York Bunker Convention 2005 - Incorporating the IBIA Bunker Arbitration Experience"**, a two-day conference held at the W Hotel New York. Bunker training courses preceded the event on October 24 and 25. This exciting occasion, in which the SMA took an active role, was co-sponsored by the SMA, NYMAR and the CMA. For more information on IBIA visit www.bunkerspot.com.

In January 2006, the SMA will again offer its comprehensive two-day seminar on **"Maritime Arbitration in New York"** presented by Professor

Jeffrey A. Weiss. This most valuable and intense program up-dates a similar seminar, conducted earlier this year. It is our intention to make this course an annual feature of our educational lectures and seminars.

Understandably, the **2005 National Maritime Savage Conference,** organized by the American Salvage Association and originally scheduled for November 1 to 3, 2005 in New Orleans, had to be canceled with new dates to be announced. The SMA was invited to present a paper on salvage arbitration.

As you see, we are off to a roaring start. Please check our website for updates on all of these events. I look forward to seeing many of you at any of these functions.

Klaus Mordhorst

CAN PARTIES EXPAND THE SCOPE OF JUDICIAL REVIEW OF ARBITRATION AWARDS?

By Keith Heard, Esq.

We sometimes think of "the law" as a towering, immutable edifice before which we are required to bow down. Certainly, a *lawyer* thinks that way if the law favors his side of a case. However, the law is *not* always an immutable structure or regime. Private parties can, by agreement, alter some aspects of the law.

Take the Carriage of Goods by Sea Act, for example. It has a one year time for suit provision but a cargo claimant and an ocean carrier can enlarge that time by agreement after a claim arises. The same holds true for the $500 package limitation and some carriers have, for commercial reasons, bumped up the amount of the limitation in their bills of lading. What you cannot do under COGSA is go below the liability floor established by the statute. *See* 46 U.S.C. § 1304(5).

The question I will address is whether private parties can, by agreement, expand the scope of a *federal* District Court's review of an arbitration award. This question also comes up under state law but, since those of us dealing with maritime arbitrations are primarily concerned with the Federal Arbitration Act (the "FAA"), I have limited my topic to what the federal courts have said about this issue.

Under federal law, the grounds for vacating an award are rather narrow. We have the statutory grounds set forth in section 10 of the FAA. These include vacating an award because it was procured by corruption, fraud, or undue means; or because there is evidence of partiality among the arbitrators; or because the arbitrators exceeded their powers. Separately, a court may modify or correct an award for the reasons stated in section 11 of the Act.

In addition, we have a few common law grounds, whose existence is based simply on case law. These include "manifest disregard" of the law, lack of "fundamental fairness in the proceedings" and the grounds that the award was "completely irrational" or "contrary to public policy". David Nourse described these common law grounds in a speech before the Society of Maritime Arbitrators in April of 2003. In his remarks, David reminded us that the Courts take a narrow approach in reviewing challenges to an arbitration award:

> "The reason for this approach is clear," he wrote.
>
> "It effectuates *the parties' agreement* to submit their disputes to arbitration and it avoids frustrating the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings." [Emphasis added.]

The key phrase here, of course, is "the parties' agreement." What if the parties ***agree*** to allow the courts to conduct an expanded review into whether an award is correct? Would such an agreement be enforceable? The answer is "it depends" – the classic lawyer's response. It depends on what part of the country you're in because, at present, we have a "split in the circuits" on this issue.

The Third, Fourth and Fifth Circuit Courts of Appeals – whose coverage includes many major ports on the East and Gulf Coasts – have ruled that private parties *may* expand the scope of review. However, the Seventh, Eighth and Tenth Circuits – which cover mostly inland areas but also Chicago – have refused to enforce language aimed at enlarging the scope of

review. The Ninth Circuit – which covers the entire West Coast – began in the camp of the Third, Fourth and Fifth Circuits but then *switched sides* and allied itself with the nay-sayers. Other courts have yet to rule on the issue.

The seminal case in this area is *Gateway Technologies v. MCI Telecommunications*, 64 F.3d 993 (5th Cir.1995). MCI entered into a contract to provide long distance telephone services, on a collect call basis, to prison inmates in Virginia. MCI then sub-contracted the work to Gateway. After performance of the contract began, MCI realized that this was a very profitable arrangement for Gateway. MCI terminated its contract with Gateway and began providing the service itself under its master contract with the state of Virginia.

Gateway demanded arbitration and won, obtaining an award of both compensatory and punitive damages. MCI moved to vacate the award but was unsuccessful in the District Court. On appeal to the Fifth Circuit, MCI argued that the lower court had failed to enforce the parties' contract, which provided that "[t]he arbitration decision shall be final and binding to both parties, except that errors of law shall be subject to appeal." 64 F.3d at 996. The District Court had *purportedly* applied this standard of review but, according to the Fifth Circuit, had actually applied the less rigorous "harmless error" standard.

The Fifth Circuit ruled that parties can legitimately agree to broaden the scope of judicial review. The Court noted that "such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties." *Id.*

The Court found support for its ruling in *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), where the Supreme Court noted that "arbitration under the Act is a matter of consent…. and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Id.* at 57. *Mastrobuono* was decided less than five months before *Gateway* so the Fifth Circuit undoubtedly believed it was following closely in the Supreme Court's footsteps.

Going further, the Fifth Circuit concluded that the governing statute, the FAA, did not prohibit parties from contractually providing for more expansive judicial review of an award. In support of this conclusion, the Court relied on *Volt Information Science v. Board of Trustees of Stanford University*, 489 U.S. 468, 469 (1989), where the Supreme Court wrote in 1989 that "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."

The Fifth Circuit chastised the lower court for its unwillingness to enforce the parties' contract. The appellate court observed that "[w]hen, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract." *Gateway*, 64 F.3d at 997. Applying the stricter standard of review agreed by the parties, the Court vacated the award of punitive damages, on the basis that it was not supported by the applicable law, and otherwise confirmed the award.

The Fourth Circuit followed the Fifth Circuit's lead in an unpublished decision in *Syncor International Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997), just as the Ninth Circuit did that same year in *Lapine Technology v. Kyocera Corporation*, 130 F.3d 884 (9th Cir. 1997). Finally, in 2001, the Third Circuit fell in line in *Roadway Package System v. Kayser*, F.3d 287 (3d Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001), announcing that "we now join the great weight of authority and hold that parties may opt out of the FAA's off-the-rack *vacatur* standards and fashion their own (including by referencing state law standards)."

In other circuits, however, a different view has taken hold. In *UHC Management Company. v. Computer Sciences Corporation*, 148 F.3d 992 (8th Cir. 1998), the Eighth Circuit gave a strong indication

in *dicta* that it would not enforce an agreement to expand judicial review of an award.

More significantly, in *Bowen v. Amoco Pipeline Company,* 254 F.3d 925 (10th Cir. 2001), the Tenth Circuit refused to require a district court to give an award higher scrutiny on the basis of the parties' agreement that the award could be vacated if "not supported by the evidence." *Id.* at 930. The Court of Appeals noted that "although Amoco [the party challenging the award] presents a difficult question, we conclude the purposes behind the FAA, as well as the principles announced in various Supreme [Court] Cases, do not support a rule allowing parties to alter the judicial process by private contract" [emphasis added]. *Id.* at 933.

The Tenth Circuit concluded that other circuits had *misread* relevant Supreme Court rulings, which, in its view, simply supported parties' rights to determine by contract what issues to arbitrate and what rules will govern arbitration. According to the Tenth Circuit, the highest court "has never said parties are free to interfere with the judicial process." *Id.* at 934. Outside of Supreme Court decisions that had been read too broadly, "no authority clearly allows private parties to determine how federal courts review arbitration awards….To the contrary, through the FAA, Congress has provided explicit guidance regarding judicial standards of review of arbitration awards." *Id.*

The Tenth Circuit cited numerous policy reasons to support its ruling. Most importantly, it was concerned that "expanded judicial review would threaten the independence of arbitration and weaken the distinction between arbitration and adjudication. *Arbitrators are chosen for their specialized experience and knowledge, which enable them to fashion creative remedies and solutions that courts may be less likely to endorse. Expanded judicial review therefore places a court in the position of reviewing that which it would not do and reduces arbitrators' willingness to create particularized solutions for fear the decision will be vacated by a reviewing court*" [emphasis added]. *Id.* at 936.

After the Tenth Circuit's decision in *Bowen,* the Ninth Circuit reconsidered its position in the very same case in which it had originally *accepted* the concept of expanded review. In *Lapine Technology v. Kyocera, supra,* the Court of Appeals had remanded the case to the district court for review under the broader standard which the parties had embraced. In their arbitration clause, the parties had agreed that an award should be vacated "where the arbitrators' findings of fact are not supported by substantial evidence, or where the arbitrators' conclusions of law are erroneous." 130 F.3d at 887.

On remand, the District Court affirmed most of the award but vacated part and returned the case to the arbitrators to recalculate damages in light of the partial *vacatur*. The arbitrators concluded that the part vacated did not affect the damages award. The District Court then confirmed the arbitrators' *second* determination. *Facing an award of over $240 million,* Kyocera appealed again.

After a three-judge panel affirmed the district court's confirmation of the award in *Kyocera v. Prudential-Bache Trade Services,* 299 F.3d 769 (9th Cir. 2003), the Ninth Circuit agreed to hear the case *en banc*, which is not a common occurrence. Siding with the Tenth Circuit's more limited reading of relevant Supreme Court cases, the Ninth Circuit rejected the more expansive approach of other circuits:

> Because the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may *not* contractually impose their own standard on the courts.

341 F.3d at 994. Reviewing the award only on the grounds authorized by the FAA, the Ninth Circuit affirmed confirmation.

Although the Second Circuit Court of Appeals has ruled on numerous arbitration issues over the years, it has not yet ruled on this one. However, Judge William Conner of the U.S. District Court for the Southern District of New York has handed down what I think is one of the more thoughtful rulings on this topic. In *Fils et Cables d'Acier de Lens v. Midland Metals Corporation,* 584 F.Supp. 240 (S.D.N.Y. 1984), - decided long before any of the

relevant Circuit Court rulings came out – Judge Conner considered an American Arbitration Association award issued under a contract whose arbitration clause provided for expanded judicial review of both factual findings and legal conclusions.

In considering the enforceability of this provision, the Court wrote as follows:

> [S]ince resort to arbitration is by itself a product of contract, there appears no reason, absent a jurisdictional or public policy barrier, why the parties cannot agree to alter the standard roles.
>
> Even though federal courts are courts of limited jurisdiction, the Federal Arbitration Act does not itself preclude this agreed grant of greater power to the reviewing court because the review provided by the Act is not independently jurisdictional in nature. Before one can seek to confirm an arbitration award in federal court, federal subject matter jurisdiction must exist independently of 9 U.S.C. § 9. See *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 969 (9th Cir. 1981). Here, federal jurisdiction exists by virtue of the constitutional and statutory grant of diversity jurisdiction. See 28 U.S.C. § 1332(b).
>
> Moreover, there exists no public policy impediment to the procedure agreed upon by the parties. Although the process contemplated by paragraph 13 of the contracts admittedly takes away much of the efficiency incentive for resort to arbitration, it nevertheless reduces the burden on the Court below that which would exist in the absence of any provision for arbitration. Whereas in an ordinary commercial litigation the Court would be required to decide all aspects of the dispute, here the Court is being asked only to review the arbitrators' findings for substantial evidence and legal validity. This is clearly a far less searching and time-consuming inquiry than a full trial.

584 F.Supp. at 244. The Court concluded that it would review the award in accordance with the standard provided for in the parties' agreement and not by what it called "the less searching inquiry normally applicable in an action to confirm an arbitration award." *Id.*

My research has failed to disclose any subsequent Southern District cases on this issue, although other District Courts have certainly ruled on it, in addition to the Circuit Courts I have identified herein.

Consequences of Expanded Review

It is now appropriate to consider some of the policy implications of the rulings that allow expanded review. Indeed, the courts themselves have pointed out that expanded review of awards may be a Pandora's box.

Some courts have expressed concern that arbitration is currently an efficient, less complicated system of dispute resolution that will become more like litigation if expanded review is allowed. For example, the Ninth Circuit wrote in *Kyocera v. Prudential Bache*, *supra* at 398, that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."

Taking this a step further, another court pointed out that to review arbitration awards effectively, the court would need transcripts of all proceedings before the arbitrators and the arbitrators themselves would have to issue detailed, reasoned awards -- vastly complicating the system, or so it is argued. *Bowen v. Amoco Pipeline Co.*, *supra* at 936. What this court did not realize is that, at least in maritime arbitration in New York, we already have transcripts and "detailed, reasoned awards." *Id.*

The Seventh and Tenth Circuits have pointed out that "if parties desire broader appellate review, they can contract for an appellate arbitration panel to review the arbitrator's award." *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir.1991). Personally, I think this is a terrible idea. In some arbitration communities, the arbitrators have known each other for years and often have extensive social relationships, outside of their professional relationships within the shipping industry and the field of arbitration. The notion that an award could get overturned or modified by arbitrators sitting in

judgment of other arbitrators does not sound persuasive to me.

Another potential problem that has concerned the courts is how expanded review can complicate what is otherwise a simpler, more straightforward review process. Whereas the meaning of the provisions of section 10 of the FAA is generally well-settled, questions of interpretation will inevitably arise with respect to the language used in private contracts. For example – and this is from an actual case -- a contractual provision allowing the losing party to appeal any "questions of law" is unclear as to whether the phrase should be limited to "pure" questions of law or mixed questions of law and fact. In that case, the Court resolved the issue by construing the language against its original proponent. *Harris v. Parker College of Chiropractic*, 286 F.3d 790 (5th Cir. 2002).

The courts have also complained that "expanded judicial review places federal courts in the awkward position of reviewing proceedings conducted under potentially unfamiliar rules and procedures. Under either expanded legal or expanded factual standards, the reviewing court would be engaging in work different from what it would do if it had simply heard the case itself. *Lapine*, 130 F.3d at 891 (Kozinski, J., concurring)." *Bowen v. Amoco Pipeline Co.*, *supra* at 935-36. Personally, I do not think much of this statement by the courts. *They do work like this all the time.* Maybe they don't want any *more* of it but applying "potentially unfamiliar rules and procedures" does not strike me as a substantial challenge for a federal district judge.

To me, a much more interesting and substantive concern is whether the entire arbitration clause is invalid if a court refuses to enforce the clause as originally agreed by the parties. This has been discussed in at least two cases, *Fils et Cables d'Acier de Lens v. Midland Metals Corporation*, *supra*, and the Ninth Circuit's *en banc* ruling in *Kyocera.* In *Midland Metals*, the District Court case from New York, Judge Conner noted that:

> if public policy forbade … application of the standard of review called for in the parties' contracts, then the entire arbitration provision of these contracts could not be enforced. The parties did not agree to arbitrate their disputes in the customary sense; rather they agreed to a process by which a non-judicial body would make a determination, which would then be subject to substantial judicial review….[O]ne can only be compelled to arbitrate that which he has agreed to arbitrate. Here, absent the judicial review provision, the parties to this action did not agree to arbitrate their disputes.

584 F.Supp. at 244. The Court used this concern to justify its ruling in favor of expanded review. However, in *Kyocera*, the Ninth Circuit rejected a similar argument, concluding that, under applicable state contract law, the Court could "sever the offending terms from a dispute resolution provision that is otherwise valid." *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, *supra* at 1000.

The result reached by the Ninth Circuit in *Kyocera* is troublesome. I tend to agree with Judge Conner that expanded review must be considered part of the "package" to which the parties agreed when they chose to arbitrate. The Ninth Circuit disposed of this argument, in part, because it undoubtedly wanted to avoid having a "re-do" in a case that had already been before the arbitrators twice.

On a more theoretical level, one commentator has suggested that expanded review provisions result in agreements that are not sufficiently "final" to be governed by the FAA. Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002). Remember that, to be enforceable under the Act, an award has to be final. That is why we moved away from having *interim* awards in New York maritime arbitration to having partial final awards twenty years ago.

Clearly, party agreement to allow expanded judicial review is a thorny area of the law. It seems to me that the Third, Fourth and Fifth Circuits may have read too much into the Supreme Court's language in *Volt* that parties may "specify by contract the rules under which [their] arbitration will be conducted." 489 U.S. at 469. Judicial review of an award occurs *after* the arbitration is over. As the Tenth Circuit pointed out in *Bowen,* the Supreme

Court "has never said parties are free to interfere with the judicial process." 254 F.3d at 934. Indeed, were they free to do so, the possibilities for abuse could be substantial.

This is an issue that cries out for Supreme Court resolution. Normally, we get such a resolution when we have a split in the circuits. However, in recent years, the Court has been granting *certiorari* in a smaller number of cases, allowing some circuit splits to exist longer than one would like. I think eventually this issue will be resolved by the Supreme Court but, until that happens; we will have to live with a certain amount of uncertainty in this area of the law.

[**Note:** After this speech was written, the First Circuit Court of Appeals, which sits in Boston and covers most of New England and Puerto Rico, weighed in on this issue in *Puerto Rico Telephone Co. v. U.S. Phone Manufacturing Corp.*, 2005 WL 2596462 (1st Cir. Oct. 14, 2005). In that case, the arbitration loser moved to vacate, arguing the contract's general provision for the application of Puerto Rican law required broader judicial review of the award. The First Circuit allowed that state law standards can supplant the FAA *unless* a "significant FAA policy…would be undermined by the state rule." *Id*. at *5. The Court determined that there is a strong federal policy requiring limited review of awards. It further concluded that private parties *can* override that policy but only with "clear contractual language". *Id*. at *7. The Court concluded that a generic or "garden variety" choice of law clause, standing alone, is insufficient to do so. As a result, the First Circuit reviewed the award under the FAA and common law standards, found no "manifest disregard" of the law, and affirmed the District Court's decision to confirm the award.]

(Mr. Heard, a Partner in the New York law firm of Burke & Parsons, presented this topic at the October 12, 2005 SMA luncheon.)

THIRD-PARTY BILL OF LADING LIABILITY

THE US Court of Appeals for the First Circuit has ruled that a third party can be liable on a bill of lading based on its conduct.

A cargo owner arranged for shipment of frozen fish and prepared a bill of lading naming itself as the shipper. The consignee orally agreed to pay to the carrier the applicable freight charges. The cargo was shipped and the consignee paid the freight charges. The cargo owner arranged a second shipment in the same manner and the consignee again agreed to pay the freight charges. The cargo was delivered, but the freight charges were not paid.

The carrier brought suit against both the shipper and the consignee. The consignee contended that, because it was not named as a party on the bill of lading, it was exempt from liability under the Carriage of Goods by Sea Act. The court held that COGSA only creates a presumption regarding liability, which can be overcome by evidence of the conduct of the parties.

(This and other summaries may be found on the Holland & Knight website at www.hklaw.com.)

A GALLIMAUFRY

Arbitration proceedings often involve a shopping list of claims and counter-claims. A recent SMA award reflected such a situation. However, three points may be of interest:

Time Charterer's arrest of the vessel as she approached redelivery was found to be proper under the circumstances and deductions from hire for the time related to the arrest, were upheld.

Disponent Owner was unable to prove through timely sampling, analysis and complaint that bunkers supplied by Time Charterer were off-specification which justified de-bunkering. Charterer was awarded the cost of bunkers removed, time lost, laboratory expenses and price differentials.

A vessel's description does not have to be labeled a "warranty" or "guarantee" to be enforced as such. Where vessel was delivered without its movable bulkhead, Disponent Owner was held to have breached its warranty entitling Time Charterer to a pro-rata reduction in hire for the loss of full use of the vessel during the relevant period. [See **M/V SCM MEXICO** SMA 3885]

Full details of this case and all issued SMA Awards may be found in the SMA Award Service available by subscription at http://www.smany.org/sma/smaaward.html

RECENT COURT DECISIONS

The two following case summaries were printed in the summer edition of **CLIENT ALERT!**, the newsletter published by the law firm DeOrchis & Partners, LLP. They can be contacted at dp@marinelex.com.)

ARBITRATORS' SUBPOENA POWERS

New York Panel Subpoenas A Non-Party in Texas

Arbitrators have greater authority to issue subpoenas than does a federal court, according to a ruling obtained by the Firm's **Christopher Mansuy** from a federal judge in New York. The arbitrators issued a subpoena to a company in Houston, Texas, a third person who was a non-party to the arbitration. The subpoena was served in Houston, but the non-party refused to comply.

The shipowner petitioned the federal court in New York for assistance. As the arbitrators who issued the subpoena were in New York, the court had jurisdiction over the parties and the dispute.

Section 7 of the Federal Arbitration Act provides that, "the arbitrators…may summon in writing any person to attend" and to bring documents requested.

The Federal Rules of Civil Procedure (Rule 45) provide that a federal court in New York cannot issue a subpoena to be served "at any place" farther than 100 miles from the courthouse. But the Judge pointed out that the subpoena to the company in Texas had not been issued by the court but by the arbitrators. The arbitration panel was asking only for the court's assistance in enforcing the authority of the arbitrators. "Had Congress intended to restrict arbitrators' authority to issue subpoenas in accordance with the Rules of Civil Procedure, as it does the courts, it would have said so."

The court granted our motion and ordered the non-party to comply. *In the Matter of Arbitration between Trammochem, et al. and A.P. Moller,* (S.D.N.Y., June 15,2005).

AMERICANS WITH DISABILITIES ACT

Structural Changes Required Only If "Readily Achievable"

The U.S. Supreme Court has ruled 6 to 3 that the Americans with Disabilities Act does apply to foreign flag passenger vessels calling at American ports. Cruise ships, whether foreign or American, qualify as "public accommodations" and "specified public transportation services" under ADA provisions when they call at U.S. Ports.

The Act guarantees all disabled persons, Americans or not, "full and equal enjoyment" and access to all cruise ships, according to the Court, but the decision is confusing because the six justices who made up the majority wrote three different opinions explaining why the Act applies to all passenger vessels, at least to some degree.

The most that can be said for now in scanning the multiple opinions expressed in the 46-page decision, is that it appears major physical alterations of existing cruise ships to accommodate disabled passengers will be exempted.

It will not be necessary, according to the Supreme Court, to remove physical barriers or provide other means of access if such alterations are not "readily achievable."

The same would be true if compliance with U.S. law would interfere with the internal affairs of a ship or would conflict with an international convention, such as the Safety of Life at Sea Convention.

For example, that some of the ship's watertight doors or coamings might present a barrier for disabled passengers, does not require widening of existing doors or removal of coamings because ship's safety is an internal affair of the ship and subject to other conventions. Nor need every cabin on a vessel be accessible to a disabled passenger. As noted, modification in ship's structural design and construction must be made only if "readily achievable," which the Act further defines in §1218(9) as "easily accomplishable and able to be carried out without much difficulty or expense." This Act might require minor alterations, such as installation of grab bars in toilets.

On the other hand, charging disabled passengers higher fares or special surcharges, or requiring advance waiver of potential medical liability, or requiring an accompanying companion, are policies which might be subject to the prohibitions of the American with Disabilities Act. The Supreme Court only laid down guidelines, and it sent the case back to the lower court for particular decision. *Spector et al. v. Norwegian Cruise Lines*, No. 03-1388, June 6,2005.

BOOK REVIEW:
Farwell's Rules of the Nautical Road (8th ed. 2005) by Craig H. Allen
Review by: Vicenç Feliú

If I say the word "Titanic," almost everyone will immediately get a picture in their mind of a huge luxurious ocean liner sinking into icy waters. But that was 1913 and nothing that catastrophic is ever likely to happen again, right? Wrong!

Today, our waters are more crowded than any other time in history. Almost ninety percent of all global trade is carried by sea. Because of the huge number of sea-going vessels, maritime case law reporters abound with collision cases. The risk of collision is very real and puts vessels, crew, passengers, and cargo in jeopardy. Furthermore, a rapid growth in passenger ferries and cruise ships exacerbate both the nature and the magnitude of the risk. These problems are particularly disturbing for us in the Pacific Northwest where our waterways are becoming as crowded as our freeways.

Back in 1941, Raymond Farwell, a captain in the U.S. Naval Reserve and a professor of transportation at the University of Washington, published *The Rules of the Nautical Road.* The book became so well-known and respected among mariners, Captain Farwell's name became permanently attached to the publication. Seven editions later, Professor Craig Allen of the University of Washington School of Law, himself a licensed master of sea-going vessels, has brought the publication full circle to its place of origin by authoring its latest edition.

Farwell's Rules is a comprehensive work on the art of collision avoidance in the open sea and should be required reading for all sailors. The book, however, is more than just a navigational aid. It is an examination of the laws, rules, regulations, and customs that govern navigation and offers studies of actual collision cases with histories and annotations, it is a clear and well-crafted resource for anyone interested in the intricacies of maritime laws of navigation, and specifically collision avoidance.

Mr. Feliú is Reference Intern at the University of Washington Law Library. The Law Library is accessible on-line at **http://lib.law.washington.edu**.

AWARD DIGESTS 5 & 6

A CD-ROM combining Award Digests 5 and 6 is available for purchase from the SMA. The files, in PDF format, are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds, net of all banking charges. We would be happy to provide our banking instructions for wiring payment direct to our account.

ICMA XVI

Nothing new to report at this time on the Congress, to be held in Singapore, 26 February - 2 March 2007. More will be forthcoming about this event. It is never too early to mark your calendars for an ICMA event.

HUMOR FOR THE QUARTER

JUSTICE TEMPERED WITH MERCY

The following appears as part of the foreword in ***STEPHEN BIESTY'S CROSS-SECTIONS MAN-OF-WAR*** (A Dorling Kindersley Book):

STOWAWAY

To All members of the CREW of
HIS MAJESTY'S SHIP
By Order of
THE CAPTAIN
a generous **REWARD**
of a
DOUBLED GROG RATION
will be given to
ANY MEMBER of the crew who
reports the whereabouts of a
STOWAWAY
Seen boarding the King's Vessel the night of Wednesday
last, The cunning Rogue gaining access by the Device of
CREEPING up the Anchor Cable like a common rat.
The SCALLYWAG being no more than SEVEN years
of age, with red hair and a sulky countenance.
BEWARE *the urchin bites when collared and has a fine set of* HIS OWN *teeth.*

GOD SAVE THE KING

This is followed up with an afterword:

CAPTURED!

By the vigilance and fortitude of one
JACK NASTYFACE
a common rating
the STOWAWAY
Was apprehended and brought before
THE CAPTAIN
The URCHIN was in a sorry state, having evaded the clutches of His Majesty's MARINES for a full week. The Captain took pity on the waif, and ordered the COOK to feed him up and the PURSER to clothe him.
The **STOWAWAY** is henceforth to serve
HIS MAJESTY
as a POWDER MONKEY *for a Twelvemonth until he can be deposited back at the port from whence he came. (This, and the ordeal he hath endured being considered sufficient punishment.)*

GOD SAVE THE KING

JUSTICE TEMPERED WITH MERCY II

A Quaker of remarkably pacifist inclination was awakened in his farmhouse one night by the sound of a burglar. Armed with his trusty flintlock he quietly descended the stairs, catching the intruder red handed. He cleared his throat and addressed the villain, " I mean thee no harm my friend, but thou art standing upon the very spot whereat I am about to shoot!"

For THE ARBITRATOR

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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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THE PRESIDENT'S CORNER

New vice president Tom Fox and I heartily welcome Soren Wolmar, Don Szostak, Jack Ring and Lucienne Bulow as the newly-elected Governors to the board and, on our joint behalf, I wish to thank the SMA membership for its confidence and support.

As we look forward, we gratefully acknowledge the previous administration's diligent and tireless efforts in reaffirming the SMA as the foremost maritime arbitration forum in the United States and as one of the leading international maritime arbitration societies. We shall deem it our mission to pursue and continue on this course with energy and enthusiasm. As we do so, we realize and are well aware of the many challenges being brought about by the rapidly changing dynamics affecting almost all phases of the maritime industry. Shifts in the flow of most major ocean-borne raw materials have effectively re-arranged the freight markets and lead to the emergence of new shipping centers in many parts of the world with at least the implication of potential effects on the traditional support-industries, including the financial, legal and arbitral services. Further, the emerging popularity of ADR, especially mediation, for the resolution of certain types of maritime disputes, including those arising out of liner service agreements and other similar volume contracts, may well pose a real challenge to commercial maritime arbitration as we practice it. Even though the SMA faces up to those challenges well prepared with its industry accepted Rules for Arbitration (including the popular Shortened Arbitration Procedure), Mediation and Conciliation, all of us have to be vigilant and prepared to acknowledge and adapt to new market demands when called for.

I repeat and strongly endorse the acclamations of previous boards that New York as an arbitration forum can be as great as all of us want it to be. Inasmuch as this, indeed, is our Society, I too urge all of you to actively partake in its activities: serve on committees, attend our monthly luncheons, take an active role in the various events, seminars and conferences the SMA arranges or co-arranges with other like-minded organizations and, subscribe to the Award Service, an indispensable tool to any active practitioner.

The SMA's promotional and educational calendar this year alone has already seen a whirlwind of events, involving scores of dedicated SMA members and the invaluable support of the NY Maritime Bar. Seminars, generally focused on New York Arbitration and/or arbitration under SMA Rules, were held in New York, Houston, Panama and Mexico. All turned out greatly rewarding. Also, the educational seminar in January and the tanker seminar in May, coordinated jointly with BIMCO, both held in New York, were highly successful .

The new board aims to keep up the momentum and that should give many of us ample opportunities to become pro-actively involved in the inner workings of our Society.

Let me again thank you for your support and endorsement. I am looking forward to serving our Society for the next two years with enthusiasm and dedication.

Klaus Mordhorst

42ND ANNUAL MEETING

As a result of the elections held at the 42nd Annual Meeting of the SMA on May 11, 2005, and President Mordhorst's announced appointments, SMA's Board of Governors for 2005/2006 is as follows (with their alternates in parentheses):

Klaus C.J. Mordhorst (-)
David W. Martowski[e] (-)
Lucienne C. Bulow (Nicholas Notias)
Henry Engelbrecht (Donald B. Frost)
Thomas F. Fox (Gerard Desmond)
Svend H. Hansen, Jr. (Nigel Hawkins)
R. Stanley Kleppe* (Eugene C. Spitz)
John F. Ring, Jr. (Charles Norz)
A.J. Siciliano (Peter Hartmann)
Donald J. Szostak (Manfred W. Arnold)
Robert P. Umbdenstock* (Bengt E. Nergaard)
Michael A. van Gelder* (Charles J. Aitcheson)
Soren Wolmar (Robert Spaulding)

[e] *ex officio*
*By appointment of the President

Henry Engelbrecht and Soren Wolmar were appointed Treasurer and Corporate Secretary, respectively.

The following Committee Chairs were appointed/reappointed:

ARBITRATOR - D.J. Szostak
Award Service - D. Letteney
By-Laws and Rules - L. Bulow
Education - A. Dooley
Liaison - M. Arnold
Luncheon - T. Fox
Membership - S. Kleppe
Professional Conduct - M. van Gelder
Public Relations - K. Mordhorst
Seminars & Conventions - K. Mordhorst
Salvage - R. Umbdenstock
Technology - D. J. Szostak
Ad Hoc Committees:
Index & Digest - D.W. Martowski
Small Craft - W. Wheeler

ARBITRATING SHIPYARD DISPUTES & DAMAGES

by John T. Jozwick, Esq.

Arbitrating a dispute over a shipyard's vessel repair or new construction contract can cause arbitrators to hear, analyze, and rule on damage claims that are not typical of other maritime arbitrations. In fact, many times the dispute being arbitrated is usually relatively straight forward, such as claims for defective design information, defective owner furnished equipment, or directed work outside the scope of the contract. On the other hand, the costs that flow from a disputed event can be confusing. Costs can escalate quickly from even straight-forward disputes, and can cause a misunderstanding of what is being claimed. However, if an arbitrator understands the inherent nature of a shipyard business, understands the type of damage claim, and understands the accepted methodologies to prove damage claims, the arbitrator may have an easier time analyzing the cost information presented in the hearing.

When looking at the inherent nature of a shipyard's business, there are large labor forces working on the vessels, high berthing costs to keep vessels in drydocks or along piers, and a significant corporate overhead to operate a shipyard. Most shipyard accounting systems segregate labor and costs to the vessel, to yard related services, and to corporate overhead. Understanding whether the dispute has caused time related damages and/or increased labor damages, along with understanding whether the damages relate to labor on the vessel, yard services, and corporate overhead will allow the arbitrator to analyze the various components of the damage claim.

One area of damages that can be particularly difficult to analyze are damage claims for disruption or loss of efficiency caused by the disputed event. When an event occurs that causes a change to the scope of the contract, the shipyard will incur direct costs to perform the change in scope. However, the effort to perform the change in scope may also cause disruption to base contract work thereby causing a loss of efficiency in the base contract work. Shipyard damage claims can include significant costs for disruption and loss of efficiency.

The problem with disruption and loss of efficiency damages is that even when project personnel know there has been a loss of productivity to the labor force, attempting to prove the amount and quantify the cost is difficult. The reason is that there is no way any accounting system can differentiate between the amounts of a labor hour spent efficiently versus the amount spent inefficiently.

In the case of Appeal of Clark Construction Group, Inc., VABCA No. 5674, 00-1 BCA para. 30,870, the Board of Contract Appeals stated:

> *Quantification of loss of efficiency or impact claims is a particularly vexing and complex problem. We have recognized that maintaining cost records identifying and separating inefficiency costs to be both impractical and essentially impossible.*

And, in P.J. Dick, Inc., VABCA No. 5597, 01-2 BCA para. 31,647, the Board of Contract Appeals stated:

> *We, as most other courts and boards, recognize that quantifying the loss of labor productivity is difficult and that the determination of the dollar amount of damages for labor inefficiency with exactitude is essentially impossible. In recognizing this fact, we expect that the measurement of the amount of inefficiency would usually be supported by expert testimony.*

Thus, there are no hard and fast accounting records that can normally be used to prove the loss of efficiency. Instead, a methodology has to be used that can approximate the loss of productivity within the amount of hours expended, or to be expended. One accepted methodology is the measured mile analysis that compares productivity rates during an un-impacted period to a defined impacted period. This allows a contractor to quantify the lost productivity by looking at the additional hours expended during the impacted time period. However, if a project is plagued from the outset with design issues, areas on hold, work-arounds, etc., there will not be a true un-impacted period of time to use as a benchmark for comparing productivity.

As a result, another method to calculate productivity loss is to use industry studies on productivity rates. One of the most well known and used is the Mechanical Contractors Association of America cost manual (the MCAA Manual). Others include the U.S. Army Corps of Engineers Modification Impact Guide and the National Electrical Contractors Association's (NECA) Manual for Labor.

When combined with expert testimony, the MCAA Manual has been approved by the courts as a reasonable method to approximate loss of efficiency. Appeal of P.J. Dick, Inc., VABCA No. 5597, 01-2 BCA para. 31,647; Hensel Phelps Construction Co. v. General Services Administration, (2001 WL 43961) GSBCA 01-1 BCA para 31,249.; and, S. Leo Harmonay, Inc. v. Binks Manufacturing Co., 597 F.Supp. 1014 (S.D.N.Y. 1984).

The MCAA manual lists sixteen (16) factors affecting labor productivity. The factors are stated as percentages to add onto labor costs for the contract man-hours of labor. The individual MCAA factors are ranked as "Minor", "Average", or "Severe".

	Percent Loss if Condition		
Factor	**Minor**	**Average**	**Severe**
1. Staking of trades.	10%	20%	30%
2. Morale and attitude.	5%	15%	30%
3. Reassignment of manpower.	5%	10%	15%
4. Crew size inefficiency.	10%	20%	30%
5. Concurrent operations.	5%	15%	25%
6. Dilution of supervision.	10%	15%	25%
7. Learning curve.	5%	15%	30%
8. Errors and omissions.	1%	3%	6%
9. Beneficial occupancy.	15%	25%	40%
10. Joint occupancy.	5%	12%	20%
11. Site access.	5%	12%	30%
12. Logistics.	10%	25%	50%
13. Fatigue.	8%	10%	12%
14. Ripple.	10%	15%	20%
15. Overtime.	10%	15%	20%
16. Season and weather change.	10%	20%	30%

Thus, if in the event all of these factors were present on a job in the "Severe" category, an add-on mark up for loss of productivity would be 413% on the direct labor hours.

For the marine industry, another commonly used analysis is the Naval Sea Systems Command (NAVSEA) Guidelines on Factors Influencing Cost For Forward Pricing Change Order Disruption, Delay, Acceleration and Cumulative Effects (25 Jan 82). The methodology calculates local disruption, cumulative disruption, and a time factor for each change order or delay event. The factors are listed in tenths of hours (i.e., 0.1 which equals 6 minutes of disruption). Weighted factors include:

		Weighted Factor
1.	Number of affected crafts:	
	$\geq$ 16	0.100
	15-11	0.075
	10-6	0.050
	5-1	0.025
2.	Number of compartments affected	
	> 20	0.100
	11-20	0.075
	6-10	0.050
	1-5	0.025
3.	Area of disruption	
	Ship - high congestion	0.200
	Ship - medium congestion	0.100
	Ship - low congestion	0.050
	Shop	0.010
4.	Complexity of the vessel	
	Nuclear	0.100
	Submarine	0.075
	Surface Combatant	0.050
	Non-Combatant auxiliary Vessel	0.025
	Small Craft	0.000
5.	Time Factor (when affected, or when must implement) to be multiplied by the sum of the 4 weighted factors above	
	1 - 30 days	1.0
	31 - 60 days	0.8
	61 - 90 days	0.5
	91 - 120 days	0.3
	> 120 days	0.1

The calculation of the factor is multiplied by the direct man-hours involved, or to be involved to

calculate the additional inefficiency or disruption man-hours that should be included.

In addition to the direct inefficiency or disruption, the NAVSEA calculation includes another factor for the cumulative inefficiency caused by the percentage of change order work to the unchanged work. As the percentage of change work or affected work increases, additional minutes of disruption or loss of efficiency occurs. An example is that if the disputed event equals 15% of the cost of the unchanged work, an additional 2 – 4 minutes/hour of disruption of loss of efficiency will impact the unchanged work effort.

As a result of the above, arbitrators of shipyard disputes should attempt to remember that the damages and claimed costs may not be obvious or directly related to the work or issue that started the dispute. Disruption and loss of efficiency damages can be significant. There will most likely be time related costs components if the disputed event caused any delay to the project. Arbitrators should look at all areas of the shipyard when considering the damage claims by looking at the efforts on the vessel, the yard related charges, and company/corporate related costs.

Mr. Jozwick presented this interesting topic at the SMA luncheon on April 13, 2005. He is an Associate & Corporate Counsel for Rider Hunt Levett & Bailey Ltd, located in Scottsdale, Arizona. With over 25 years experience in the marine industry, Mr. Jozwick has assisted owners, contractors, subcontractors, and attorneys in the resolution of disputes relating to shipbuilding, ship repair and marine construction projects. Mr. Jozwick's experience in the marine industry has been broad and extensive. He has experience as an Engineer, Owner's Construction Representative (CONREP), Attorney, Claims Consultant, Arbitrator and Mediator. Having experience as an Owner's Engineer and CONREP, along with representing marine, shipbuilding, and ship repair contractors and subcontractors, Mr. Jozwick has a unique and balanced perspective when hearing and resolving marine disputes. As a result, Mr. Jozwick is routinely engaged as an Arbitrator and Mediator of disputes involving shipyards and marine contractors. Mr. Jozwick can be contacted at Rider Hunt Levett & Bailey Ltd., 8283 North Hayden Road, Suite 258, Scottsdale, Arizona, 85258. Phone: 480-368-8333. Fax: 480-368-8444. E-mail: jtjozwick@riderhunt.com.

TESTIMONY BY TELEPHONE

Testimony by telephone is being proposed more often in New York arbitration these days for many of the reasons outlined in an article in the March 28, 2005 issue of the ***New York Law Journal***. The article is reproduced here in full:

Hello? Is Everyone There?

As of Jan. 1, CPLR §3113 provides a way to take depositions by telephone or other electronic means.

By Lauren Reiter Brody, Frances K. Browne, Deborah L. Shapiro and Sarah L. Jensen

(*Lauren Reiter Brody and Frances K. Browne are partners, and Deborah L. Shapiro and Sarah L. Jensen are associates, in the litigation department of the New York law firm of Torys LLP*)

Deposing witnesses who are located outside the state is an issue that New York attorneys often face. Clients are concerned about litigation costs and prefer not to incur travel expenses, for themselves, their employees or their lawyers; and witnesses are not always willing or able to travel to New York to be deposed. The New York State Legislature has recognized that communications technology can make pretrial discovery more efficient and cost-effective, and can accelerate the disposition of cases. The Legislature thus enacted CPLR 3113(d) to create a formal procedure for parties in a civil action to conduct depositions by telephone or other electronic means.[1]

New York CPLR 3113(d)

As of Jan. 1, 2005, the CPLR fell in line with the Federal Rules of Civil Procedure in providing a mechanism for parties to agree to take depositions by telephone or other electronic means. CPLR 3113 (d) now provides the following:

> The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically. The stipulation shall designate reasonable provisions to

> ensure that an accurate record of the deposition is generated, shall specify, if appropriate, reasonable provisions for the use of exhibits at the deposition; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances. Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition and the additional costs of conducting the deposition by telephonic or other remote electronic means, such as telephone charges, shall be borne by the party requesting that the deposition be conducted by such means.[2]

While parties certainly could stipulate to electronic depositions in the past, the new rule provides specific instruction on how to proceed. However, the rule does not discuss the situation where one party resists a telephone or video deposition. Can a party prevent the taking of a deposition by telephonic or other electronic means? And if a party does not agree, can the party seeking the telephone or video deposition obtain relief from the court?

Although the statutory language of CPLR 3113(d) calls for stipulation of the parties, other provisions of the CPLR may be relied upon to obtain judicial intervention if one party will not stipulate.

CPLR 3103 provides that the court can make "a protective order denying, limiting, conditioning or regulating the use of any disclosure device." CPLR 104 sets forth the rule of construction that the CPLR "shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." Given the stated justification of the new rule — that technology be employed in the interests of efficiency and cost-saving — CPLR 3113(d) should be read to permit application to the court to take a deposition by telephone or other electronic means.

The question remains: what standard will the court use on a motion to compel a deposition by telephone or other electronic means? New York courts have not articulated firm guidelines in deciding this question.[3]

For example, in *Rogovin v. Rogovin,*[4] the defendant, a Kansas resident, moved for a protective order directing that her deposition be conducted by live videoconference so that she would not have to travel to New York City. The defendant was the sole caregiver for her ailing grandmother, as well as her 10-year-old daughter. The court found that the defendant sufficiently showed that traveling from Kansas to New York City would result in hardship and it permitted the deposition by videoconference.

Although the movant in *Rogovin* demonstrated hardship, it is not clear whether this would be required under CPLR 3113(d). Federal court precedent provides some guidance.

Federal Court Standards

The federal courts have dealt with these issues since the 1980s and have articulated standards that provide insight into the way the New York courts would apply the new CPLR provision.

Rule 30(b)(7) of the Federal Rules was amended in 1980 to include a rule similar to CPLR 3113(d), allowing depositions by telephone. In 1993, the rule was revised to allow depositions by other remote electronic means as well.[s]

Although the federal rule, like CPLR 3113(d), speaks in terms of stipulations, federal courts are generally amenable to ordering telephone or video depositions under Fed. R. Civ. P. 30(b)(7) where one party resists.[6] However, some federal courts have imposed stricter requirements on plaintiffs residing outside the district where the action is held.

The majority of federal courts follow the standard set forth in *Jahr v. IUInternational Corp.*[7] that the party seeking a telephone deposition need only make a limited showing of a "legitimate reason" for the request.[8] Conservation of financial resources is a legitimate reason to seek a telephone or videoconference deposition.[9]

In *Jahr,* the plaintiff moved to take the deposition of a non-party California resident by telephone, citing a lack of financial means to travel

from North Carolina to California. The defendant opposed the motion, stating that the plaintiff failed to show good cause and had not submitted an affidavit of financial hardship. The court held that leave to take telephonic depositions should be "liberally granted in appropriate cases," placing the burden on the opposing party to establish that its rights would be prejudiced by a telephonic deposition.[10]

Parties opposing a telephone or video deposition may argue that they are prevented from effectively evaluating the witness's demeanor, or that the telephonic and video depositions deny the opportunity for face-to-face confrontation. These reasons, although frequently proffered, generally have been rejected because their acceptance would be tantamount to repealing Fed. R. Civ. P. 30(b)(7).[u] Assertions that video testimony is "extraordinary and awkward" also fail to meet the burden necessary to overcome the legitimate reasons to take depositions by remote means.[12]

Other courts have held that "extreme hardship" must be shown before a deposition by video or telephonic means will be allowed under the Rule 30(b)(7). However, this standard, articulated in *Clem v. Allied Van Lines International Corp.,*[13] arose in the more limited context of a plaintiff who sought to be deposed by telephone because he resided outside the United States. This requirement has also been applied to plaintiffs within the United States but outside the state of New York.[14] Courts justify the more rigorous standard by the fact that plaintiffs outside the jurisdiction who have availed themselves of the United States judicial system should expect to be deposed within the jurisdictional limits of the court they have selected.[15]

It is worth noting that some courts have rejected the "extreme hardship" standard, and have even permitted foreign plaintiffs to be deposed by telephone or video. In *Rehau Inc. v. Color Tech Inc.*,[16] the court found there was no reason to force the plaintiff's two corporate witnesses to fly from Europe to Michigan for depositions when the same task could be accomplished with two simple phone calls."[17]

Not surprisingly, a court's willingness to order a telephone or video deposition depends on the circumstances of the case. The court may be more willing to accept a defendant's argument concerning difficulty in obtaining a visa to come to the United States,[18] but less willing to accept the same argument from a plaintiff.[19] A party's prior bad conduct may also color a court's willingness to order a telephone deposition.[20] Applications by *pro se* plaintiffs are also generally liberally granted.[21]

Exhibit Issues

Remote depositions are appropriate even where complex or numerous exhibits will be shown to the witness. If counsel agree to send exhibits in advance, they can stipulate that the exhibits not be viewed until the deposition starts. If counsel does not want to deliver exhibits in this manner, documents may be faxed to the witness and each of the parties during the deposition.[22] Using PDF documents sent by e-mail or posting the exhibits to a Web site made available for the deposition are also solutions.

Since the policy underlying CPLR 3113(d) is to "utilize technology to make pretrial discovery as efficient and cost effective as possible,"[23] it seems unlikely that New York courts will refuse a telephone or video deposition simply because of exhibit-related issues.[24]

Nevertheless, federal courts have not allowed a telephone or video deposition if a party would be prejudiced because of the sheer number of exhibits to be introduced during the deposition.[25] Courts have also ordered a deponent to appear in person if the exhibits are highly technical or complex.[26] The majority view in the federal courts is that exhibit-related issues should be exceptional, and in the ordinary course, parties should be flexible in arranging for exhibits to be delivered to opposing counsel in advance or sending exhibits during the deposition electronically.

Another potential complication arises with administering the oath to the witness. Under CPLR 3113(b), the officer administering the oath must be present with the witness unless the parties stipulate otherwise.

Questions About the Oath

If no agreement is reached in advance, and the officer administering the oath is not present with the witness for the telephone or video deposition, the opposing party must object at the time the deposition is taken.[27] In *Washington v. Montefiore Hosp.*, the court reporter administering the oath was in the New York office of the defendant's lawyer, not in Connecticut with the witness who was testifying by telephone. The court held that plaintiff's failure to object at the time of the deposition resulted in a waiver.

The oath-taker must be qualified to take the witness's oath where the witness is located.[28] CPLR 3113(a)(3) provides that a deposition in a foreign country may be taken before "any diplomatic or consular agent or representative of the United States, appointed or accredited to, and residing within, the country, or a person appointed by commission or under letters rogatory, or an officer of the armed forces authorized to take the acknowledgment of deeds."[29]

If the witness is in a foreign country, that country may have laws identifying who has the authority to administer an oath. If the parties do stipulate to a remote deposition of a witness in a foreign country, they should consult with the United States embassy or consulate to confirm that the deposition is permitted. Consular officers charge daily fees for their services. Parties should contact the consulate for the current fee schedule.

Apart from the requirements under the rules, the oath-taker's presence with the witness during the deposition has the added benefit of safeguarding against "chicanery" on the witness's side.[30]

Conclusion

Some attorneys may be uncomfortable with the idea of remote depositions, but as the practice becomes more common, the cost savings and other benefits to the witness will likely outweigh any perceived inconvenience by attorneys.

* * * * * * * * * * * * * *

1. N.Y. Assembly Mem. in Support, L 2004, ch 66(2004), eff. Jan. 1, 2005.
2. N.Y. CPLR 3113(d) (2005).
3. The Council on Judicial Administration for the Association of the Bar of the City of New York recommends that courts weigh the legitimate need of the party making the request, including "cost savings, convenience to the witness and facilitating discovery,"against the prejudice to the opposing party. Eric D. Welsh, Council on Judicial Administration for The Association of the Bar of the City of New York, "Report on Amending New York's Civil Practice Law and Rules to Provide for the Taking of Depositions by Telephonic Means" (ABCNY Report) at 13 (April 1998).
4. 770 N.Y.S.2d 343 (1st Dept. 2004).
5. Fed. R. Civ. P. 30(b)(7).
6. *Bywaters v. Bywaters,* 123 F.R.D. 175,177 (E.D. Pa. 1988).
7. 109 F.R.D. 429 (M.D.N.C. 1986).
8. Id. at 431.
9. *Cressler v. Neuenschwander,* 170 F.R.D. 20,21 (D. Kan. 1996); *In re Central Gulf Lines and Waterman Steamship Corp.*, No. 97-3829, 1999 US. Dist. LEXIS 19070 (E.D. La. Dec. 3,1999) (ordering deposition of witnesses in Hong Kong by videoconference citing Fed. R. Civ. P. 1 (similar to CPLR 103), and rejecting argument that video deposition was inappropriate simply because multiple documents would be reviewed).
10. *Jahr,* 109 F.R.D. at 431.
11. See, e.g., *Jahr,* 109 F.R.D. at 432 (holding that in civil cases as opposed to criminal cases, the telephonic deposition should not be denied on the mere conclusory statement that it denies the opportunity (or confrontation); *Cressler,* 170 F.RD. at 21; *Normandev. Grippo,* No. 01 Civ. 7441, 2002 WL 59427 at *1 (S.D.N.Y. Jan. 16, 2002). But see *U.S. v. Bank of America,* 202 F.RD. 624 (S.D. Cal. 2001) (holding that party's inability to "see the witness and to evaluate the witness's demeanor, facial reactions and expressions" would be prejudicial and denying telephone deposition).
12. *Cacciavillano v. Ruscello,* No. 95-5754,1996 U.S. Dist. LEXIS 18968 at **6-*8* (S.D.N.Y. Dec. 23, 1996) (where party complained that travel to Arizona was cost prohibitive, court found that video deposition was appropriate, no showing of hardship required).
13. 102 F.R.D. 938 (S.D.N.Y. 1984).
14. *Connell v. City of New York,* 230 F.Supp. 2d 432, 436-37 (S.D.N.Y. 2002) (applying standard to indigent plaintiff resident of Massachusetts).
15. Daly v. Delta Airlines, Inc., No, 90 Civ. 5700,1991 WL 33392, at *2 (S.D.N.Y March 7,1991) (holding that plaintiff should have expected to come from Ireland to New York for deposition when filing suit).
16. 145 F.R.D. 444 (W.D.Mich. 1993).
17. Id. at 447.

18. *Dagen v. CFC Group Holdings Ltd.*, No. 00 Civ. 5682, 2003 WL 22533425 at *2 (S.D.N.Y. 2003).
19. Dubai Islamic Bank v. Citibank, No. 99 Civ. 1930, 2002 WL 1159699 at *13-*15 (S.D.N.Y. May 31,2002).
20. *American Int'l Telephone v. MONY Travel Servs.*, 203 F.RD. 153,155 (S.D.N.Y. 2001).
21. *Normande*, 2002 WL 59427 at *1.
22. *Baker v. Institute for Scientific Information*, 134 F.RD. 117 (ED. Pa. 1991). See also *Daly*, 1991 WL 33392 at n.l (S.D.N.Y. 1991) (noting the advent of fax machines can alleviate any problem with allowing the deponent access to the exhibits before the deposition takes place, though denying motion by plaintiff in Ireland to be deposed by telephone).
23. N.Y. Assembly Mem.
24. ABCNY Report, at 8 n.7.
25. *Epling v. UCB Films, Inc.*, Nos. 98-4226,98-4227, 00-4062,2001 WL 584355 at *9-*10 (D. Kansas April 2, 2001) (approving magistrate's refusal to grant telephone deposition based on the number of documents requested).
26. *Mercado v. Transoceanic Cable Ship Co.*, No. 88 Civ. 5335,1989 WL 83596, at *3 (E.D. Pa. July 25,1989). See also *Fireman's Fund Ins. Co. v Zoufally*, No. 93 Civ. 1890,1994 WL 583173, at *1 (S.D.N.Y Oct. 21,1994).
27. *Washington v. Montefiore Hosp., 777* N.Y.S.2d 524(3d Dept. 2004).
28. *Loucas G. Matsas Salvage & Towage Maritime Co. v. M/T Cold Spring I*, No. 96-0621, 1997 U.S. Dist. LEXIS 2415 (E.D. La. March 5, 1997) (relying on Fed. R. Civ. P. 28(b)).
29. N.Y. CPLR 3113 (a)(3).
30. *Baker v. Institute for Scientific Information*, 134 F.RD. at 118.

RECENT COURT DECISIONS

Holland & Knight recently posted summaries of the following:

Obvious Danger

In an unpublished decision, the US Court of Appeals for the Fifth Circuit has ruled that a shipowner has no duty to warn crew members of an open and obvious danger. A seaman was injured when he fell down a stairway on a pipe-laying vessel. The seaman was superintendent on the vessel, answering only to the captain, and was also a member of the safety committee. During a safety tour, he noticed standing water on the port cross-over deck. He later took one of his subordinates to inspect the site. He walked in the standing water while determining where drain holes might be drilled. He and his subordinate then left the area, descending the port stairway, where he slipped and fell.

The seaman brought suit, alleging unseaworthiness and Jones Act negligence. The trial court held that the vessel was seaworthy, but that the subordinate should have warned the seaman of the dangers of descending the stairway in wet boots. On appeal, the higher court held that the subordinate could not have provided the seaman with any more information than he already had.

In the Matter of Patterson v. Allseas USA, Inc

Employer of Vessel's Crew Not Entitled to Limit Liability

The U.S. Court of Appeals for the Eighth Circuit ruled that the employer of a vessel's crew is not entitled to limit its liability for damages caused by negligence of a crew member. In the instant case, the towboat was owned by one company and was crewed by employees of another company. The crewing company was responsible for routine maintenance, but the towboat owner was responsible for other work, including scheduling, insurance, repairs, and relations with the Coast Guard. The towboat and its tow allided with a bridge on the Mississippi River during a period of high water. The barges broke loose and damaged property owned by third parties, who filed claims. The owner filed a complaint in federal court seeking limitation of liability. The crewing company joined in seeking limitation.

Following an extensive analysis of the degree of control a non-owner must exercise so as to be entitled to the benefit of the Limitation of Liability Act, the court determined that the crewing company did not exercise sufficient authority over the vessel to meet the statutory requirement. In the Matter of Winterville Marine v. Patricia Jackson *<http://www.ca8.uscourts.gov/opndir/05/05/033441P.pdf> , No. 03-3441(8th Cir., May 17, 2005).*

These and other summaries may be found on the Holland & Knight website at www.hklaw.com.)

PACKAGE LIMITATION

In a suit to recover about $1,400,000 for alleged loss and damage to a shipment of pharmaceuticals that was stolen when an ocean carrier's trucker left a container unattended overnight in a parking lot, a federal court in New York has ruled that the bill of lading's $1,000 package limitation applies to the container or the 44 pallets of drugs, but not to the 2,156 pieces or boxes shipped on the pallets.

The Court reasoned that the carrier had no opportunity to view the cargo shipped in the sealed container, which was shipped at a flat rate per container, and the parties would not have intended that the limitation would apply to the 2,156 boxes, for that would mean that the carrier was insuring the drugs for $700,000 more than they were worth.

The fact that the shipper separately purchased cargo insurance for the full value evidenced that it realized the bill of lading limitation would apply either to the container, as the "customary freight unit," or to the 44 pallets, as the limitation "package."

Of interest is the fact that the shipper and carrier did business under a service contract, and no bill of lading was actually issued. However, the service contract incorporated the bill of lading.

Finally, the Court held that the limitation was also applicable to the trucker under the bill of lading's Himalaya clause.

The defendants were represented by DeOrchis & Partners, LLP, the ocean carrier by John Orzel and M.E. DeOrchis of the New York firm, and the trucker by Hyman Hillenbrand of the Florida office. *American Home Assurance Co. V. CSX Lines, LLC, and Wall Street Systems, Inc., (S.D.N.Y., March 17, 2005).*

(This case summary was printed in the spring edition of **CLIENT ALERT!**, the newsletter published by the law firm DeOrchis & Partners, LLP. They can be contacted at dp@marinelex.com.)

FEDERAL COURT OF AUSTRALIA ADMIRALTY AND MARITIME WEBSITE

The following message was received recently at the SMA offices. We thought it would be of particular interest to our readers.

I am writing to inform you of the Federal Court of Australia's admiralty and maritime website. The site is intended as a gateway for distributing information about the Court's admiralty and maritime jurisdiction, practice and procedure, and as a research tool covering admiralty related information internationally.

The Court invites you and/or your members to use and link to this resource at http://www.fedcourt.gov.au/how/admiralty.html. The site is under continual development and any feedback or suggestions you may have as to organisation or content are welcome.

The site includes:

· Admiralty and maritime jurisdiction of the Federal Court of Australia

· Organisation of the Federal Court's admiralty and maritime jurisdiction nationally

· Notices to practitioners and announcements

· Australian and New Zealand legislation links

· Admiralty and maritime cases

· Recent case law

· High Court of Australia

· Federal Court of Australia

· Australian states and territories

· United Kingdom

· New Zealand

· Singapore

· Hong Kong

· Canada

· United States

· Other (under development)

· Other admiralty and maritime links

· Legislation - Australia, UK, USA, Canada, South Africa, India.

· Treaties and conventions

· Courts and tribunals - international

· Arbitration

· International maritime and trade-related organisations

· Maritime law associations

· Universities, maritime law centres, education and training

· Organisations and government departments - Australian and international

· Ports, port authorities and related government bodies - Australian and international
· Maritime security links
· News, information and research
· Shipping and shipping-related companies
· Regional and national shipping links
· Weather
· Federal Court of Australia Papers and publications
· Federal Court of Australia Forms and guides, filing and fees
· Video: 'The Role of the Admiralty marshal in the Federal Court of Australia'
· Rule reform

Sincerely
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AWARD DIGESTS 5 & 6

We continue to offer a CD-ROM combining Award Digests 5 and 6 for purchase from the SMA. The files, in PDF format, are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds. We would be happy to provide our banking instructions for wiring payment direct to our account.

ICMA XVI

Nothing new to report at this time on the Congress, to be held in Singapore, 26 February - 2 March 2007. More will be forthcoming about this event. It is never too early to mark your calendars for an ICMA event.

QUESTIONABLE DISCLAMATION FOR THE QUARTER

Shipowners are well known to be notoriously abhorrent of liability, commonly shifting or denying, choosing whichever would be most effective. The following was found on the reverse of a passenger ticket:

> ***The passenger assumes all risks of loss, injury or damage to the person or property while on the vessel or while embarking or disembarking, even though such loss, injury or damage is caused by the negligence or default of the shipowner, its servants or agents, or otherwise. The holder hereof in accepting this ticket thereby agrees to all the conditions stipulated thereon.***

The conveyance in question is not a "Multiple Flags"/"Dizzy World" or other amusement park excursion through some make believe, concocted environment. It applies to a harbor tour aboard the M/V Louis Jalliet on the St. Lawrence River where huge oceangoing vessels from the world over are commonly navigating at close quarters. If, indeed, this is based on sound law, the P&I Clubs might be interested in engaging the author of this masterful disclaimer. Check at the Tourist Information Bureau in Quebec City.

For THE ARBITRATOR

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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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THE PRESIDENT'S CORNER

Since our January issue, the Society has co-sponsored successful promotional events in New York, Houston, Panama and Mexico, as my colleagues have summarized below. And please diary BIMCO's Tanker Seminar to be held in New York on May 9th and 10th. See www.smany.org for more detail.

As I write this, my last President's column, it is difficult to believe that these four years have been so fleeting. My watch has been a challenging and extremely satisfying one that has enabled me to grow professionally and befriend so many here and abroad. I wish to thank my colleagues within the Society and at the Bar for your robust support in furthering the interests of the industry we serve. It has truly been a team effort in pursuing our common goal of streamlining the dispute resolution process by "getting it right", expeditiously, at a reasonable cost.

David Martowski

MARITIME ARBITRATION IN NEW YORK - A REVIEW

The Education Committee Chaired by Austin L. Dooley, Ph.D. conducted its renewed and revised course on "Maritime Arbitration in New York" this past January 27th and 28th. The course was offered to the maritime industry to help further and promote the understanding of New York arbitration processes. Leading the discussions was Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College. His 20 plus years of undergraduate and graduate level teaching experience added a new dimension to the course as one email received afterwards commented:

> *"…Thanks very much for a very interesting and informative two days. Since I have not been involved with arbitrations for about twenty-five years, I found the course extremely useful, both*

to see how much I had forgotten as well as to learn how much has changed in the meantime. It was also gratifying to sit with such informed, interested and experienced fellow-students..."

There was a full range of the industry represented in the class with attendees including people from a P&I Club, ship charterers, grain traders, marine technical consultants, ship owners and dry and liquid cargo operators.

The course was structured to focus on the newest version of the SMA Arbitration Rules. The students were taken through the various sections of the rules focusing on topics which included the commencement of the arbitration and panel construction; the Federal Arbitration Act; the final versus interim award; the role of the majority and dissenting opinion; confirmation, *vacatur* and enforcement of award; and ethical considerations of the panel members. Legal and technical issues such as time bar, defaults and consolidation of arbitrations; discovery in aid of arbitration; hearing procedures; security in aid of an award; evidentiary considerations in arbitration, the Federal Rules Of Evidence and related issues were also discussed.

The overall presentation was such that another email review commented:

"…I want to add that my high pre-course expectations were not only met, but significantly exceeded. SMA sets high standards and delivers. Again, definitely 'A1'..."

And a third review added:

"The verbal presentation as well as the printed material are of high quality and well laid- out. I thorougly enjoyed it and learned a lot about the underlying law and legal considerations. Jeff's skillful presentation certainly made it most enjoyable. These were two days well spent. Thanks to everybody who participated…"

The course was summarized by a walk through of a typical arbitration proceeding as class members were quizzed on each stage of the process according to the lecture material. Of course, there also was a homework assignment! The Education Committee is planning another session soon due to the encouraging words from one class member:

"…I would also like to express my thanks and high praises for the SMA course. Not only did I find the two-day course very informative, but also the additional comments provided by my fellow students pertaining to shipping in general. For someone new in the industry, it was a very valuable learning experience."

Please consult our website at www.smany.org and watch for future email notices.

CONDUCTING ARBITRATIONS IN NEW YORK

By Klaus Mordhorst

At the invitation of the New York County Lawyers' Association and its Continuing Legal Education (CLE) Program, the SMA conducted an educational seminar on the subject ***A Primer on Conducting Arbitrations with the Society of Maritime Arbitrators***. The four hour evening program took place on February 3, 2005 at the Association's headquarter at 14 Vesey Street in downtown Manhattan and was attended by 46 persons representing 12 law firms practicing admiralty law in NYC, two P&I clubs and one grain house.

In his welcome and opening remarks SMA President David Martowski took the audience through the beginnings and history of the SMA and then expanded in detail on the Society's Rules, elaborating on the selection of arbitrators and the formation of an arbitration panel, the roles of the arbitrators and the conduct of an arbitration proceeding from the arbitrators' disclosures and their taking an oath to hear and adjudicate the disputes fairly and faithfully and to arrive at their decision based solely on their understanding of the testimony and evidence produced during the proceeding. He explained the evidentiary discovery process, the intricacies of vouching-in third parties, the availability of consolidating related arbitration proceedings when all the charter parties/contracts contain the SMA arbitration clause; he spoke of the deliberation process and the need to render timely decisions and

emphasized the importance of finality of SMA awards, so that the parties can go on with what they do best, making their money in the maritime business. He then highlighted the value the publication of NY awards through the SMA Award Service as a helpful guide and reference work for the users of the arbitral system.

This was followed by a Mock Arbitration, involving a grain voyage out of the Great Lakes at the end of the Lakes' season and the resulting disputes, when the ship failed Coast Guard approval and her sailing was delayed, when seawater ingress damaged the grain in No.1 hold and when, as a result of all this, the vessel failed to meet her arrival date at the European discharge port by year end and the cargo thus became subject to sharply increased Import Duties.

The parties' attorneys Gerry White (Hill Rivkins & Hayden) and Mike Frevola (Holland & Knight) vigorously argued their positions and interrogated the witnesses Henry Engelbrecht and Thomas Fox before the three arbitrators Patrick Martin, Manfred Arnold and Klaus Mordhorst. Narrator Austin Dooley guided the proceeding along, explaining the various phases of the arbitration process with a well received power-point presentation. The audience, divided into several groups and assisted by SMA arbitrators, then went into very lively deliberations before the Panel finally announced its findings.

Lively discussions and a prolonged Q&A session followed. An innovative feature of the program was the use of SMA members as discussion leaders with the audience which was seated in small groupings at separate tables. John Ring, Lucienne Bulow and Tony Siciliano provided expert guidance to eager young lawyers.

Thanks are due the NYCLA Admiralty and Maritime Committee, chaired by Doug Burnett (Holland & Knight), the NYCLA Arbitration and ADR Committee, the Maritime Law Association of the United States - Arbitration and ADR Committee, who all co-sponsored the evening. Mr. Burnett observed, "The goals of the CLE program were twofold. The first was to provide a valuable and practical educational experience for admiralty practitioners, especially associates, on the salient features of NY maritime arbitration. The second goal was to reach out to all of the firms in NY which practice maritime law to allow them to strengthen contact and friendships which are so traditional and important to the maritime bar in New York. I am very pleased with the way all of the sponsors worked together to make the event a success. The large number of attendees, the impressive number of NY admiralty firms represented, and the positive feedback received from the attendees about the interactive format of the program underscore how well both objectives were accomplished."

It is fair to say that the event was full of good fun and a great success!

HOUSTON SEMINAR

By Tom Fox

Reprising an earlier event held in April 2002, a seminar for the Houston maritime community was conducted on February 17, 2005. "Dispute Resolution: The New York Arbitration Alternative" was sponsored by Poten & Partners, Inc., the SMA and New York law firms Burke & Parsons, Cichanowicz Callan Keane Vengrow & Textor, Freehill Hogan & Mahar, Healy & Baillie, Hill Rivkins & Hayden, Holland & Knight, Nourse & Bowles and Tisdale & Lennon. While aimed primarily at the energy-related community, there was also good representation from the dry cargo sector among the more than eighty attendees.

The morning session opened with welcoming remarks by SMA Vice President Klaus Mordhorst and included presentations on the powers of arbitrators, the vouching in process, damages for breach of charter parties, interesting recent awards and decisions and disputes arising out maritime security initiatives as well as two lively question and answer periods. The luncheon speaker was Captain William G. Schubert, former U.S. Maritime Administrator, who spoke about recent developments in U.S. maritime policy and their impact on international and domestic marine transportation. A key part of Captain Schubert's presentation focused

on the development of LNG terminals in the U.S. The early afternoon session included presentations on demurrage and customary quick dispatch and on safe port clauses in tanker charter parties.

By all accounts, the highlight of the day was the mock arbitration, which involved a tanker grounding with a resultant oil spill and shipping channel closure. Among the issues considered were: the issuance of a partial final award, the recovery of damages by blocked vessels as well as issues of liability and indemnity under OPA-90. There was lively testimony by two witnesses under persistent examination by counsel. The audience heard the panel of arbitrators consider the testimony and arguments as well as the rationale for the subsequent issuance of an interim ruling, which was read into the record and later provided in hard copy to the attendees. Specifically designed to cover both procedural and substantive issues, the mock arbitration scenario provided the audience with an opportunity to gain rare insights into the arbitration process and the powers that arbitrators possess. A lively discussion by the audience followed.

The reception following the event was well attended by the audience and event participants. There have been reports of several interesting conversations concerning New York's role in maritime arbitration and there were several requests for a return engagement by the group.

The topic presentations were made by Bill Honan, Gina Venezia, LeRoy Lambert, Tom Tisdale, Lucienne Bulow, Keith Dalen and Jim Textor.

In the mock arbitration, counsels Jay Paré and Tony Pruzinsky took testimony from witnesses Jack Ring and Doug McCormick of Houston before panel chairman Tony Siciliano and arbitrators Soren Wolmar and Tom Fox. Moderator Keith Heard provided several incisive closing comments.

Through the hard work of the New York team, a good time was had by all.

MOCK ARBITRATION IN PANAMA

By Svend H. Hansen, Jr.

At the request of Panama Maritime VII, a conference in which 300 members of the worldwide maritime community participated, the SMA, New York and Panamanian maritime bars presented a mock arbitration on February 21, 2005, designed to illustrate the capacity of New York arbitration to deal swiftly with disputes arising in Panama.

Conceived and led by David Martowski, the arbitration scenario dealt with the allocation of liabilities for security related damages. In this case, delays, losses and expenses to both vessel and cargo arose from actions by U.S. and Panamanian security forces involving a Panamanian flag vessel proceeding to Cristobal for discharge of cargo considered "suspicious" by the U.S. Department of Homeland Security. Speed in resolving the parties' dispute was essential.

David first set the stage with an introduction outlining U.S. policy on sea borne terrorism in today's environment, citing the *Cole* and *Limburg* incidents, as well as costly false alarms such as the *Palermo Senator* and other recent fiascos.

The arbitration proceeded on the basis of facts and issues contained in a general handout. It explored the Agreement between the United States and Panama under which the U.S. Coast Guard is authorized to assist the Panamanian Maritime Service in security matters. It also laid out provisions of the charter party's ISPS Clause, which allocated responsibilities of Owner and Charterer under the ISPS Code. And it highlighted the issues arising in this case.

Vessel Owner, played by Peter Wiswell, Esq. was represented by the legal team of Peter Drakos, Esq. of New York and Lic. Francisco Linares of Panama. Charterer, played by Raymond Burke, Esq. of New York, was represented by the legal team of William Dougherty, Esq. of New York and Lic. Romano Feoli of Panama. The SMA panel was made up of Svend Hansen (Chairman), William Peters and Jack Ring.

Testimony and arguments were spirited and the panel, following an open deliberation, rendered an expedited award. Of special and encouraging note was the active interest demonstrated by the audience through the number and thoughtfulness of questions that followed.

SEMINAR IN MEXICO

By Manfred Arnold

The March 9-11, 2005 Seminario De Derecho Maritimo y Arbitraje at the Las Hadas Resort in

Manzanillo (Mexico) was by all accounts a smashing success. The setting (with distant memories of Bo Derek in "10"), weather and ambiance were spectacular; the support was enthusiastic for the seminar program as well as the social events. The actual attendance was larger than the official registration due to last-minute walk-ins. Overall, approximately 75 delegates attended. The New York contingent consisted of William F. Dougherty (Burke & Parsons), Joseph G. Grasso (Thacher Proffitt), Robert J. Gruendel (Curtis Mallet), Keith W. Heard (Burke & Parsons), Marisa Marinelli (Holland & Knight), David A. Nourse (Nourse & Bowles), Rangam Rakha (Curtis Mallet), Richard V. Singleton (Healy & Baillie); Austin Dooley, Svend Hansen, David Martowski, Klaus Mordhorst, William Peters, Michael van Gelder and Manfred Arnold, further supported by some of our wives.

The quality of the papers presented was especially high and the available simultaneous translation service enabled everyone to fully appreciate them and participate in the program. The Mexican attendees represented a solid cross-section of the country's legal, financial, insurance, port development, shipping, including stevedoring, and oil/chemical industries. Foreign delegates included representatives from PDVSA's Caracas office.

The mock arbitration of the ill-fated voyage of the EL PRESIDENTE created great interest and audience participation. We look forward to viewing the video recording arranged by the organizers

With the gracious hospitality of the hosts, a good time was had by all.

Special thanks must go to Bob Gruendel and Juan Carlos Merodio Lopez, who conceived the idea for this seminar and were instrumental in its success.

NORTHERN VOYAGER

By Michael Rauworth

The *Northern Voyager* was a 144' US flag freezer-trawler, and the keystone of a $10 million-plus business. On November 2, 1997, off Gloucester, Massachusetts, her rudder dropped clean out of the hull, creating a 6" diameter opening to the sea. The crew began pumping, and called the local Coast Guard. The Coast Guard sent out several boats, and put two men aboard with additional pumps. A number of the crew of the *Northern Voyager* got aboard the Coast Guard vessels, but the master, the chief mate, and the chief engineer voluntarily stayed on board to deal with the flooding.

Within minutes of the first radio call, but unbeknownst to the master or crew of the *Northern Voyager*, a commercial salvor and diver named Mike Goodridge telephoned the Coast Guard to make his services available. He was told that the Coast Guard was "handling it," which meant that he, as a private salvor, would not be allowed to get involved if even he were to come to the scene. So he stayed put.

On board, for a while, it seemed that the pumps might be keeping up with the flooding. But the Coast Guard's pumps were operating fitfully, and eventually the water was seen to be gaining. The Coast Guard agreed with the master of the *Northern Voyager* to bring over a larger pump from a Coast Guard cutter.

In the meantime, Mike Goodridge had concluded that the Coast Guard was *not* really going to be able to "handle it," so he started down to Gloucester Harbor with his dive gear. As a professional diver, he held the key to saving the *Northern Voyager* — a quick dive under the hull would allow him to plug the leak. A lobster buoy would do it, a piece of cork — lots of things, readily at hand. When he got to Gloucester, he called the Coast Guard's shore station to ask if he should take the time to load pumps onto his boat, in addition to his dive gear. They essentially chased him off the airwaves. He went ahead and loaded the pumps, and started out to the scene just a few miles away, at full throttle.

In fact, out at the scene, even before the bigger Coast Guard pump could arrive, the Coast Guard suddenly changed its mind — it decided to stop its efforts to help the *Northern Voyager*. The Coast Guard had gotten matters thoroughly confused, mostly because its on-scene commander was not consulting with the master about the actual on-board conditions. But not only did the Coast Guard withdraw its *own* people — and there's no quarrel

with its right to do *that* — it *also* ordered those three senior officers to abandon their own ship. This order was over these officers' objections, and against their will. The Coast Guard told the master he would be "subdued" if he didn't leave his ship as instructed.

More than this, the Coast Guard had never told the master of the *Northern Voyager* that the salvor/diver Mike Goodridge was on his way. Even when the master was being carried ashore to the Gloucester Coast Guard station, the Coast Guard refused to let Goodridge communicate with him. The master left the *Northern Voyager* under duress, believing she was doomed.

After the officers were forced to leave, it took nearly an hour before the *Northern Voyager* rolled onto her side, and more than another hour after that before she sank. Mike Goodridge was only a mile or so away when the three officers went by, inbound aboard the Coast Guard boat. He had more than enough time to reach the *Northern Voyager* and plug the opening. He would have done exactly that if her main propulsion diesels were shut down. But Goodridge could see that the vessel still had power, because her main deck floodlights were still burning, and he was naturally unwilling to dive near the propellers of a vessel that still had live power. But the master would have gladly shut down the diesels if the Coast Guard had not put a communications barrier between himself and Mike Goodridge.

In fact, if the master had been told about a diver en route when the Coast Guard knew about it, he and the other two officers could have set up and buttressed flooding boundaries that would have kept the *Northern Voyager* afloat for many hours, if not days, and certainly long enough to get other help — this is shown by professional naval architecture analysis.

Just weeks beforehand, the *Northern Voyager* had been refitted with the best in freezer processing and fish-handling gear, at a cost of well over a million dollars. She had one of the very few permits for a fishery that the federal government had said was crying out for exploitation, and she had access to the most lucrative markets. But today she's nothing but a recreational dive site.

In a few months, the case against the government will go to trial, based on the government's interference with the communications from the salvor that could have saved the ship. But in that trial, the government will *not* have to face liability for the forcible removal of her officers. The Court of Appeals in Boston has let the government off the hook on that front. For generations, the Coast Guard has operated under a law that *permits* it to give help to persons in distress at sea — the key parts read like this: "In order to render aid to distressed persons, vessels . . . on and under the high seas . . ., **the Coast Guard may** . . . **perform any and all acts necessary to rescue and aid persons** and protect and save property." Before this appellate decision, this law had *never* been understood, even by the Coast Guard, to permit forcible removal — after all, help is not really *help* if it is forced on you. But the Court of Appeals decided, in a 2-1 vote, that this law gave the Coast Guard "the power to rescue a person ***even against his will*** in life-threatening circumstances," and that the "Coast Guard could not be held responsible for the consequences of its decision" to force the officers to leave their ship.

The dissenting judge vigorously pointed out the wrong in this. He wrote: "I am decidedly in disagreement with the majority's recognition of authority by the Coast Guard to forcefully remove the master of a vessel from his ship, thus preventing him from continuing efforts to save it. With due respect, **there is no authority in law, practice, or maritime tradition that validates such action by the Coast Guard**, nor am I aware of the government's having claimed such extraordinary powers before the inception of this case." He went on to say: "Congress has never granted the Coast Guard the authority to force a master to abandon his vessel. Neither should this Court." Finally, he encouraged the owners to present the matter to the Supreme Court. But the Supreme Court declined to place the case on its calendar.

Most of the time, when there's a distress at sea, the wisest choice is to *accept* the help and counsel of the Coast Guard. But not always — the Coast Guard does make mistakes sometimes, and big ones, too. Seafarers have been making their own choices about personal risk at sea for millennia. The

officers here were competent professional mariners, making their *own* choices about risk to their *own* lives — no one else's interests were at risk. Contrary to many people's instincts, the Coast Guard could *not* have been held liable for going along with the express wishes of these professional seamen to be left on board — there's only liability if the Coast Guard (or any other salvor) makes a distress situation affirmatively *worse off* — as it actually did here.

Maybe the Coast Guard *thought* it knew better, but why should it have the power to overrule these men — are their lives their own, or not? The difference between interference and help is: *who decides*? For thousands of years, we've known the answer: the seafarer himself decides, and *not* his would-be salvor (including the Coast Guard) — and it has worked pretty well. But now it's changed. Someday, someone who's wary of Coast Guard *interference* will hesitate — too long — before calling for *help*. If a deep-draft ship is involved, a pollution disaster could be the result. Let's just hope no one has to die before this kind of thinking is set straight.

(Mike Rauworth spoke to the SMA Luncheon on December 15, 2004, with a slide show about the loss of the Northern Voyager. This is a synopsis of his discussion, minus the slides. In case of any questions, he can be reached at 617-217-5219 and mrauworth@cetcap.com. He practices with the firm of Cetrulo & Capone LLP, in Boston. All the emphases in the text are his own.)

RECENT U.S. AND INTERNATIONAL MARITIME DEVELOPMENTS

By Peter Tirschwell

Good afternoon ladies and gentlemen. It's a pleasure to be here with you and I hope you all had a nice holiday and new year.

I was asked to talk today about "Recent U.S. and International Maritime Developments of Interest to the New York Area Maritime Community," and while I will raise a few different issues and maybe we can get into a discussion about others later on, there is really one issue that I believe stands head and shoulders above all the others. It is the issue that more than any other defies easy answers yet could not be more important to get solved, and that issue is, of course, security. At the recent Cargo Security Summit in Washington in December, James Loy, the former Coast Guard Commandant, remarked that every generation of Americans arrives at a moment when it is called upon to do its part to protect the nation for future generations, and that for our generation, that moment is now and the challenge is protecting the nation from terrorism. We in the maritime community have a very important role to play in this effort.

It would be comforting to say that the story of maritime and supply chain security reaches back, like so many other aspects of the maritime industry, into the annals of history, but that is not the case. To the contrary, if the history of the maritime industry is one of creating interconnectedness in the world, of being the world's first truly international industry, of facilitating the global economy, those characteristics are the antithesis of a system that must be put in place to address the threat of 21st century terrorism. Now terrorists will seek to exploit the maritime system. And that is why the story of maritime security does not begin with the Phoenicians but rather five blocks from here on Sept. 11, 2001. It is difficult to overstate the reality that there was not even the bare bones of a maritime security system in place on 9-11 and therefore what the industry has been hard at work doing over the past three years and four months is to attempt, in the words of Council on Foreign Relations fellow Stephen Flynn, to "retrofit" the system, to defeat the terrorist threat that would be facilitated through the maritime system, yet without, in the process, compromising the economic benefit that the nation and the world derives from maritime trade. Not an easy task.

What has since transpired is well known and does not require any extensive elaboration here. In the area of vessel and port security, the ISPS code was adopted in Dec. 2002 and went into effect this past July and in the U.S. took the form of the MTSA-Maritime Transportation Security Act. In the area of supply chain security the focus has been much more U.S.-centric, with the C-TPAT, Container Security Initiative and 24-hour advanced manifest rule all coming into effect within a year and a half after the attacks. The World Customs Organization has begun to take up supply chain security.

But I raise this as a critical area worthy of attention because this story is hardly over. The story is not over because, while the U.S. government appears to be satisfied that with the ISPS, we have largely tackled or at least made a major and – as far as the public is concerned - satisfactory dent in the

challenge of vessel and marine security, the same cannot be said of ocean container security. Here there are still serious and legitimate concerns. The heart of the container security system -- C-TPAT – and its inherently voluntary nature, were the subject of repeated political attack during the presidential campaign, reflecting widespread public unease with the state of security surrounding the 6 million-plus containers that arrive at U.S. ports each year. The Homeland Security Department is proceeding on the basis that the container security regime is not adequate and must be improved. That is why in the next several months I predict you will be seeing and hearing a lot on this issue.

Part of the problem is inherent to the international supply chain. We in the U.S. are used to taking matters into our own hands to protect ourselves. When we're threatened or attacked, we defend ourselves militarily. But unless we want to invade China, Pakistan or India or anywhere else where our imports originate, we have no choice but to surrender control, and that is not an easy concept for the U.S. to embrace. To a certain extent we must place trust in our trading partners to make the system more secure at foreign points of origin. Countries participating in the global economy do not want to be seen as soft on security, so they have a vested interest in maritime security. But more importantly in terms of U.S. policies coming down the pike, the companies that import into the U.S. or handle those imports are going to be held to a higher standard of security, higher than current C-TPAT guidelines require. It is an acknowledged fact that not every container can be inspected and nor does non-intrusive inspection technology exist to scan every container. I've heard figures that 10% is the highest inspection rate that could possibly be attained given current resource levels. Therefore the concept of risk management is and will remain at the heart of the container security system – that is, the use of shipment data to identify anomalies in terms of shipment patterns, shipper, cargo, value, etc. that would make that container suspect and worthy of the limited resources we have to inspect it further. But we will be going alone in the sense that the Department of Homeland Security will not be waiting for the WCO or any other international body to act- it will continue to develop what it says will be a "best in class" container security system that could serve as a model for the rest of the world.

What is a "best in class" system? This is where things get interesting, and where the private sector is likely to face more stringent and costly requirements. Remember that aside from the 24-hour rule- which required manifest information to be submitted to the government electronically 24 hours before the vessel sails from the foreign port – it has not been particularly difficult for the private sector to comply with security rules. C-TPAT has not generally required a lot of resources for a company to implement, and we have seen no taxes on the public or on business, or any major inconvenience imposed on business or the public. Could that change? Absolutely.

How? In any number of possible ways.

- Importers could, under the idea of C-TPAT "minimum standards", acquire a larger burden to ensure that their vendors - who often are the ones responsible for stuffing their containers - maintain a secure environment around the container stuffing process. The stuffing process has been identified as a key vulnerability in the supply chain. This idea in early December produced an outcry by major importers. They argued that the standards were vague and imposed unreasonable potential liability on importers.

- Importers could be required to submit not just manifest information, but the much more complete data earlier in the shipment process in order to give the government a more complete data set on which to conduct risk analysis. This would happen as part of the development of the Automated Commercial Environment, or ACE, the next-generation computer system being developed by Customs and Border Protection.

- A system of non-electronic container seals could be imposed, requiring shippers and ocean carriers to maintain a chain of seal integrity throughout the container's voyage. This could potentially lead to a system of RFID to collect information on shipments and their whereabouts. The idea has been proposed as a benefit to importers because better visibility of cargo could conceivably translate into greater supply chain efficiencies and thus greater profit, but this has yet to be proved in practice. The Operation Safe Commerce tests proved that tracking technology still has a long way to go.

In short, you have pressure from the public, the Bush administration and the national security establishment to move the ball forward on container security, but few obvious ways of accomplishing that.

If there were easy answers, this issue would have been solved long ago.

[Mr. Tirschwell is Editor-in-Chief of The Journal of Commerce. He delivered this talk at the January 12, 2005 SMA luncheon. Mr. Tirschwell may be contacted by email at ptirschwell@joc.com]

AN OVERVIEW OF THE DRY BULK FREIGHT MARKET

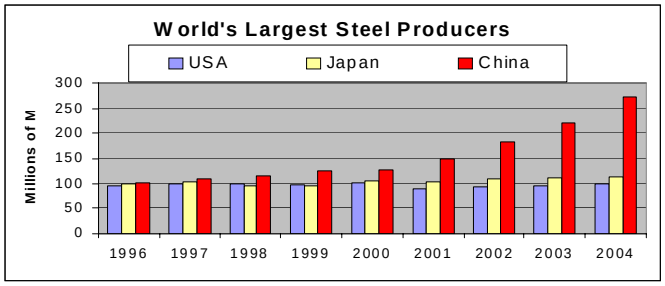
By Peter Sandler

The shipping community has experienced such a dramatic confluence of events over the past two years that freight rates have soared to levels once thought impossible. Unlike any other period of prosperity in the ocean freight markets, the factors that have led to the underlying shift of fortunes for ship-owners and operators have manifested themselves across all 3 segments of the business – containers, tankers, and the dry bulk market. The common theme we hear across each of these sectors is the burgeoning demand for bulk commodities from China; led by strong levels of economic growth and a growing wave of industrialization sweeping the country. I'll spend some time detailing for you the events that have unfolded in the dry bulk sector over the past several years, and try to put them in context with historical norms.

Looking at the market over the past decade, world dry bulk seaborne trade has grown 29% from 1,804 million metric tons (mmts) to 2,323 mmts. However, closer examination shows the past 10 years can be divided into two distinctively different periods. From 1995 to 1999 shipping volumes grew by 81 mmts, for an average annual growth rate of 1.1%, while from 1999 to 2004, cargo volumes grew by 438 mmts, for an average annual growth rate of 4.7%.

Examining freight rates over the past 12 years we see that the Baltic Panamax Time Charter Average spent seven of the first nine years below owners' break-even rates. This fact, which led to decreased investment in shipping assets, coupled with the strong growth in cargo volumes in the past 5 years, set the stage for the explosion in freight rates we have witnessed over the past two years. From a long-term average of $9,700/day, we now are experiencing a market that trades between $30,000 to $40,000/day. The Baltic Capesize Time Charter Average even broke through the $100,000/day level in 2004.

While steam coal demand represented nearly 43% of the growth in dry bulk freight demand over the past decade, surging demand for iron ore from China over the past several years is what tipped the supply/demand balance for ships into owner's hands. Between 1998 and 2004, Chinese crude steel production grew by 234%, with output in 2004 surpassing 268 mmts. From 1997 and 1999, China imported between 52 and 55 mmts of iron ore. In 2004, Chinese imports topped 208 mmts. Market estimates for 2005 predict another 50+ mmts of growth – almost as much as the annual totals from the pre-1999 era. To give you a relative perspective of what this growth has meant, lets look at a graph of the world's 3 largest steel producers.



The USA, Japan, and China are the world's 3 largest steel producers, and were all relatively equal in size as late as 1997. As you can see, Chinese growth in the last 3 years has led the Chinese to produce more steel than Japan and the USA combined. Shockingly, this caught the world by total surprise – even the Chinese, who failed to plan appropriately to handle the growing volumes of imported iron ore, and to expand their rail networks quick enough to handle growing volumes of iron ore, coal, and grain shipments.

Equally important in pushing freights rates to the levels we are witnessing today is a growing series of logistical bottlenecks in the world's major ports. Lack of investment in port infrastructure, and the logistical networks that feed them have resulted in loading and discharging queues that have often exceeded 30 days of waiting time. In Brazil, Australia, and China alone, over 4% of the world's dry bulk fleet sits idle, waiting to receive or discharge cargo.

The combination of demand side growth and slipping supply side efficiencies has meant a structural shift in how the dry bulk market has behaved. Between 1993 and 2001, the average weekly market trading range was under $600/day, with only a handful of occurrences where the market moved over $1,000/day in any week. During the past two years, average weekly trading ranges are $2000-$4000/day, with 6 episodes of market swings exceeding $6,000/day in a week. Measured on a monthly basis, prior to 2003, the market had never moved more than $5,000 in any 30-day period. Now the market moves between $5,000 and $15,000 month.

Shipowners have responded to surging freight rates and improved cash flow by ordering new ships en-masse. Fleet growth, which averaged just over 4% in 2003 and 2004 despite a large drop in vessels sold for scrap, will average at least 6% over the next 3 years based on the current order book for new vessels and market estimates for scrapping based on current freight rates. With 10% of the world's fleet over 24 years of age, the likelihood that rates will need to remain strong for the foreseeable future to encourage fleet renewal helps point to the likelihood that what we are experiencing is not a short term boom.

The dramatic shift in freight rates, and their underlying volatility, has created a growing current of disputes regarding laytime and time charter duration, where even a difference of opinion of 3 days can mean a $100,000 claim. When operators have the chance to re-deliver a vessel 3 days before the minimum duration when a charter is $15,000 over the current market, compared to being forced to perform a 30 day voyage to meet their commitment, you can imagine the financial incentives the market has produced to create conflict, not solve it. Arbitrators should see a growing flow of business created by today's market conditions in the near future.

[Mr. Sandler is an Ocean Freight Analyst with Louis Dreyfus Corporation. He delivered this talk at the February 9, 2005 SMA luncheon.]

RECENT CASE

SOLE NEGLIGENCE IN SHIPMAN

In a recent award, a New York panel ruled on the issue of sole negligence in performance of services under a contract on the SHIPMAN Form of ship management agreement. This award has particular relevance since it is the first time an SMA panel has ruled on this Form. The award illustrates that, while the sole negligence standard in SHIPMAN is a high hurdle to overcome, it also shows that that standard does not assure immunity for the managers.

The disputes in the matter arose out of a ship management agreement between Associated Transport Line, LLC ("ATL") and Colonial Marine Industries, Inc. ("CMI") on the "SHIPMAN" Form, dated March 8, 1999, for the technical and operational management of two multi-purpose cargo vessels, the M/V GGE RANGER and M/V ATL EXPLORER. In asserting claims in excess of $4 million, ATL maintained that CMI was negligent, grossly negligent, willfully in default and/or reckless in performing its obligations under SHIPMAN with respect to the technical management and operation of the RANGER and EXPLORER. ATL identified the following general categories in alleging CMI was negligent and reckless:

- The operational budgets it submitted;
- The takeover of the two vessels from the previous technical manager;
- The technical management and operation of the RANGER on her first voyage from Newport News to South America; and,
- The failure to ensure that the main engines and other machinery for both vessels were operated in accordance with manufacturers' recommendations and in accordance with elementary principles of sound ship management.

The panel provided the following discussion regarding standard of review and burden of proof:

CMI's liability to ATL depends upon a finding that ATL's losses or damages had resulted solely from the negligence, gross negligence or willful default of CMI, its employees, agents or sub-contractors. CMI is entitled to limit its liability for each incident or series of incidents to ten times the annual management fee ($960,000 per vessel), but if the incident is the result of CMI's personal act or omission committed with intent to cause damage, or CMI was reckless and had knowledge that loss or damage would probably result, CMI may not limit its liability.

SHIPMAN is a maritime contract governed by the general maritime law. Any and all disputes arising under this agreement are subject to arbitration in New York before three members of the SMA, under SMA Rules.

CMI's duties are defined in SHIPMAN, therefore, its performance of those duties should be viewed and measured by the contract standard of negligence. The specific elements of a maritime negligence claim are a) a duty owed by the defendant [CMI] to the plaintiff [ATL] under SHIPMAN; b) a breach of such duty; c) proximate causation [sole causation here] of plaintiff's [ATL's] injury; and d) damages.

The standard upon which we are obliged to judge CMI's performance is clearly indicated in the following clauses of SHIPMAN, stated in relevant part

2.2 The Managers undertake to use their best efforts to provide the Management Services specified in sub-clause 2.3 on behalf of the Owners in accordance with sound ship management practice . . . (Emphasis added).

2.3 Subject to the terms and conditions herein provided, during the period of this Agreement, the Managers shall carry out, as agents for and on behalf of the Owners, . . . and shall have authority to take such actions as the Managers may from time to time in their absolute discretion consider to be necessary to enable them to perform this Agreement in accordance with sound ship management practice. (Emphasis added)

Clause 18 sets forth the responsibilities of the parties to the agreement and states, in relevant part:

18.1 *Force Majeure. Neither the Owners nor the Managers shall be under any liability for any failure to perform any of their obligations hereunder by reason of any cause whatsoever of any nature or kind beyond their reasonable control.*

18.2 *Liability to Owners. Without prejudice to sub-clause 18.1, the Managers shall be under no liability whatsoever to the Owners for any loss, damage, delay or expense of whatsoever nature, whether direct or indirect, (including but not limited to loss of profit arising out of or in connection with detention of or delay to the Vessel) and howsoever arising in the course of the performance of the Management Services*

***Unless** same is proved to have resulted solely from the negligence, gross negligence or willful default of the Managers or their employees or agents, or sub-contractors employed by them in connection with the Vessel, in which case (save where loss, damage, delay or expenses has resulted from the Manager's personal act or omission committed with the intent to cause same or recklessly with knowledge that such loss,*

> *damage, delay or expense would probably result) the Manager's liability for each incident or series of incidents giving rise to a claim or claims shall never exceed a total of ten times the annual management fee payable hereunder.*
>
> To recover for negligence, ATL must establish that CMI did not employ reasonable care in the exercise of its best efforts to provide management services in accordance with the foregoing standard and that its negligence was the proximate and sole cause, to the exclusion of all other possible and/or contributory causes, of the damages suffered.
>
> A recovery for gross negligence requires a finding of willful or intentional misconduct and is defined as the thoughtless disregard of consequences that may flow from an act, and an indifference to the rights of others. Recklessness is more than ordinary negligence. It is an indifference to the rights of others but does not necessarily mean the act is intentional or purposely done.
>
> Where sole fault negligence is the applicable contractual standard, as it is here, ATL is responsible for proving sole fault, and this requires the exclusion of all other causes. CMI is not obliged to prove the existence of potentially contributing causes such as inherent vessel defects, *force majeure* events or ATL's fault as contributory factors to the loss. ATL bears the burden of excluding all such causes.

The vessels were inspected by CMI in November of 1998. The panel noted that ATL paid nothing for CMI's preliminary inspection of the vessels other than CMI's travel expenditures. SHIPMAN was signed and dated March 8, 1999, but it was agreed to have commenced as of February 1, 1999. At the time ATL asked CMI to perform the November 1998 inspections there was no business relationship between the parties and no management contract. Therefore, the panel ruled, whatever duty CMI owed to ATL with respect to the performance of those inspections fell outside of CMI's obligations under SHIPMAN and, therefore, the scope of the panel's jurisdiction.

ATL specifically negotiated with the owner of the RANGER and EXPLORER to place technical observers aboard each of the vessels prior to their delivery under the MOA's. CMI arranged for the selection of the observers, for their presence aboard the ships and for their instruction. CMI understood it had the right under the MOA for the observers to inspect the vessels' operating logs and to copy them. CMI's superintendent, who was designated to supervise both vessels, instructed his observers to fully familiarize themselves with the vessels, to review the MOA's, vessel reports and other details, to learn as much as possible about the vessels' operations and maintenance and to review all manuals.

The RANGER's observer party consisted of the vessel's future Master and Chief Engineer. For purposes of their status under SHIPMAN, the observers were not crew members but representatives or agents of the shore-based management team of CMI. In all, the observers were on board the RANGER for about 18 days before CMI took over formal technical management of the vessel at Newport News. The observer party for the EXPLORER was on board that vessel for approximately the equivalent time.

CMI's technical superintendent personally attended aboard the RANGER in Houston so he could meet with the observing Master and Chief Engineer, learn first hand of their observations of the vessel's operations during the voyage from Trinidad to Houston and to discuss their findings in detail. The superintendent did, in fact, meet with the observers and subsequently reported to CMI that he was generally pleased with their comments. He reported some concern about cylinder oil consumption, which he described as alarmingly high, therefore, he sought specific advice about this item from the engine manufacturer. The superintendent knew CMI had the right to inspect and copy the log books, and knew full

well the observers did not review the logs. However, he never availed himself of the opportunity to review the logs when he was aboard the vessel in Houston. The RANGER sailed from Houston to Newport News on March 9th.

ATL contended it specifically negotiated a clause in the MOA that provided it with the right to place its ship manager's technical observers on the RANGER before the purchase took place. ATL argued that CMI understood that the observers had a right under the MOA to inspect the operating logs and copy them. ATL maintained it fully expected the observing Chief Engineer and the CMI superintendent to call any defects to ATL's attention before delivery of the vessel. It was ATL's position that CMI's personnel failed to attend to their prescribed duties during the observer voyage and did not bring obvious defects to ATL's attention.

CMI contended the purpose for the observers to ride the vessel from Trinidad to Houston and Newport News was to familiarize themselves with the vessel's operations. It was not to conduct a condition survey or anything resembling such a survey. CMI maintained the superintendent's visit to the vessel in Houston was for the purpose of meeting with the observers and to discuss their findings. CMI argued the departing crew did not provide the observers with much cooperation and that the lack of cooperation was conveyed to the CMI superintendent. More specifically, CMI maintained the observers were not permitted to touch equipment or take temperature readings of the main engine. Neither were they, CMI alleged, given access to logs and records nor provided answers to questions about the operating conditions of the machinery. In fact, CMI argued that the prior crew operated the RANGER in a manner that was designed to conceal defects from the observers. Therefore, CMI contended it was impossible for the observers to discover anything other than the most superficial defects of the main engine. In summary, CMI maintained it could not be faulted for not discovering what was purposely hidden from it.

Although SHIPMAN formally commenced February 1, 1999, CMI did not actually assume technical management of the RANGER until March 15, 1999 at Newport News. However, CMI was in the process of preparing for its management responsibilities from February onwards and CMI was paid its regular management fee for the month of February 1999. Therefore, the panel concluded, the performance of the observers and CMI's superintendent should be measured by the appropriate standard as set forth in SHIPMAN. Clause 9 of Part II referred specifically to "the sale or purchase of the Vessel" and stated:

> *The Managers shall, in accordance with the Owner's instructions, supervise the sale or purchase of the Vessel, including the performance of any sale or purchase agreement, but not negotiation of same.*

CMI did not deny that mechanical problems the RANGER experienced shortly after sailing from Newport News on her first ATL voyage were not sudden failures and that defects most probably existed during the observer voyage. CMI's explanation for not noting the problems during that voyage or reporting them afterwards essentially related to allegations that the departing crew concealed the defects, restricted the observers's access to the machinery and that the departing crew was generally uncooperative. What CMI had not been able to explain to the panel's satisfaction is why the observers did not insist upon access to the operating logs when the MOA specifically gave them the authority to do so. CMI had admitted the lack of cooperation and the restricted access the observers were allegedly subjected to was reported to the CMI superintendent in Houston when he met and boarded the vessel. The panel observed that CMI had not credibly explained why the RANGER's defective operation was not picked up by the observers as it should have been.

SHIPMAN standard of performance clearly provided for CMI to render management services in accordance with "sound ship management practice" as it is generally understood in the shipping industry. Under this principle, the observers had the duty to accomplish CMI's orders to monitor the vessel operations, review and copy logs and, insofar as possible, determine the obvious operating problems

undeniably present in the RANGER and to report them to the shore side management personnel who had the further duty to alert ATL prior to the consummation of the sale. A panel majority concluded that CMI did not meet the foregoing standard and that its failure to find and report discoverable problems, particularly a clogged air cooler, during the observer voyage resulted in consequences that emanate solely from this failure. In summary, the majority concluded CMI was liable, not because they caused additional physical damage to the vessel during the observer voyage, a point never argued by ATL. Rather, CMI was found liable for ATL's financial losses emanating from CMI's sole negligence in its performance of the observer voyage.

In his detailed partial dissent, the dissenting arbitrator concluded that ATL had not carried its very strict burden of proof in accordance with Clause 18.2 of SHIPMAN. He would have denied ATL's claims, accordingly.

The RANGER broke down on her initial voyage under the management agreement, due largely to the existence of a clogged main engine air cooler, a problem which existed prior to the takeover of the vessel. The award summarizes the situation:

> A panel majority has already concluded that CMI was negligent in its conduct of the observer voyage and the failure of its superintendent to report defects of which it should have been aware prior to the vessel's presentation at Newport News for the transfer of title. Had it viewed and copied the logs as it should have and as it was obliged to, it surely would have known of the main engine cooler problem. CMI contends that it recognized a potential problem with the main engine air cooler almost immediately after the RANGER departed Newport News but it was not obvious the cooler was completely blocked at the time. However, the fact is the cooler problem could have been discerned from the log books had the observers done their job. In fact, the cooler had not been cleaned since June 1997, almost two years before the takeover, a fact later discerned from belated review of the RANGER's records. Had the logs been properly reviewed, or, failing that, had the CMI technical superintendent alerted ATL of CMI's inability to perform its duties during the observer voyage, the problem of the clogged cooler would have been discovered and repairs accomplished prior to the closing. At a minimum, allowances could have been comprehended in the vessel price such that ATL would have avoided certain costs during the first voyage. But for the sole negligence of CMI prior to the sale, ATL would not have sustained the damages it experienced during the first voyage. The panel majority concludes CMI is liable for the damages ATL sustained on the first CMI managed voyage.

The panel majority awarded ATL approximately $300,000 with respect to additional costs incurred during the first voyage. But, as to CMI's claim for lost revenue as well, the panel concluded:

> ATL contends CMI should be responsible for all of the extra costs that were incurred during this first voyage, including the consequential damages associated with the loss of future Foster Wheeler cargo.
>
> The principal item of damages that ATL asserts is the loss of about 70,000 revenue tons of Foster Wheeler project cargo to be carried between United States ports and Venezuela. ATL contends it lost $1,500,000 because Foster Wheeler directed Transoceanic Shipping Company Inc., its shipping agent, not to offer further project cargo to ATL because of the late delivery of the first shipment on the RANGER. ATL contends it attempted to salvage the situation by directly courting Foster Wheeler, however, Foster Wheeler was adamant in its refusal.
>
> We have reviewed the evidence on this particular aspect of ATL's claim

and deny it for a number of reasons. First of all, there is no evidence of a binding contract between ATL and Transoceanic for ATL to lift the 70,000 revenue tons of Foster Wheeler project cargo. Secondly, ATL never advised CMI that there was such an agreement and that a delay in delivering any one shipment would affect its ability to carry future project cargo. Lost profits fit within the realm of consequential damages and may be recoverable if they are a natural and probable consequence of the loss and within the contemplation of the parties when the contract was entered into. In short, consequential damages may be recoverable if they are foreseeable. Hadley v. Baxendale, 9 Exch. 341 15b Eng. Rep. (1854). They were not foreseeable here.

When addressing the matter of negligent operation of the main and auxiliary machinery the panel noted that ATL failed to prove, by a preponderance of evidence, that the operational problems were the result of sole negligence on the part of CMI. They observed that the crew members charged with the operation of the equipment were the most culpable parties and the fact that the Hull and Machinery underwriters recognized a crew negligence claim supported this view. The arbitrators observed that it might even be concluded that establishing crew negligence supports, *prima facie*, that the managers' negligence, if it existed, could not have been the sole cause of the damage. A determination of negligence by the managers was not supported by a preponderance of the evidence.

Several other areas of dispute, including interest, costs and counsel fees, were also adjudicated by the panel. In assessing costs and counsel fees the panel considered the value of the claims and counterclaims asserted by the parties, the relative level of effort expended in the prosecution and defense of the claims and counterclaims, the reasonableness of the expenditures and the level of success achieved by the prevailing party. [See **GGE RANGER/ATL EXPLORER** - SMA 3870]

PREGNANT? BUT HOW DID THAT HAPPEN?

Problems of interpretation very often arise after the event, when the words of the agreement can be dissected at leisure in light of the facts. But questions about the existence of a contract usually require a snap decision in "real time"; and the consequences of calling it wrong can be catastrophic.

This is the area to be explored at a one day seminar to be held in Montreal on 18 May and entitled: "Pregnant? But How Did That Happen?" Speakers from England, the United States and Canada will discuss a variety of practical issues, including the role of brokers and intermediaries: how far can they commit their principals without their knowledge? And what are the consequences of the intermediary acting outside his authority, whether intentionally or not?

The cost of admission will be $63 US (C$75) per person, including a sandwich lunch and the opportunity to have a drink with the speakers afterwards. The person to contact is John Weale at tel: 514.878.6676 (or e-mail him: jweale@fednav.com).

ICMA XVI

Mr. Lawrence Boo, Chairman of the recently formed Singapore Chamber of Maritime Arbitration and Chairman of ICMA XVI Organizing Committee advises that the Organizing Committee has formally fixed the dates of the Congress, to be held in Singapore, for 26 February - 2 March 2007. More will be forthcoming about this event but it is never too early to mark your calendars for an ICMA event.

AWARD DIGESTS 5 & 6

We continue to advise that the INDEX AND DIGEST OF SMA AWARD SERVICE - VOLUME 5 has been digitized into Adobe Acrobat PDF format. A CD-ROM combining Digests 5 and 6 is available for purchase from the SMA. The files are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of

Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds. We would be happy to provide our banking instructions for wiring payment direct to our account.

HUMOR FOR THE QUARTER

A typical home office might contain two computers, a monitor, a docking station with power supply, a couple of USB hubs, a wireless keyboard and mouse, a cable modem, a wireless router, a printer, a scanner/fax machine, a few surge protectors, a telephone and a stereo amplifier. One recent night your editor, whose office accommodates all of the above noted "must-have" items, counted forty-four (44) winking, blinking and nodding, beady-eyed lights betraying various stages of operation, readiness and/or alarm. It brought to mind the following words from a poster, long ago spawned in an industrial environment, but equally applicable today:

ACHTUNG

Alles touresten and Non-technischen Lookens Peepers!

Das Machine control is nicht fur Gerfingerpoken und Mittengrabben. Oderwise is easy Schnappen der Spriggenwerk, Blownfuse, und Poppencorken mit Spitzensparken. Der Machine is Diggen by Experten only. Is nicht fur Geverken by das Dumnkopfen. Das Rubberneken Sightseenen Keepen das Cottenpicken Hands in das Pockets. So Relaxen und Watchen der Blinkenlight.

(For some reason "Spell Checking" has failed. Any ideas?)

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

Welcome to 2005 which will see the Society's participation in a number of events:

January 27-28 - **Maritime Arbitration in New York** - A two day course taught by Professor Jeffrey Weiss, sponsored by the Society of Maritime Arbitrators, The Yale Club, 50 Vanderbilt Avenue, NYC

February 3 - **A Primer on Conducting Arbitrations with the SMA** - An introduction to the SMA Rules and a mock arbitration, sponsored by the Admiralty and Maritime Law and the Arbitration and ADR Committees of the New York County Lawyers' Association (NYCLA), the Arbitration and ADR Committee of the Maritime Law Association (MLA) and the Society of Maritime Arbitrators (SMA); NYCLA, 14 Vesey Street, NYC

February 17 - **Dispute Resolution: The New York Arbitration Alternative** - An in depth review of New York arbitration and mediation practice and procedure highlighted by a mock arbitration, sponsored by Poten & Partners and New York Law Firms, The Warwick Hotel, 5701 Main Street, Houston, Texas

February 20-23 - **The PALERMO SENATOR Scenario - Mock Arbitration** - New York arbitral practice and procedure under the SMA Rules, Panama Maritime VII World Conference & Exhibition, Riande Continental Hotel, Panama City, Republic of Panama

March 10-11 - **A Comparative Analysis of Mexican/US Law & Practice** - An introduction to New York arbitration with a mock arbitration, sponsored by the Mexican Maritime Law Association, Society of Maritime Arbitrators and New York admiralty firms, The Las Hadas Golf Resort & Marina, Manzanillo, Mexico

May 8-9 - **BIMCO Seminar on Tanker Practice & Procedure** - Alternative Dispute Resolution with a mock mediation, New York City venue to be announced

For further details contact the SMA website at www.smany.org.

Please also plan on joining your friends and colleagues at the SMA luncheons on January 12th, February 9th, March 16th and April 13th.

With best wishes for a happy, healthy and prosperous New Year,

David Martowski

MARITIME ARBITRATION IN NEW YORK - A COURSE

The Society of Maritime Arbitrators, Inc. recently was pleased to announce a two day course to be presented at the Yale Club, 50 Vanderbilt Avenue, New York, NY on January 27 and 28, 2005. Consistent with its charter as an educational organization, the SMA is offering this two day program to help further and promote the fair, just, ethical and cost efficient resolution of charter party and other maritime contract disputes via arbitration in New York. Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College, who has over 20 years of college and graduate level teaching experience, will be the lead instructor. Members of the SMA will assist in discussing selected topics. Course content will include:

* Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act and SMA Rules
* The Arbitration Award: Interim Awards; Final Awards; Majority Decision; Dissenting Opinions
* Confirmation, Vacatur and Enforcement of Award
* Panel Members and Ethical Considerations
* Discovery in Aid of Arbitration
* Hearing Procedures
* Security in Aid of an Award
* Evidentiary Considerations in Arbitration, the Federal Rules of Evidence and Related Issues
* Time Bar, Defaults and Consolidation of Arbitrations.

This course will be especially valuable to professionals in the shipping business who are users of the maritime arbitration process. Attendees from shipowners, chartered vessel operators, maritime claims adjustors, insurers, traders and export/import companies should find the course an efficient way to gain an understanding of the current practices in New York maritime arbitration proceedings.

The course will also be uniquely beneficial to newly admitted maritime attorneys or lawyers with less than two years practice or those seeking a more comprehensive understanding of the process. (Application for CLE accreditation of this course in New York is currently pending.)

Please communicate with the SMA for application and registration information. Address, telephone numbers and other contact details may be found at the end of each issue of THE ARBITRATOR.

MISDECLARED CARGOES

By Captain James J. McNamara

Intentional misdeclaring of cargoes is not a new phenomenon. It has gone on for ages. The practice can be intentional or accidental. It can occur in the container, dry bulk, liquid bulk and even the break bulk trades. If cargo is intentionally misdeclared it can be done for many reasons. In the past, the usual reason was to obtain a cheaper freight rate, or insurance premium. Although that was not an innocent deed, it was far less serious than avoiding a safety consideration, or worse yet, a security consideration. While misdeclaring cargoes is not new, the liability of the practice is. Courts and insurance companies, via subrogation, are recognizing the shippers' (and their agents') traditional responsibilities of properly declaring cargoes. Additionally, a Customs Official recently mentioned to me that Customs views misdeclared cargoes as being smuggled, and those persons involved as smugglers.

Cargoes were misdeclared for hundreds of years, but it wasn't until the days of prohibition when alcoholic beverages were being manifested as olives (in barrels) or other various innocuous commodities shipped in drums or barrels that the public became aware of the practice. Then beginning in the 1960's we heard about drug smugglers hiding their consignments in a whole array of innocent cargoes, diverting attention from their forbidden commodity.

As time went on, we entered the age of unitization and then containerization. The Non-Vessel Operating Common Carrier (or NVOCC) was born. This group acting as a cargo or freight

consolidator in ocean trades buys space from a carrier and sub-sells it to smaller shippers. The NVOCC issues Bills of Lading, publishes tariffs and otherwise conducts itself as an ocean common carrier, except that it will not provide the actual ocean or intermodal service. Thus, yet another party is added to the chain of responsibility in a shipment possibly obscuring the original shipper or contents of a shipment.

One simple way used to misdeclare a shipment was through the use of descriptive but vague terms such as household goods, oil well supplies, building materials, machine parts, or even freight, all kinds. One example of the practice, very common in the 1970's, was the use of the term "oil well supplies." Most every ship leaving the ports of New Orleans and Houston had on their manifest, and carried, "oil well supplies." This term frequently included drilling mud, vehicles, explosives, alcoholic beverages, hair spray, pipe, lube oil and even drums of gasoline. It should be noted that all of those named items were actually used by the personnel while drilling for oil. Consolidators in order to expedite shipments utilized such terminology to excess until the 1980's. Various authorities and administrations such as the U.S. Coast Guard, and the International Maritime Organization acted prohibiting the use of these general terms for reasons relating to safety of carriage (such as firefighting). Now at least this practice is no longer prevalent. However, with the tremendous increase in imports to our country coming from a growing number of underdeveloped countries, there are far more means of and reasons for misdeclaration. It is quite common in the dry bulk trades, and particularly in the carriage of bulk metal commodities. Such cargoes are frequently given names which are not listed in the *IMO Code of Safe Practice for Solid Bulk Cargoes*. This international code describes all bulk commodities, details the risks of carriage, and recommends practices and procedures for their safe carriage. When a cargo is being fixed for a ship, the ship owner, charterer or ship master will research the characteristics in the IMO publication to determine any hazard or characteristic which may require special care. If the cargo is not listed, the assumption will be "there is no risk." Then the cargo will be loaded aboard. Should the cargo emit hydrogen when wetted, such as the case with Direct Reduced Iron, an explosion may result. This has occurred a number of times recently resulting in loss of life. Rather than the cargo being declared and loaded under the IMO requirements for Direct Reduced Iron, the cargo was declared under the alias names of Orinoco Iron Remet Fines, Metallic HBI Fines, Remet Fines, Orinoco Iron Remet, Hot Briquetted Iron Fines, Metallized Fines or even Iron Sands.

Other cargoes may be subject to liquefaction and must be tested by a laboratory to determine a moisture content. Should the laboratory falsify the test to the advantage of the shipper, the ship will be at risk and be subject to shifting cargo and capsize. This occurred recently in a U.S. port and the ship sank in the North Atlantic. Should a falsified certificate accompany the documentation of a cargo, the cargo is misdeclared.

Since September 11, 2001 our government has been most concerned with containerized cargoes, and their potential for aiding the terrorist. Containerized cargoes have always presented an easy opportunity for misdeclaring or smuggling cargoes into or out of a country as the contents are shipped in a sealed metal box. With the emphasis on "just in time delivery" and the constant pressure of speed in delivery, security in this mode of transportation has become a major concern for us all, and there are no easy answers.

Although misdeclared cargoes have always been a reason for concern for the safety of the ship's crew, the ramifications in today's world make this issue a threat to the security of the nation.

(Captain McNamara is President of the National Cargo Bureau. He delivered the foregoing at the November 17, 2004 SMA luncheon. He augmented his presentation by detailing a number of examples of misdeclared cargoes and their disastrous results.)

RECENT CASES

ADMIRALTY JURISDICTION

David Martin-Clark recently posted another interesting Court decision on his website - DMC's CaseNotes at http://www.onlinedmc.co.uk. In this important decision, the United States Supreme Court held that the United States Federal maritime law, not state law, governs disputes arising under a multi-modal ocean bill of lading which includes a "substantial" maritime leg, irrespective of whether the carriage also includes a substantial over-land carriage and irrespective of the leg of the voyage on which the claimed damage occurred.

The Court held that claims arising under multi-modal ocean bills of lading are not "inherently local" such that state law should govern. Applying Federal maritime law, the Supreme Court concluded that defendant rail carrier was covered by Himalaya Clauses contained in two multi-modal bills of lading issued in respect of the subject cargo and thus was entitled to the US Carriage of Goods by Sea Act 1936 (COGSA)'s US$500 per package limitation of liability in respect of damage to a cargo of machinery which occurred as a result of a train derailment on the final leg of the delivery. In so doing, the Court held that, for the narrow purposes of accepting limitations of liabilities in the bill of lading, at least, the cargo interests were bound by the terms in the bill of lading of the actual carrier through the agency of the contracting carrier.

Facts

As Justice O'Connor aptly observed in the Court's opinion, "this is a maritime case about a train wreck." Kirby, an Australian manufacturing company, sold ten containers of machinery to a General Motors plant located outside Huntsville, Alabama. Kirby hired International Cargo Control (ICC) to arrange for delivery. ICC issued a through bill of lading to Kirby designating Sydney, Australia as the port of loading, Savannah, Georgia as the port of discharge, and Huntsville, Alabama as the place of delivery. The ICC bill incorporated the COGSA package limitation in respect of the sea leg and, for the land portions of the carriage, adopted the Hague-Visby limitation of liability.

ICC in turn arranged for carriage through Hamburg Süd, and Hamburg Süd issued a bill of lading to ICC which also designated Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the ultimate delivery destination. The Hamburg Süd bill also incorporated COGSA's package limitation and extended the application of that limitation to all portions of the carriage, whether at sea or on land.

Both bills of lading contained Himalaya Clauses. The ICC bill provided that the limitations of liability in the bill would apply in respect of claims against "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." The Hamburg Süd bill was worded slightly differently and extended the benefit of its liability limitation to "all agents … (including inland) carriers … and all independent contractors whatsoever."

Hamburg Süd contracted with Norfolk Southern Railroad to transport the machinery from Savannah to Huntsville. During this leg of the carriage, the train derailed causing US$1.5 million in damages. Kirby sued Norfolk Southern in the District Court for the Northern District of Georgia, and Norfolk Southern subsequently applied to the court to limit its liability to US$500 per container pursuant to the Hamburg Süd bill or, alternatively, to the somewhat higher Hague-Visby limitation in the ICC bill. The District Court granted the motion, but the Eleventh Circuit Court of Appeals reversed the District Court decision, holding that the Himalaya Clause in the ICC bill did not extend to parties, such as Norfolk Southern, who were not in privity of contract with ICC and that, in any event, the clause was not broad enough to cover inland carriers. The Eleventh Circuit further concluded that the Hamburg Süd bill's Himalaya Clause was not binding on Kirby because ICC could not be construed as having been acting as an agent for Kirby when it obtained the Hamburg Süd bill.

Judgment

The Supreme Court first considered the issue, raised by Kirby, of whether the claim was governed by Federal maritime law or by state law. The Court concluded that the bills of lading were maritime contracts "because their primary objective is to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States." The court acknowledged that the bills called for some performance on land but concluded that "under a conceptual rather than spatial approach, this fact does not alter the essentially maritime nature of the contract." In sum, the Supreme Court concluded that only where a bill of lading's sea components are "insubstantial" will it not be considered a maritime contract.

The Court further considered whether the case was "inherently local" such that state law should nevertheless apply. In concluding that the Federal maritime law should apply, the Court observed "our touchstone is a concern for the uniform meaning of maritime contracts like the ICC and Hamburg Süd bills."

Turning to the merits of the dispute, the Supreme Court first considered the ICC bill of lading. Rejecting the Eleventh Circuit's strict construction of the ICC Himalaya Clause, the Court concluded that the natural meaning of the language in this bill was to extend the limitations of liability to "any" party whose services contributed to the performing of the contract. Given that the contract called for delivery of the cargo at Huntsville, an inland city, the Court concluded that the parties must have anticipated that an over-land carrier's services would be necessary for the contract's performance. Thus, the Court concluded, it was clear that a railroad such as Norfolk Southern must have been an intended beneficiary of the ICC bill's "broadly written Himalaya Clause."

Turning to the Hamburg Süd bill, which extended COGSA's limitation of liability to the land portion of the carriage, the Supreme Court rejected the Eleventh Circuit's strict reliance on agency law principles to determine the question of whether Kirby should be subject to the limitation of liability in the Hamburg Süd bill issued to ICC. The court acknowledged that "the traditional indicia of agency, a fiduciary relationship and effective control by the principal, did not exist between Kirby and ICC." Nevertheless, the Court concluded, for the narrow purpose of contracting for liability limitations with carriers downstream, it was appropriate to hold that an intermediary binds a cargo owner to limitations of liability contained in contracts between the intermediary and the ultimate carrier. This was appropriate, the Court held, for three reasons: (1) a limited agency rule tracks industry practice; (2) if liability limitations negotiated directly with cargo owners were reliable whereas limitations negotiated with intermediaries were not, carriers likely would charge higher rates to intermediaries; and (3) the result is equitable because Kirby retains the right to sue ICC for any loss that exceeds the liability limitation to which they agreed (i.e., here the difference between the COGSA package limitation and the somewhat higher Hague-Visby limitation contained in the ICC bill). Thus, the Court held, Norfolk Southern was entitled to limit its liability to US$500 per package (which in this case was the container) pursuant to the Hamburg Süd bill of lading.

Mr. Martin-Clark's Comment

This decision is significant for at least three reasons: (1) it broadens and clarifies the application of the Federal maritime law to all bills of lading involving multi-modal transportation which includes a "substantial" maritime leg; (2) it makes clear that Himalaya Clauses in bills of lading are subject to the same rules of construction as other contract terms and should be enforced if a plain reading of the language indicates that it was intended to apply in a given situation; and (3) it makes clear that an intermediate carrier or NVOCC can bind the shipper to the actual carrier's limitation of liability contained in its bill of lading.

Case note contributed by Thomas H. Belknap, Jr., partner at Healy & Baillie, LLP in New York. Healy & Baillie are the International Contributors to the site for the USA. (You can access the case notes at www.onlinedmc.co.uk where you will find the cases listed. Click on the name of the case and that will take you directly to the case note.)

MISDIRECTED CARGO

David Martin-Clark recently uploaded another COGSA case note on the website DMC's CaseNotes @ http://www.onlinedmc.co.uk.

Summary

The New York City Civil Court granted summary judgment against an insurance company pursuing a subrogated claim against a container line. The insurer sought damages for the line's misplacement of a New York-bound shipment of doors and windows from Germany. The shipping company had represented to the cargo owner that its shipment could not be located and had been apparently stolen, but it later located the cargo and delivered the shipment in good condition. The court ruled the carrier's failure to unload the container at New York and its on-carriage of the container to Japan and back was not an unreasonable deviation because the carrier's actions were not undertaken voluntarily. The court rejected the insurer's claim for negligent misrepresentation on the ground that the shipping company owed the cargo owner no duties except those created by and arising out of the shipping contract, a bill of lading. Moreover, the court found that the alleged negligent misrepresentation was not a misrepresentation in the first instance because the shipping company had never definitely advised the cargo owner that its container had been "stolen."

Background

On February 9, 2000, Tischler und Sohn ("Tischler") contracted with Orient Overseas Container Line, Ltd. ("OOCL") for the carriage of a container of custom doors and windows from Germany to New York. The shipment arrived in New York on February 17, 2000, but OOCL was unable to locate the container. After repeated searches failed to unearth the missing cargo, OOCL advised Tischler on February 29, 2000, that it appeared the shipment had been stolen, but that it would delay reporting the theft to the authorities until an additional twenty four hours had elapsed. Tischler gave the carrier a preliminary notice of claim on March 5, 2000. Apparently, the container was never actually reported stolen to the authorities.

On March 24, 2000, the container was located: it had not been unloaded in New York but had instead traveled first to Japan and then to California. When the container finally was discharged in New York its cargo was apparently undamaged. No claim for cargo damage was presented in the suit against OOCL.

Fireman's Fund Insurance Co. ("Fireman's Fund"), as subrogee of Tischler, brought an action against OOCL claiming damages resulting from the delayed delivery. OOCL applied to the court for summary judgment on the ground that the bill of lading provided no particular delivery time and, further, that it had disclaimed any liability resulting from delay. Fireman's Fund argued that OOCL could not disclaim damages for delay because it had unreasonably deviated from the contract voyage. Fireman's Fund also claimed that OOCL's February 29 statement (that the container was apparently stolen but that OOCL would wait to report the theft to the authorities) was a negligent misrepresentation sufficient to create a liability in tort, and it applied to the court for summary judgment on this ground.

Judgment

Judge Eileen A. Rakower of the New York City Civil Court ruled that Fireman's Fund was not entitled to recover damages under the unreasonable deviation concept. An unreasonable deviation "must be both voluntary and intentional" and there was "no allegation" of voluntary deviation in the ship's route. Instead, the facts of the case indicated the container had been inadvertently left on the ship and carried on to subsequent ports, until it was found and returned to Tischler. "It is obvious . . . that [OOCL] had no intention of diverting the cargo, and indeed was actively searching for it. Thus, there was no unreasonable deviation within the meaning of COGSA."

As to Fireman's Fund's negligent misrepresentation claim, the court ruled that Fireman's Fund had "failed to identify an independent duty on which to base its tort claim." Instead, "the parties' legal duties and correlative responsibilities arose entirely from" the contract for carriage. Because OOCL owed no duties beyond those contained within the Tischler-OOCL contract, Fireman's Fund (as Tischler's subrogee) could not "circumvent the provisions of the contract" by recovering under a tort theory.

Even though the court had ruled that the claim was not tortious, it nevertheless analyzed the merits of Fireman's Fund's negligent misrepresentation allegation. Judge Rakower ruled that the statement was insufficient to create such liability because "there is nothing to indicate that [OOCL] definitely told Tischler that its container was stolen." OOCL's communications on the matter "remained equivocal" until OOCL advised Tischler that its container had been located and was being returned to New York. The court stated "the statement that the carrier was requesting 24 hours before taking further action was not alleged to be false" and thus could not give rise to a cause of action for negligent misrepresentation.

Comment

This decision presents an unusual twist on the "unreasonable deviation" doctrine. Here, although the container clearly was diverted by the carrier from its intended route of carriage, the carrier's lack of subjective knowledge that the container was in fact being carried on to Japan—and, thus, its lack of "voluntariness" in that particular act of carriage—was sufficient to defeat the shipper's claim. In this way, it illustrates the subjective nature of the doctrine's "voluntary" requirement.

Case note contributed by David Jensen of the firm Healy & Baillie, LLP in New York. Healy & Baillie are the International Contributors to the site for the United States.

(You can access the case notes at www.onlinedmc.co.uk where you will find the cases listed. Click on the name of the case and that will take you directly to the case note.)

BUNKER QUALITY DISPUTES
More Onus on Charterers

On Friday, October 8, 2004 the UK P&I Club circulated the following:

In a recent dispute concerning damage caused to main engines by bunkers, the key defence raised was that the bunkers were on spec. In a finding with important implications for future bunker disputes, the tribunal held that under English law a term would be implied to the effect that **any bunkers supplied would have to be of a reasonable general and merchantable quality, reasonably suitable for the particular vessel's engines and reasonably fit for the purpose intended**.

Significantly, this is in addition to any obligation to provide bunkers which comply with the express terms of the specification set out in the relevant charter or bunker supply contract.

In this particular case, the tribunal found on the balance of probabilities that the bunkers supplied exhibited poor ignition and combustion qualities and that it was these qualities which caused (or were the principal cause of) the damage to the main engine, thereby constituting a breach of the implied term. The tribunal found that the damage sustained by the vessel's main engine was more likely than not to have been caused by the poor ignition qualities of the fuel supplied. The charterers were therefore found liable not only for extensive engine damage, but also for consequential loss, including loss of time.

The application of this approach will certainly considerably increase the exposure to liability of charterers who are responsible for supplying bunkers to a vessel, particularly in the light of the ignition quality aspect discussed below. **They can no longer simply rely on the fact that the bunkers supplied complied with their technical specification: there is a further and**

more onerous duty to ensure that the on spec bunkers supplied will not cause damage to the particular engine on board the particular vessel.

Charterers' potential liability will remain substantial, even though they are often many times removed in the contractual chain from the ultimate supplier (whose sale contract may, in any event, be subject to a different law and jurisdiction). In addition, charterers' exposure may also be affected by the fact that it is now very tempting for owners to blame any damage to their vessel's main engine on unfit bunkers, knowing that the fact that the bunkers supplied were on spec may not be a sufficient defence.

An aspect of this case of particular interest is that it centred on ignition quality, a property of fuel which is of major importance in diesel engines, affecting the time between injection and the start of the combustion phase.

If the ignition process is delayed for too long a period by virtue of some chemical quality of the fuel, too large a quantity of fuel will be injected into the engine cylinders and will ignite at once, producing a rapid pressure and heat rise and causing associated damage to the piston rings and cylinder liners of the engine.

In many vessels the effects of poor ignition quality are negligible, but in this case the particular engine was nearing its overhaul period and was less resilient than would perhaps otherwise have been the case. It would seem that charterers have to have regard to the susceptibility of the particular engine.

The problem for charterers is that there is at present no standard test for poor ignition quality. Charterers will increasingly find themselves between a rock and a hard place: on the one hand, marine fuel oils may be technically on specification, although actually not fit, and on the other hand owners now have the basis for a legal remedy. Charterers will be squeezed and they may not have the necessary insurance coverage in place, nor be able to seek legal redress down the contractual chain.

So what is the answer for charterers? It would clearly be desirable to have a standardised form of bunker supply contract which places on bunker suppliers the same contractual requirements as those on the parties immediately above them in the contractual chain, but that seems unlikely.

An obvious solution for charterers is to ensure that their contracts down the contractual chain (be it with a bunker broker or the actual supplier), are also subject to English law and jurisdiction, which will afford them the remedy of seeking an indemnity. Furthermore, it will now be essential for charterers to ensure that they inform their immediate contractual counterparts not only of the exact specification of bunkers to be supplied, but also the particular vessel and the particular engine to be supplied (and its overhaul record), expressly placing the contractual obligation on the supplier to ensure that the bunkers supplied are not only within the specification ordered, but also fit for the purpose of the vessel and the engine to be supplied.

Charterers will also have to insist on a widening of the scope of the analysis performed by the bunker analysis agencies employed by owners to include analysis of ignition quality, and such a specification should become a standard specification tested for in any analysis results.

Such analysis can be performed by the Fuel Ignition Analyser currently supplied by Fueltech AS. To achieve this, it is obviously an absolute necessity for charterers to ensure that the relevant charter parties impose such an obligation upon owners, including an obligation that owners properly satisfy themselves through their engine manufacturer that the ignition quality exhibited is fit for the purpose of the particular engine on board, both in relation to its specification and in relation to its particular condition. Such a clause will help charterers to divest themselves of some of the responsibility for ensuring fitness for purpose. Only then will charterers be able to identify, contain and minimise their exposure, an exposure which has the potential to put them out of business. Finally, charterers should also investigate what products are available in the insurance market to properly protect them against this sort of liability.

Source of information: Mark O'Neil, (Partner), Stephenson Harwood

SMA AWARDS PUBLICATION POLICY

Several members of the SMA recently had an exchange of views regarding the society's policy not to print awards issued under the auspices of arbitral organizations other than the SMA. The discussion arose from a request by a member that the SMA include an award that he had recently issued as a sole arbitrator. The matter involved a procedure governed by the MLAA Terms.

SMA Board Member A.J. Siciliano, explaining the general policy of the SMA, noted that it has been the long-standing policy of the SMA not to publish awards issued under the auspices or pursuant to a foreign or competing forums. That is the reason why awards of members sitting on AAA, Miami, Vancouver, San Francisco, New Orleans, ICC, Chamber Abitrale, and London panels are not found in the modern SMA Awards Service. For the particular request under consideration, Mr. Siciliano observed that, since it was an MLAA matter under discussion, he cautioned that a separate and potential additional difficulty is the parties' expectations of privacy. The prevailing policy of the LMAA is to not publish awards issued under or pursuant to its auspices. Indeed, the English courts afford such awards and the information derived therefrom an unusually high degree of confidentiality.

SMA Board Member Lucienne Bulow explained further. Under English law, an agreement to arbitrate is considered a private agreement. Awards issued under such an agreement are thought to only concern the parties involved in the arbitration.

Section 22 of the current LMAA Terms states very clearly that, in a situation where the parties have not specifically asked for reasons to a decision with the possible intention of lodging an appeal in court, the arbitrators may issue an outline of the reasons on a confidential basis which is called "privileged reasons." Such reasons are not considered part of the award. This type of an award is not to be shared with any party other than the parties involved in the arbitration.

Recently, the LMAA has tried to stem the criticism of its not publishing its members' awards and has added Section 26 of its current Terms. This section provides that if a tribunal considers that an arbitration decision merits publication and obtains the agreement of the parties to release the award for publication, "the award may be publicized under such arrangements as the Association may effect from time to time." It goes on to state, "The publication will be so drafted as to preserve anonymity as regards the identity of the parties, of their legal or other representatives and of the tribunal."

The LMAA clearly reserves the right to publish decisions made under its Terms and clearly intends to protect the anonymity of the parties, legal and other representatives and of the tribunal.

SEMINAR IN MEXICO SAVE THE DATE

The Mexican Maritime Law Association, the Society of Maritime Arbitrators, Inc. New York and select New York admiralty firms are pleased to announce a two-day seminar on Maritime Law and Arbitration Issues. The seminar will take place at Las Hadas Golf Resort and Marina in Manzanillo, Mexico on March 10 - 11, 2005, preceded by a cocktail reception on Wednesday, March 9, 2005. The program will include a comparative presentation of Mexican/U.S. law on practice and procedures, marine insurance, offshore operations, security/ISPS, and LNG port development. There will be a presentation of U.S. ADR and an introduction into U.S. arbitration, followed by a mock arbitration. There will also be an Official Dinner midway through the seminar on Thursday evening, March 10, 2005. More information will be forthcoming as the plans are developed.

CMA'S MARCH PROGRAM

The Connecticut Maritime Association reports it is always a pleasure to introduce to the market the Connecticut Maritime Association's annual Conference Program. A pleasure because once again a team of industry participants have created a program packed with substance, energy and a schedule designed to maximize your business opportunities. The following link will take you to their show website and the first release of the program:

www.shipping2005.com/confer2005.html

The CMA looks forward to seeing you in Stamford, Connecticut March 21-23 for CMA Shipping 2005 and wish to thank the many professionals who have contributed so much already to the program and activities. Please don't hesitate to contact them for questions or more information on how you too can participate.

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AWARD DIGESTS 5 & 6

We continue to advise that the INDEX AND DIGEST OF S.M.A. AWARD SERVICE - VOLUME 5 has been digitized into Adobe Acrobat PDF format. A CD-ROM combining Digests 5 and 6 is available for purchase from the SMA. The files are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds. We would be happy to provide our banking instructions for wiring payment direct to our account.

HUMOR FOR THE QUARTER

Arbitrators, often faced with the dilemma of reconciling facts and truth, need subjective intuition, not unlike how Ogden Nash must have felt when he wrote:

SAMSON AGONISTES

I test my bath before I sit,
And I'm always moved to wonderment
That what chills the finger not a bit
Is so frigid upon the fundament.

Which often leads to a quandary when awards are to be calculated. Many a counselor adheres to the following Robert Frost theory:

THE HARDSHIP OF ACCOUNTING

Never ask of money spent
Where the spender thinks it went.
Nobody was ever meant
To remember or invent
What he did with every cent.

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

Ron Murphy, Deputy Director of the Federal Maritime Commission's Bureau of Consumer Complaints & Licensing, kicked off our Fall luncheons with a stimulating presentation on the FMC's Alternate Dispute Resolution Program. Please, mark your calendars for the year's remaining luncheons which are scheduled as follows:

November 17th - Captain James McNamara, President - National Cargo Bureau:
"*Mis-Declared Cargo*"
December 15th - Michael Rauworth, Esq., Cetrulo & Capone LLP - Boston
"*The NORTHERN VOYAGER - Salvage Interrupted.*"

A presentation on "Maritime Arbitration under the SMA Rules" was made at the Marine Log Conference held in Washington, DC on September 24th. The Society has also been invited to make a similar presentation at a seminar sponsored by the Admiralty Committee of the New York County Lawyers' Association. Promotional presentations are also in the planning stages for Spring events here and abroad which will be posted on the Society's website.

David Martowski

FMC'S ALTERNATIVE DISPUTE RESOLUTION PROGRAM

Ron Murphy, Deputy Director of the Federal Maritime Commission's Bureau of Consumer Complaints & Licensing was the invited speaker at the SMA's October 13, 2004 luncheon. He discussed the Federal Maritime Commission's Alternative Dispute Resolution ("ADR") program.

First, he provided a short history of the program, whose statutory basis is the Administrative Dispute Resolution Act of 1990, as amended in 1996. He acknowledged the increase on use of ADR, particularly mediation, throughout the 1990's, and the requirement that all Federal Courts must now have an ADR Program. Mr. Murphy indicated that the movement toward ADR corresponded with changes in regulation of the shipping industry, as the 1990's saw an increasing desire to modify the Shipping Act of 1984, which was ultimately accomplished through the Ocean Shipping Reform Act of 1998 ("OSRA").

In implementing OSRA, the Commission was reorganized in early 2000. Part of that reorganization involved an emphasis on ADR in matters before the Commission. Mr. Murphy was assigned the responsibility of developing an effective ADR program. For a number of years, the Commission had provided assistance to shippers and others in resolving problems with shipment delivery, overcharging and other issues with shipments. To that service, the Commission intended to offer mediation services to those involved in cases pending before Administrative Law Judges at the Commission. Mr. Murphy indicated that pre-litigation mediation is also emphasized. Rules implementing that program were issued in August 2001. Since then, ADR services have been utilized on approximately 20-25 matters between private parties, with 80-85% of those cases being settled. ADR services have not been very effective in resolving enforcement cases, however.

In another recent reorganization, the Commission established an Office of Consumer Affairs and Dispute Resolution Services ("CADRS"), which Mr. Murphy now heads. That office focuses exclusively on ADR services, including *ombuds* services and mediation services.

Mr. Murphy then mentioned several pending matters at the Commission:

1. Anchor Shipping Co. v. Alianca Navegacao e Logistica LTD. is a currently pending case filed after the Complainant was unhappy with the arbitration decision issued by an SMA member. Despite an award exceeding $300,000, Anchor Shipping contends that the arbitrator did not have authority to decide Shipping Act issues, and filed the Commission complaint seeking additional damages. The Administrative Law Judge dismissed the complaint, but Anchor Shipping appealed that dismissal to the full Commission, which has yet to rule on the matter.

2. NVOCC petitions. There are currently several petitions pending which seek a Commission ruling allowing NVOCCs to offer service contracts to their customers.

3. Recently, an investigation was initiated regarding a long term lease for a passenger vessel service at the Port of Portland, Maine.

4. There are several cases pending against the Puerto Rico Ports Authority concerning terminal leasing issues.

Mr. Murphy explained that the focus of the Commission is reducing litigation expenses and time delays and the resulting interference with the flow of commerce. The Commission's ADR program encourages various types of assisted negotiation, primarily mediation, in lieu of arbitration and litigation. The program is not meant to replace private sector mediators, but to complement such mediation and encourage its use. In fact, the Commission's rules provide that private sector mediators may be used, but the parties must pay. In addition, the Commission is focusing on streamlining its application procedures and utilizing automation.

RECENT CASES

SECOND CIRCUIT ORDERS ARBITRATION OF CHEMICAL CASES

On June 24, 2003, the USDC for the District of Connecticut denied Owners' motion to compel arbitration. On October 26, 2004, the Second Circuit reversed the District Court Order and remanded the case for further proceedings consistent with its opinion that arbitration was appropriate.

The plaintiffs are affiliated corporations engaged in the business of buying, selling and trading of chemicals in bulk which are shipped aboard parcel tankers to and from U.S. ports. The four shipowner defendants are described as companies handling more than two thirds of the liquid chemicals cargoes shipped on parcel tankers.

The shipping transactions under consideration were subject to an ASBATANKVOY charter form, including the standard

ASBATANKVOY arbitration clause 24 specifying either London or New York as the place of arbitration. The plaintiffs central allegation is that Owners exploited their market power by conspiring to fix freight rates for the transportation of liquid chemicals, by coordinating worldwide bidding so as not to compete with one another and to essentially carve up the worldwide market. The plaintiffs allege violations of the Sherman Act, Connecticut Antitrust Act, a common law claim for unjust enrichment and a violation of Connecticut Unfair Trade Practices Act.

Owners moved to compel arbitration of plaintiffs' claims pursuant to the ASBATANKVOY arbitration clause. The district court denied the motion, concluding price fixing allegations against the Owners fall outside the scope of the arbitration clause. Specifically, the district court held it would be improper to compel arbitration because the plaintiffs' claim does not depend upon the interpretation, construction or application of any provision of ASBATANKVOY.

The Second Circuit concluded the district court erred in holding that arbitration was not appropriate. In making its determination, the court examined whether the parties agreed to arbitrate, the scope of the agreement and, if federal statutory claims were asserted, whether Congress intended them to be non-arbitrable.

The court addressed plaintiffs' argument that ASBATANKVOY as a whole amounted to a contract of adhesion, concluding this was an issue for the arbitration panel to decide. With respect to the question of whether the arbitration clause extended to Sherman Act claims, the court, citing Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985), a Sherman Act case, and Kerr-McGee Refining Corp. v. M/T Triumph 924 F.2d 467 (2d Cir. 1991), a RICO claim, noted that where a broad arbitration clause is at issue, it is presumptively applicable to disputes involving matters that go beyond the interpretation or enforcement provisions of the contract containing the arbitration clause. The court concluded that the above cases provided it with a firm basis to conclude that plaintiffs' claims regarding a conspiracy among Owners in violation of the Sherman Act are arbitrable.

The court next addressed the question of whether Congress precluded the arbitration of plaintiffs' Sherman Act claim, concluding that the Supreme Court in Mitsubishi held that the international arbitration of antitrust disputes is appropriate.

As a final point, the court directed itself to the choice of law provision in the arbitration clause and plaintiffs' assertion that about one-third of the charters were to be arbitrated in London under British law. Plaintiffs' argued that British antitrust law was inherently hostile to its claims and could not provide an effective antitrust remedy. The court stated that the manner in which a London arbitration panel would apply British law to plaintiffs' substantive claims was wholly speculative, therefore, the question of whether the plaintiffs would be able to effectively vindicate its rights under the Sherman Act was premature. [Docket Nos. 03-7683 (L), 03-7913 (CON)]

THE STRANDING OF THE SEALAND EXPRESS

The disputes in a recent arbitration arose out of a December 10, 1999 time charter of the **SEALAND EXPRESS**, a 32,926 DWT cellular container vessel, between U.S. Ship Management, Inc. (USSM), as bareboat charterer and Maersk Line Limited (MLL), as time charterer. USSM was formed in 1999 when A.P. Moller purchased the international business of Sea-Land Service, Inc. from CSX Corp.

During the morning of August 19, 2003, while awaiting a berth, the vessel dragged anchor during heavy weather and grounded on a sandbank just off Sunset Beach in Table Bay, Capetown, South Africa. Salvage efforts to refloat the vessel consumed nearly a month and required a dredger to remove sand trapping the vessel, tugboats to pull her off the strand and miscellaneous equipment to remove bunkers and the cargo containers. The vessel was refloated on September 13th, towed to a

berth at Capetown, inspected there and subsequently towed to Durban for major repairs to the hull, rudder and propeller. Repairs were fully completed by mid-December 2003.

On November 26, 2003, MLL advised USSM that, based on the information it had received, it concluded the stranding was the result of crew negligence. Furthermore, it considered the continued unavailability of the vessel as an Event of Default under Article 29 of the time charter and advised that it elected to terminate the charter pursuant to that provision. USSM disagreed.

The parties agreed to bifurcate the arbitration into two phases, the first addressing the question of whether vessel unavailability due to crew negligence constituted an Event of Default under the time charter entitling MLL to terminate. For the purpose of this preliminary phase the panel was asked to assume that the stranding of the **SEALAND EXPRESS** and its subsequent unavailability was the result of crew negligence.

After reviewing the documentation submitted by the parties and considering counsel's arguments, the panel unanimously concluded:

i. That unavailability of the vessel resulting from the August 19th stranding was an Event of Default under Article 29 of the time charter, assuming as agreed for the purpose of the threshold question, that the stranding was caused by crew negligence.

ii. That the Event of Default described above entitled MLL to exercise its right to terminate the time charter pursuant to Article 29.

Having ruled in favor of MLL in the preliminary phase, the panel promptly ordered discovery and a schedule of evidentiary hearings for the second phase of the proceeding, which was to determine whether the stranding was, in fact, the result of crew negligence and whether the materiality requirement of Article 29 was applicable to the specifics of this case.

The circumstances of the vessel's arrival at Table Bay and the events leading up to her stranding are relatively straightforward and not in essential dispute. The vessel was advised prior to her arrival that the port was closed and that it was unlikely she would be berthed on arrival. Accordingly, the Master decided to anchor in Table Bay about 1.3 nautical miles from the shore. The main engines were secured on the Master's orders. The weather reports forecast NW winds reaching 40-45 knots with the comment that individual gusts may exceed these values by a factor of up to 1.5. The Admiralty Sailing Directions for Table Bay warned:

> ***The holding ground is not good in strong winds. In winter months, April to September, when N and NW winds are frequent, there is no safe anchorage in the bay . . . Vessels at anchor should at all times have their main engines ready at short notice.***

The Master retired to his quarters during the early evening of the 18th. Very early on the morning of the 19th, the Second Officer advised the Master that the vessel had dragged anchor. The Master never inquired about the vessel's position and never went to the bridge. A few hours later the vessel dragged anchor once again and the Master was once again notified. This time he came to the bridge, however, the vessel at this point was *in extremis*. It would take 15-20 minutes to get the main engines on line. The vessel stranded shortly thereafter.

USSM argued that the violent storm that caused the vessel to ground was not predicted in the weather forecast and that the Master would not have anchored in the first instance had the forecast been correct. The panel noted that the documentary evidence and witness testimony adequately established the weather information the vessel had in hand during the critical periods and that the Navtex forecasts the vessel received were substantially accurate and fairly represented the weather the **SEALAND EXPRESS** would encounter on arrival at Table Bay and while at anchorage.

USSM argued that the performance and participation of the Master, Chief Officer and

Second Officer in the chain of events leading up to the stranding was, at worst, nothing more than a combination of errors in judgment but not negligent conduct. The panel unanimously concluded the grounding in Table Bay was the result of crew negligence and that the Master was reckless in his blatant disregard of the obvious perils his vessel would be exposed to. His errors were not mere errors in judgment as USSM suggested but negligent conduct of a gross nature. In summary, the panel pointed to the selected anchorage position, just 1.3 miles from the beach and 1.0 miles from the 10 meter shoal area, and concluded the Master's total disregard of the warnings contained in the Admiralty Sailing Directions was negligent and irresponsible and proved fatal in the end.

With respect to the materiality issue, USSM contended that the time to salvage the vessel and repair her would have been substantially shorter had the salvor followed alternative courses of action during the first 48 hours. USSM insisted the measures the salvor failed to pursue involved basic salvage principles that were open and obvious and well understood by experienced salvors. The panel noted that USSM had not argued in a serious way that the salvor was negligent but simply that a more aggressive salvage plan, such as the one suggested by its expert, would have freed the vessel earlier and prevented major damage to the rudder and propeller. The panel explored the details of USSM's salvage plan and the assumptions underlying it, concluding the assumptions were plainly wrong, therefore, the plan had no merit.

The South African Maritime Safety Authority (SAMSA) investigated the circumstances of the grounding and prepared a report that was placed in evidence. SAMSA's conclusions essentially mirror this panel's findings.

Article 29 of the time charter grouped Events of Default into two categories, separating them into an (A) and (B) list. USSM argued that both the (A) and (B) Events of Default required MLL to demonstrate that it had failed to realize the material benefits of the time charter before it could terminate. Vessel unavailability unquestionably falls within the (A) category. The panel unanimously concluded that there was no ambiguity in the language of Article 29 and that the grouping of the Events of Default into two categories was intended to have a substantive effect. The language of Clause 29 clearly applies the materiality benefit standard to (B) Events of Default. It does not to the (A) grouping. The nature of the enumerated Events of Default in each category reinforced the panel's conclusion on this point.

The panel unanimously concluded that upon the occurrence and during the continuance of the Event of Default under Article 29, MLL was entitled to declare the time charter in default and exercise its remedies under that Article, including termination.

In summary, the panel unanimously concluded:

a) The stranding on April 19, 2003 was the result of crew negligence. The preliminary phase previously concluded vessel unavailability resulting from crew negligence was an Event of Default.

b) MLL's declaration of the stranding as an Event of Default and its termination of the time charter was a proper exercise of its rights under the time charter.

[See **SEALAND EXPRESS** - SMA 3859]

PRODUCTS LIABILITY

David Martin-Clark recently uploaded a new case note on the website DMC's CaseNotes @ http://www.onlinedmc.co.uk.

Summary

In this case, the United States District Court for the Southern District of New York held that defendants Hyundai Corporation and Hyundai Mipo Dockyard Co., Ltd. ("HMD") (collectively the "Hyundai Defendants") were liable in strict products liability and in negligence for damages arising out of the fracture of the *MSC Carla*'s hull while on a voyage from Le Havre to Boston in 1997. The Court

held that the Hyundai Defendants, as manufacturers and sellers of an insert section welded into the *Carla*'s hull in 1984, were liable for all damages resulting from their failure properly to fabricate and install the insert.

Facts

In 1984, the owners of the *MSC Carla* contracted with Hyundai Corporation ("Hyundai"), as "contractor," to lengthen the *Carla* by approximately 15 meters. Hyundai delegated the work to its shipyard Hyundai Mipo Dockyard Co., Ltd. ("Mipo"). The elongation was accomplished by cutting the vessel in half and welding a lengthening insert to the aftbody and forebody of the vessel.

On November 24, 1997, the *Carla* encountered heavy weather en route to Boston from Le Havre. The hull of the *Carla* broke apart in a complete "U" along the line where the lengthening insert was welded to the stern of the vessel. The forebody of the *Carla* sank over a period of five days. The stern of the *Carla* was towed to Spain where it was scrapped. The owners of the *Carla* filed a limitation action as a result of the casualty. The cargo interests filed a claim in the limitation action and impleaded the Hyundai Defendants.

Judgment

After a trial on the claims against the Hyundai Defendants, the Court concluded that the installation of the lengthening insert had been a sale, rather than a repair, and that the Hyundai Defendants therefore had a duty to use reasonable care in designing and manufacturing the insert to avoid foreseeable risk of injury.

The Court rejected Hyundai's assertion that it was not responsible for the defective workmanship because it delegated the work to Mipo and it further held that:

(1) Hyundai was responsible under tort law because Hyundai was a manufacturer and seller for the purposes of the law of products liability[1] and

(2) Hyundai was responsible under contract law because Hyundai was designated as "contractor" under the terms of its agreement with the *Carla*'s owners and therefore was responsible for the work.

The Court ultimately concluded

(1) that the insert had been defectively manufactured;

(2) that the defect had existed at the time the Hyundai Defendants delivered the insert to the *Carla*'s owners, and

(3) that the defect had been the proximate cause of the casualty.

The Court stated that under admiralty law, this was sufficient to find the Hyundai Defendants liable in strict liability and in negligence. Having established liability, the Court directed the parties to proceed with a hearing on damages.

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[1] ***Products Liability***

Under US law, strict liability is imposed on a party who manufactures or sells a defective product which is unreasonably dangerous to the ultimate user of the product. The concept of strict liability in tort is based upon the premise that when a manufacturer presents his goods to the public for sale, he represents that they are suitable for their intended use. To invoke this doctrine it is essential to prove that the product was defective when placed into the stream of commerce.

Case Note contributed by Brian Tretter, an attorney with the firm of Healy & Baillie, LLP, New York. Healy & Baillie are the International Contributors to the DMC website for the United States

(You can access the case notes at www.onlinedmc.co.uk where you will find the cases listed. Click on the name of the case and that will take you directly to the case note.)

WAIVING ARBITRATION

On Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civ. No. 02-cv-01276)

Honorable Cynthia M. Rufe, District Judge

Submitted under Third Circuit LAR 34.1(a)

September 24, 2004 BEFORE: MCKEE, ALDISERT and GREENBERG, Circuit Judges

(Filed: September 28, 2004)

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This matter comes on before this court on consolidated appeals by ExpoFrut, S.A. and Bocchi America Associates, the plaintiffs in this case, from an order entered on July 1, 2003, denying their motion for a stay of this action pending arbitration. The district court had jurisdiction in this admiralty action under 28 U.S.C. § 1333 and we have jurisdiction under 9 U.S.C. § 16(a)(1)(A). We will exercise plenary review on this appeal as we are deciding the case through the application of legal principles on the basis of essentially undisputed facts. See Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 925 (3d Cir. 1992).

The district court in its July 1, 2003 order explained the reasons for denying the stay as follows:

> On March 13, 2002, Plaintiff filed its Complaint praying for complete relief with no reference of its intent to arbitrate. Plaintiff filed various ex parte pleadings to affect the arrest and attachment of the Aconcagua without any mention of its intent to arbitrate the instant dispute. To date, the parties have engaged in extensive discovery from the time of the filing of Plaintiff's Complaint until its notice to Defendants of its intent to arbitrate on February 28, 2003, nearly one year after the filing of the Complaint. In addition, Plaintiff submitted a Scheduling Information Report and a Joint Discovery Plan to this Court with no reference of arbitration. Plaintiff's counsel also attended an initial scheduling conference with the Court on February 19, 2003, with no indication that the Plaintiff intended to seek arbitration of the disputes. Therefore, due to Plaintiff's substantial delay in noticing the Defendants of its intent to seek arbitration the Court finds that Plaintiff has waived its right to arbitration.
>
> See Hoxworth v. Blinder Robinson & Co., 980 F.2d 912 (3d Cir. 1992) (explaining that waiver is appropriate where the 'demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery'); Perry v. Sonic Graphic Sys., 94 F. Supp.2d 623, 625 (E.D. Pa. 2000) (holding that defendant waived its right to arbitration where there was substantial delay in asserting its arbitration rights thereby causing prejudice to Plaintiff).

In addition, after the appellants filed their notices of appeal the district court, pursuant to Third Circuit Rule 3.1, filed an opinion on August 11, 2003, further explaining the reasons for its conclusions reiterating that the appellants waived their right to seek arbitration and that it would prejudice the appellees to stay the district court action at this time.

After review of this matter we find no merit to this appeal. While we recognize that appellants could commence this case in the district court and obtain preliminary relief, as they did, without at that time waiving their right to seek arbitration, overall their conduct in this case waived the right. We also are satisfied that the scheduling order of February 25, 2003, providing that "[a]ll parties shall have sixty days (60) from the date of this Order to file dispositive motions regarding this Court's jurisdiction" did not preserve or revive appellants' right to seek arbitration as a motion for a stay of an action pending arbitration is simply not the same as a motion to dismiss for want of jurisdiction. In any event, the court by allowing a motion within a given time does not bind itself to a particular disposition of the motion.

The order of July 1, 2003, will be affirmed.

BOUNTY

Thomas L. Sansonetti, Assistant Attorney General for the Justice Department's Environment and Natural Resources Division, and Christopher J. Christie, U.S. Attorney for the District of New Jersey, announced that a Connecticut-based shipping company that transports petroleum products in the United States and abroad was sentenced to pay $4.2 million for illegally concealing the dumping of thousands of gallons of waste oil and sludge at sea. U.S. District Judge Katharine S. Hayden ordered

OMI Corporation to pay a $4.2 million fine and serve three years of probation.

Judge Hayden also awarded $2.1 million of the fine to a former OMI crew member who reported the crimes to the government. The reward, issued under a bounty provision in the Act to Prevent Pollution from Ships, is the largest ever, which allows the Court to award up to one half of the criminal fine to those providing information leading to conviction.

In pleading guilty, OMI admitted that it had deliberately discharged waste oil, sludge and oily-water mixtures directly overboard from the oil tanker Guadalupe without the use of required pollution prevention equipment known as an Oil Water Separator. The Oil Water Separator is designed to separate out harmful quantities of oil so that they could be incinerated on the ship or properly disposed on shore. Instead, the company intentionally polluted by circumventing this key equipment with the use of a bypass hose. The deliberate discharges were then concealed in a false and fictitious Oil Record Book, a required log in which all overboard discharges must be accurately recorded and which is regularly inspected by the U.S. Coast Guard.

The government learned about OMI's criminal conduct from an individual who once served as a member of the engine room department on the Guadalupe. In September, 2001, when the ship arrived in Carteret, New Jersey, the ship's 2nd Engineer walked off the ship and directly to the local police department where he reported that he was being ordered to engage in criminal activity. At sentencing, prosecutors informed the Court that the crew member had risked his career with OMI and the industry in coming forward and qualified for an award under the statute.

"This case should send a message that polluting our environment and lying to the government will not be tolerated," said Tom Sansonetti, Assistant Attorney General for the Justice Department's Environment and Natural Resources Division.

"This prosecution demonstrates the continuing commitment of the United States Attorney's Office to aggressively prosecute environmental crimes," said Christopher J. Christie, U.S. Attorney for the District of New Jersey.

The ship's Captain, Ashok Kumar, and Chief Engineer, Elangovan Mani, have also pled guilty and are awaiting sentencing. After learning of the discharges, the Captain of the ship participated in efforts to cover up what had happened from U.S. Coast Guard inspectors. The Chief Engineer was charged with making false statements in the Oil Record Book.

The prosecution case is part of a longstanding initiative by the Department of Justice, in partnership with the U.S. Coast Guard and EPA, to detect and deter crimes related to deliberate pollution caused by ships. Sansonetti and Christie credited Special Agents of the U.S. Coast Guard Investigative Service for the Northeast Region; EPA's Region II Criminal Investigation Division and the U.S. Department of Transportation Office of Inspector General for their outstanding investigative work. The case was prosecuted by the U.S. Attorney's Office for the District of New Jersey and the Environmental Crimes Section of the U.S. Department of Justice.

[See www.marinelink.com]

COMMUNICATION

Arbitrators often muse about the repetitive detail counsel embark upon in trying to persuade panels of the precision of their perspectives. The following article, written by Don Moyer, which appeared in the September 2004 issue of the HARVARD BUSINESS REVIEW, might possibly shed some light on the reasons for this:

Communication suffers from a six-blind-men-and an-elephant problem. Speakers and writers think they are delivering clear, cogent messages. Listeners and readers think - - whatever they want to think. And what they want to think is influenced by the astonishing assortment of

preexisting ideas, associations, and assumptions bumping around inside their skulls.

Yet we persist in believing that our messages are getting through just as we intended. We give people marching orders and expect them to march. When instead they shuffle, sprint, or fox-trot, it comes as a complete surprise. Some thinkers - - most notably Paul Watzlawick - - suggest that miscommunication calls into question objective reality itself. Well, there's probably not much you can do about that. But you can work on making your own missives springwater clear. Reading David Hill's "Getting Heard" is a good place to start.

The best strategy for communications may be this: Prepare to be misunderstood. And don't insist that your meaning is the right one. Sometimes what your listeners hear is more interesting than what you've actually said.

Don Moyer can be reached at don@amsite.com

AWARD DIGESTS 5 & 6

We continue to advise that the INDEX AND DIGEST OF S.M.A. AWARD SERVICE - VOLUME 5 has been digitized into Adobe Acrobat PDF format. A CD-ROM combining Digests 5 and 6 is available for purchase from the SMA. The files are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds. We would be happy to provide our banking instructions for wiring payment direct to our account.

HUMOR FOR THE QUARTER

In this corner we often exhibit a playful attitude toward words. From the Internet comes the following play on letters:

> *A Polish immigrant goes to the Department of Motor Vehicles to apply for a driver's license. He has to take an eye test. The examiner shows him a card with the letters:*
>
> **CZJWIXNOSTASZ**
>
> *"Can you read this?" the examiner asks.*
> *"Read it?" the applicant replies, "I know the guy!"*

Your editor, while recognizing that this is, blatantly, a "politically incorrect" anecdote, nonetheless harbors the notion that any name, fictional or otherwise, containing an **SZ** combination can't be all bad!

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

The Society's annual elections were held in May and our congratulations go to Messrs Engelbrecht, Fox, Hansen and Siciliano who will serve on the Board of Governors for two year terms. Michael van Gelder and Henry Engelbrecht have been appointed Secretary and Treasurer, respectively.

I have been invited to speak on "Maritime Arbitration Under the SMA Rules" at Marine Log's Maritime Legislation Regulation & Policy 2004 Conference which will be held at the Wyndham Washington Hotel, Washington, D.C., on September 23rd and 24th . The program covers a wide range of security and environmental regulatory issues and further details may be obtained directly from Marine Log at Tel: (212) 620-7209 or Fax: (212) 633-1165.

The Society continues planning a number of projects designed to promote New York maritime arbitration here and abroad, and further details will follow.

We kick off our Fall luncheons on October 13th with guest speaker Ronald Murphy, Deputy Director of the Federal Maritime Commission's Bureau of Consumer Complaints & Licensing. You will also want to note that the year's remaining luncheons are scheduled for November 17th and December 15th - speakers to be announced. Please check the website calendar for the latest at www.smany.org.

A most pleasant summer to all!

David Martowski

MUDDLED WATERS: MARITIME SECURITY DELAYS AND CHARTER PARTY IMPLICATIONS

By Robert G. Clyne, Esq.

I. Introduction:

I am pleased to address you on a subject that is very much on the minds of a lot of people today although, perhaps, not the commercial aspects and who will pay for it all.

This is a very challenging subject, and when David asked me to speak I really had some hesitation because of the difficulty in predicting the types of disputes that could arise. What comes to mind is all of the predictions regarding the Y2K disputes. Yet, somehow, I do believe that terrorism and maritime security are going to generate disputes,

especially considering the aggressive positions being taken by the U.S. Coast Guard and the Bureau of Customs & Border Patrol which, by the way, no longer goes by that short-lived name – it is now U.S. Customs & Border Patrol. So we can all go back to referring to them as "Customs".

Hill Rivkins was one of three maritime firms that lost its offices on September 11 – along with Hill Betts & Nash and Thatcher Proffitt & Wood. But we lost so much more than our offices – we lost the wife of one of the firm's partners – Maureen Olson, and we continue to miss Rene very much.

Before I forget, I brought with me several copies of a law review article that I wrote last year for The Tulane Law Review, and they are available if anyone would like a copy. The title is "Terrorism And Port/Cargo Security: Developments And Implications For Marine Cargo Recoveries." The article outlines the major developments, and then goes through some considerations in pursuing cargo claims. The paper may already be somewhat dated, because it predates the most recent Coast Guard regulations, but there is some useful information. Please take a copy.

What are we going to talk about today? Notwithstanding the title of my speech, I am going to talk a little bit about terrorism itself, and how terrorism and the ever present threat result in extra expenses and delay costs. Looking at the outline, I only want to highlight certain requirements under MTSA, the Coast Guard/Customs regulations, and the ISPS Code that might be of interest. We have already had 2 speakers this year on the subject. Then, we will briefly look at some of the types of disputes that could potentially arise. Next, we will look at the clauses that have been drafted to date and finally – we will look at two actual incidents – the first being a terrorist incident - the LIMBURG - and the second being the PALMERO SENATOR incident, wherein the vessel was detained for several weeks on suspicion of radioactive material aboard the ship.

II. **Major Highlights of Maritime Security Law:**

a. MTSA/USCG Developments:

I am not going to bore everyone to death by going through this statute. The highlights of MTSA are explained in my Tulane article and I'm sure that most of you are familiar with the major provisions.

The requirements for the plan are closely associated with the ISPS Code and this is not a coincidence. The U.S. played a major role in the formation of the ISPS Code. For the differences between U.S. law and the requirements of the ISPS Code, Dennis Bryant has written an article in Benedict's Maritime Bulletin within the past year and I highly recommend that article to you.

On October 22, 2003, the U.S. Coast Guard issued final regulations that revise the temporary regulations passed on July 1, 2003.

An ongoing dispute exists between Congress and the Coast Guard as to whether the Coast Guard is to approve vessel security plans for foreign vessels calling in the U.S. The Coast Guard has indicated that it will not – that an ISPS certificate would suffice – but the position of Congress (at least the House of Representatives as of this date) is that the Coast Guard is required to do so under MTSA. In any case, the Coast Guard is not reviewing these plans and does not plan to do so if the vessel has or will obtain an ISPS certificate. Notwithstanding the provision of the MTSA, under 33 C.F.R. Part 104, subpart 104.105, it states "Foreign vessels that have on board a valid International Ship Security Certificate...will be deemed in compliance with this part." Presently, my understanding is that the Coast Guard will not approve these plans even if submitted. But an interesting question arises if a terrorist incident occurs and the vessel does not have a Coast Guard approved plan in place. Is the vessel unseaworthy and does it otherwise lose its rights to limit liability in the event of an incident? Will the Pennsylvania Rule apply on the basis of the violation of a federal statute? Some ship owning clients are being counseled to submit the security plans to the Coast Guard anyway. As of now, the Coast Guard is assessing penalties of $10,000 for failure to submit the plans that were required as of December 31, 2003.

b. Customs' Developments:

I will not talk in great detail about Customs since Leroy Lambert covered it last time. However, these are the major programs that Customs has put forward:

- CTPAT
- CSI (Container Security Initiative)
- RAECPI (Required Advance Electronic Presentation of Cargo Information) (a/k/a "24 Hour Rule")
- AMS (Automated Manifest System)
- SCAC Codes
- ICB (International Carrier Bonds)
- FAST (Free And Secure Trade)
-ACE(Automated Commercial Environment)
- Definition of "Carrier" –

Mr. Lambert mentioned last time (see The Arbitrator, Vol 35 No 3) that the definition being put forward by CBP was vague (i.e. "the party that controls the conveyance"). But now customs has thrown its hands up and sent the question back to the industry and will recognize a contractual allocation as to who the "carrier" is for customs purposes. This appears in the latest frequently asked questions (FAQ) that appear on the Customs' website. We are likely to see some clauses on this point in the coming months.

c. ISPS Code:

Again, the highlights are in the Tulane article. The upshot is that compliance with the code results in the issuance of an ISPS certificate similar to an ISM certificate and we'll look at that analogy in a minute. Under the ISPS Code records must be kept of the last 10 ports of call. This is a potential problem area to the extent that the vessel has visited ports that the Coast Guard or other port state control may consider high risk ports something for charterers, owners and brokers all to keep in mind.

III. **Potential Disputes:**

What does this all mean in terms of potential disputes? Every case is different and wholly dependent on its own facts and the charter contracts that apply. As Mr. Lambert mentioned last month, a good rule of thumb is that matters pertaining to the cargo will be for the charterers' account while matters pertaining to the ship are the owners' responsibility. But things can become "muddled." It is easy enough to talk about black and white issues wherein the security requirements have not been complied with. The difficult issues arise when there are (or there may not be) grounds for suspicion that the port state acts upon which cause delay and/or expense, especially when such suspicion turns out to be unfounded or situations occur whereby the owner or charterer acts upon a good faith but mistaken belief. In these situations many of our arbitration awards have held that you do not have to be right – you simply have to act reasonably and have reasonable grounds for taking the actions you deem necessary and warranted.

1. Non Compliance/Lack of ISPS Certificate:

The potential consequence is that the vessel risks being turned away by Port State Control. The Coast Guard has received over 90% of plans for vessels and facilities that they expected to receive and have begun assessing penalties of $10,000 for failure to meet the submission deadline of December 1, 2003. We are told that the approval process for vessel security plans is going a little bit more smoothly than the process for facility plans.

One of the first issues to address is the consequences attendant to the failure to obtain approval of a security plan and/or to have an ISPS certificate in place. It is likely that the vessel will not be allowed entry into a U.S. port. What are the commercial consequences? Under English law a vessel is not seaworthy unless it is in possession of documentation necessary to perform the voyage. And certainly under several of the charter party forms, this would be a breach of the fundamental warranty of "being seaworthy" and "every way fitted for the voyage." Thus, the ISPS certificate will be treated in much the same way as other documents/certificates required to be sighted on board, such as the ISM certificate which is mandatory under SOLAS.

Of course, most charter parties have rider clauses requiring the vessel to comply with Coast Guard regulations, for example. If that is not enough there are quite a number of arbitration decisions that address the issue of compliance (many involving the lack of a valid tank vessel examination letter – TVEL) and Lucienne Bulow has cited to a number of those decisions in a paper to be given at ICMA later this month. So whether construed as a breach of the charter, misrepresentation or an invalid tender of NOR, which we will discuss, the potential for disputes exists.

2. Valid Tender of NOR:

Here, charterers and owners would be well-served to spell out the circumstances of a valid tender of NOR. If the charter provides that NOR is to be tendered at the customary anchorage and the vessel is detained beyond the anchorage by the U.S. Coast Guard, NOR may not be properly tendered. Of course, a number of the new clauses attempt to deal with this situation. What if Customs prevents the vessel from loading for whatever security related reason and the charter party provides that NOR may be tendered whether "customs cleared or not?" If the vessel has been quarantined or the cargo seized, owners will not likely be able to rely on that clause As such, one really needs to look at the underlying purpose for the seizure or quarantine. Depending upon who is at fault and what the charter party stipulates, the issue may be valid tender of NOR or, alternatively, a separate cause of action for breach of the charter. In any case, there is a wealth of case law and arbitration precedent to support the point that the ship has to be both physically and legally ready.

3. Safe Port/Berth:

What if the charterer's nominated port or berth/facility does not have a port/berth security plan or an inadequate plan? What if the security procedures are not followed? Is it a safe port/berth? Is the vessel justified in not entering the port or the terminal? It is hard to imagine that circumstance in the U.S. But what if the nominated loading or discharge port is considered a high risk port? Is the owner justified in refusing to proceed to the port or berth?

Traditionally, the concept of a safe port or berth warranty was that it had to be physically safe in order that the vessel could get to, load or discharge and depart always "safely afloat." But since we are talking about terrorism, it may be that the port/berth is politically unsafe or physically unsafe as a result of a lack of security. And there are plenty of decisions out there on this point. Here, I have to recommend Manfred Arnold's paper entitled "Charter Parties – The Impact of Terrorism and Armed Conflict on Risk Allocation." Mr. Arnold goes through the War Risk Clauses and many of the safe port/berth cases, or decisions I should say. One of the important points to remember is that the port does not always need to be safe; rather, it only needs to be safe for purposes of being able to get to it, load or discharge and depart. These are questions of fact and the decisions have really gone both ways based on whether there was a good faith, justifiable refusal to comply with the nomination.

4. Laytime/Demurrage/Detention:

It may be that the vessel is seized or detained after tender of the NOR and after the commencement of laytime. Again, you have to look to the particular charter party and the event. These are some of the issues that could arise:

a. Exceptions to laytime not stipulated in charter.

b. *Vis Major* Defense (sudden force that interrupts the loading or discharge of cargo). This is a difficult defense to succeed on but may come into play when the events are truly unanticipated

c. Fault of owner. The charterer has the burden of establishing that the fault was caused by the owner.

e. Demurrage/Detention. Of course, in the demurrage or detention context, exceptions to laytime and most other defenses generally will not apply in the absence of a charter party clause addressing such circumstance.

f. Canceling: Canceling is an option to the charterer if the vessel is late (i.e. cannot meet the canceling date). If a vessel is detained by the Coast Guard outside the customary anchorage, for example, the charterer has an absolute right to cancel if the ship has not "arrived" by the canceling date. In the event of supervening unreadiness, cancellation is not an option and the parties are left to their contractual claims and defenses for breach of the charter. Typically, the charterer is not entitled to damage in the event of a cancellation – that being his sole remedy. But what if the vessel's position/condition is misrepresented? The general rule is that charterer may recover damages in respect of cancellation not normally recoverable if the vessel position is misrepresented. What if the vessel's condition – not physical condition – but legal condition is misrepresented? This would probably give rise to separate breach.

g. Frustration/*Force Majeure*: Arbitrators are reluctant to conclude that the charter has been frustrated merely because there has been some delay

or other event that occurs that is beyond the control of the parties. The cases speak to an unforeseen supervening event that vitiates the entire purpose of the charter. In other words, it renders performance impossible or commercially impractical. Three factors are required for frustration: 1) unexpected event; 2) risk of unforeseen event has not been contractually or customarily allocated; and 3) occurrence must render performance impossible or commercially impractical. If the alleged frustrating event was the result of an act or omission of a party, there will be no frustration. An unforeseen event of terrorism that destroys the ship and cargo would probably qualify as frustration. Of course, *force majeure* is a possibility if the contract of charter provides for same and the event qualifies as a *force majeure* event.

IV. **BIMCO/ICS:**

BIMCO has been most active in drafting clauses to cover potential security related disputes and the International Chamber of Shipping (ICS) has drafted some clauses as well. The following are on the books so to speak:

BIMCO U.S. Security Clause for Voyage Charters

If the Vessel calls in the United States, including any U.S. territory, the following provisions shall apply with respect to any applicable security regulations or measures:

Reporting
The Vessel or its agents shall report and send all notices as required to obtain entry and exit clearances from the relevant U.S. authorities. Any delay caused by the failure to so report shall be for the Owners' account, unless such failure to report is caused by or attributable to the Charterers or their representatives or agents including but not limited to the shipper and/or receiver of the cargo.

Clearances
Unless caused by the Owners' negligence, any delay suffered or time lost in obtaining the entry and exit clearances from the relevant U.S. authorities shall count as laytime or time on demurrage.

Expenses
Any expenses or additional fees relating to the cargo, even if levied against the Vessel, that arise out of security measures imposed at the loading and/or discharging port and/or any other port to which the Charterers order the Vessel, shall be for the Charterers' account.

Notice of Readiness
Notwithstanding anything to the contrary contained in this Charter Party the Vessel shall be entitled to tender Notice of Readiness whether cleared for entry or not by any relevant U.S. authority.

BIMCO U.S. Security Clause for Time Charters

If the Vessel calls in the United States, including any U.S. territory, the following provisions shall apply with respect to any applicable security regulations or measures:

Notwithstanding anything else contained in this Charter Party all costs or expenses arising out of or related to security regulations or measures required by any U.S. authority including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the Owners' negligence.

BIMCO ISPS Clause for Voyage Charter Parties

(a) (i) From the date of coming into force of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) in relation to the Vessel, the Owners shall procure that both the Vessel and "the Company" (as defined by the ISPS Code) shall comply with the requirements of the ISPS Code relating to the Vessel and "the Company." Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Company Security Officer (CSO).

(ii) Except as otherwise provided in this Charter Party, loss, damage, expense or delay, excluding consequential loss, caused by failure on the part of the Owners or "the Company" to comply

with the requirements of the ISPS Code or this Clause shall be for the Owners' account.

(b) (i) The Charterers shall provide the CSO and the Ship Security Officer (SSO)/Master with their full style contact details and any other information the Owners require to comply with the ISPS Code.

(ii) Except as otherwise provided in this Charter Party, loss, damage, expense, excluding consequential loss, caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account and any delay caused by such failure shall be compensated at the demurrage rate.

(c) Provided that the delay is not caused by the Owners' failure to comply with their obligations under the ISPS Code, the following shall apply:

(i) Notwithstanding anything to the contrary provided in this Charter Party, the Vessel shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code.

(ii) Any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code shall count as laytime or time on demurrage if the Vessel is on laytime or demurrage. If the delay occurs before laytime has started or after laytime or time on demurrage has ceased to count, it shall be compensated by the Charterers at the demurrage rate.

(d) Notwithstanding anything to the contrary provided in this Charter Party, any additional costs or expenses whatsoever solely arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the Owners' negligence. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

BIMCO ISPS Clause for Time Charter Parties

(a) (i) From the date of coming into force of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) in relation to the Vessel and thereafter during the currency of this Charter Party, the Owners shall procure that both the Vessel and "the Company" (as defined by the ISPS Code) shall comply with the requirements of the ISPS Code relating to the Vessel and "the Company." Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Company Security Officer (CSO).

(b) (i) The Charterers shall provide the CSO and the Ship Security Officer (SSO)/Master with their full style contact details and, where sub-letting is permitted under the terms of this Charter Party, shall ensure that the contact details of all sub-charterers are likewise provided to the CSO and the SSO/Master. Furthermore, the Charterers shall ensure that all sub-charter parties they enter into during the period of this Charter Party contain the following provision:

> *"The Charterers shall provide the Owners with their full style contact details and, where sub-letting is permitted under the terms of the charter party, shall ensure that the contact details of all sub-charterers are likewise provided to the Owners."*

(ii) Except as otherwise provided in this Charter Party, loss, damage, expense or delay, excluding consequential loss, caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account.

(c) Notwithstanding anything else contained in this Charter Party all delay, costs or expenses whatsoever arising out of or related to security regulations or measures required by the port facility

or any relevant authority in accordance with the ISPS Code including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the Owners' negligence. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(d) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party

BIMCO U.S. Customs-Trade Partnership Against Terrorism (C-TPAT) Clause

The Charterers have voluntarily signed the C-TPAT Agreement with the U.S. Customs Service. The Owners, Master and Crew will use reasonable efforts to assist the Charterers to comply with their obligations under the C-TPAT Agreement. However, under no circumstances shall the Owners, Master and Crew be liable for any delays, losses or damages howsoever arising out of any failure to meet the requirements of the C-TPAT Agreement signed by the Charterers.

The Charterers agree to indemnify and hold the Owners, Master and Crew harmless for any claims made against the Owners, Master and Crew or for any delays, losses, damages, expenses or penalties suffered by the Owners arising out of the C-TPAT Agreement signed by the Charterers.

BIMCO U.S. Customs Advance Notification/AMS Clause for Voyage Charter Parties

(a) If the Vessel loads or carries cargo destined for the US or passing through US ports in transit, the Owners shall comply with the current US Customs regulations (19 CFR 4.7) or any subsequent amendments thereto and shall undertake the role of carrier for the purposes of such regulations and shall, in their own name, time and expense:

i) Have in place a SCAC (Standard Carrier Alpha Code);

ii) Have in place an ICB (International Carrier Bond); and

iii) Submit a cargo declaration by AMS (Automated Manifest System) to the US Customs.

(b) The Charterers shall provide all necessary information to the Owners and/or their agents to enable the Owners to submit a timely and accurate cargo declaration. The Charterers shall assume liability for and shall indemnify, defend and hold harmless the Owners against any loss and/or damage whatsoever (including consequential loss and/or damage) and/or any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Charterers' failure to comply with any of the provisions of this sub-clause. Should such failure result in any delay then, notwithstanding any provision in this Charter Party to the contrary, all time used or lost shall count as laytime or, if the Vessel is already on demurrage, time on demurrage.

(c) The Owners shall assume liability for and shall indemnify, defend and hold harmless the Charterers against any loss and/or damage whatsoever (including consequential loss and/or damage) and any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Owners' failure to comply with any of the provisions of sub-clause (a). Should such failure result in any delay then, notwithstanding any provision in this Charter Party to the contrary, all time used or lost shall not count as laytime or, if the Vessel is already on demurrage, time on demurrage.

(d) The assumption of the role of carrier by the Owners pursuant to this Clause and for the purpose of the US Customs Regulations (19 CFR 4.7) shall be without prejudice to the identity of carrier under any bill of lading, other contract, law or regulation.

BIMCO U.S. Customs Advance Notification/AMS Clause for Time Charter Parties

(a) If the Vessel loads or carries cargo destined for the US or passing through US ports in transit, the Charterers shall comply with the current US Customs regulations (19 CFR 4.7) or any

subsequent amendments thereto and shall undertake the role of carrier for the purposes of such regulations and shall, in their own name, time and expense:

i) Have in place a SCAC (Standard Carrier Alpha Code);
ii) Have in place an ICB (International Carrier Bond);
iii) Provide the Owners with a timely confirmation of i) and ii) above; and
iv) Submit a cargo declaration by AMS (Automated Manifest System) to the US BIMCO Customs and provide the Owners at the same time with a copy thereof.

(b) The Charterers assume liability for and shall indemnify, defend and hold harmless the Owners against any loss and/or damage whatsoever (including consequential loss and/or damage) and/or any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Charterers' failure to comply with any of the provisions of sub-clause (a). Should such failure result in any delay then, notwithstanding any provision in this Charter Party to the contrary, the Vessel shall remain on hire.
(c) If the Charterers' ICB is used to meet any penalties, duties, taxes or other charges which are solely the responsibility of the Owners, the Owners shall promptly reimburse the Charterers for those amounts.

(d) The assumption of the role of carrier by the Charterers pursuant to this Clause and for the purpose of the US Customs Regulations (19 CFR 4.7) shall be without prejudice to the identity of carrier under any bill of lading, other contract, law or regulation.

ICS CLAUSES

ICS Clauses Addressing Automated Manifest System Regulations

7. Costs, Expenses, Penalties, Delays, Etc.
(a) Notwithstanding anything else contained in this Charter party, all costs and charges associated with the procurement of an ICB as defined by the RAEPCI for calling at any U.S. port and the filing of the AMS, incurred in respect of the particular voyage to the United States, shall be for the Charterers' account.

(b) The Charterers shall assume liability for and shall indemnify, defend and hold harmless the Owners against any loss and/or damage whatsoever (including consequential loss and/or damage) and/or any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Charterers' failure to comply with its obligations under this Clause

(c) If the vessel is delayed, detained, attached, seized or arrested as a result of the Charterers' failure to comply with its obligations under this Clause, the Charterers shall provide a bond or other appropriate security to ensure the prompt release of the vessel. Notwithstanding any other provision in this Charter party to the contrary, the vessel shall remain on hire and any delay or time lost shall be entirely for the Charterers' risk and account, unless delay has been caused by the Owners breach of its obligations hereunder.

V. **Examples of Terrorism/Delay:**

There have been more incidents of maritime terrorism than we may realize. The ACHILLI LAURO, the ferry bombing in the Philippines, the USS COLE, the M/V SILK PRIDE incident in Sri Lanka and the M/T LIMBURG are but a few.

The LIMBURG was the French tanker that was hit last October by a smaller boat containing a large amount of explosives aboard in an apparent suicide mission in Yemen. The incident mirrored the USS COLE tragedy. There was a considerable oil spill and the vessel's insurer settled the pollution damage claim with the government of Yemen. I have attempted to determine what other disputes, if any, are being pursued but I have not been successful due to the confidential nature of the London proceedings. I suspect that there are salvage/general average issues and, perhaps, even cargo claims to be considered. In any case, security has been redefined in the post 9/11 world and we are likely to see some real scrutiny of security in the event of future terrorist events of this nature.

Another interesting incident involved a vessel that was detained in New York for over 2

weeks on suspicion that some of the cargo contained radioactive material. The PALERMO SENATOR was a containership that was time-chartered to Senator Line. There were also various slot charters in place. The whole sordid tale was written up in the American Shipper and the author goes into great detail as to how the matter was being handled by the Coast Guard, Customs, FBI, Navy Seals and, ultimately, the White House. After several weeks, the cargo that apparently set off the Geiger counters was determined to be clay tiles in a container below deck. Apparently, the owner absorbed the delay costs.

The PALERMO SENATOR incident provides a classic example of the difficulties involved when neither party is at fault. The question is who should be held responsible for the delay costs? The answer is not an easy one and the wording of the particular charter party as to who bears the risk of delay costs may prove determinative.

VI. **Conclusion**

Again, these types of cases really stand on their own facts and charter clauses. The potential for arbitral disputes will likely be a function of how well the parties allocate risks in their contractual undertakings. Only time will tell.

(Mr. Clyne, a Partner in the NY law firm of Hill Rivkins, presented the foregoing at the SMA luncheon on April 14, 2004.)

RECENT AWARDS:

EXPLOSION, LIABILITY AND *RES IPSA LOQUITUR*

The disputes in a recent arbitration arose out of a bareboat charter between Tidewater Marine Services, C.A. and Gulf of Paria East Operating Company ("GOPEOC") on the "BARECON 89" Standard Bareboat Form, dated January 11, 2001, for the charter of the Tank Barge PELICAN. New York law and arbitration applied. The PELICAN was a standard 25,000 bbl. unmanned tank barge, without propulsion capability. In essence, the PELICAN was chartered for two separate but interrelated functions – to accommodate oil and gas production and testing equipment owned by Schlumberger and to store the crude extracted from GOPEOC's test well.

On or about June 8, 2001, GOPEOC returned the PELICAN to Tidewater in Guiria, the place designated in the charter party for redelivery. An off-hire survey concluded that the barge was in "good physical condition" and was "safe" and "seaworthy", but that its tanks contained 70 barrels of unpumpable heavy crude.

As the charter party redelivery clause provided for GOPEOC to redeliver the barge to Tidewater "in the same or as good structure, state, condition and class as that in which she was delivered, fair wear and tear not affecting class excepted", GOPEOC arranged for WINS Service Company to remove the crude oil and gas free the tanks at Tidewater's Semarca facility in Maracaibo within a five day period. Tidewater recommended WINS and approved the hiring, specifically noting that WINS had cleaned the PELICAN's tanks on several prior occasions.

The PELICAN arrived at the Tidewater facility, was moored alongside, and a WINS cleaning crew arrived onboard the barge to commence venting the tanks. Shortly afterwards, a series of explosions rocked the barge, followed by fire. The explosion killed five members of the cleaning crew, destroyed the barge as well as the oil and gas production and testing equipment that was to be removed from the PELICAN after she was gas freed. The barge sunk alongside the Semarca dock, was deemed to be a constructive total loss and was removed by Tidewater pursuant to a government wreck removal order.

Tidewater's claims, totaling $2,894,436.44, encompassed all damages and/or expenses related to 1) loss of hull; 2) all third party claims arising out of the casualty, including but not limited to property damage, personal injury and/or wrongful death claims; 3) wreck removal; and 4) costs, damages, expenses, fines and penalties relating to pollution emanating from the barge.

GOPEOC denied any responsibility for the casualty and counterclaimed for payments it was required to make to Schlumberger for the loss and/or damage of the Schlumberger equipment.

GOPEOC's counter-claim amounted to US$452,973.73 and Bs 12,984,645.90 (converted to dollars as of the date of the award).

The question of attorney client privilege relating to communications between Tidewater's counsel and various underwriters said to be represented by Tidewater's counsel was argued at some length. Counsel were asked to brief the issues, which they did. The panel issued its unanimous ruling on the privilege issue in a letter to counsel. The ruling stated in part:

> *It is the panel's view that privilege extends to counsel's communications with Tidewater, its insurer Pental, its reinsurer MOAC, and its broker, but not to its excess carriers, whomever they are. . . . The panel's reasoning for this decision will be included in the Final Award in this matter.*

The panel explained that, as a general rule, the burden of establishing the existence of an attorney-client privilege rests with the party asserting it, Tidewater in this case. The privilege is strictly construed, and readily waived, because it tends to inhibit and limit the full benefit of discovery. A party asserting the privilege cannot carry its burden by asserting the right in a blanket fashion. The privilege must be specifically raised, and the party seeking to invoke it must demonstrate why the particular material being demanded should be afforded the protection sought. Tidewater failed to meet that burden in a meaningful way.

The panel was willing to afford Tidewater the benefit of the doubt based upon Tidewater's counsel's assertion and the client's confirmation that he represented Pentel, MOAC and the insurance broker, despite counsel's prior statements to the contrary. However, it was clear to the panel that the excess insurers had no possible exposure because of the size of the claim and were not logically represented by counsel. Certainly, the legal standard for exercising the privilege could not be met with respect to the excess underwriter. Tidewater was directed to produce the communications between its counsel and the excess underwriters, and it did.

The panel concluded that the PELICAN was redelivered under the charter six days before the barge exploded at Maracaibo, putting to rest Tidewater's principal assertion that the charter party was in full force and effect at the time of the casualty because GOPEOC had not redelivered the barge in the same or as good condition as she was upon delivery. GOPEOC had acknowledged it still had the contract obligation to gas free the tanks, clean them and remove the Schlumberger equipment, and did not argue that the Guiria redelivery terminated those commitments. The work was intended to be performed at the Semarca facility, in part by WINS and thereafter by Schlumberger.

As a final point on this subject, the parties had argued that the decision to gas free and clean the tanks at Maracaibo was for the sole benefit of the other. While it is not significant with respect to the assessment of fault, it was the panel's view that the agreement to clean in Maracaibo and remove the Schlumberger equipment there was mutually beneficial. GOPEOC would benefit from a more economical and efficient tank cleaning operation and Tidewater would have its equipment ready for future employment at an earlier date.

Since the barge was redelivered prior to the accident, and the charter was terminated at the same time, the panel did not address the substance of the insurance responsibilities that were the focus of much testimony and documentary evidence. The charter party insurance requirements were no longer in effect at the time of the casualty.

Tidewater contended the cause of the ignition and heat source for the explosion was accidentally generated by WINS employees, perhaps by the striking of a non-spark resistant tool, smoking or by operating, connecting or disconnecting electrical devices not designed for or approved for use in a flammable environment. Tidewater relied heavily on the research and testimony of its expert witness who concluded that the heat source that led to the explosion had to originate within several feet, certainly no more that fifteen feet away from a tank opening. The expert's fundamental premise was the assumption that the tank atmosphere had to be in the explosive range at the time the vessel arrived and the gas freeing operation began, without which the explosion could not have occurred. The predicate of

his opinion rested on his understanding of the dilution factor of the hydrocarbon being emitted from the tank opening and the maximum distance it could disperse and still remain within the explosive range. Tidewater alleged that the dilution factor conclusion authoritatively established that the ignition source was introduced by the WINS cleaning operation and that GOPEOC was answerable for WINS negligence.

Additionally, Tidewater asserted the arbitrators may consider and apply the doctrine of *res ipsa loquitur* and thereby draw an inference of WINS' negligence as the cause of the accident. Tidewater contended the application of *res ipsa* was warranted in this case because it had met the elements of the three prong test. First, the event must be of a kind that does not ordinarily occur in the absence of someone's negligence. Second, the event must be caused by an agency or instrumentality that was in the parties exclusive control. Third, there must be no contributory negligence.

The panel concluded Tidewater had not established WINS' negligence by a preponderance of the evidence. The only potential sources of ignition identified by Tidewater were non-explosion proof blowers, non-explosion proof tools and cigarette smoking. Tidewater bore the burden of identifying the negligent act and demonstrating that the act of negligence caused the explosion. There was no hard evidence on what the gas condition was, nor could there be because no one made the measurement. Even if the analysis was valid, the alleged sources of ignition were completely tenuous.

Tidewater attempted to establish an inference of negligence, urging that the panel accept its *res ipsa* argument. It was problematic that the barge was not within WINS' exclusive control from the time she departed Guiria and while alongside the Tidewater Semarca berth. The barge was moored inboard of, and alongside, TIDEMAR 240 and across the dock from Tidewater tug RIO GRANDE. Tidewater personnel tied the barge up and monitored the mooring lines shortly before the accident. There was no exclusive control of the barge.

The panel concluded one may speculate about the cause of the explosion, however, there was no definitive evidence on causation. Tidewater had not carried its burden of establishing the cause of the explosion and that WINS' negligence precipitated the casualty.

Tidewater's assertion of liability for the PELICAN explosion was directed specifically at WINS. Since the panel addressed this issue and concluded that Tidewater had not established the cause of the explosion or that WINS was negligent during its short operational stay on the PELICAN, the question of GOPEOC's possible vicarious liability for WINS' conduct became irrelevant. However, the panel nevertheless addressed the issue simply because it was argued at some length and extensively briefed.

The panel concluded GOPEOC would not be vicariously liable for WINS negligence had the arbitrators concluded WINS was, in fact, negligent. Tidewater did not contest the fact that New York courts do not apply vicarious liability for the acts of independent contractors as a general rule, but argued that an exception to the general rule may be applied when there is a delegation of a contractual duty to an independent contractor who then performs negligently. However, the question of whether the delegation of a contractual duty is an exception to the general rule turns upon the issue of whether the contractual duty is delegable or non-delegable.

Tidewater conceded during oral argument that the tank cleaning operation was a delegable operation. In fact, Tidewater was fully aware that GOPEOC had no tank cleaning experience or capability and intended to engage a tank cleaning contractor. Some of the cases Tidewater cited in support of its argument for a finding of vicarious liability involved trial court findings of non-delegable duties in situations involving public reliance.

Regarding the counter-claims, the panel rejected GOPEOC's position on the loss of the Schlumberger equipment. As it concluded with respect to Tidewater's claims, the cause of the explosion remained unknown. While Tidewater could have kept the WINS people off the barge until they had met Tidewater's safety requirements and were properly supervised, there was nothing in the evidence that would allow the panel to conclude that WINS personnel caused the explosion. As previously stated, the cause of the explosion remained speculative, at best.

Concerning counsel fees and costs, both parties, in agreement that the panel was authorized to award costs, claimed for reimbursement of these. As the prevailing party on the issue of the claims put forward by Tidewater, the panel concluded GOPEOC was entitled to an award for reimbursement of its counsel fees and costs in defending against those claims. However, Tidewater prevailed in its defense against counter-claims by GOPEOC. Taking into consideration the relative levels of effort expended in the prosecution and defense of the claims and counter-claims, the panel allowed GOPEOC $589,000.00 toward its counsel fees and costs. [See **PELICAN** - SMA 3847]

EXXONVOY 90 FORM

David Martin-Clark recently uploaded a new case note on the website DMC's CaseNotes @ http://www.onlinedmc.co.uk. The note relates to the award of an arbitration panel of the SMA in New York, in the case of Sea Goddess Shipholdings Inc. v. Standard Tankers Bahamas Ltd. In this award the panel unanimously held that, on the facts of this case, the charterers were protected by the "half-demurrage" provisions in the Exxonvoy 90 Form charterparty in respect of some 16 days delay encountered in the vessel, which had been loaded to an arrival draft ordered by the charterers, entering the port of discharge. The delay was caused by insufficient depth of water in the Houston Ship Canal, caused by northerly winds blowing water out of the canal into the adjacent Galveston bay. [See **STRIMON** - SMA 3807]

CLASSIFICATION SOCIETY

Another case note uploaded to the DMC CaseNotes relates to an award of the SMA in the case of Shipping Force & Marine Managers v. American Bureau of Shipping. In this case, owners were unsuccessful in pursuing the ship's classification society for damages allegedly arising from the society amending its preliminary report on the vessel's annual dry-docking. [See **SEA TRIDENT** - SMA 3815]

(You can access the case notes at www.onlinedmc.co.uk where you will find the cases listed. Click on the name of the case and that will take you directly to the case note.)

IDLE THOUGHTS

(The following appeared recently on www.MaritimeAdvocate.com)

The meaning of the description of a vessel's fuel consumption as described in a NYPE charter party formed the basis of a recent dispute heard by London arbitrators.

The speed and bunker consumption was described throughout as, "Speed about 13 knots on about 30 tons IFO … plus 2 tons MDO (marine diesel oil) idle plus 0.5 tons per each 8 hours period when winches working." The charterers contended that this meant that the vessel consumed no MDO at sea, while the owners maintained that it meant the vessel consumed 2 tons of MDO per day at sea or in harbour, when not using cargo gear, plus an additional 0.5 tons per eight-hour period when working cargo using the ship's gear.

The arbitrators held that the word 'idle', in relation to consumption, was normally used in relation to whether the vessel's cargo gear was being used and did not relate to whether the vessel was in harbour or at sea. It was noted that, except when MDO was used when entering or leaving port, most vessels' MDO consumption was the same at sea or in harbour when not working cargo.

Pointing out that the speed and consumption terms could have made it clear that the daily consumption of MDO was two tons both at sea and in harbour when not working cargo, the arbitrators said that this did not mean, however, that the consumption of MDO as described was either ambiguous or that there was a gap in the description of the vessel's consumption.

It was held that, "The description of the vessel's speed and bunker consumption drew a distinction between when the vessel's cargo was being worked, when it would be higher, and when it was not, whether that be at sea or in port. Obviously there was no IFO consumption in harbour, and the consumption of IFO could therefore only relate to periods at sea.

"Accordingly, the vessel was described as burning 2 tons of MDO per day whether at sea or in port, provided the ship's cargo gear was not being worked."

The charterer's claim failed.

(*Lloyd's Maritime Law Newsletter* www.lmln.com)

41ST ANNUAL MEETING

As a result of the elections held at the 41st Annual Meeting of the SMA on May 11, 2004, and President Martowski's announced appointments, SMA's Board of Governors for 2004/2005 is as follows (with their alternates in parentheses):

David W. Martowski (-)
Manfred W. Arnold* (George Hearn)
Lucienne C. Bulow (Soren Wolmar)
Austin L. Dooley (George C. Blake)
Henry Engelbrecht (Donald B. Frost)
Thomas F. Fox (Charles Measter)
Svend H. Hansen, Jr. (Nigel Hawkins)
R. Stanley Kleppe (Eugene C. Spitz)
Klaus C.J. Mordhorst (Donald J. Szostak)
Katherine A. Pappas (John F. Ring, Jr.)
A.J. Siciliano (Robert P. Umbdenstock)
Michael A. van Gelder* (Charles J. Aitcheson)

*By appointment of the President

Henry Engelbrecht was appointed Treasurer and Michael van Gelder was appointed Corporate Secretary.

The following Committee Chairs were appointed/reappointed:

Arbitrator - D.J. Szostak
Award Service - D. Letteney
By-Laws and Rules - L. Bulow
Education - A. Dooley
Liaison - M. Arnold
Luncheon - T. Fox
Membership - S. Kleppe
Professional Conduct - K. Mordhorst
Promotion/ Marketing - D. Martowski
Salvage - T. Fox
Technology - D. J. Szostak
Ad Hoc Committees
Index & Digest - D.W. Martowski
Small Craft - W. Wheeler

AWARD DIGESTS 5 & 6

We are pleased to announce that the INDEX AND DIGEST OF S.M.A. AWARD SERVICE - VOLUME 5 has now been digitized into Adobe Acrobat PDF format. A CD-ROM combining Digests 5 and 6 is now available for purchase from the SMA. The files are fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy simply click on this link:

http://www.smany.org/sma/orderForm.html

Complete the form, copy it and mail it along with your payment to the SMA offices. Please remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds. We would be happy to provide our banking instructions for wiring payment direct to our account.

QUIXOTRY FOR THE QUARTER?

Take the CIA (and we don't mean The Culinary Institute of America) for example:

Seeking to see
Indeed, they looked;
Ordered to oversee
Alas, they overlooked.

POEM FOR THE QUARTER

AMERICA, THE BEAUTIFUL

[2nd Verse]

O beautiful for pilgrim feet
Whose stern, impassioned stress
A thoroughfare for freedom beat
Across the wilderness!
America! America!
God mend thine every flaw,
Confirm thy soul in self control,
Thy liberty in law.

Katherine L. Bates

For THE ARBITRATOR

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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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THE PRESIDENT'S CORNER

Society members are busily preparing for the XVth International Congress of Maritime Arbitrators (ICMA XV) which will be held at London's Millennium Mayfair Hotel on April 26-30. I strongly urge those who haven't registered to do so. This event needs your support and presents an unique opportunity, available only every other year, for you to meet your colleagues from the world's arbitral centers.

We have recently returned from visits with the Federal Maritime Commission and the Maritime Administration where we trumpeted the benefits of New York arbitration under the SMA Rules. The sessions proved quite interesting to the folks at the FMC and MarAd, and a senior FMC representative will address the Society at our October 13th luncheon. Mark your calendars accordingly.

Another seminar is in the planning stage, this one to be held this fall in Mexico. We will round out the information on this topic after the details are firmed up.

I call your attention to page 5 of this issue to the discussion about the definition of "carrier" resulting from recent strategical changes in U.S. Customs bonding requirements.

See you in London at ICMA XV!

David Martowski

THE EMERALD DECISION

By Jack Berg

Introduction

It is fairly routine in the maritime industry for shipowners, charterers and cargo owners to operate within a corporate structure in which the various affiliates and related companies deal in specific areas for a variety of business reasons. This is especially true of the petroleum companies, such as Mobil, Hess, Chevron etc. but it is also so for the major commodity trading companies such as Cargill, Reynolds, Alcoa and the various Japanese houses. The question that often arises, and one which I will specifically address in this talk, is whether, under U.S. law the signing of a contract containing an arbitration clause, such as a charter party, by one member of the corporate group can bind or create

rights for other members of the same group who didn't sign the contract.

This is a question that has been presented to, analyzed and ruled upon by arbitrators and Federal Courts on a regular basis. In short, can a non-signing affiliated company that operates a vessel for the owner compel arbitration against a signatory? Can a non-signing subsidiary cargo owner participate in an arbitration between a shipowner and its corporate related charterer. The Emerald decision falls into this latter category. These are questions that have been before the Federal Courts either in actions to compel arbitration or as motions to confirm an award.

The decision of whether a non-signing affiliate has the obligation and/or the right to arbitrate or compel arbitration falls within the jurisdiction of the District Court pursuant to Sec. 4 of the U.S. Arbitration Act, as it relates to "the making of the arbitration agreement or the failure, neglect or refusal to perform the same." Thus the proper time to bring the issue of participation by a parent or subsidiary in the arbitration before the Court is at the outset of the proceeding by means of a motion to compel.

Surprisingly, or perhaps not so surprisingly, the overwhelming number of disputes involving non-signatories have been submitted to arbitration panels for their rulings and sometimes later presented to the District Court and Court of Appeals on Motions to Vacate. There are a number of arbitration decisions affirming the right of related non-signatory parties to participate in the arbitration. See Volere, SMA 1885 (1983); Wapello, SMA 3615 (2000); Heering Kirse, SMA 1171 (1971).

Typically, the issue is whether there is an agreement to arbitrate between the party that signed the agreement and seeking to enforce it, and another who has not signed it and seeks to avoid it. This case, referring now to the Emerald is just the opposite. The non-signatory cargo owner seeks to enforce the arbitration agreement against a signatory shipowner.

Facts Regarding the Mv Emerald Dispute

The shipowner, Rover Navigation, and voyage charterer AOT, entered into a tanker voyage charter party for the carriage of gas oil from Taiwan to ports in the United States. The charter contained the typical broad tanker arbitration language calling for the arbitration of "any and all differences and disputes of whatever nature arising out of the charter." Astra, the cargo consignee, and AOT were affiliated companies, both owned by Astra Oil Trading in the Netherlands, and both engaged in international oil trading. A few days after the charter was concluded, Astra sold the gas oil to Sprague Energy under a contract that called for the product to be delivered between December 25 -- January 5.

During the vessel's trans-Pacific voyage the Emerald developed engine problems, limped about in the vicinity of Hawaii and then drifted for some 11 days performing engine repairs at sea. The Emerald eventually made its way to Boston on January 25 for the discharge of some of its cargo and to then carry the Sprague gas oil cargo on to Portland, Maine. While in Boston, the USCG issued a SOLAS Detention Order after an inspector discovered a crack in a main deck plate. The vessel remained in Boston until February pursuant to this Detention Order.

After the main deck crack was discovered, Owner declared General Average to both Astra and AOT and liened the cargo. Astra on the other hand threatened to arrest the vessel to secure its claim for commercial damages caused by the cargo's late delivery. Consistent with the usual practice, counsel exchanged security for their respective claims -- Rover posted a Club Letter of Undertaking (LOU) that included the claims of AOT, as voyage charterer and Astra as cargo seller and consignee. Astra posted a Lloyd's Average Bond for the General Average.

Subsequently, Astra presented its claim for commercial damages, representing the loss in the price of gas oil account of late delivery, approximating $400,000. Owner declined liability. Astra and AOT demanded arbitration, both parties appointed arbitrators and the two arbitrators

appointed a chairman. After initial submissions, Rover contested Astra's standing to arbitrate its cargo claim, arguing that Astra was not a signatory to the charter party. Thereafter, Astra filed a petition to compel arbitration in the USDC for the Southern District of New York and the arbitration proceedings were suspended pending the District Court's ruling.

The District Court Decision

First addressing general principles, District Judge Laura Taylor Swain noted that arbitration under the U.S. Arbitration Act is a matter of consent, not coercion, and that parties are generally free to structure their agreements as they see fit. Further, she states that it is well established that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that it has not agreed to submit. Having stated the above general principles, the District Judge then noted that it didn't necessarily follow that the Act limits the obligation to arbitrate only to those who have personally signed the written agreement. Non-signatory's may be bound to an arbitration agreement by virtue of an incorporation by reference, typically by incorporating the terms of the charter party and arbitration provision in the bill of lading. Non-signatories may also be bound by assumption, agency, veil piercing/alter ego and estoppel. Citing Thomson-CSF v. AAA, 64 F.3d 773 (2d Cir. 1995), the Court noted that the party seeking to compel arbitration has the burden of demonstrating by a preponderance of the evidence the existence of an agreement to arbitrate.

Judge Swain recognized that the Second Circuit has been willing to estop a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory seeks to resolve in arbitration are intertwined with the agreement the signatory has executed. In determining whether the claims are sufficiently related to the underlying agreement to support an order to compel arbitration, the court generally examines the relationship of the entities involved and the relationship of the alleged wrongs to the agreement at issue. In denying Astra's motion to compel arbitration, the court noted that Astra and AOT were separate but affiliated companies, that the charter party was silent regarding damages for late delivery of cargo, and most importantly, Judge Swain concluded that the issues that Astra and Rover were seeking to resolve arose out of Astra's dealings with its buyer, Sprague Energy, rather than out of the charter party. Given this, the District Court held that Astra's claim against Rover was not "so intimately founded in and intertwined with the charter party."

Astra appealed the District Court decision.

The Second Circuit Decision

In September 2003, Judge Sotomeyer spoke for the Second Circuit addressing Astra's appeal of the District Court decision. The Court noted it had dealt with the issue of enforceability of arbitration agreements by a non-signatory in two of its recent decisions, Choctaw Generation Ltd. v. Am. Home Assurance Co., 271 F.3d 403 (2d Cir. 2001) and Smith/Enron Cogeneration Ltd. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88 (2d Cir. 1999). In both cases the Court held that the signatory was estopped from avoiding arbitration because the issues the non-signatory was seeking to resolve in arbitration were intertwined with the agreement. Although Choctaw Generation did not specifically identify the degree of "intertwining" that would be required to support an estoppel theory, the Court made it clear that such a finding should be made after a careful review of the relationship of the parties, the contracts they signed and the issues that were between them.

The Second Circuit reversed the District Court denial of Astra's Petition and remanded the issue with instruction to the District Court to grant the Petition to Compel Arbitration. It stated the Petition should have been granted based on the undisputed evidence of the close corporate and operational relationship between Astra and AOT, the fact that Astra's claim against Rover was brought under the charter with AOT, the fact that Rover treated Astra as if it were a party to the charter party by accepting voyage directions, by asserting a General Average demand against Astra and AOT and by accepting a General Average Bond from Astra on behalf of AOT and Astra.

The Court pinpointed the District Court's fundamental mis-perception of the relationship between the charter party and Astra's late delivery claim. The issues that the Court highlighted were those relating to the engine breakdown, the warranty of unseaworthiness and the undue delay in delivery. These issues were without doubt "intertwined" with the charter party. Astra's claim was not based on the Sprague sales contract but on damages it allegedly sustained by reason of the vessel's woeful performance.

Having decided the case by applying the estoppel principles of Choctaw and Smith-Enron, the court avoided dealing with counsel's alternative arguments of whether the express provisions of the Letter of Undertaking obligated Rover to arbitrate with Astra and also avoided addressing with Judge Weinfeld's decision in State Trading Corp. of India v. Grunstad Shipping Corp. (Belgium) N.V., 582 F. Supp. 1523 (S.D.N.Y. 1984). In State Trading, Judge Weinfeld held that a non-signatory consignee holder of a tanker bill of lading that did not specifically incorporate the charter party or arbitration clause may nevertheless arbitrate its cargo claim against the signatory shipowner if the arbitration clause is broad rather than narrow.

Conclusion

Hopefully, this talk will have cleared the air on this subject and pinpoint the elements Courts take into account when called upon to address the inclusion of non-signatories into arbitration proceedings. The same principles are obviously guides to arbitrators when such issues are submitted to a panel of arbitrators as they have been in the past.

It is a pretty much recognized fact that petroleum companies, and other major shippers charter vessels in the name of one of their companies and buy, sell and ship cargoes in the name of another subsidiary company. The question of whether a corporate entity, as voyage charterer, must arbitrate the traditional demurrage, safe port, performance claims, etc. of the shipowner but that its related cargo trading company may not introduce its claim in the same proceeding is impractical, wasteful and inherently unfair. To have to arbitrate and then also litigate specific issues that are in the main based on an identical set of facts is objectionable and wasteful.

But there is a better way, and preventative medicine is often a more practical and economically effective way to go. One of the many rider clauses we often see bloating standard charter forms can easily and without fanfare provide for the inclusion of subsidiary and affiliated companies in any arbitration proceeding. A clause along this line may obviate what could be a costly and time consuming pre-arbitration trip through the Courts:

> *Arbitration shall be conducted in accordance with Clause 24 of Part II. The right to arbitrate claims against Owner shall also extend to companies affiliated with, or in the same financial group, as Charterer. This Charter shall be governed by the general maritime law of the United States, as interpreted and applied in New York.*

Brief Comments on Practice in Other Jurisdictions

ICC arbitrators often apply the so-called "group of companies doctrine" to obtain a result they perceive will reflect the parties' intent and the "good usages of international commerce." Their holding in the Dow Chemical case in 1982 reflects this approach. International Chamber of Commerce Arbitration, Third Edition, Craig, Park, Paulsson refers to this doctrine and the holding in Dow:

> *This holding is consonant with that made in a U.S. arbitral decision rendered under the auspices of the Society of Maritime Arbitrators, where the arbitrators reviewing the industry practice of operating through multiple subsidiaries at various stages (chartering, shipping and consigning) and expressing their loathness "to narrowly restrict the parties' apparent intention to arbitrate their differences" stated that it was "neither sensible nor practical" to exclude from the arbitration claims of companies "having an interest in the venture and who are*

members of the same corporate family. (at p. 76).

English law does not embrace this doctrine, emphasizing that in commercial terms, the creation of a corporate structure is by definition designed to create separate legal entities for entirely legitimate purposes.

(Mr. Berg, a member and past-President of the SMA, spoke on this subject at a luncheon before the Society of Maritime Arbitrators – February 11, 2004.)

OF CUSTOM BONDAGE, UNCITRAL DRAFTS, "IF ANY," AND WHAT AN ARBITRATOR SHOULD KNOW ABOUT THESE RECENT LEGAL DEVELOPMENTS

By: LeRoy Lambert, Esq.

My purpose today is not so much to relate specific information about the topics I will discuss, but rather to alert you, as arbitrators, to developments near, intermediate, and longer term that may give rise to disputes and which may affect arbitration in New York.

To this end, I will focus on three areas: (a) new Customs requirements for bonding of "carriers"; (b) continuing efforts to revise the laws governing carriage of goods by sea; and (c) a recent pro-arbitration decision issued by Judge Hellerstein in the Southern District of New York.

Customs Requirements for "Carriers" Bonds

The United States Maritime Transportation Security Act of 2002 (the "Act") was introduced to improve the security of cargo shipments entering or leaving the United States by sea, air, rail, or truck, in the wake of the terrorist attacks of September 11, 2001. The United States Bureau of Customs and Border Protection ("CBP") is charged with implementing the Act.

One result, if not purpose, of the Act is to make the identities of the persons "behind" transportation of goods into and out of this country more transparent. The Act can be seen in conjunction with regulations recently issued by the IRS which generally require disclosure of the ownership interest of foreign corporations in order to claim exemption from tax on U.S. source income.

Leaving aside for now who a "carrier" is under the Act, what must a carrier do to comply? In respect of cargo loaded for the U.S. or in transit on the vessel through the U.S., including any U.S. territory, the "carrier" has to comply with CBP regulations entitled "Required Advance Electronic Presentation of Cargo Information" ("RAEPCI") and be responsible for the following items as required and defined by RAEPCI: (1) filing the vessel manifest electronically via the Vessel Automated Manifest System ("Vessel AMS"); (2) obtaining a "Standard Carrier Alpha Code" ("SCAC"); and (3) obtaining an "International Carrier Bond" ("ICB").

Any "carrier" of goods into and out of this country has some exposure to CBP for fines and penalties if it does not comply with laws and regulations governing the carrier's responsibilities to CBP. Prior to 9/11, many carriers "piggy-backed" on their agents' bonds.

The Act has made such "piggy-backing" on the agent's bond impossible. Each "carrier" must now have its own bond. Note, as mentioned above, that CBP will now have a large database of information on each company with a bond, as opposed to pre-9/11 when it had a database consisting primarily of the major agents around the country.

On December 5, 2003, CBP promulgated a Final Rule (68 F.R. 68140) detailing the implementation and enforcement of RAEPCI. The Final Rule affects all ships bringing cargo into the United States including all U.S. non-contiguous and island territories other than the Panama Canal Zone.

For the maritime industry the primary impact of the Final Rule is upon the carriage of cargoes by "carriers" and authorized NVOCC's. Enforcement of the Final Rule was to begin on March 4, 2004. The CBP suspended enforcement until April 2, 2004, to those entities who show "informed compliance," meaning an attempt to comply.

Carriers and NVOCC's are required to post an ICB to secure payment to the CBP of any customs "penalty, duty, tax, or other charge provided by law or regulation", which any "vessel, master, owner, or person in charge of a vessel" fails to pay upon demand.

An ICB may be continuous (covering all visits to U.S. ports by a carrier's vessels) or single entry. Obviously, most will want a continuous bond. The minimum bond amount is $50,000, but the amount may be increased at the discretion of the local Customs Port Director. The ICB should be filed by the carrier in the port where their vessels discharge most frequently, or, in the case of occasional calls, any port of choice. This presents a challenge as well to decide the port in which to file. An ICB must be obtained from an approved surety authorized to write bonds on Customs Form 301.

The costs and requirements of obtaining an ICB vary from surety to surety. A typical premium will be between 1 % and 2.5% of the value of the ICB. Additionally, the surety will likely require collateral or a showing that it is not needed.

The carrier also must have an IRS number (employer identification number) or obtain a Customs Assigned Number. Doubtless many owning companies and operators do not presently have one. Remember, the sub-text of the Act is increased transparency.

To the consternation of the maritime industry, CBP has defined a "carrier" as: "The entity that controls the vessel." [*Author's note: These remarks were as of March 10, 2004. See the postscript immediately following this article for CBP's approach to the issue as of publication of this article.*]

This leaves at least three possibilities as to who will be considered a "carrier" (leaving aside the status of NVOCC's, who, as the last initial "C" in the acronym shows, are "carriers" as well: (1) Vessel Owners and/or Bareboat Charterers; (2) Time (or even Voyage) Charterers; and/or (3) Vessel Managers.

Our industry has typically organized itself through one-ship companies managed by an affiliated or, increasingly, an arms-length, independent management company. Management companies can have virtual complete control of the vessels owned by passive, non-maritime investors, or they can be limited to a single aspect, such as crewing, or the operations of the vessel can be parceled out to several companies (e.g., a crewing agent, a commercial agent, a technical agent). And this is simply on the ownership level. Charterer/operators are organized in various ways as well.

As a practical matter, a time (or even a voyage) charterer can be said to control a vessel insofar as it is the party closest to the decisions about where the vessel will go, its cargo, and importing and exporting the cargo.

And, today, many companies wear one or more or all of these hats: owner, time/voyage charterer, manager.

Who in this crowded playing field "controls" a vessel for the purpose of getting a bond and filing manifests? Given the financial risks of not complying, all doubts must be resolved in favor of attempting to comply.

More "conservative," traditional clients may well decide to apply for a bond for each one-ship company. For some companies today, however, whose "controlled tonnage" can fluctuate in a relatively short period of time by tens of vessels, this simply does not seem practical. No matter who in a particular chain of contracts actually files the cargo manifest and complies with RAEPCI, it is only prudent that everyone in the chain have a bond, lest CBP find someone in the chain not in compliance and delay the vessel. In this market, and until and unless CBP clarifies who the "carrier" is, no one should wish to be a party liable for even a delay of half a day.

CBP has stated that it will rule on an individual basis whether an entity is a carrier. In particular, CBP has stated that vessel managers will be granted carrier status on a case by case basis, and that any vessel manager wishing to be considered a carrier for the purposes of the Final Rule must submit a written request for a legal ruling on the issue with Carrier under RAEPCI.

As a result, CBP is receiving many applications and requests for rulings. I believe the

impact of these applications and requests for rulings will drive home to CBP the difficulty the industry faces and that a workable rule will eventually result. CBP has already shown itself to be responsive to the industry, while at the same time being firm in its resolve to apply the Act.

Since at present, however, it is not clear whether the "carrier" subject to these regulations is, say, the time charterer or the owner, the potential dispute is quickly spotted: if the CBP delays a vessel's entry because one or both are not in compliance, who pays for the delay?

Here, if your charter does not have a clause on this point, it should get one. The NYPE 1993 Clause 2 provides that the vessel shall be, "Tight, staunch, strong and in every way fitted." ASBATANKVOY Clause 1 calls for the vessel, "Being in every respect fitted for the voyage." There is English law authority that these phrases are not limited to the physical condition of the vessel. Many charters now have rider clauses in which an owner (or disponent owner down the chain) warrants the vessel's eligibility to trade to the US and its compliance with applicable regulations. Yet, typically, customs, cargo, and manifest issues relate to cargo and are for the charterer's account.

In the absence of a specific clause allocating responsibility for compliance with the Final Rule and in the absence of a definition of who the carrier is that is supposed to comply, a dispute is clearly in the offing. BIMCO and various other organizations have drafted clauses. I have reviewed them and cannot stress enough the importance, though, of using a clause that applies to your situation and your trade. I am not sure a one size fits all approach is appropriate or prudent.

The UNCITRAL Draft Instrument on Transportation

Many of you no doubt have heard that Congress did not take action on the efforts of the MLA to revise our Carriage of Goods by Sea Act ("COGSA"). The reasonable conclusion, however, that efforts to revise COGSA died with Congress' failure to act, is not correct. The scene has shifted to an international stage. Through the efforts of the Comite Maritime Internationale ("CMI") and the United Nations Commission on International Trade Law ("UNCITRAL"), it is possible that within the next five years, Congress might well enact a new statute to replace COGSA. The CMI is an umbrella organization of individual state maritime law associations, **www.comitemaritime.org**. UNCITRAL is a UN agency, as its name reveals, **www.uncitral.org**.

First, some history is in order. It has always taken time to agree and enact new regimes in this area of the law. The US, in an early act of unilateralism, enacted the Harter Act in 1893 to regulate perceived heavy-handedness by carriers in the terms of their bills of lading issued in the liner trades. The international community took note and began working on a convention to regulate the carriage of goods by sea under the auspices of the CMI. The Hague Rules of 1924 resulted, which Congress enacted in 1936 in a slightly-modified version as our statutory COGSA.

Over the years many in the industry believed the Hague Rule package limitation amount ($500 per package of customary freight unit under COGSA) had become out of date. Conceptual difficulties over the one-year time bar also arose as a result of multiple carriers in a chain issuing bills of lading. The Hague Rules were accordingly tweaked in these and other respects by the Hague-Visby Amendments adopted in 1968 by CMI and subsequently enacted as domestic legislation by many seafaring nations. A further protocol, the Hague-Visby SDR Protocol, concerning limitation of liability, was issued in 1979 and thereafter adopted by several nations. The US, however, was and is not one of the nations to have enacted either amendment to the Hague Rules.

A more extensive reworking of the Hague Rules was meanwhile underway through UNCITRAL, resulting in the issuance of the Hamburg Rules in 1978. Few major trading/seafaring nations have enacted the Hamburg Rules. The Hamburg Rules, among other things, eliminated the "error in navigation" defense for the carrier, so that the carrier would be responsible for the negligence of the master and crew just as a

trucking company is responsible for the negligence of its employee-driver.

The various trading and insurance interests in the US remained deadlocked on change throughout this period. Then, in 1994, the Supreme Court issued its decision in *Sky Reefer*, holding that a foreign arbitration clause in a bill of lading did not lessen a carrier's liability under COGSA so as to render the clause unenforceable.

The *Sky Reefer* decision was of course pro-arbitration. However, most carriers then inserted *foreign* arbitration and/or litigation clauses in their bills of lading. Armed with *Sky Reefer*, district and appeals courts--who perceive themselves to be overworked--had little difficulty using the same rationale to enforce foreign forum litigation clauses as well as foreign arbitration clauses. Whether or not Ross Perot was right about NAFTA, US jobs, and Mexico, the maritime bar has certainly been listening to the "giant sucking sound" of bill of lading claims for cargo damage going abroad ever since.

During the 1990's, several countries, notably the Nordic countries and most recently, Canada, went their own way and adopted tweaks in the views of some and radical changes in the views of others to their enactments of the Hague and/or Hague-Visby Rules.

The MLA reform efforts had their heyday in the mid/late 1990's. And, in 1998, as Congress failed to act, the CMI realized that it needed to act as the voice of uniformity and formed a working group. The efforts of this group are now taking place within the auspices of UNCITRAL. The American delegation consists of Chet Hooper, Vince DeOrchis, George Chandler, and Michael Sturley. The State Department is participating as well.

The work product so far has been substantial and can be tracked on the UNCITRAL website and downloaded. Go to **www.uncitral.org** and then look down the left side of the screen and click on "working groups," and then click on the links under "working group III." The documents can also be accessed on the CMI website under the tab titled "Draft Instrument."

Mr. Hooper informed me just prior to these remarks that he expects a deadline for a final draft instrument will be set for the spring of 2005. Then, it must be adopted as a convention which will then be enacted in individual countries. This process may take three to five years.

Now, what are the dispute implications for arbitrators and for arbitrators in New York, in particular? One issue which has been raised in the MLA Committee on Arbitration and Mediation concerns the scope of the instrument.

The Hague Rules and Hague-Visby amendments apply to bills of lading and except charter parties. COGSA applies to "Every bill of lading or similar document of title which is evidence of a contract for carriage of goods by sea." *46 U.S.C. §1300*. Section 1305 excepts charter parties: "The provisions of this chapter shall not be applicable to charter parties."

The present draft instrument seems broader. It applies to "contracts of carriage" which are defined as a "contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another." *Article 1(a) of the draft instrument*.

The broader language of the draft no doubt reflects the fact that the world of shipping contracts no longer divides neatly into the "bill of lading/liner world," on the one hand, and the "charter party/tramp world," on the other. We now have electronic bills, waybills, booking notes, service contracts, slot charters, space sharing agreements, NVOCC's, etc., etc. The persons I have heard from on the issue all agree that there is no intention of making the instrument applicable to charter parties. Nevertheless, the drafting issue, to my mind, at least, and insofar as I understand the present draft, has not yet been resolved in such a way as to make such an intent clear. Comments from SMA members are certainly welcome.

As to the "giant sucking sound" of maritime claims departing New York, the instrument adopts the approach of the Hamburg Rules and allows a plaintiff, at its option, to bring a claim arising under the instrument in: (a) the principal place of business or, in the absence thereof, the habitual residence of

the defendant, or (b) the place where the contract was made provided that the defendant has there a place of business branch or agency through which the contract was made; or (c) the place of receipt or the place of delivery; or (d) any additional place designated for that purpose in the transport document or electronic record, or (e) a place where the vessel or another vessel owned by the carrier has been arrested or attached.

The draft instrument is also very much pro-arbitration and makes clear that arbitration agreements in bills of lading will be enforced.

Judge Hellerstein's Decision in *Usinor Steel Corp. V. M/V Koningsborg, C.V. Scheepvaartondermining Koningsborg,* 03 Civ.4301 (AKH) (SDNY 2004) U.S. Dist. Lexis 1615

Judge Hellerstein issued a recent pro-arbitration decision, albeit pro-arbitration in Paris, not New York. The clause in the bill of lading provided:

> *Arbitration, if any, to be settled in Paris by Chambre Arbitrale Maritime and French Law to apply. General Average, if any, to be settled in Paris.*

The Bills of Lading, issued in standard "Congenbill" form, stated as follows on their face:

> *"ALL TERMS, CONSIDTIONS [sic] AND EXCEPTIONS INCLUDING ARBITRATION CLAUSE OF C/P DATED FOS SUR MER 28/08/2002 ARE HEREWITH INCORPORATED."*

On their reverse, the Bills of Lading contain the following clause one of the Conditions of Carriage:

> *"All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, are herewith incorporated ...."*

Judge Hellerstein held that the claim was subject to arbitration and stayed the New York action pending arbitration in Paris. Existing case law was not clear whether such an "if any" clause mandated an arbitration. Judge Hellerstein ruled, however, that any doubt should be resolved in favor of arbitration. By staying the action, Judge Hellerstein also made a pro-arbitration holding in that by staying it, instead of dismissing it, any appeal would have to await the outcome of the Paris arbitration.

To sum up, the Transportation Act, an UNCITRAL draft instrument for the carriage of goods, and the continuing trend of the courts to issue pro-arbitration decisions in otherwise close cases are developments which have dispute implications for the near, intermediate, and longer term.

Perhaps as importantly, the present freight market has escalated the monetary risks of any and every dispute in shipping. Eighteen months ago, whether laytime counts from noon Saturday to 8:00 a.m. on Monday was a dispute worth $15,000, if that much. Today, it is a dispute worth $50,000 or more.

Ultimately, it is the task of the bar and the arbitrators to persuade users that the process adds value to disputes. This is of course a difficult sales job.

Let us hope, however, that arbitrators and attorneys can persuade users that even arbitrators and attorneys can in fact "add value" to disputes by following the theme sounded by President Martowski: resolving disputes correctly, expeditiously, and at reasonable cost.

(Mr. Lambert, a Partner in the NY law firm of Healy & Baillie, LLP, presented the foregoing at the SMA luncheon on March 10, 2004.)

POSTSCRIPT:

INTERNATIONAL GROUP OF P&I CLUBS
UPDATE – 23 MARCH 2004
U.S. AUTOMATED MANIFEST SYSTEM REGULATIONS

The U.S. Customs and Border Protection ("the CBP") is indicating that the Carrier under the Federal register 19 CFR Parts 4,103 (the

"Regulations") may be interpreted in certain circumstances to mean the end charterer – either time or voyage – and not, as previously indicated, necessarily the vessel owner.

The latest information from legal counsel in the U.S. who have been advising the International Group and corresponding with the CBP representatives is that the CBP appears to have modified its initial advice as to the identity of Carrier under the new U.S. Automated Manifest System ('AMS') Regulations.

Although the CBP's original approach was that the owner or bareboat charterer would be the Carrier responsible for compliance, it is now possible that the obligations for filing the cargo manifest via the Vessel AMS, obtaining the SCAC number and posting the International Carrier Bond ('ICB') could be the responsibility of the end charterer (either time or voyage).

Because the end charterer (time or voyage) may be closest in relationship to the cargo interests, the CBP has indicated that under certain circumstances it may be more appropriate to deem the charterer the Carrier responsible for compliance with the Regulations.

The CBP has not published an official announcement or modified its website to reflect this shift but rather provided some guidance in a meeting held Thursday, 18 March 2004 in New Orleans, Louisiana to answer industry concerns. The CBP set forth the characteristics it views as essential in establishing the Carrier under the Regulations: (1) the entity determining the ports of call; (2) the entity controlling the loading and discharging cargo; (3) the entity having knowledge of cargo information; (4) the entity issuing bills of lading; and (5) the entity typically providing the CF 1302 cargo declaration or cargo information to prepare the CF 1302 to the vessel's agent.

Given the continued doubt as to which entity is responsible for compliance and approaching 2 April 2004 date on which the informed compliance period will expire, the Association recommends that Members submit a written request to the CBP for a formal ruling with respect to their particular contractual arrangement to ascertain who is the Carrier and ensure Members are in compliance with the Regulations.

Members are also strongly advised to access the Association's website regularly for updates that may be issued by the CBP as well as the International Group's pending supplemental Circular.

[*This update by the International Group of P&I Clubs was provided by Mr. Joseph Ludwiczak, General Secretary, LIBERIAN SHIPOWNERS' COUNCIL LTD. - liberianshipowners.com*]

RECENT AWARDS:

UNJUSTIFIED DETENTION

An unusual case, involving the detention of a vessel to be searched for the suspected presence on board of drugs, has recently been heard by arbitrators in New York. The **"ENERGY RANGER"** was employed under time-charter to carry concentrates from Chile to Montreal and other ports in Canada. After the vessel had started loading in Chile, it was served by the port authority with a detention order issued by the US Drug Enforcement Agency (DEA), alleging that illicit drugs, believed to be cocaine, were hidden on board.

The master, officers and crew were interrogated and fined, and an exhaustive, six-day search took in all parts of the vessel, including the No 3 ballast tank, where, according to the DEA, up to two tons of cocaine had been secreted. As No 3 hold had already been loaded with cargo, an access hole was cut in the side shell of the vessel to allow the DEA investigators access.

The search failed to reveal any drugs or other contraband cargo, the access hole was temporarily patched, and the vessel was allowed to resume its contractual operations. The charterer issued an off-hire deduction for the time lost while the vessel was under detention. This was disputed by the owner, and the issue proceeded to arbitration.

By a majority decision, the arbitrators found that, although there was nothing to suggest that the charterer was in any way at fault, the owner was entitled to be paid for the lost time. Pointing out that off-hire clauses are not necessarily fault-based, the majority found that the detention associated with the drug search was not a permitted off-hire event.

The dissenting arbitrator, meanwhile, found that the restrictions placed on the vessel were so far removed from those enumerated in the charter party as to be given their own independent meaning. He said that, having been prevented from performing its obligations, the owner could not claim to be paid hire while its vessel was not available to carry out the charterer's orders. (See **ENERGY RANGER** - SMA 3817)

(This summary was prepared by David Martin-Clarke. His CaseNotes may be accessed at: http://www.onlinedmc.co.uk)

TIME CHARTER v. VOYAGE CHARTER

The parties entered into a time charter on the NYPE Form for a single voyage from Osaka, Japan with redelivery in the Tampa/Trinidad range. Charterers advised Owners that its supplier had canceled their shipment, they would not be accepting delivery of the vessel and Owners should mitigate their damages. Owners claimed for direct damages, representing their losses as the difference between the anticipated time charter hire and the amounts earned in mitigation. Owners also claimed potential freight losses due to Charterers' failure to redeliver the vessel in the U.S. Gulf area.

Owners argued that since Charterers had given voyage orders, they should be bound by them and that all damages should be based upon the specifics of that voyage with respect to duration and redelivery. The panel rejected this interpretation quoting the Hon. Lord Michael Mustill as stated in The Rijn ([1981] 2LLR 267):

> *The question is simply this, would the charterers have been entitled to change their minds, when the sub-charter fell through, and say that after all they did not want the ship to carry a cargo of grain to Japan? From a commercial point of view, there is no problem with an affirmative answer to this question. Indeed, any other answer would make little sense. Why should not the charterers have been entitled to change their minds and order the ship to carry grain to Singapore, or coal to Japan, or nothing at all to any port within the range? What commercial reason could there be to hold that the charterers were permanently locked into an obligation to ship grain to Japan, merely because this was what they had said they were going to do; and to go on to say that they would have been compelled to keep the ship idle at Galveston, for no matter how long, until they could find a cargo of grain (and nothing else) to be carried to Japan (and nowhere else).*
>
> *Nor do I find the owners' argument compelling in point of law. There can certainly be no doubt on the findings in the award, that the charterers evinced successively an intention to ship cargo, to ship grain cargo and to ship it from Galveston. The owners equally evinced a willingness to carry cargo from this port, and did their best to do so, within the capabilities of their ship. Perhaps - and I say only "perhaps" - if the present case had been concerned with a voyage charter, it might have been possible to hold, on the basis of the difficult cases relating to the "election" of a loading port or cargo, that the charterers, having once committed themselves to a particular charter within the permitted range of voyages, could not thereafter choose another. In my view, however, this notion has no application to a time charter, where the ship is at the free disposition of the charterer for any service, so long as he does not exceed the stipulated limits of cargo and of port. . . . .Nor can I see any signs of a variation, in the strict contractual sense. For this, one would need to find an*

> *unequivocal offer to restrict the choice of return voyages to the carriage of grain from Galveston to Japan, coupled with an unequivocal agreement by the owners that this, and no other, would be permissible employment. The conduct of the parties was certainly consistent with an intention to engage the ship on this employment but I can see nothing in the award to show that they intended to bind themselves to such an employment.*

For the determination of damages, the parameters which exist and cannot be changed are the minimum charter period, the charter rate and an account of the delivery and redelivery ranges. There is no question that the innocent party is entitled to be put in the same financial position it would have been but for the breach, however it is not entitled to anything more. Also, the breaching party, despite its acts, is entitled to all rights and limitations as provided for in the governing contract. Furthermore, it is the Charterers' burden to establish the inappropriateness of the mitigation effort.

The panel found that the period of employment for which Charterers were liable is the minimum period of the charter, i.e., 50 days without guarantee. Applying the customary trade practice of 5% more or less, the minimum period was determined to be 47.5 days.

Regarding mitigation efforts, the panel agreed with Charterers that Owners mitigation effort was deficient. The panel determined that the market was at or close to the level of this fixture and, therefore, Owners should have been able to achieve a higher mitigation level. Employing the vessel under Owners' existing contracts of affreightment at rates which do not reflect the prevailing market level does not meet the test of mitigation. An adjusted differential was awarded.

Having concluded that Charterers did not have an obligation to redeliver the vessel at Brownsville and are entitled to invoke the minimum charter duration for the purpose of the damage calculations, the panel concluded it follows that Charterers cannot be held responsible for the positioning damages as claimed, such damages being highly speculative and not within the parameters of predictability, as they are dependent upon a series of intervening events, which may or may not occur. [See **THARINEE NAREE** - SMA 3811]

MASTER'S NEGLIGENCE AND UNSAFE PORT

A recent award arose out of an amended NYPE Time Charter Form. While attempting to enter the channel to Boca Chica, the vessel went aground shortly after the pilot had boarded and was not refloated until the next day. Owner damages claim resulting from Charterer's breach of the safe port warranty was countered by Charterer who alleged Master's negligence.

Owner argued the port of Boca Chica was unsafe for the vessel at the relevant time since there were deficiencies in the entrance buoys, the range markers, the charts and navigation guides as well as with the pilot, and that the grounding was not caused by want of good navigation and/or seamanship on the part of the Master and crew.

Charterer maintained that the vessel grounded outside the buoyed channel and that competent mariners routinely enter the port safely when they properly utilize its various navigational aids. Further, Charterer maintained that the charts and other navigation aids were not "inaccurate" or "deceiving", the pilot did not cause the grounding, the agent did not mislead the Master, rather the Master ignored the agent's warnings. Moreover, Charterer contended that because the grounding could have been averted by the exercise of prudent seamanship, the damages may not be divided.

Scrutton's "On Charter Parties" was referenced:

> *"Whether a port is a safe port is in each case a question of fact and degree and must be determined with reference to the particular ship concerned, assuming that she is properly manned and equipped and navigated and handled without negligence and in accordance with good seamanship."*

\- - - -

> *"Where a ship is ordered to an unsafe port and the Master acts negligently in entering or remaining in the port, the Charterer will be free from liability if, but only if, the negligence is sufficiently serious to sever the causal connection between the order and the damage to the vessel."*

The panel was unanimous in concluding there was sufficient evidence to support Owner's contention that there were deficiencies in the entrance buoys, the range markers, the charts and navigation guides as well as with the pilot so as to render the port unsafe at the relevant time. The panel also concluded that there was also sufficient evidence to support Charterer's argument that the grounding could have been avoided by the exercise of good seamanship. Indeed, vessels continued to enter and leave the port without incident, while the vessel was stranded.

A panel majority found that the actions of the Master on the passage and in attempting to enter the port were so egregiously negligent and unseamanlike that they overcame any safe port deficiencies and led directly to the vessel's grounding. They adopted Scrutton's view that the Master's "negligence was sufficiently serious to sever the causal connection between the order and damage to the vessel."

The dissenting arbitrator found an apportionment of damages to be appropriate. He noted that the majority's reliance on Scrutton's dissertation of the concept of superceding negligence is, *inter alia*, the accepted standard based upon English decisions. Scrutton footnotes:

> *In the United States the more equitable rule prevails that liability can be divided between the parties according to the degree of fault but this result does not appear to be open in England on the cases as they stand at present.*

Considering that American case law exists on this issue, it should find application to arbitrations conducted under U.S. law. Once a panel has concluded that both parties were at fault, they cannot automatically and totally absolve one party from all liability because the other party was irresponsible or imprudent. If one finds both parties at fault, then it becomes a question of degree, whether it is 1/99 or 50/50, but there has to be a degree or percentage of liability. To hold otherwise would ignore one's own finding of fault on both sides. [See **STAR B** - SMA 3813]

N.B. This award is reminiscent of another where the facts led to a finding of want of prudent navigation and seamanship on the part of the Master [See **CHESAPEAKE BAY** - SMA 3677]. While the conclusions were similar, the reasons differed. Since the port, in that case, could have been entered utilizing good seamanship, the panel majority declined to declare the port unsafe, as defined in the well known EASTERN CITY DECISION:

> *A port will not be safe unless in the relevant period of time, the particular ship can reach it, use it, and return from it without, in absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.*

APPEAL OF SALVAGE AWARD

Under normal circumstances New York arbitration awards are only subject to appeal through the courts. An exception exists where the rules to be followed concern the SMA Recreation and Small Commercial Vessel Arbitration Rules. A recent award concerned the application before an Appeal Arbitrator, not a common occurrence in New York arbitration.

The claimant appealed the decision in an earlier case arbitrated under those Salvage Rules [See **OVATION** - SMA 3801]. The pertinent language of the Rules is:

> ***Limited Appeal of Award***
> *(a) If, and only if, the dispute is before a sole arbitrator, the decision of the arbitrator may be appealed. In the event the parties cannot agree upon an arbitrator to hear the appeal, the appellant(s) may, within 15 days after issuance of the original award, make written request to the President of the*

SMA to appoint one. Upon receipt of such request, the President of the SMA shall choose an arbitrator at random from the SMA list of salvage arbitrators.

(b) The appeal arbitrator shall review the original decision. His review shall be limited to clear error, and he shall either affirm or modify the award on this basis alone. His decision shall be issued within 15 days after his receipt of the award and evidence relevant to the appeal, and shall be absolutely final and binding upon the parties.

The Appeal Arbitrator found nothing which could be described as "clear error" and affirmed the original award. Without explanation, he charged the claimant, who lost the appeal, with half of the Appeal Arbitration costs, saddling the respondent with the remainder. [See **OVATION** - SMA 3805]

DISAPPEARING INK?

A recent Partial Final Award concerned a voyage sub-charter on the ASBATANKVOY Form. Owner requested dismissal on the grounds that Charterer waived all claims of every kind for the vessel's failure to meet the canceling date. The charter party incorporated an earlier version of an amended ASBATANKVOY Form. The earlier version contained numerous typewritten special provisions that one would normally expect to hold precedence over printed terms. In this instance the earlier contract contained a certain Clause 14D in the typewritten provisions affecting Clause 5 of the original ASBATANKVOY Part II. In negotiations the entire Clause 14D, which contained "without prejudice" language, was edited out. Owner's claim for dismissal alleged that:

". . . the deletion of Clause 14D, a specific, typewritten clause, trumps any printed provision, such as Clause 5 of ASBATANKVOY Part II, and Charterer can have no claim . . .that might have arisen under case law construing Clause 5 . . ."

Owner's argument in short: Clause 14D modified Clause 5; delete Clause 14D and Clause 5 must be interpreted to have been annulled, as well.

The panel, seeing through this attempted verbal three card monty, denied the motion, deeming that deletion of the typewritten Clause 14D is to be interpreted as though that clause never existed. [See **HYDE PARK** - SMA 3808]

DIGESTING AWARDS

The following appeared recently in the Maritime Advocate Online:
(http://www.maritimeadvocate.com)

"AGATHA Christie might not have been above inventing some of the reasons given over the years for not publishing maritime arbitration awards. But the Society of Maritime Arbitrators in New York has had no part of that. It has shown the way on publication, and has recently taken things a step further.

You can now get an electronic version of the latest SMA digest, and access to annual updates and notification of revisions. The digest, which enables you to search for published awards by number, date and subject matter, is free to SMA members and subscribers to the award service. But non-members can buy the CD for $100, and get free annual updates.

The digest is a work in progress. It will be expanded and reissued periodically in electronic format, thereby offering users the opportunity to email suggested additions, revisions and corrections to the editor at:

info@smany.org

The full text of all SMA awards, meanwhile, is available via the LexisNexis online service at:

www.lexis.com

We can expect others to follow the SMA lead, but not London, which continues to hide timorously behind its sham entitlement to privacy."

There has been a good response to this new CD-ROM. It contains the complete DIGEST 6 in Adobe Acrobat format. It is fully searchable, depending upon the version of Adobe Acrobat Reader used to access it. As a bonus, the complete SMA website is also incorporated on the CD-ROM which includes the Rules and the Roster of Members. If you haven't yet gotten your copy please click on this link:

http://www.smany.org/sma/orderForm.html

Please complete the form, copy it and mail it along with your payment to the SMA offices. Remember, particularly our non-U.S. subscribers, payment must be made in U.S. funds. We would be happy to provide our banking instructions for wiring payment direct to our account.

POEM FOR THE QUARTER

NEITHER OUT FAR NOR IN DEEP

The people along the sand
All turn and look one way.
They turn their back on the land.
They look at the sea all day.

As long as it takes to pass
A ship keeps raising its hull;
The wetter ground like glass
Reflects a standing gull.

The land may vary more;
But wherever the truth may be -
The water comes ashore,
And the people look at the sea.

They cannot look out far.
They cannot look in deep.
But when was that ever a bar
To any watch they keep?

Robert Frost

QUIZ FOR THE QUARTER

This World is adorned in various ways.
I saw a strange contraption, an experienced traveller,
grind against the gravel and move away screaming.
This strange creature could not see; it had no shoulders,
arms, or hands; on one foot this oddity
journeys most rapidly, far over
the rolling sea. It has many ribs,
and a mouth in its middle, most useful to men.
It carries food in plenty, yielding tribute to all people
year by year, enjoyed by rich
and enjoyed by poor. Tell me if you can,
O man of wise words, what this creature is.

[An Anglo-Saxon riddle found in the Exeter Book]

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

In November, the New York community mourned the death of John Besman, one of the Society's Founding Fathers and Past Presidents. John, you will be remembered as devoted to your family, the Society and the industry you served so well; an internationalist; a larger than life bon vivant; and one who dealt with his disease with great courage and dignity. Michael van Gelder's eulogy appears below.

Year-end luncheon speakers included Jon Wing on "SMA Arbitration from a User's Perspective", George Byrnes on "The Transportation of Exxon-Mobil Cargoes" and Ray Hayden on "The New York Maritime Scene." On January 14th, Buck Miller addressed "The Implications of the U.S. Maritime Transportation Security Act of 2002" - a timely concern to all shipping interests. The SMA luncheons serve as a convenient meeting place and you will want to note luncheons scheduled for February 11, March 10 and April 14. This year's promotional activities are in the planning and will include seminars and presentations to the Federal Maritime Commission and other users of the system here and abroad.

Reminder: The XVth International Congress of Maritime Arbitrators will be held at London's Millennium Mayfair Hotel on April 26-30 which will provide a unique opportunity for you to meet your colleagues from the world's arbitral centers.

A Happy, Healthy and Prosperous New Year to all!

David Martowski

IN MEMORIAM

JEAN-PIERRE (JOHN) BESMAN

(This biography was prepared by Michael van Gelder, former President of the SMA and longtime friend of Mr. Besman.)

On March 29, 1926 in Melbourne, Australia, a boy was born to a Russian father and a French mother. Nobody could have imagined at that time what an important event that birth would become for the future of the international freight industry.

Jean-Pierre grew up in Melbourne and attended school at Melbourne Grammar, the

Australian equivalent of an English public school. He graduated with honors in 1944 and immediately joined the Royal Australian Naval Reserve. He served his country during World War II with distinction in the Pacific theatre of operations. John participated in three Borneo invasions on a landing ship infantry. He was demobilized in 1946.

In January 1947, accompanied by his father, JPB was introduced to the shipping division of the Louis-Dreyfus et Cie. in Paris. That became one of the best moves that LDC ever made as it kicked off a career that took John to the very top of the LDC shipping empire.

Quickly, JPB made his talents clear to those in charge. After spending a few months in Paris learning the various shipping interests of the company, JPB was promoted to become assistant manager at SAGITAL, LDC's main agents in Genoa. At that time, the company was operating a regular liner service from Montreal to and from the Mediterranean and Genoa was the main hub that arranged cargoes for the ships. Working with Dr.Alberto Solari, the Manager, JPB not only learned the ins and outs of the Italian markets, he also learned to speak Italian with a fair amount of fluency. He also learned the local Genovese patois, which allowed him to communicate with the local populace, particularly in the docks area which proved invaluable and enabled him to execute his duties much more effectively.

Early in 1949, the company transferred JPB to Buries Markes, Ltd., its London ship owning headquarters. Working with its top management, JPB learned tramp ship operations and chartering. He was often dispatched to various ports to supervise ship and cargo operations on the spot. LDC at that period was very active in building new tonnage which afforded JPB the opportunity to work with naval architects and other technicians, visiting numerous shipyards where the new ships were being built.

In 1952 LDC decided that JPB's talents would better be used in New York and sent him there after a short stay in Montreal, where he worked with Montship, a Canadian group with which LDC were partners. Just before JPB arrived in New York, LDC had bought a small brokerage and agency firm, Ponchelet Marine Corporation. JPB was named a Vice President of that firm which changed its identity to Sagus Marine Corporation. JPB took charge of the chartering activities of the company and established the LDC ship owning name as an important factor in the New York freight market. Later he was promoted to be President of Sagus and worked very closely with the top management of Louis Dreyfus Corporation to establish a fleet of time-chartered tonnage available to carry the grain sales of that part of the LDC firm. In those days, bulk grain was a major commodity and LDC was one of the biggest firms in that trade worldwide. However, JPB did not limit his activities to grain and time chartering. He introduced the firm to the benefits of trading in other commodities and established a very profitable trade transpacific for lumber and other wood trades. Under JPB's leadership, Sagus became a focus point for charterers and owners to offer their business and it was not long before he established a reputation for having or even creating new cargoes for the benefit of LDC. During the twenty years he was running Sagus Marine, JPB ensured that the Louis Dreyfus name was a major market player having always business to propose which it undertook with complete integrity.

In 1972, LDC determined that it needed its shipping business to be consolidated in Europe and brought JPB back to London where he became responsible for the whole of the commercial shipping activities of the company. In this capacity, he took on many vessels under time charter and millions of tons of commodity contracts which enhanced the activities of the owned ships of the firm. For the next eleven years JPB worked the markets for LDC's benefit and made the company a major force on the world's freight markets. JPB retired from the company in 1983 at which time he became a full time maritime arbitrator.

His activities as arbitrator did not start in London. Back in 1963, working with John Reynolds and eight other men who were then resolving some disputes, principally between U.S. entities, JPB was active in the formation of the Society of Maritime

Arbitrators in New York. Before the formation of that society, maritime arbitration in New York had been a rather informal manner of settling disputes, but thereafter the SMA became a force in developing dispute resolution, working closely with the members of the maritime bar. JPB became the third President of SMA, serving from 1967 to 1969. JPB's personal contribution to the development of New York arbitration was by insisting that a New York arbitration clause was inserted in many charter parties, and others soon followed in that direction. JPB became known as one of New York's leading arbitrators and his experience both as an owner's and charterer's broker enabled him to contribute to the need for impartial experienced arbitrators.

During his years in London, his arbitration activities continued as much as his commercial responsibilities allowed. He joined the London Maritime Arbitrators Association and eventually was elected to the Committee of that association. On account of his background in Paris, JPB was also named as an arbitrator in Paris and became a member of the Chambre Maritime Arbitrale de Paris. In fact, he is probably the only person who has been an active arbitrator in all three major centres.

For most people, these commercial and arbitral careers would have been sufficient, but not for JPB. While in New York, he made Sagus join the Association of Ship Brokers and Agents (USA), Inc. and became active in that organization. He became President of that Association in 1972 before leaving for London.

In the late 1960's, some European agents and brokers were trying to form an international group to coordinate the interests of those businesses. Subsequently the Federation of National Ship Brokers and Agents (FONASBA) was founded in 1968. In 1969, JPB was instrumental in having ASBA join that federation and after his return to London in 1972 he actively participated in its work, He was elected President of FONASBA in 1975/76.

However, JPB's greatest contribution to the world of shipping was his work in revising and updating many charter party forms. Chartering markets were still using many outdated forms, going back to pre- WWII years. Naturally as business and markets developed it became necessary to incorporate so many changes and additional clauses that the original forms were unrecognizable and in many cases the form itself only served as a signature page, while adding several pages of amendments. JPB recognized the inefficiency of that system and determined to update the system. Working often alone but also with assistance from others he devised new forms which, working with ASBA and FONASBA, he introduced to the market. Probably the most successful of these forms is the NORGRAIN, which replaced the 1913 Baltimore Form C. a berth grain document which had become totally useless, but was still being used for lack of any alternative. JPB developed NORGRAIN working with the major grain companies over a two year period and this document is now in general use, not only in the United States but also for many other countries' exports. In many instances foreign governments for their purchases of USDA aid cargoes have adopted it.

FONASBA had been negotiating with BIMCO to make some documentary changes, but that organization did not particularly care for other associations being involved in issuing new charter party forms. In his capacity as Chairman of the Chartering and Documentary Committee of FONASBA, JPB managed to develop a satisfactory working relationship with the BIMCO Documentary Committee and this resulted in getting several charter party forms accepted generally. Among the forms that JPB tried to reform, was the New York Produce Time Charter Party, which had been the subject of various changes since after WWII, but still was being used with many additional clauses being appended. In fact, on one occasion JPB produced a brand new form at a conference in 1977 bearing the name FONASBATIME. Naturally, this caused others to start working on a new time charter party. JPB remained Chairman of FONASBA's Chartering and Documentary Committee up to 2000, although he had returned to live in New York in 1992.

JPB was recognized internationally. As an arbitrator in London, Paris and in New York his talents were continually in demand. In London his

colleagues would refer to him lightheartedly as “The Judge”, while Lord Denning, then Master of the Rolls, referred to JPB as an internationalist.

During his long business career, Jean-Pierre enjoyed the unfailing support of his wife, Rosette, who accompanied him on many of his trips and was able to participate in friendly discussions concerning his work. In their marriage they had two boys and later on, four grandchildren. Despite a very active business career, JPB had time for his hobbies. He was a lover of classical music and closely followed Australia’s exploits in tennis, cricket and rugby. He was a gourmet chef of no mean accomplishment as anyone fortunate enough to be invited to his home will readily acknowledge.

Jean-Pierre Besman passed away on November 13,2003 after fighting cancer of the liver.

SMA ARBITRATION FROM A USER’S PERSPECTIVE

Jon Wing, Acting Vice President and General Manager of Lockheed Martin Maritime Systems & Sensors spoke at the SMA's fall kickoff luncheon regarding his experience with SMA arbitration. Mr. Wing's overall reaction to SMA arbitration was so positive that Lockheed Martin Maritime Systems includes an SMA arbitration clause in all of its marine agreements including, teaming agreements with other marine contractors.

Jon Wing grew up in Maine and graduated as a marine engineer from Maine Maritime Academy in Castine. Mr. Wing spent seven years at the Bethlehem Steel Shipyard in Baltimore working his way up the ladder from machinist foreman to ship superintendent. After running his own shipyard business for several years, Mr. Wing got married and then got a real job by joining Lockheed Martin in 1984.

The Maritime Systems Group at Lockheed Martin has several distinct lines of business. It is best known for its launchers from which over 90% of the Cruise and related missiles used in the Iraq war were launched. The business of most interest to the Society of Maritime Arbitrators is the Advanced Hull Form Technology business which relies on SWATH ("small waterplane area twin-hulls") and related hull forms. This type of hull form has the superstructure supported by thin struts attached to pods or mini-hulls riding beneath the surface of the ocean, thus decreasing the exposure of the vessel to wave action and drag. As a result, a SWATH type vessel is very fast, stable and maneuverable. It is an excellent bad weather and rough seas vessel suited for littoral type enforcement and rescue operations and as a supply and ferry ship in areas where bad weather limits sea operations.

Mr. Wing went on to describe his experience with the SMA during the construction of the M/V KILO MOANA, a research vessel built for the Office of Naval Research which is using a team of mariners and oceanographers from the University of Hawaii to operate the vessel. The award of the prime contract to Lockheed Martin had several novel aspects to it. Lockheed Martin did not own a shipyard so that Lockheed had to assemble a shipyard and naval architecture team to build this vessel. In addition, ONR agreed to treat this contract as an 845 or "commercial" Agreement which meant that the normally burdensome federal acquisition regulations did not become part of Lockheed's prime contract with ONR. Lockheed Martin successfully managed this project and the KILO MOANA was delivered to ONR both on time and on budget.

On the advice of New York counsel, Lockheed Martin had included an SMA arbitration clause in its agreement with the shipyard. Lockheed first invoked arbitration in May 2002 when a dispute arose regarding the delivery of the vessel by the shipyard. After a one-day hearing held in Jacksonville, at the urging of the Panel, Lockheed and the shipyard were able to resolve the dispute regarding delivery. After the vessel was delivered, Lockheed and the shipyard each asserted substantial claims against each other. These claims were heard by the same Panel for one week in January, 2003 and after the Panel issued interim rulings on a substantial portion of the claims, the parties were able to resolve the remaining claims in a confidential settlement.

Mr. Wing first commented on his past experience with court proceedings which arose in approximately 75% of the shipyard contracts he had been involved with. Mr. Wing's general experience was that court proceedings were too protracted and the

judges in most instances had no maritime expertise or practical knowledge of marine construction. He also found that typically there was favoritism towards the local or smaller party and that the length of proceedings drained resources from ongoing projects. Mr. Wing was therefore in the market to find a procedure that would insulate Lockheed's customer from the litigation and that would not affect project success and timely customer delivery.

Even though Lockheed Martin and Mr. Wing had no prior experience with the SMA, he accepted counsel's recommendation of an SMA arbitration provision. The shipyard also accepted SMA arbitration--an acceptance repeated in recent new deals in which SMA clauses have been proposed by Mr. Wing. In terms of Mr. Wing's expectations about the process, he thought that written submissions would be paramount and that there would be no formality in the proceedings. Among his surprises about the process was the ease of choosing the arbitrators which contrasted in his mind with the surprising formality of the proceedings. In his words, "the preparation and the witness presentations felt more like litigation in a court."

Mr. Wing said that he was very impressed with the Panel's handling of the contractual issues which arose under the ship building contract. He was particularly complimentary about the way the Panel led the parties to a settlement on the initial title and delivery issue. On that issue as well as the issues that arose after the vessel was delivered, the Panel showed its depth of experience and maritime knowledge which was a very pleasant surprise to Mr. Wing. Although he was a bit frustrated in being able to initially obtain a definitive interim ruling, Mr. Wing realized the Panel had purposely been a little vague in its ruling, in order to encourage the parties to reach a settlement on their own. While the process was stressful at times, the Panel was skillful in guiding the parties to a solution where there were no winners, and no losers. In today's environment where business moves at the speed of light, Mr. Wing said it is essential that the SMA arbitration process focus on the issuance of timely decisions.

In terms of some advice for SMA arbitrators, Mr. Wing's parting words were, “Be sure! Be fast! And be decisive!”

(Thanks to Leo G. Kailas, Esq., a partner at the New York Law firm of Reitler Brown LLC, for his assistance in preparing this report.)

RECENT AWARDS:

CONFLICTS OF LAW

A New York panel once again addressed the confusion often resulting from the melange of laws apparently applicable as a consequence of having chosen the combination of a private contract of carriage incorporating the United States Carriage of Goods by Sea Act (COGSA) and embodying Bills of Lading applying the Hague Rules. The **BONA FULMAR** sustained loss and damage to unleaded gasoline cargo being carried from Antwerp to the U.S. East Coast under an ASBATANKVOY charter party incorporating special provisions. How do parties interpret contracts containing the following conflicting clauses?

Special provision:

> *General average/Arbitration - New York/US Law*

Part I, Clause K:

> *The place of General Average and arbitration proceedings to be London/New York* (London struck). *U.S. Law* (added)

Part II provides:

> *Clause 20: Issuance and Terms of Bill of Lading*
>
> *(a) The Master shall, upon request, sign Bills of Lading in the form appearing below for all cargo shipped but without prejudice to the rights of the Owner and Charterer under the terms of this Charter . . . .*
>
> *(b) The carriage of cargo under this Charter Party and under all Bills of Lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in subparagraphs (i) through (vii) of this clause . . .*
>
> *(i) CLAUSE PARAMOUNT. This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 15, 1936, except that if this Bill of Lading is issued at a place where any other Act,*

> *ordinance or legislation gives statutory effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels, August 1924, then this Bill of Lading shall have effect, subject to the provisions of such Act, ordinance or legislation . . .*

After loading at Antwerp the master signed a Bill of Lading which designated Petro Fina as shipper and Fina Overseas S.A. Belgium as consignee and contained the following Jurisdiction Clause:

> *This Bill of Lading shall be construed and the relations between the parties determined in accordance with the Law of England notwithstanding any other terms set out or incorporated herein. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Bill of Lading.*

The owner contended that Clause K of Part I unequivocally reflected the parties' intention that all disputes are to be arbitrated in New York and that by adding the typewritten provision, "US Law," they also intended that cargo claims would be governed by COGSA. The owner emphasized that the ASBATANKVOY preamble provides that "[i]n the event of a conflict [between Charter terms], and the provisions of Part I [of the Charter] will prevail over those outlined in Part II," and that as a basic tenet of construction, typewritten amendments to a form contract must prevail over the terms of the printed form in determining the intent of the parties. Therefore, the owner concluded, the words "US Law" added at Charterer's request supercedes or overrides Clause 20(b)(i) of Part II and that COGSA governed the dispute.

The Charter contended that the mere reference to "U.S. Law" in Clause K is insufficient to incorporate COGSA into the charter. The reference means US law generally, including US choice of law rules. Further, the addition is not inconsistent with Part II, Clause 20(b)(i) of the charter, and, as the Bill of Lading was issued in Belgium, the specific incorporation of COGSA in the clause must yield to the 1924 Hague Rules as enacted in Belgium, in accordance with its very terms.

In its Partial Final Award the panel ruled as to the applicable law in this situation. The charter party was the governing contract of private carriage between the owner and the charterer. While the Bill of Lading served as a receipt and document of title in the parties' transaction, its jurisdiction clause providing for the Law of England and the exclusive jurisdiction of the High Court of London was deemed inapplicable.

COGSA specifically provides that the Act does not apply to a charter party of its own force and effect. Although parties to a private contract of carriage are free to incorporate COGSA, the incorporation must be clear and specific. Mere reference to "US Law" in and of itself is insufficient to incorporate the statute into a charter party.

The panel observed that basic principles of cargo law relating to the incorporation of COGSA into private contracts of carriage, principles of contract construction, and applicable case law all lead to the same conclusion. The use of the phrase "US Law", by itself in a charter party does not evidence clear intent to incorporate COGSA in the charter. The logical extension of this principle to the owner's contention that the phrase "US Law" was intended to supercede and override all the choice of law provisions of Clause 20(b)(i) could mean that the usual protections afforded Owner by COGSA and the Hague Rules (like exculpation for errors in navigation) would be unavailable to the owner.

Generally accepted rules applicable to contract construction and interpretation of contracts include the rule that if two contractual provisions can be reasonably read together, they should be read together. Both should remain binding and part of the agreement, and one should not be found to have no effect in favor of the other, and effectively read or interpreted out of the agreement.

The arbitrators referred to several cases on record where jurisdictional conflicts were addressed. The conclusions in those cases supported the view that adjudication should differentiate between laws chosen to govern contracts versus those chosen to interpret them. Given the fact that the Bill of Lading covering the cargo in question was issued in Belgium, and the "gives statutory effect" language of the charter's "CLAUSE PARAMOUNT," the panel concluded that the Hague-Visby Rules applied in determining the merits of and defenses to both the charterer's claim for cargo loss and

damage and the owner's claim for general average contributions. [See **BONA FULMAR** - SMA 3787]

ILLEGITIMATE VOYAGE

A recent case involves a decision which highlights specific differences between the Last Voyage clauses in SHELLTIME 4 and SHELLTIME 3 charter forms. Charterer, having 82 days remaining under a SHELLTIME 4 charter, instructed the **M/V SEA WORLD** to undertake a final voyage that could not be completed, in Owner's estimation, in fewer than 85.5 days. Owner agreed to perform the voyage, but reserved its right to claim damages. The vessel was ultimately delivered approximately 20.5 days beyond the contractual termination date in the charter party.

Charterer, contending the charter party allowed for vessel use at normal charter party terms for the final voyage in progress at the contractual termination date, paid normal charter hire for the additional days.

Owner countered that the last voyage was illegitimate because at the time voyage instructions were given it would have been unreasonable, under the most favorable of circumstances, to contemplate the final voyage could be completed on or before the contract redelivery date. Therefore, Owner was due, not contracted charter hire, but compensation reflecting the much more favorable prevailing market. Owner argued that any voyage ordered prior to the charter's contractual termination date must be legitimate in order for clause 19 of SHELLTIME 4 to apply.

The panel observed that "as a general rule, a shipowner is not obliged to obey a charterer's order to perform an illegitimate last voyage, defined as a voyage that cannot be completed in time for the vessel to be redelivered within the contract period. If a specific 'last voyage clause' is part of the charter party, with the intention of permitting Charterer the right to perform a last voyage that may exceed the charter duration and cause a late delivery, the intention to do so must be clearly stated."

The panel noted that previous decisions on both sides of the Atlantic had been consistent in concluding that the last voyage Clause 18 of SHELLTIME 3 achieved that purpose by incorporating the introductory wording, "*Notwithstanding the provisions of Clause 3....*" in the charter duration provision. These introductory words indicating this intent in SHELLTIME 3 are not a part of Clause 19 of SHELLTIME 4, and therein lies the difference. Under SHELLTIME 4, a last voyage order is not legitimate if it cannot be reasonably contemplated to complete the voyage on or before the contracted redelivery date. The panel, finding such was the case here, ruled in Owner's favor. [See **SEA WORLD** - SMA 3791]

DEMURRAGE VS DETENTION DAMAGES

When is demurrage not the sole remedy when apparently unexpected delays occur? A recent award comprehensively reviewed the history and law in both England and the United States. Damages for detention will accrue as the result of wrongful detention of the vessel due to charterer's breach of a separate and distinct obligation in the charter party. Failure to provide cargo, failure to load at the agreed rate, abnormal delays, failure to open a letter of credit, delays associated with the issuance of the bills of lading, failure to promptly nominate a loading/discharging berth, charterer employing the vessel as a floating warehouse were several of the examples cited.

In the case in point, **M/V AN AN** was directed to the port of Baltimore to discharge sugar, despite the fact that the sugar pier cranes were damaged and the return to service date was uncertain. Charterer disclaimed any knowledge of the relevant facts at the time it nominated the disport. They said they were unable to direct the vessel to any alternative discharge port and chose to hold the vessel in Baltimore until discharged. Charterer claimed the owner's sole remedy for lost time was demurrage given the fact that the delay resulted from events which were beyond Charterer's control.

The sole arbitrator found that the charterer knew, or should have known, that it was directing a ship to a facility that was completely shut down. Charterer's nomination of Baltimore as the sole discharge port was illegitimate, placing charterer in breach for its failure to nominate a port/berth/place where the vessel could physically discharge her cargo. Furthermore, he found

Charterer to have used the vessel as a floating warehouse, for its own commercial purposes, a further illegitimate endeavor. Finally, the arbitrator found the charterer failed to mitigate damages in not redirecting the ship to any of a wide range of discharging ports/berths available to it.

The arbitrator found Charterer to be liable for the owner's provable damages for loss of use. He awarded the owner detention damages for the entire period, with no exceptions or interruptions, from arrival until the disabled crane was repaired and the terminal was in working condition. At that time the charterer's breach was found to have been cured and laytime commenced, pursuant to the terms of the charter. [See **AN AN** - SMA 3792]

SIMPLE OR COMPOUND INTEREST?

It is commonly accepted practice in New York for arbitrators to allow interest as part of their Awards. Simple interest is the norm but infrequently compound interest is awarded. The award of interest should always be compensatory and not punitive. The following might offer some guidance in this matter:

The question whether to award simple or compound interest is one of discretion. In exercising the discretion, the arbitrator should bear firmly in mind the object of awarding interest. If the applicant can make out a case that compound interest is the only way he can be put in the position he would have been in if payment due him had been made on time, then he should have compound interest. Thus, for example, if the applicant has had to borrow money from a bank and pay compound interest, an award by the arbitrator of compound interest would be justified.

Bernstein's Handbook of Arbitration and Dispute Resolution Practice, § 2-900, page 358

Book Review:
BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE

Authored by: John Tackaberry, Q.C.
and
Arthur Marriott, Q.C.

This most comprehensive of reference books on the subject of arbitration and dispute resolution practice has recently been published in the Fourth edition. And comprehensive it is! The following is excised from the Foreword by Lord Phillips of Worth Matravers, Master of the Rolls:

"For the fourth edition of this Handbook two hands are now necessary - one for each volume . . . It covers a panorama of alternative methods of dispute resolution and helpfully collects all the relevant statutory materials and Rules of Court into the second volume, which can stand alone as a valuable reference source.

In the first volume the individual topics have been expanded to include areas of dispute resolution of which, I suspect, many practitioners will only be hazily aware. It may occasion no surprise that the ever increasing commercial importance of sport should justify a new chapter on Sports Arbitration. But how many venturing into the field of construction law know about "Adjudication" or "Dispute Boards?" There is now a chapter on each of these. There is an increasing overlap between domestic and international arbitration practice and the additional emphasis that this edition places on the international arena will be welcome, particularly to those who aspire to enter the stratosphere of "Investment Treaty Arbitration" and "World Trade Organisation dispute settlement" who are catered for by two new chapters.

At a time when the Court Service is experimenting with a pilot scheme for the initial stages of online litigation, I was particularly interested in a new chapter on "Online Dispute Resolution." This is an over-arching topic covering the law and practice involved in the application of information technology and distance communication to conciliation, mediation and arbitration. I suspect that it will not be long before some of the issues identified by the contributor reach the Court of Appeal, including the seminal question of whether an arbitration agreement concluded by email satisfies the requirements of an agreement in writing under the 1996 Act.

In this edition the previous high standards of expertise and lucidity of the contributors is maintained. The only question that I was left with was why the title had not been changed to the Encyclopedia of Arbitration and Dispute Resolution Practice."

While the volumes reflect English Law and practice, including the articulate chapter on Maritime Arbitration contributed by Bruce Harris, the frequent reference by New York Arbitrators and Counsel to practices in London makes the publication quite relevant to readers of THE ARBITRATOR. And, although the

references to maritime arbitration are relatively limited, the chapter entitled General Principles covers some 380 pages, a book in itself. We agree with Lord Phillips' inference that Bernstein's Handbook of Arbitration and Dispute Resolution Practice is an encyclopedia and we recommend it for the library of anyone involved, or wishing to be involved, in the practice of arbitration and alternative dispute resolution. The Handbook may be obtained by calling the Publisher, Sweet & Maxwell at +44 1264 342906 or for callers in the UK, 020 7449 1111, or via their website at:

www.sweetandmaxwell.co.uk.

The price is £195.

SMA Digest 6 and smany.org

Just a reminder that the SMA in collaboration with several maritime law firms has developed a CD-ROM which contains the complete SMA Digest 6 comprising SMA Awards 3106 through 3630 covering the years 1994 to 2000. [If you had this CD-ROM you could have found 93 hits for *interest*!] Also included is a mirror of the SMA website.

This CD-ROM is available for the asking, with a shipping and handling charge only, to all SMA members as well as to subscribers of the SMA Award Service. Others are welcome to order a copy which will be available at a cost of $100, plus shipping and handling. Current rates for shipping and handling are $15 for domestic U.S.A. and Canada and $25 for foreign delivery. Anyone interested in receiving this CD-ROM should contact the Editor of the ARBITRATOR at the email address at the end of this issue.

QUIZ FOR THE QUARTER

Regular readers of THE ARBITRATOR remember the quiz contest offered in our last issue. The lucky winner is John Koster, a Partner at the New York law firm of Healy & Bailee who correctly *googled* that the meaning derives from:

An Indian expression, a variant upon the Iroquois katno aiss' vizmi-- I am unmoved, unimpressed.

Congratulations, John. Your prize, a copy of the CD-ROM of the SMA Digest 6 is on its way. However, there is more to this expression than *google* has to offer. Those with a burning interest in etymology are referred to their British friends who surely have heard of Patrick O'Brian. Enough said.

QUOTE FOR THE QUARTER

"If at first you don't succeed, skydiving is not for you."

(Author unknown)

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

The Fall arbitral season is in full swing! On September 30th, BIMCO's Torben Strand kicked off the BIMCO/SMA sponsored seminar entitled **"The Late Show: Who Loses When a Ship Arrives/Loads Late?"** which drew over 100 representatives from the shipping, legal and arbitration communities. Attendees - some traveling from Germany, The Netherlands, Venezuela, Georgia and Algeria - heard Jack Berg, Michael Crowley, Bill Honan, Robert Gruendel and John Kimball wrestle with timely problems involving vessel delay, hedging, bills of lading and maritime liens. This provided a perfect backdrop for the afternoon's mock arbitration (scripted by Pat Martin) in which Michael Marks Cohen and Leo Kailas advocated their clients' (Lucienne Bulow and Tom Fox) positions before a panel consisting of Tony Siciliano as Chair, Soren Wolmar and Klaus Mordhorst. Austin Dooley and Keith Heard moderated and summarized these lively and realistic proceedings. Bob Flynn, President of Mallory, Jones, Lynch, Flynn & Associates, updated luncheon guests on the **"American Flag Tanker Market"** and an evening reception capped a perfect event.

The seminar also provided the launch site for the Fourth Edition of the SMA Blue Book entitled **"Maritime Arbitration in New York."** This expanded booklet includes an updated foreword by Charles S. Haight, Jr., U.S. Senior District Judge for the Southern District of New York, and the SMA Rules for Shortened Arbitration Procedure (effective March 1, 2001) and Rules for Mediation. The SMA Rules were substantially revised in 1994 through the collaborative efforts of the SMA and maritime bar. Their work left very little room for improvement and the Fourth Edition reflects four minor amendments explained in the SMA press release of September 17th. Thanks once again to Lucienne Bulow and Katherine Pappas for their efforts and those of their committee.

On October 3rd, the Society and it friends from the Bar and industry celebrated its fortieth anniversary at India House. More than 125 attendees, including Founding Member and Honorary Director John Besman and all surviving Past-Presidents, shared an elegant evening of revelry during which Bruce Harris marked the occasion with a presentation on behalf of the London Maritime Arbitrators Association. Thanks once again to Klaus Mordhorst for organizing a most pleasant event.

At the October 15th, luncheon, Jon Wing, Deputy General Manager & Director of Business, Lockheed Martin Marine Sensors & Systems spoke on **"Arbitration under SMA Rules from a User's Perspective."** His presentation was very well received. We have many more interesting guests scheduled for future luncheons. Please note the following SMA Luncheon dates and speakers in your calendars:

November 19 - George D. Byrnes, Former Admiralty Counsel and Consultant to the Exxon-Mobil Corporation
December 17 - Raymond P. Hayden, President, The Maritime Law Association of the United States

Please join us in supporting your arbitral community! Also, note that from April 26 through April 30, 2004, the XVth International Congress of Maritime Arbitrators (ICMA XV) will be held at the Millennium Mayfair Hotel in London. This conference deserves our support!

David Martowski

SMA NEWS
SMA Blue Book

On September 17, 2003 SMA President David W. Martowski announced the publication of the Fourth Edition of the SMA Blue Book entitled ***Maritime Arbitration in New York***. This expanded booklet, which contains a foreword by Charles S. Haight, Jr., U.S. Senior District Judge for the Southern District of New York, (the text of which immediately follows) presents the SMA Arbitration Rules, revised September 15, 2003, adds the updated SMA Rules for Shortened Arbitration Procedure (effective March 1, 2001) and the SMA Rules for Mediation. Appendix C has been annexed to Document 1, elucidating the standard terms for the administration of the SMA escrow fund for those using this vehicle to secure arbitration fees and expenses.

Users of the system will recall that the SMA Rules were substantially revised in 1994 through the collaborative efforts of the SMA and the maritime bar. Their work left very little room for improvement and the Fourth Edition reflects four minor amendments:

- The Preamble articulates that all references to Arbitrator(s) are deemed *gender neutral.*
- Paragraph 1 of Section 2 - Consolidation - incorporates language which tracks the amendments to the Federal Arbitration Act recently proposed by the U.S. MLA Committee on Maritime Arbitration and Mediation:
  "*The parties agree to consolidate proceedings relating to contract disputes with other parties which involve common questions of fact or law and/or arise in substantial part from the same maritime transactions or series of related transactions, provided all contracts incorporate SMA Rules."*
- Section 6 - Initiation Under an Arbitration Agreement - now states that any party may initiate an arbitration by "*giving written notice to the other party of its demand for arbitration* ***and naming its chosen arbitrator***."
- Section 12 - Notice of Appointment to Arbitrator(s) - The last sentence now reads:
  "*The Chairman shall promptly notify the parties or their counsel, that the Panel is complete and ready to proceed with the arbitration.*"

The new Blue Book underscores the Society's continued commitment to "getting it right," expeditiously and at a reasonable cost. Copies of the book are available from the Society's headquarters in New York. Additionally, all of the various current rules are available on the SMA website at www.smany.org . The complete Blue Book will be posted in the near future.

MARITIME ARBITRATION IN NEW YORK
FOREWORD to the FOURTH EDITION
by Charles S. Haight, Jr.

In 1988, the Society of Maritime Arbitrators celebrated its twenty-fifth birthday and published the first edition of **Maritime Arbitration in New York**. In the Foreword which the Society kindly asked me to write, I noted some decisions of the United States Supreme Court favoring and enhancing arbitration as a means of alternative dispute resolution - alternative, that is, to litigation, with its attendant trial and appellate delays, onerous discovery procedures, and greater legal costs. I concluded those remarks by observing: "Judges and arbitrators work together as laborers in the same vineyard of Justice. The procedural differences are less important than the substantive common purpose." In 2003, the Society celebrates forty years of service to the international maritime community, launches this revised edition, and has invited me back on stage to sing another Prologue.

In this fifteen-year interval, the Society has materially improved its effectiveness as a laborer in the vineyard of commercial justice by introducing a Shortened Arbitration Procedure, promulgating Mediation Rules, improving its Conciliation Procedure, and revising its Arbitration Rules. What have the courts been doing? Consideration of the period 1988 -2003 requires shifting the emphasis from decisions of the Supreme Court to those of the United States Court of Appeals for the Second Circuit, the most active intermediate appellate court in the federal system in cases where judges come into contact - sometimes into collision - with commercial arbitrators. To echo the prior theme, it may be said that the more recent Second Circuit cases address two questions: Who may enter the vineyard of commercial arbitration? And how fruitful are the grapes - the award - that the prevailing party harvests?

In the interim since 1988, the Second Circuit has stressed that "notwithstanding the strong federal policy favoring arbitration as an alternative means of dispute resolution, courts must treat agreements like any other contract,"[1] and, applying that principle, reversed a district court for ordering over a party's objection to a consolidated arbitration of a dispute involving two closely linked but separate helicopter manufacturing contracts: "The district court cannot consolidate arbitration agreements arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation."[2] As for judicial review of arbitration awards, in the Halligan case the Second Circuit sent a frisson of alarm through the arbitration community by refusing to confirm an employment discrimination arbitration award which "did not contain any explanation or rationale for the result" and left the court of appeals "with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both."[3] However, concern that the Second Circuit was expanding that elusive and uncertain concept "manifest disregard of law" has been assuaged by the court's more recent opinion restricting Halligan's application to discrimination cases, stressing that in Halligan "there was no written [arbitrators] opinion, and, thus, no findings of fact," and reiterating that since Halligan "we have continued to apply the same manifest disregard standard" pre-dating that opinion, namely, "that our review under the doctrine of manifest disregard is severely limited." [4]

With these judicial winds blowing from several points around the compass, the Society steers a steady course by providing in its Arbitration Rules at Section 2 for a consolidated arbitration in appropriate cases, which would bind all parties whose contracts incorporate the Rules, and by continuing its tradition of publishing awards which

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[1] *U.S.Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001).

[2] *The Government of the United Kingdom v. The Boeing Company*, 988 F.2d 68, 74 (2d Cir. 1993).

[3] *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir. 1998).

[4] *The GMS Group, LLC v. Benderson*, 326 F.3d 75, 79 (2d Cir. 2003).

give detailed reasons for the result reached. That salutary practice helps avoid the shoals of judicial review while creating a vital body of maritime commercial precedent.

The hope I would express in this Foreword is that the Society will distribute this excellent handbook far and near, so that all maritime commercial interests may be aware of the necessity of expressing their dispute resolution preferences in unmistakably clear contractual language.

Given these judicial expressions, the Society is to be congratulated for its tradition of publishing awards which give detailed reasons for the results. "[A]rbitrators have no obligation to do so," as the Second Circuit said in Halligan,[5] but the absence of a reasoned award hampered judicial review in that case and led to an arguably unfortunate result. More importantly, a dispute resolution procedure serves the public best if the parties know why they won or lost; and the compilation of the Society's awards has created a vital body of practical commercial law.

So the Society of Maritime Arbitrators should be saluted, on its fortieth birthday, for having not just continued but broadened its important service to the international maritime community. If judges sometimes seem to get in the way of progress, perhaps the continuing regard they have for the arbitral process may incline the readers of this Foreword to forgive them.

CHARLES S. HAIGHT, JR.
United States Senior District Judge
For the Southern District of New York

40TH CONGRATULATIONS

Remarks By Bruce A. Harris
(Expurgated for Political Correctness)

Reflecting on the fact that we are here to celebrate the 40th anniversary of the SMA, I realised that this year also marks the 40th anniversary of my own involvement in matters related to maritime arbitration. I am sure whether that is not a cause for celebration, but for me the thought that I have been around as long as the SMA is terrifying.

However, I am accustomed to being terrified. The last time it happened in this great city was at the 1981 International Congress of Maritime Arbitrators. Not long before that, a judgment had been handed down on a question of crucial importance to those involved in tramp shipping, namely the meaning of the phrase, "subject to details." I had read and thought about the judgment a lot, and I didn't think much of it. So, being a relatively young man then, I stood up in the Congress and announced that I thought the judgment, which had been written by Justice Constance Baker Motley, was inconstant, half-baked and motley in the extreme. As you may imagine I was advised to leave the country quickly, before I was interned for contempt of court.

Happily, since that time I have been allowed to visit New York on a number of occasions, none more enjoyable - although tinged with the most profound sadness as a result of then-recent history - than for the Congress two years ago. But the real point about the judgment I have just mentioned is that the approach to the issue in question - which was diametrically opposed to the position in English law - demonstrates Churchill's adage, that we are two nations divided by a common language. Of course there are other examples: the one that always springs to my mind - and this tells you a lot about my mind - is the expression we use to mean "stay cheerful", namely "keep your p____r up." I understand that means something quite different here.

But whatever the differences between our two nations, at least the SMA and the London Maritime Arbitrators Association, or LMAA, are united in a common purpose. That is to do commercial justice between disputing maritime parties as quickly and cost-effectively as may be. And whatever divergencies of opinion we may have, we respect one another. We look at and take into account your Awards. No doubt you do the same with ours - to the extent that you can!

If, at the end of the day we do not agree, and think that "subject to details" means "***not*** subject to

[5] 148 F.3d at 204.

details", or that two ports are actually one, we have not failed in our common purpose. On the contrary, we are simply indulging in "cultural diversity": in other words we are being entirely politically correct.

As it happens I personally loathe political correctness when taken to excess. So it was with considerable pleasure that the other day I came across a document called "Man Rules." It opens by saying that we - i.e. men - always hear "the rules" from the female side, but here are the other ones, i.e. the ones men always want to state to women. Let me read you just a few of them:

1) Learn to work the toilet seat. You're a big girl. If it's up, put it down. We need it up, you need it down. You don't hear us b____ing about ***you*** leaving it down.
2) "Yes" and "No" are perfectly acceptable answers to most questions
3) Anything we said six months ago is inadmissible in an argument. In fact, all comments become null and void after seven days.
4) I AM in shape. Round is a shape.

I could go on, but I must keep these remarks short and I still have two important matters to cover.

Firstly, please allow me a plug for the Congress to be held in London next April. You did a fantastic job organising the ICMA in 2001, especially considering the circumstances. We will try to do as well as you did. On the social side of things we are being treated to a cocktail party in Mansion House, the home of the Lord Mayor of London. We will be holding our gala dinner in the ancient Guildhall, the seat of government for the City of London for around 800 years, with trumpeters and a brilliant speaker or two. On the day off, we are planning a river trip to Greenwich (our one, that is, not the Village) to visit the National Maritime Museum, the Painted Hall and the Queen's House. And of course there will be all the fascinating work sessions, and opportunities to catch up with old friends and make new ones. And if that's not enough, why not just visit London? So please come and support us - and please submit papers/outlines to Austin Dooley as quickly as you can, please.

The other - and crucial - thing is, of course, to congratulate the SMA on its fortieth anniversary on behalf of all of us in London, and particularly on behalf of the LMAA. As a personal gesture I would like to offer to the SMA library these two books. They are not in fact books of jokes: one is entitled London Maritime Arbitration and the other is a Commentary on our Arbitration Act.

And I have been asked by the LMAA to present you with a small token of our regard for you, in the form of this LMAA escutcheon. It has been inscribed "**Presented to the SMA, with deepest respect and friendship from the LMAA, on its 40th anniversary, 2003."** Lastly, Mr President, our very best wishes for the next forty years, and for many centuries after that.

(Mr. Harris, a Past President of the London Maritime Arbitration Association, delivered these remarks at the SMA's 40th Anniversary Dinner on Friday, October 3, 2003 at The India House in New York City)

LATENESS AT THE LOADPORT

By Jack Berg

INTRODUCTION

It is rare to have a voyage chartered vessel situated at the intended load port when the charter party is negotiated and concluded. The same holds true for a time chartered vessel being located at the intended port of delivery when the fixture is concluded. It is far more likely that the subject vessels will be steaming in performance of other charters, loading or discharging cargo or simply idle and seeking employment. Under any of these scenarios, the vessels are generally well removed from the intended load ports or delivery areas and, therefore, will have to make an approach voyage to present under the charters.

The various charter party forms provide, in a variety of ways, clauses that are designed to satisfy charterers that the vessels will arrive at the load port in a timely fashion. In general, the charter parties will indicate the vessel's current position, require

that the vessel proceed with due dispatch, in those words or ones having a similar import, to meet an expected arrival date. Charters will almost always permit a right of cancellation in the event the vessel arrives after the canceling date. If the vessel's geographic position and employment status are properly furnished and the vessel proceeds to the load port with due dispatch, the risk of a timely arrival at the load port rests with charterer.

If the expected duration of the approach voyage results in a load port arrival well ahead of the expected load date, the shipowner may perform intermediate employment for a third party or for its own account. However, if there are unexpected delays on the intermediate employment that causes the vessel to miss her expected ready date, owner will be liable. The obligation is the same if the vessel is employed under a pre-existing charter, that is the vessel must immediately proceed to the load port with reasonable dispatch to arrive there by the expected ready date. In the absence of express language to the contrary, the risk of delay on pre-existing charters cannot be shifted to the charterer.

THE CANCELING CLAUSE

Virtually every charter party incorporates phraseology in one form or another relating to laycan and the express obligation of the vessel to proceed to the intended load port with all due dispatch or words conveying the same meaning. Also included in most charter forms is a provision requiring the vessel to meet an "expected readiness date." For illustration purposes I have included typical wording, in this case the GENCON FORM, that is a part of some prominent charter forms.

GENCON FORM 1976

1. The said Vessel, as soon as her prior commitments have been completed, proceed to the loading ports (s) or places (s) stated in Box 10 . . .

9. Canceling Clause (a) Should the Vessel not be ready to load (whether in berth or not) on the canceling date indicated in Box 21, the Charterers shall have the option of canceling this Charter Party. (b) Should the Owners anticipate that, despite the exercise of due diligence, the Vessel will not be ready to load by the canceling date, they shall notify the Charterers thereof without delay stating the expected date of the Vessel's readiness to load and asking whether the Charterers will exercise their option of canceling the Charter Party, or agree to a new canceling date. . . . Such option must be declared by the Charterers within 48 hours after receipt of Owners notice. . .

Part I Box 8 should contain the vessel's present position. Box 9 the Expected Ready to Load date and Box 21 the Canceling Date.

The canceling clause allows the charterer an option to cancel the charter if the vessel arrives at the loadport after a fixed agreed date. The right to cancel is independent of any breach by the owner and is not affected by the operation of an excepted peril. In short, there is no permissible excuse for the vessel's arrival after the canceling date, whether it be for causes beyond owner's control or excepted perils.

It should be noted no promise may be implied by owner that the vessel will arrive on or before the canceling date and an arrival at the load port after the canceling date does not automatically entitle charterer to damages. However, charterer may be entitled to claim damages if it can demonstrate that the vessel's failure to arrive by the canceling date is the result of owner's breach of its obligations to present the vessel in a fit condition by the canceling date and to commence the approach in time for the vessel to be at the loadport and ready for service by the canceling date.

In the absence of express wording to the contrary, the vessel must proceed to the loadport even though it clearly cannot present by the canceling date and even if the canceling date has passed. Similarly, charterer has no right to an "anticipatory cancellation" and may not rescind the charter under the canceling clause until the canceling date has passed.

A question which often arises is the degree of readiness required to avoid cancellation when the vessel presents at the loadport. More precisely, whether the standard of readiness should simply be

the readiness of the vessel to load or the more stringent Notice of Readiness standard applied for the commencement of laytime. There are no hard and fast guidelines on this point but it would be fair to conclude that the standard of fitness required for satisfying the canceling clause is far more relaxed than one would experience for tendering a valid Notice of Readiness. Therefore, a charterer may not have a right to cancel even if the vessel cannot tender a valid NOR for the commencement of laytime. The approach is logical and commercially reasonable because the canceling clause is a forfeiture provision with harsh consequences.

Clearly, a charterer may not invoke the canceling clause if the lateness is caused by its own conduct i.e. late port nomination.

You may wish to note a variation of the canceling clause contained in the Gencon form. Clause 9 of Part II grants owner the right to demand an early declaration of charterer's intention to exercise its cancellation option. So, if the shipowner is aware of the fact that the vessel cannot arrive at the loadport by the canceling date, it may press charterer to declare its intention to cancel within 48 hours after receipt of owner's notice.

EXPECTED READY DATE

The "expected ready date" to load cargo under a charter is understood to be a shipowner's undertaking that, he honestly and on reasonable grounds expects the vessel to be at the loadport and ready to load on or about that date. Illustrative of this point is **ARALDA**, SMA 1883 (1983), an arbitration dispute that involved a missed "expected readiness" date because the vessel did not proceed to Puerto Miranda with all convenient dispatch. Instead, the vessel was diverted to Curacao to conclude a change of ownership and registration, delaying her arrival at the loadport some three days after the "expected readiness" date. The panel stated that the "expected readiness" date was not a guaranteed arrival date, therefore, the shipowner could not be held to be a guarantor of that date. A vessel would be excused for not meeting the date if the evidence establishes the following criteria:

1) When given, the "expected date" was honestly made on reasonable grounds;
2) The vessel sets out [for the load port] in good time so that under normal circumstances she will arrive at the port of loading at or about the day which she has given as being the one when she expects to be ready to load; and
3) She proceeds direct to the load port without deviation for owner's own purposes.

In concluding that owner breached its obligation to proceed with convenient dispatch to the load port and, therefore, did not meet its "expected ready" date, the panel relied heavily on *Evera S.A. Commercial v. North Shipping Company, Ltd. [1956] 2 Lloyd's Rep. 367 (Q.B.)*, the court stating:

> *A charterer manifestly wants, if he can get it, a fixed date for the arrival of the ship at the port of loading. He has to make arrangements to bring down the cargo and to have it ready to load when the ship arrives, and he wants to know, as near as he can, what that date is going to be. On the other hand, it is to the interest of the shipowner, if he can have it, to have the date as flexible as possible. Because of the inevitable delays due to bad weather or other circumstances that there might be in the course of a voyage, he can never be sure that he can arrive at a port on a fixed and certain day. Therefore, in order to accommodate these two views as far as possible, it has been the general practice for a long time past to have a clause under which the shipowner, without pledging himself to a fixed day, gives a date in the charter party of expected readiness, that is, the date when he expects that he will be ready to load.*
>
> * * *
>
> *Thus, the result is that, in a perfectly simple case, where at the time when the charter party was entered into the ship*

> *was free to proceed to the port of loading, her obligation is simply to set out in good time so that under normal circumstances she will arrive at the port of loading at or about the day which she has given as being the one when she expects to be ready to load. If something occurs on the voyage to the port of loading which delays the ship without her fault, then the owners under this type of clause are not liable.*

In the **VENUS V**, SMA 2153 (1985), the vessel was chartered for a voyage from Puerto la Cruz, with an "expected ready date" of October 26 and a cancellation date of October 28. During negotiations the charterer made a point of its need to have the vessel tender on October 26, and owner represented it would. In fact, the vessel arrived on October 27, and charterer canceled because it lost its loading window. Owner claimed damages for the alleged wrongful cancellation and charterer sought damages for additional transportation costs and a higher price for its cargo purchase. The panel's distinction between an "expected ready date" and laycan is important. The panel stated:

> *Cancellation dates and expected ready dates are not equivalent terms, although they relate to the same general subject. If the vessel misses its lay/canceling date the Charterer may cancel the charter. Neither good faith nor any other reason excuses the Owner's failure to timely tender the ship;[citations inserted]. An expected ready date, however, is a representation to be made and adhered to in good faith and invites reliance . . . If the Owner has acted in good faith in making the representation and in performance, lateness is not a basis for termination by the Charterer on the basis of the expected ready date [citing Evera]. The fulfillment of Owner's obligation to deliver the vessel is not answered by the cancellation date, and the cancellation date cannot be used as the measure of the Owner's representation of the expected ready date.*

The panel concluded the "expected ready date" was an item of considerable importance and that Owner gave a date that could not possibly be met, therefore, Charterer justifiably terminated the charter. The opinion states:

> *Owner's mistaken belief regarding the significance of the estimated arrival representation as well as its error as to the impact of the cancellation date do not constitute a legal excuse. Owner was not justified in giving an incorrect expected ready date. The expected ready date of October 26th was a material representation by Owner. It was wrong and negligently arrived at. With the facts available to Owner, the representation cannot be deemed reasonable.*

GENMAR BOSS, SMA 3781 (2003), is a most recent decision on the subject. The vessel arrived at the discharge port after the canceling date but was accepted by charterer. However, because of the late arrival the vessel lost her turn in berth. The principal issue was whether the time lost waiting for berth should count as used laytime. Charterer contended the vessel sailed two days later than expected and, therefore, did not proceed to the loadport with " . . all convenient dispatch." Charterer argued owner was liable for the consequences of the vessel's lateness. In finding for the owner, the panel noted that the charter did not contain any represented expected readiness date but simply indicated the present position of the vessel and the estimated date of sailing from Philadelphia, which the panel concluded was reasonable when given. However, the vessel was delayed for two days discharging at Philadelphia and consequently arrived late at the load port. The panel stated:

> *Charterer attempts to make up for the lack of any representation of expected readiness at the loadport by pointing to the laycan dates, the fixture note's designation of the vessel's current position as "ETD Philadelphia November 23, 2000" and Clause 1 [the*

> *obligation to proceed with all convenient dispatch]. ….. There was no "expected ready" date in the charter and none can be implied. Owner cannot be held in breach for failure to meet a non-existent obligation.*

The present location of the intended vessel is often a matter of concern to charterers and is important for a variety of reasons, especially when spot prompt arrangements are required. In **SANDRA FARBER**, SMA 2685 (1990), the owner described the vessel as "now trading" when, in fact, it was in the shipyard undergoing repairs at that time. The panel concluded that the vessel's position was intentionally misdescribed and that charterer properly relied on the representation and the "expected readiness" date it was given. The panel addressed the "now trading" representation as follows:

> *A vessel is "trading" when she is engaged in a commercial venture or readily able to do so. She is "trading" when she is underway with cargo or with ballast en route to a load port, anchored or in a similar status awaiting berth or voyage orders and when loading or discharging cargo. She is not "trading" when she is under construction, undergoing repairs in a shipyard, under arrest, in layup, aground or detained by acts of government.*

DAMAGES

The basic principle underlying an award of damages in a breach of contract action is to place the innocent party in the same financial position it would have been had the contract been performed. However, damages which are remote and not within the contemplation of the parties at the time of contract are not recoverable. It is the parties understanding of the nature of the transaction at the time of making the contract that controls rather than information learned later on.

Clearly, if the wrongdoer has special knowledge of the nature of damages to be suffered, he will be judged by that knowledge. So, in **ILIAD**, SMA 2874 (1986), a tanker arrived at the load port two days before the agreed date, was loaded immediately and a bill of lading issued reflecting that date. As a result of the early loading, Charterer suffered contract price damages. The issue before the panel was whether these damages were remote and, therefore, unrecoverable.. The arbitrator found otherwise and concluded, in part:

> *Seateam next argues that Conoco's damages were not reasonably foreseeable and should not be granted. Evidence of what transpired during the fixture negotiations strongly indicates there was a common understanding of the importance of the vessel not arriving at the loadport prior to 0600 hours September 30. Conoco's broker testified about his discussions with Seateams broker, and more specifically regarding the cargo price being affected by an October bill if lading date. Seateam has offered no evidence on this point.*

Where no special knowledge can be shown, the question is whether a reasonable commercial contracting party would contemplate the loss or damage in question. In Baleares, *Geogas v. Trammo Gas [1993] 1 Lloyd's Rep. 215*, the Court of Appeal confirmed the arbitrators' conclusion that in a specialized trade the carrier would be expected to know and understand the trading patterns of the products being carried, liquefied petroleum gases in this case. A similar principle was applied to the owner of a reefer vessel operating in the banana trade when it contended that knowledge of the banana business was not within its contemplation at the time of contracting. In **ARALDA**, supra, the vessel arrived late at the loadport and charterer claimed as its damages the increased cost of its purchased crude because of OPEC's price increase. Owner argued that the damages were unforeseeable, citing *Hadley v. Baxendale (1854) 9 Exch. 341*. The panel concluded Owner (Phillips Petroleum in this case) was in a unique position to understand the

nature of the commercial damages that would ensue if the vessel was late. The arbitrators stated:

> *Phillips is one of the world's major oil companies with vast experience in the purchase, sale and carriage of petroleum products in worldwide trade. Indeed, Phillips purchase crude oil from Venezuela on a large scale and all indications are to the effect that at one point Phillips intended to use (the chartered vessel) to lift one of its own cargoes from La Guira, Venezuela*.

However, in **POINT MARGO**, SMA 2310 (1987), the panel denied charterer's claim for loss of U.S. Government PL-480 financing as too remote and not within the contemplation of the parties. Similarly, in **ESPOIR**, SMA 2254 (1986), the panel denied charterer's claim for loss of lead credits associated with the blending of leaded gasoline as special damages which the shipowner would have no knowledge of; charterer's claim for refinery shutdown in **TEAM AUGWI**, SMA 1260 (1978) was also denied because the shipowner would have no knowledge of refinery stocks and throughput. However, in **FELICITY L**, SMA 3235 (1995) a panel allowed charterer its damages for loss of refinery production. Charterer fixed the vessel under an ASBA II form to lift a cargo of Venezuelan crude for the production of asphalt at its Corpus Christi refinery. The vessel missed its expected ready date by almost a day and arrived at the discharge port five days late. The panel concluded that owner's scheduling was neither reasonable nor made in good faith. In allowing the production loss as damages, the panel cited *Hadley v. Baxendale* and noted that owner and charterer had an extensive commercial relationship involving many prior charters and that owner was familiar with charterer's crude import program and its Corpus Christi refinery program.

A determination of remoteness within the *Hadley v. Baxendale* guideline is often a close call and very much fact oriented.

Cargo hedging programs are designed to eliminate the risks attendant to physical price fluctuations, which are particularly troublesome when moving bulk oil cargoes by sea over great distances. It is pretty well accepted that the hedging of bulk oil cargoes in the international and domestic trades is now a routine and accepted trading practice and that physical waterborne cargoes are generally hedged with futures contracts in London or New York. The industry practice in Europe has been to hedge in London against Brent Crude contracts, while cargoes directed to the U.S. are hedged on the NYMEX against West Texas Intermediate (WTI) contracts.

NYMEX defines a selling futures hedge as follows:

> *Establishing what is known as a "short" or selling hedge protects energy industry participants from a decline in the market price of crude oil or refined products. This type of hedge would be used by producers, oil refiners, product wholesalers and retailers -- anyone in the oil industry who could be adversely affected by declining product prices.*
> *Similarly, agricultural producers and exporters generally seek to reduce the financial risk of market price fluctuations. The cash market is where the physical grain is handled by producers, processors etc. The futures market, primarily in Chicago, although there are others, trades contracts for future delivery. Hedging is defined as taking equal but opposite positions in the cash and futures market. In short, a decrease in the value of the cash commodity will be offset by a gain on the futures contract.*

In **BONI**, SMA 3053 (1994), a central issue of charterer's claim for damages related to an alleged refining hedge loss of about $2.5 million caused by the late delivery of charterer's cargo to charterer's refinery in Puerto Rico because of the lifting tanker's unseaworthiness. This was a consolidated arbitration which involved both the registered and disponent owners. The vessel interests jointly challenged the hedging claims as special damages, consequential and unforeseeable and further argued they were not aware of the

charterer's refining operation or its hedging practice. The panel acknowledged the essential benefits of hedging petroleum products and that the vessel interests were aware, or should have been aware of hedging practices. However, the panel concluded the hedges in this case were not placed in a manner consistent with industry practice or charterer's own guidelines. In this respect, the panel stated:

> *It is generally recognized that the hedging of petroleum products and other commodities is a desirable and essential method of minimizing price fluctuations and exposure to loss. All of the experts before this panel testified on this point and there was no disagreement. Indeed, one may logically conclude that it is foolhardy and speculative not to do so. Seaemblem and Jahre knew Arochem operated a refinery in Puerto Rico and that it was also a sometime trader in the spot markets. Jahre's principal business is in the tanker lighterage trade and as such has close contact with a variety of petroleum operating companies. Seaemblem operates tankers and is presumed to have some understanding of the basic elements of the petroleum trade. After all, the very political and economic pressures impacting oil prices also affect tanker rates. We accept in this day and age that most companies are aware of the need and advantage of hedging products to assure price stability and a low risk profile.*
>
> *Arochem's chief executive testified in this proceeding and described his company's hedging policy as follows:*
>
> > *"Well, what we try to do -- we enter into a balancing, if you will, what -- there is -- at that point in time and what we were trying to do for every barrel physically we bought of either Tapis or Arun, we would sell an equal number of barrels of West Texas Intermediate."*
>
> *The principal question we must now address is whether the transactions, which form the basis of Arochem's equity loss claim, are hedged on the Boni transaction or speculative position taking. Jahre's expert witness explained hedging in its simplest form:*
>
> > *"A hedge is placed by either going long or short on the Mercantile at a fixed month or fixed commodity at a fixed price by either buying in or selling out a relevant number of contracts relating to your open position in the wet oil, therefore, performing the hedge. If you are long, for example, a cargo of 250,000 barrels of gasoline, then you go short, a relevant number of wet contracts per thousand barrel contracts on the New York Mercantile on the month you anticipated that cargo be delivered or the month you take position so you lock in your prices."*
>
> *We have carefully reviewed the alleged hedging transactions and conclude they are not in accord with Arochem's own stated procedure, nor are they placed in accordance with accepted industry standards. Hedges are never an absolute protection against the risks of market fluctuations, but if placed properly, and in a manner similar to the procedure which Arochem's witness described, they offer a large measure of price protection. They were not so placed here.*

CONCLUSION

Hopefully, this paper will offer an understanding of the rights and obligations of the parties to a charter party with respect to laycan and the canceling clause, the "expected readiness date", and the nature and measure of damages one may expect on those issues in an arbitration. It is fair to say that owners and charterers have conflicting interests regarding the question of timely presentation and performance and that charter party negotiations more often than not involve attempts by each party to minimize its risk for lateness. For this reason, owners, charterers and brokers have drafted a multitude of additions, deletions and alterations to standard charter party texts to suit their individual needs. In short, owners seek to limit the cancellation option as best they can and liberalize the "expected readiness" requirement. Charterers have contrary interests and that is because they must tailor their purchase and sale contracts to a vessel's laycan and expected readiness dates. So, the standard example of a charter party clause I've included in this paper is simply a sample of standard phraseology that is often significantly modified.

Therefore, I would suggest that the tailored specifics of the clauses in question be closely reviewed and questioned before one concludes if, when and where there may be a right to cancel for late presentation and whether there is a breach and claim for damages because of a missed "expected readiness date."

In the final analysis, disputes on these points will ultimately come before commercial maritime arbitrators for resolution. The SMA Award Service offers a world of assistance to counsel and their clients in identifying similar disputes of this nature and their ultimate disposition.

(This paper was presented by Mr. Berg on September 30, 2003 at a seminar in New York entitled "The Late Show" which was jointly sponsored by BIMCO and the SMA. Mr. Berg is a past President of the SMA and is currently a member if its Board of Governors)

RECENT AWARDS:

FORESEEABILITY

A recent arbitration arose out of a voyage charter party on the ASBATANKVOY form involving the transportation of unleaded gasoline from Italy to New York. The charter required the vessel ". . . at all times [to] have on board all certificates, records and other documents that may be required . . . Any delays or direct expenses incurred by the vessel . . . as a result of Owners failure to obtain the aforementioned certificates shall be for Owners account." Further, the owner warranted that the vessel carried on board all relevant certifications of compliance as may be required by, *inter alia*, U.S. Government authorities, compliance being at the owner's time and expense. In an additional pertinent clause, Owner warranted the vessel's inert gas system (IGS) to be "operational for the duration of the voyage(s) under this Charter Party."

The vessel docked at New York but was ordered by the U.S. Coast Guard (USCG) to leave the port. After a class surveyor asserted that the vessel systems were operable, the vessel returned only, upon further USCG inspection, to be once again ordered out. After completion of repairs the vessel finally commenced discharging cargo, five days having been lost obtaining certification and approval from the USCG.

In response to Owner's demand for arbitration claiming wrongfully withheld freight, Charterer conceded liability, put the withheld amount in escrow with Owner's counsel and asserted counter-claims for damages incurred as a result of the delay in discharging the cargo, including a price de-escalation penalty in its sales contract, financing costs for late receipt of payment for cargo, interest and costs.

Charterer argued that Owner conceded that USCG's rejection was directly related to an inoperable IGS and the failure of the vessel to have a USCG required Tank Vessel Evaluation Letter (TVEL) resulted in a breach of the Vessel Eligibility Clause and the certificate of compliance requirements. These breaches, the charterer pleaded, directly resulted in delays in the discharge of the vessel which in turn led to imposition of penalties by the cargo receiver as well as financial losses incurred for the late payment for the cargo. Charterer, while acknowledging that Owner was not privy to the exact nature of the penalty clause in its sales contract, contended such knowledge was immaterial to the matter since such a sophisticated owner should have foreseen that monetary penalties and other losses would naturally flow from their breach.

Owner argued that it is not uncommon for equipment breakdowns to occur and rejected assertions that the vessel was not properly maintained, pleaded exercise of due diligence to make the vessel seaworthy, including the IGS, prior to commencement of the voyage and insisted the charter expressly excepts damages arising from latent defects in hull, equipment or machinery in addition to delays arising therefrom. In addressing charterer's claim for delay damages, Owner invoked *Hadley v. Baxendale* to the effect that it can only be held responsible for foreseeable damages. Not having been notified prior to or at the time of the fixture of any consequence that might arise if the vessel failed to discharge cargo by a specified date

and not being privy to the terms of the confidential sales contract, Owner challenged the notion that it could reasonably have foreseen that the incurred delay would have led Charterer to sustain the amount and kind of losses asserted, particularly since Charterer's sales contract was entered into after the charter party was fixed, the discharge port nominated subsequent to the vessel having loaded and sailed and that Charterer was already subject to the de-escalation penalty prior to the vessel's first arrival.

A panel majority found that Owner breached three charter party clauses for not having an operable IGS and failure to have a TVEL and certificates of compliance on board at the time of arrival and awarded Charterer its claimed damages, including those consequential in nature. The majority did not accept the position that foreseeability is governed by the original date of the charter party and reasoned that, while it may be true that Owner would not know the exact details of the specific contract, because of its sophistication and experience, the owner should have known of the direct and natural consequences of their breach, including expectation that gasoline cargo typically suffers from price fluctuations. The award came down fully in Charterer's favor including a de-escalation penalty, finance costs for five days delayed receipt of product sales proceeds, interest and an allowance towards legal fees.

The dissenting arbitrator's opinion was critical of the Final Award on several counts. He opined, liberally citing precedent, that the "Law on Foreseeability," *inter alia*, demands that recoverable losses must have been foreseeable and in the contemplation of both parties at the time they made the contract, a physical impossibility in this case, the initiation of the charter party having preceded the making of the sales contract. He further reflected that the burden of proof lie with Charterer regarding customary practice in gasoline sales contracts. That they failed to carry this burden is reflected in the fact that the majority apparently confused the concept of contract de-escalation provisions and product price fluctuations. Finally, the dissenting panel member asserted the majority erroneously accepted Charterer's characterization of Owner as a "sophisticated" tanker operator without requiring accepted burdens of proof to determine the relative merits of this designation. [See **MERCURE - SMA 3785**]

PLAUSIBLE READING

In a recent court action, a United States Court of Appeals for the Second Circuit served to affirm the **M/V ARISTIDES** Award [SMA 3686 (2001)]. (*Duferco International Steel Trading v. T. Klaveness Shipping A/S, United States Court of Appeals for the Second Circuit: Judges Feinberg, Cardamone, and Sack*: 333 F.3d 383: June 24 2003)

In this case, the Second Circuit affirmed a district court's decision refusing to vacate the arbitration award for manifest disregard of the law after finding a "plausible reading" of the award which resolved an apparent contradiction. The Petitioner, Duferco, argued that the arbitrators had acted in manifest disregard of the law when they rendered an award concerning Respondent's, Klaveness', indemnification claim for damages and attorney's fees and costs incurred in a prior London arbitration. After an extensive review of the law on manifest disregard of the law and the award, the appellate court agreed with the "plausible reading" of the award advanced by the district court and affirmed its decision. In so affirming, the Second Circuit concluded that it was of no consequence that this plausible reading was not necessarily one which was advanced in the arbitration or readily apparent in the award.

(*This case was recently summarized in David Martin-Clark's CaseNotes. These may be accessed on the Internet at* www.onlinedmc.co.uk)

ICMA XV

ICMA XV organizers remind prospective authors that outlines (of no more than 250 words) are due to be submitted not later than October 31, 2003. Final papers are to be submitted by January

15, 2004. Submission of outlines can be made via email to the Chair of the Topics and Agenda Committee by email, facsimile or letter (contact details below). Notification of acceptance will be sent by email or facsimile to the submitting authors.

Papers must be prepared and submitted in electronic form with use of a word processing program as it is anticipated that delegates will be provided with a CD-ROM containing all papers. If electronic form is not possible, authors must present a camera-ready document. Layout details will be provided on notification of acceptance.

The Chair of the Topics and Agenda Committee is Dr. Austin L. Dooley of the United States. His contact details are:

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E-TOOLS
SMA Digest 6 and smany.org

As part of the effort not to remain too far behind the leaders at the cutting edge of technology, the SMA in collaboration with several maritime law firms has developed a CD-ROM which contains the complete SMA Digest 6 comprising SMA Awards 3106 through 3630 covering the years 1994 to 2000. Also included is a mirror of the SMA website.

In the unlikely event that there are ARBITRATOR readers unfamiliar with the SMA Digests, we reproduce below the introduction to Digest 6:

The Publication of Maritime Arbitration Awards in New York

The publication of arbitration awards is an important aspect of New York maritime arbitration, and one in which the New York maritime community takes pride.

Soon after its founding in 1963, The Society of Maritime Arbitrators, Inc. began reproducing awards and periodically sending them in bundles to its members and subscribers. In 1980, distribution was enhanced by compiling the awards in bound paperback volumes. In 1983 the awards became available on the online service now known as LexisNexis, and since 1993 the awards have been published in typeset looseleaf format.

Various topic and other indices to the awards were prepared almost from the beginning, but they were very basic and pointed only to major subjects. This changed in 1979, when the SMA and 46 members of the New York and international maritime community joined to sponsor a project, directed by Michael Marks Cohen, Esq., to prepare a comprehensive topic index scheme and to digest in detail and classify all of the nearly 1,800 awards that had been issued up to that time. This project became the first SMA Digest.

Subsequent Digests were issued under Michael's expert editorship in 1983, 1986, 1990, and 1995, and these five volumes have provided the main point of entry for research in the extensive body of maritime arbitration awards issued in New York over nearly half a century.

The Digest now in your hands is the latest addition to this series, and marks the first phase of an ambitious project that will eventually result in the consolidation of all of the existing Digests into a single comprehensive volume to be published electronically. The Digest's new look is the result of a move from word processing to database publishing, and the establishment of a production system which will permit frequent updating, easy additions, corrections and revisions where required, and faster and more economical distribution.

We hope you find the Digests and the published awards which they describe to be useful in defining the rights and obligations of those engaged in the business of shipping.

The new CD-ROM is an interim step toward the eventual development of the single comprehensive volume referred to above. It contains Digest 6 in PDF format and is fully searchable using Adobe Acrobat Reader, free software available at www.adobe.com.

The other aspect of this CD-ROM is the mirrored SMA website. This is useful for those who need a reference to the numerous areas of the website, such as the SMA Rules, Member Roster, etc., but who cannot readily connect to the Internet.

The content of the CD-ROM will be up to date as of the day it is burned. It is the SMA's hope to update the CD-ROM with new versions, perhaps annually, in order to keep the information current.

This CD-ROM is available for the asking, with a shipping and handling charge only, to all SMA members as well as to subscribers of the SMA Award Service. Others are welcome to order a copy which will be available at a cost of $100, plus shipping and handling. Current rates for shipping and handling are $15 for domestic U.S.A. and Canada and $25 for foreign delivery. Anyone interested in receiving this CD-ROM should contact the Editor of the ARBITRATOR at the email address at the end of this issue.

QUOTE FOR THE QUARTER

With reference to the article entitled ***QUONDAM QUISLINGS FOR THE QUARTER*** in the July 2003 issue of the ARBITRATOR, we received some criticism for our use of the term *quislings* as being somewhat severe and Franklin's phraseology as being, frankly, a form of flagellantism. We were tempted to respond with the following headline:

Questing Quarrelsome Quarry, Questioning Querulous Quips, Quickly Quibbled Quite Queasily: "Quit!"Quaked Quasi Quondam Quislings, Quelling Quizzical Quotes

Perhaps we could have made the original point by quoting Walt Kelly's favorite possum:

We have met the enemy and he is us!
(Pogo, numerous times)

QUIZ FOR THE QUARTER

Our inclusion of a Latin expression (*Quos deus vult perdere prius dementat?*) at the end of the July 2003 issue elicited several comments. Our thanks to Captain Henry Engelbrecht, who advises that the quote is attributed to Euripides, Greek Philosopher, circa 400 B.C. and was probably Latinized when Rome conquered Greece. He adds, "If the Latin quotation has any current validity, how come Clinton is still around?" How come, indeed?

For those who expressed nescience of the classic language, we can only counsel:

Hic, haec, hoc!

Offering our readers a chance to recover we propose a simple quiz. The person offering the cleverest disquisition on the following dictum, revealing the language, meaning and/or interpretation will be declared the winner of a handsome prize, to be awarded at the sole discretion of the Editor:

katno aiss vizmi

(Hint: A common reaction of arbitrators after listening to a particularly biased so-called "expert witness.")

For THE ARBITRATOR

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THE PRESIDENT'S CORNER

A brief update on this Spring's activities, May's elections and forthcoming events. Manfred Arnold, Pat Martin and I represented the New York arbitral community at the LMAA's Annual Dinner held on March 26th. It was a grand affair and while in London, Manfred and I met with representatives of all of the International Group's Defence Club Managers. We had a positive and fruitful exchange, followed by a most enjoyable luncheon.

In April we were invited to meet with Exxon-Mobil's legal and chartering teams at their Fairfax, Virginia headquarters, and gave a presentation on New York arbitration, followed by a robust question and answer session.

The Society's members went to the polls on May 13th and I very much look forward to working with Vice President-elect, Klaus Mordhorst, and our newly-installed Board of Governors. I also take this opportunity to thank former Vice President Don Szostak, who has served the Society so well these past two years; Soren Wolmar and Tom Fox who step down after eight years on the Board; and our outgoing Committee Chairpersons for their hard work and dedication. The Board had its first organizational meeting on June 11th and is well-prepared to meet the challenges ahead.

The Fourth edition of "The SMA Bluebook" will soon be published, thanks to the efforts of Lucienne Bulow, Katherine Pappas and their fellow committee members.

The Society was also pleased to approve a formal resolution supporting The Maritime Arbitration Act of 2003, as proposed by the US Maritime Law Association's Committee on Maritime Arbitration and Mediation

On September 30th , BIMCO will sponsor a one day seminar at Manhattan's Southgate Tower Hotel entitled "The Late Show: Who Loses When a Ship Arrives/Loads Late?" The seminar will feature speakers Jack Berg, Michael Crowley, Robert Gruendel, Keith Heard, Bill Honan, John Kimball and luncheon speaker Robert Flynn, followed by a mock arbitration presented by Austin Dooley, Michael Marks Cohen, Patrick Martin, A.J. Siciliano, Soren Wolmar and Klaus Mordhorst.

On Friday, October 3rd, the Society will celebrate its Fortieth Anniversary at a black tie dinner to be held in the Marine Room of India

House. Details appear below. We have already received a substantial number of acceptances - including several from overseas - and we invite all to join us for an elegant and relaxed evening of camaraderie with your friends and colleagues.

The Society's monthly luncheons begin again in the Fall and you might set aside now the dates of October 15th, November 19th and December 17th. These luncheons provide an ideal opportunity to hear speakers with something to say, an occasion to join your friends and colleagues, and a showing of support for your arbitral community.

The XVth International Congress of Maritime Arbitrators will be held at the Millennium Mayfair Hotel in London on April 26-30, 2004. ICMA XV promises to be a great event and merits your support and active participation.

With best wishes to all for a relaxing and enjoyable summer.

David Martowski

AN INVITATION

The SOCIETY OF MARITIME ARBITRATORS, INC., takes great pleasure of inviting its members and friends to celebrate the occasion of its FORTIETH anniversary.
Friday, October 3, 2003
7 PM - 11 PM
to be held at the historic
Marine Room / India House
One Hanover Square, New York

An elegant three-course dinner prepared by Chef Eberhard Mueller (Bayard's)
Open bar from 7 PM to 10 PM
Music throughout the evening
Black tie

Advance reservation only - limited to 200 guests
$150 per person

(Checks to be made out to the SMA, 40th Anniversary)

NON-STATUTORY GROUNDS FOR VACATING AN ARBITRATION AWARD

By: David A. Nourse

You are all familiar with the statutory grounds for vacating a maritime arbitration award. They are set out in Section 10 of the U.S. Arbitration Act, which provides in pertinent part as follows:

> In any of the following cases the United States court…may make an order vacating the award…:
> 1. where the award was procured by corruption, fraud, or undue means;
> 2. where there was evident partiality or corruption in the arbitrators…;
> 3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing…, or in refusing to hear evidence…or of any other misbehavior by which the rights of any party have been prejudiced; or
> 4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S. Code Section 10

You are also all familiar with the narrow approach which the courts take in reviewing a challenge to an arbitration award. As the Second Circuit described it in Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 581-2 (2d Cir. 1967):

> In such cases the role of the courts is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in Section 10 of the Arbitration Act [citation and footnote omitted]. We have made it quite clear on earlier occasions that it is the function neither of this court nor of the district courts to review the record of the arbitration proceeding for errors of law or fact. [citations and footnote omitted]. It is true that when a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates "evident partiality" on the part of the arbitrators. [citations omitted]. The burden of proof on this issue in the confirmation proceedings in the district court rests upon the party making the claim.

The reason for this approach is clear. It effectuates the parties' agreement to submit their disputes to arbitration and it avoids frustrating the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.

Non-Statutory Grounds:

Non-statutory grounds for vacating an arbitration award were first suggested in Wilko v. Swan, 201 F.2d 439 (2d Cir. 1953), rev'd 346 U.S. 427, 74 S.Ct. 182 (1953), in a case involving claims by a purchaser of securities against brokers for violations of the Securities Act of 1933. In staying the purchaser's suit pending arbitration, the Second Circuit rejected the argument that arbitrators couldn't deal with such claims and that public policy, as expressed in that Act, prohibited referring the claims to arbitration. The court, noting that the margin agreement in question was subject to the Securities Act and that the arbitrators were bound to decide in accordance with the provisions of the Act, observed:

> Failure to do so would, in our opinion, constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act….

Wilko, 201 F.2d at 445.

The Supreme Court disagreed, considering that the limited scope of judicial review of arbitration proceedings could not ensure that the law was being correctly applied. Acknowledging that "it might be true" that the failure of the arbitrators to apply the provisions of the Act would constitute grounds for vacating an arbitration award, as the Second Circuit had stated, the Court concluded that such a failure

> would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

Wilko v. Swan, 346 U.S. 427, 436, 74 S.Ct. 182, 187 (1953) (emphasis added). Overruled on other grounds in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917 (1989).

In Wilko v. Swan the Supreme Court appeared to create a "public policy defense" to the arbitration of statutory claims. However, some 30 years later, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346 (1985), a case involving anti-trust claims under the Sherman Act, the Court reversed course, concluding:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum… Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Mitsubishi, 473 U.S. at 628, 105 S.Ct. at 3354.

In explaining this decision the Court referred to The Bremen v. Zapata Off-Shore Co., 407 U.S. 1,13-14, 92 S.Ct. 1907, 1914-1916 (1972), in which it had recognized that "agreeing in advance to a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting", and stated:

> …we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi, 473 U.S. at 629, 105 S.Ct. at 3355.

Brushing away the argument that international arbitration tribunals might be hostile to the constraints of U.S. anti-trust law, the Court referred to its Wilko v. Swan dictum and noted:

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed…. While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry

> to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.

Mitsubishi, 473 U.S. at 638, 105 S.Ct. at 3359.

In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991) the Supreme Court expanding on Mitsubishi, held that claims under the Age Discrimination In Employment Act were subject to arbitration. Rejecting an argument that judicial review of arbitration awards was too limited, the Court stated that

> "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."

Gilmer, 500 U.S. at 32 n.4, 111 S.Ct. at 1655 n.4 (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232, 107 S.Ct. 2332 (1987)).

The net effect of the public's increased experience with arbitration as a procedure for alternative dispute resolution and the Supreme Court's decisions in cases like Mitsubishi and Gilmer, expanding the application of arbitration to claims arising under public statutes, has been that more and more agreements now contain arbitration clauses. As a result, more and more people are finding that their disputes are subject to arbitration.

In the maritime world it generally is thought that owners and charterers entering into a charter party arbitration agreement know what they are doing. But it is not so clear that the ordinary consumer leasing a car or signing a credit card application or the employee accepting employment with a company has the same level of commercial sophistication. Yet arbitration agreements are now standard parts of car leases, consumer credit agreements and employment agreements. From the ordinary consumer's or employee's point of view, this may have unexpected consequences.

For example, take the case of Boone v. Toyota Motor Credit Corp., 2003 U.S. Dist. LEXIS 5204 (April 2, 2003). Elsie Boone, an African-American woman living in New York City, leased a new Toyota Corolla. She quickly realized that she was going to have problems making the lease payments and attempted to surrender the car, as she believed she was entitled to do under the Spot Instant Delivery Conditions which she signed when taking delivery. However Toyota refused to accept the return of the car. About 6 months later Ms. Boone brought suit in the Southern District of New York against Toyota, alleging that its actions violated the Equal Credit Opportunity Act. Toyota countered with a demand for arbitration under the terms of lease agreement, which contained a broad arbitration agreement. Judge Casey of the Southern District of New York found the claim for violation of the Equal Credit Opportunity Act was within the scope of the agreement and, under the weight of authority in the Second Circuit, such statutory claims were arbitrable. Case dismissed. Presumably this week Ms. Boone is reviewing the procedures of the National Arbitration Forum and JAMS/Endispute, the two alternative arbitration organizations listed in the lease agreement's arbitration clause, and trying to decide whether she wants to go forward with her discrimination claim.

There is increasing public concern about the appropriateness of arbitration of claims under such remedial statutes as the Civil Rights Act of 1964 and 1991, the Age in Discrimination In Employment Act and the Equal Credit Opportunity Act. This has resulted in calls for the expansion of judicial review of arbitration awards in these areas. See, Julian J. Moore, Note: "Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims", 100 Columbia Law Review 1572 (2000).

In the meantime, the courts have formulated a number of non-statutory grounds for overturning arbitration awards. Courts have overturned awards where they (1) are in "manifest disregard of the law", (2) conflict with "public policy", (3) are "arbitrary and capricious", and (4) are "completely irrational". Some examples of the application of these non-statutory grounds are as follows:

(1) **Manifest Disregard of the Law:**

In Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998), cert. denied 526 U.S. 1034 (1999), the widow of an equity investments salesman, Theodore Halligan, appealed from a decision confirming an arbitration under the rules of the National Association of Securities Dealers denying the salesman's claims that his employment

had been terminated in violation of the Age Discrimination In Employment Act. The Second Circuit reversed the decision below on the ground that the NASD arbitrators had manifestly disregarded the law or the evidence or both.

Although acknowledging that, on its own precedents, "manifest disregard" means more than an error or misunderstanding with respect to the law and that, to vacate an award on grounds of manifest disregard the court "must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case", 148 F2d at 202, the court found that Halligan had presented "overwhelming evidence" that Piper's conduct was motivated by age discrimination, that the governing law had been brought to the arbitrators' attention and that the arbitrators had failed to explain their award. See also Sawtelle v. Waddell & Reed, Inc., 754 N.Y.S.2d 264 (1st Dep't. 2003), granting motion to vacate punitive damages award of arbitrators for $25 million on top of compensatory damages of $1.8 million.

(2) **Conflicts With Public Policy:**

In Diapulse Corporation of America v. Carba, Ltd., 626 F.2d 1108 (2d Cir. 1980), Diapulse manufactured an electronic device designed to expedite bone and tissue healing. The device, manufactured in New York, was sold in Europe under an exclusive distributorship agreement with Carba. Diapulse commenced arbitration, contending that Carba was selling a competing device, in violation of the agreement. Arbitrators found in Diapulse's favor and enjoined Carba from selling a competing device (even though the two-year period of the agreement had expired). Carba moved to set aside the permanent injunction. The District Court granted Carba's motion on the ground that the injunction, unlimited in time or geographic scope, was in violation of the public policy of the U.S. against unreasonable restraints of trade and that, as a result, the award was "imperfect in form", justifying modification of the award under 9 U.S. Code Section 11(c). The Second Circuit held that the District Court was not entitled to amend the award under Section 11. However, concluding that "an award may be set aside if it compels the violation of law or is contrary to a well accepted and deep rooted public policy", Diapulse, 626 F.2d at 1110, the court remanded the case to the District Court so that the award could be referred back to the arbitrators for clarification of the injunction.

See also Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841 (1st Cir. 1997), refusing, on public policy grounds, to enforce labor arbitrator's award reinstating driver of petroleum tractor-trailer who failed a drug test.

(3) **Arbitrary and Capricious:**

In Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992), cert. denied, 507 U.S. 1045 (1993), a Florida investor sought damages from a New York securities broker for violation of Florida securities laws. Florida securities laws provided mandatory damages for violations of the type alleged. A panel of National Association of Securities Dealers, Inc. arbitrators concluded that the broker was negligent in handling the account but that no damages should be awarded. The Eleventh Circuit held that, as the arbitrators had not explained why damages should not be awarded, the award was an arbitrary or capricious denial of damages with no factual or legal basis and would not be enforced. The District Court's judgement, awarding damages on the basis of the arbitrators' finding of negligence, was affirmed.

(4) **Completely Irrational:**

In Spear, Leeds & Kellogg v. Bullseye Securities, Inc., 291 A.D.2d 255, 738 N.Y.S.2d 27 (1st Dep't. 2002), Bullseye was a securities trading firm owned by Joseph and Eva Roffler. Spear, Leeds & Kellogg provided securities clearing services for Bullseye. Bullseye claimed that Schettino, the managing director or Spear, Leeds & Kellogg, engaged in unauthorized trading, causing it losses. A panel of NASD arbitrators denied all claims against the managing director and held that Joseph and Eva Roffler were entitled to recover $1,250,000 in damages from Spear, Leads & Kellogg. The Appellate Division held that the award must be set aside as irrational:

> …individual claimants, as a matter of law, cannot assert a cause of

> action to recover for wrongdoing done to a corporation [citations omitted]. Thus, that aspect of the award, rendered without explanation, was properly vacated as *"manifest disregard" of the law [citations omitted]. .... Finally, the arbitration award is inherently inconsistent. The gravamen of appellants' claim against SLK was predicated upon Schettino's conduct. However, the arbitrators, again without explanation, specifically denied all of appellants' numerous claims against Schettino. Where, as here, there is no independent basis for finding SLK solely liable for over a million dollars in damages, apart from one grounded upon the negligence of its employee, the award must be set aside as irrational.*

Spear, Leeds, 291 A.D.2d at 256, 738 N.Y.S.2d at 29.

CONCLUSIONS:

As you will have noted, none of these cases are maritime cases and, as maritime arbitrators, it perhaps is unlikely that you will ever be faced with claims under the Age Discrimination In Employment Act and other such remedial statutes. However, you should remember that the Carriage of Goods By Sea Act, 1936, is also a "remedial statute" which sets out governing principle respecting the carriage of goods, including rules for burden of proof. In at least one arbitration involving COGSA, The JO ELM, S.M.A. 3617 (Arb. at N.Y. 2000) (Arnold, Connell, Mordhorst) the Southern District of New York remanded the award to the arbitrators on the ground that it was ambiguous as to whether the cargo was in good order and condition at the time of loading into the vessel. After the arbitrators responded, explaining their decision, the court confirmed the award, denying charterers' claim that the arbitrators had manifestly disregarded the requirements of COGSA. E.I. Dupont de Nemours and Company v. Jo Tankers, 172 F. Supp. 2d 405 (S.D.N.Y. 2001). So "manifest disregard" is a principle to keep in mind.

Also, it probably is better that, as arbitrators, you explain your decision in a written award, as is the practice of the Society of Maritime Arbitrators, rather than merely providing a decision without reasons. In several of the decisions discussed above, it was the lack of explanations which caused problems for enforcement of the awards. While a written award, in some circumstances, may expose you to charges of arbitrariness or irrationality, the deference that courts naturally give to arbitration awards probably will enable your awards to be confirmed.

Finally, pay attention to counsel. If the relief requested by one party raises issues of public policy or suggests other problems, the other party's attorney should be alert to point this out. After all, it's in everyone's interest that the arbitrators "get it right."

(Mr. Nourse, a partner at Nourse & Bowles, LLP, a New York maritime law firm, delivered these remarks at the April 16, 2003 SMA luncheon.)

Seaman's Failure To Disclose Prior Injuries Forfeits Right To Maintenance & Cure Benefits.
By James P. Nader & Joseph A. Poblick

Maintenance and Cure is the obligation of a ship owner who employs seamen to care for them in the event that they are injured or become ill during their service to the vessel. This duty can be traced back to medieval maritime law. What is maintenance and cure? Maintenance is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of his vessel. Cure is the right to necessary medical services. The duty of the Jones Act employer to pay maintenance and cure is triggered when the seaman falls ill or is injured regardless of fault. A claim for maintenance and cure may be asserted by anyone who is a Jones Act seaman. To be eligible the seaman must be acting in the service of his vessel at the time of the illness or injury. "In the service of the vessel" is liberally construed to include the period of time that the seaman is generally answerable to the call of duty. The injury may occur on shore or during recreation, and may even involve some misconduct on the part of the seaman. If the seaman if off duty and not answerable to the call of his employer, recovery will be denied.

Payment of maintenance and cure is to continue until the seaman reaches the point of "maximum cure." The duty covers the payment of a subsistence allowance and reimbursement for medical expenses. It is the duty of the employer to take reasonable steps to insure that the seaman receives proper care and treatment. The U.S. Court of Appeal for the Fifth Circuit has noted that over the last century "maintenance and cure," which originally had the ship owner pay only for room and board comparable to what the seaman had at sea, has grown to cover his actual or at least reasonable expenses incurred while recovering from his injury. A seaman has reached maximum cure if his condition is not expected to improve further with additional treatment, regardless of whether or not he remains disabled and unable to return to work as a seaman. A seaman is obligated to mitigate his medical expenses; however the seaman's employer has the burden of proving that the extent of medical costs for treatment by a seaman has been excessive or unnecessary. At the point of maximum cure, the vessel and her owners are no longer responsible for maintenance or cure.

The employer's duty to pay for maintenance and cure exists without regard to fault. Negligence on the part of the seamen will not prevent his recovery of maintenance and cure. A case out of New York allowed a seaman to recover for injuries sustained when he jumped out of a window of a room occupied by a prostitute. It may also be awarded even though the seaman has suffered from a preexisting condition, such as a heart condition or a prior illness that reoccurs during the seaman's employment. This right may be forfeited if he fails to disclose or misrepresents material facts when asked in an employment application or interview. Material facts would be those that an employer considers to be of key importance in formulating its decision whether or not to hire someone.

The forfeiture of maintenance and cure is an affirmative defense and requires the employer to establish three things. First, the seaman must have intentionally misrepresented or concealed information concerning a prior injury or condition. Second, the information must have been material to the employer's decision to hire the seaman. And, third, there must be a connection between the non-disclosed injury and the condition complained of in the lawsuit at hand. One case has held that where the seaman is required to submit to a pre-hiring medical exam or interviews and he intentionally misrepresents or conceals material medical facts, and it is clear that the employer desired disclosure, the seaman will forfeit his right to maintenance and cure. A key factor to remember is that the concealment or misrepresentation must be material to the employer's decision to hire the seaman and must be connected to the injury sustained.

In a recent Louisiana case, a seaman sustained an injury to his back and shoulder while working as a deckhand aboard a tug which was moving barges in the Mississippi River. The deckhand was taken ashore and treated at a local hospital for his injuries. He subsequently contacted his employer, McKinney Towing, and was sent to a medical clinic for further treatment. The deckhand then filed suit against McKinney Towing seeking, among other damages, maintenance and cure.

The deckhand had originally worked for McKinney Towing until 1989 when he left to seek other employment and took a position with C & D Towing working the grain elevator. At the same time he was also employed by Progressive Barge Line as a deckhand. In 1990 the deckhand left C & D Towing and Progressive after pulling a muscle in his right shoulder while lifting wires on a rigging. Next, he went to work for DRD Towing. In 1992, while working for DRD Towing he slipped and fell on his back injuring his wrist, back and neck. As a result of this injury, plaintiff saw Dr. Kenneth Adatto who performed surgery on the broken wrist and treated the ruptured discs in his back. Dr. Adatto continued to treat the plaintiff for his injuries until the end of 1994.

In 1995 plaintiff was rehired by McKinney Towing as a deckhand. After several months the deckhand was injured while working on a tug. After receiving treatment from the hospital, plaintiff again went to see Dr. Adatto for this "new" injury. During the trial of this case, the medical records of the deckhand from the 1992 injury were introduced into

evidence and indicated that the deckhand suffered from total permanent spinal disability and needed back surgery. During the trial of the present case, Dr. Adatto testified that in 1993 he had placed restrictions on the type of work that the deckhand could perform.

The deckhand testified that he was out of work from the time of the accident in 1992 until he was rehired by McKinney Towing. During that time plaintiff had received $112,500 in maintenance and cure from DRD Towing. In his employment application he failed to list DRD Towing as a former employer. A representative for McKinney Towing testified that it was standard procedure to get references from former employers and that if the deckhand would have listed the company, they would have contacted it. Furthermore, during the interview of the deckhand, he failed to mention anything about his back injury. The representative for McKinney Towing further testified that they would not have hired the plaintiff for the position of deckhand if the back injury would have been disclosed. The deckhand admitted that he lied to McKinney on the application and to the doctor conducting the pre-employment physical, because he knew that they would not hire him as a deckhand if they knew about his back problems. Ultimately Dr. Adatto testified that the injury plaintiff suffered in 1995 was an aggravation of a preexisting condition caused by the 1992 accident. The court also found that the current injury was related to the injury that the seaman concealed from his employer. Therefore, the seaman's right to maintenance and cure was denied.

There is a general theme among the cases where maintenance and cure have been denied. The courts will look for a history of prior injury or illness, such as ruptured discs, surgeries or persistent medical conditions which would cause the seaman to be unfit for the position for which he is applying. There also needs to be some sort of pre-hiring medical examination or questionnaire during the interview process which solicits information regarding past medical history. The seaman must fraudulently conceal or misrepresent information of the past injury or illness to the employer and/or medical examiner. Generally, the reason for the concealment is irrelevant, as long as the concealment or misrepresentation is material to the employer's decision whether or not to hire the seaman. And finally, the injury for which he is seeking maintenance and cure must be related to the injury or illness that was concealed from the employer. However, if the employer later discovers that the seaman's condition precluded him from performing his duties and still kept him on, then the employer is obligated to pay maintenance and cure. Thoroughness in the application and hiring process is essential to recruiting healthy employees. It is important to ask the right questions and follow up by checking references and contacting former employers.

James Nader is a partner and Joseph A. Poblick is an associate with the law firm of Lobman, Carnahan, Batt, Angelle & Nader in New Orleans, La. Mr. Nader's trial practice over the last eighteen years has included Admiralty and Maritime Law, an area in which he is an adjunct professor at Tulane University. Mr. Poblick's primary practice areas include admiralty, maritime law, and insurance defense. For more information on the firm, please see it's Website at www.lcba-law.com, or contact them at 400 Poydras St., Suite 2300, New Orleans, LA 70130, phone (504) 586-9292.**

**This article is for general information and educational purposes only, and should not be construed as legal advice. The authors are available to discuss any specific questions or concerns regarding any issues related to this article.

Thanks to the publishers of MarineNews for their kind permission to reprint this article which originally appeared in their April 28, 2003 edition.

RECENT AWARD:

Ibar Ltd v. ABS

The claimants were the owners of a fibreglass motor yacht. The vessel became a total loss by fire, off the coast of Palma de Mallorca, Spain, in August 1990, within six weeks of her commencing cruising upon completion of her construction by an Italian shipyard. The Owners claimed against her classification society for the loss of the vessel, on the grounds that, as a result of the

fault and negligence of the society, a fire that began in the engine room of the yacht was not detected sufficiently early in the absence of a fire detection device in the unmanned engine room, as a result of which the fire could not be extinguished by the fixed fire-fighting system with which the yacht was equipped. The panel dismissed the claim, finding that the claimant had failed to prove by a preponderance of the evidence, any fault or negligence on the part of the classification society that had proximately caused the loss of the yacht.

Facts

Supplementing the facts given in the above summary, the owners' claim amounted to GP£2.491 million and was founded on allegations that the classification society ('ABS') had failed in its duties to the owners by not insisting on the installation of a fire detection system in the yacht's engine room and by improperly approving the fixed fire extinguishing system (the 'FFES') that was installed on board, which, in the owners' submission, was subject to a number of critical defects. These included allegations that ABS had failed to ensure that the engine room could be rendered airtight to ensure the effectiveness of the CO_2 system and that the automatic closure of the fuel supply to the engines included in the FFES would not shut the engines down quickly enough to enable the CO_2 injections to be effective. Owners further alleged that the engine push button stop systems accepted by ABS should have been configured to stop the engines when de-activated, rather than when activated.

The Award

The panel accepted that a classification agreement, such as that between the owners and ABS in this case, was a maritime contract which would be governed by the general maritime law as applied in New York, the agreed place of arbitration under the contract. Any fault or neglect would accordingly constitute a maritime tort, and be subject to the same law. The standard of care to be applied to ABS' technical effort in this case was the same standard generally applicable to naval architects and marine engineers and similar technical experts, namely that of the ordinary and reasonable skill usually exercised by, in this case, classification society surveyors.

But the panel then drew the important distinction that class societies and their surveyors are not chargeable with duties corresponding to those of the owners' design agents, naval architects and marine engineers, who select and adapt and adjust for all the factors in producing a final design. The class society's surveyor's role is narrower. He inspects and observes the design that is presented to him, probably first at the plan approval level and then performs two duties, as stated in the case of Great American Insurance Company v. Bureau Veritas, affirmed by the Court of Appeals for the Second Circuit in 1973. These are, firstly, to survey and classify vessels in accordance with rules and standards promulgated by the society for that purpose and secondly, to use due care in detecting defects in the ships it surveys and notifying them to the owner. The panel held that the class society and its surveyors are not responsible for insisting that all design decisions result in the best choice for this or that purpose. This is true so long as the trade-offs inherent in design do not go so far as to violate existing rules or regulations or result in an unsafe or seriously defective condition. Nor are class societies or their surveyors under any duty to recommend additional optional safety features not required by their rules or the regulatory authorities, in the absence of serious, dangerous defects. In other words, they are not overall safety/seaworthiness guarantors.

The panel concluded that for them to find ABS liable in the instant case in contract or tort, there would have to be direct evidence of an unreasonable failure on its part in line with the standards of skill normally exercised by class society personnel, to have required the correction of a specific defect in the yacht and that such a defect, or a combination of similar such defects, was a substantial factor in causing the fire to run out of control and the yacht to sink. If a class society fails to advise an owner of a condition not readily apparent to such owner, which it perceives or should perceive creates an unsafe condition and should be corrected, with the result that the vessel is damaged

or lost, the class society should respond in damages. But there needs to be direct evidence connecting that negligence causally to the loss or damage sustained.

The panel held that the owners failed to establish such a state of affairs in this case. The panel did not know whether, if the fire did start in the engine room, as, on balance it was prepared to find, it would have been extinguished but for one or more of the alleged defects and shortcomings claimed to exist on board the yacht. The panel said that it had "no idea as to what contribution, if any, any of these conditions made to the fact that the fire burned out of control and sank the [yacht]." The panel found that, given the volume of air/CO_2 used by the engines while running, the failure to stop the engines [by reason of the unexplained malfunction of the stop buttons on the flying bridge and in the wheelhouse] nullified any realistic possibility that the CO_2 system in the engine room could extinguish the fire, which the panel found, on the evidence, to be in an advanced stage and outside the engine room when the system was activated.

The panel accepted that there may have been some mistakes or misjudgments in the totality of the work done by ABS for the owners, but these had not been shown to cause the loss of the yacht. As regards the absence of a fire detection system in the engine room, the panel held that, as of 1990, the relevant rules of ABS did not require pleasure boats to have engine room fire alarms. Moreover, the owners had not established that the presence of an alarm in the engine room would have enabled the fire to be extinguished. Thus the absence of a fire alarm had not been proved to be a proximate cause of the loss. The panel concluded, "These fibreglass laminates are so extremely flammable, so easily ignited and a fire burning them so very difficult to extinguish that the likelihood of a detection system providing an early enough warning to enable such a fire to be controlled is highly conjectural. These same conditions make successful extinguishment of a fibreglass fire, even if confined to the engine room, by use of a CO_2 FFES…. similarly conjectural." The panel held that ABS never warranted that the FFES would extinguish any engine room fire.

As for the FFES itself, owners were correct in their assertion [which ABS had contested] that, at the relevant time, there was an ABS requirement that a FFES be installed in the engine room, as was done here. But since there was such a system fitted, the apparent misinterpretation of its own rules by ABS could not engender liability but, of course, its testing and evaluation of the FFES must have been up to standard. The panel did not consider the CO_2 containment features of the FFES to constitute a defect to which ABS should have objected, particularly since the system presupposed stopped engines and little, if any, forward speed.

Claimants had further criticized ABS for the positioning of the remote-activated fuel turn-off valves in the engine room, claiming that these were placed at a considerable distance from the engines, and the fuel tank side (rather than the engine side) of two large cylindrical filters serving each engine. As a result, even after the valves were activated, there would have been sufficient fuel left in the lines and filters to keep the engines running sufficiently long to dissipate all of the injected CO_2. The tribunal, however, felt that it could not hold ABS liable for the loss without better proof of the defective location of the turn-off valves and without proof that the fire was confined to the engine room at the relevant times.

In denying all of the Claimants' claims, the tribunal concluded with the following comments: "Claimant has launched an encyclopedic attack on ABS' performance on the [vessel], proceeding with monumental industry and perseverance at every stage, but this massive, extremely thorough effort has strayed from normal workaday realities. Claimant is seeking to transform ABS's role from classification society to overall safety guarantor when it asks us to hold ABS liable for the consequences of this fire which originated and flourished under circumstances unknown…..ABS was not owner's supervising engineer or independent marine surveyor and did not become such because Claimant did not engage such an engineer or surveyor. Nor [as the jurisprudence makes clear] is ABS a safety guarantor."
[See **YACHT STANY -SMA 3760**]

(With thanks for the above summary from Mr. David Martin-Clark. His CaseNotes may be activated at www.onlinedmc.co.uk .)

ICMA XV

The London Maritime Arbitrators Association is delighted to announce the Fifteenth International Congress of Maritime Arbitrators, which will take place at the Millennium Mayfair Hotel, Grosvenor Square, London between 26th and 30th April, 2004.

This renowned Congress, first held in 1975, provides delegates with a unique opportunity to meet their international colleagues and to learn, teach and exchange views on maritime arbitration topics of the day in the context of a program which is shaped by the delegates through the papers they produce. It is the organizers' aim to ensure that every contributor of a paper has the opportunity to speak to it.

The Congress will be opened by Lord Bingham of Cornhill, the Senior Law Lord. The Lord Mayor of London hosts a reception at his official residence, the Mansion House, on the first evening; and the gala dinner at the magnificent Guildhall on the Thursday will be addressed by Lord Phillips of Worth Matravers, the Master of the Rolls. A river trip to Greenwich is planned for the Wednesday, and of course there will be a full program for accompanying persons.

The registration fee is expected to be £895 + VAT. Details of all aspects of the Congress are posted on the website: **www.icmaxv.org** as they become available.

CALL FOR PAPERS

Papers for ICMA XV are now invited. The papers at past congresses have covered issues concerning all aspects of maritime arbitration, from substantive issues to hearing procedures and appeal processes.

The Topics and Agenda Committee has put together the following list of topics to encourage participation from as large a group of attendees as possible. Attendees are encouraged to use the list as a starting point when thinking about papers they might contribute. Papers on these and other pertinent arbitration issues are encouraged. Plenary and parallel sessions will be arranged to ensure ample opportunity for presentation, comment and discussion of all issues.

To assist the preparation of the Congress program those preparing papers are asked first to prepare an outline (of no more than 250 words) which is to be submitted in advance, not later than 31st October, 2003. Final papers are to be submitted by 15th January, 2004. Submission of outlines can be made via email to the Topics and Agenda Committee Chair's email address, by facsimile or letter (contact details below). Notification of acceptance will be sent by email or facsimile to the submitting authors.

Papers must be prepared and submitted in electronic form with use of a word processing program as it is anticipated that delegates will be provided with a CD-ROM containing all papers. If electronic form is not possible, authors must present a camera-ready document. Layout details will be provided on notification of acceptance.

The Chair of the Topics and Agenda Committee is Dr. Austin L. Dooley of the United States. His contact details are:

Via email: dseawx@ix.netcom.com

Via facsimile: Dr. Austin L. Dooley
01-718-885-0964

Via mail:
ICMA Papers Committee
Attention: Dr. Austin L. Dooley
C/O Dooley SeaWeather Analysis, Inc.
P.O. Box 63
City Island, Bronx, New York 10464

POSSIBLE TOPICS

Arbitration and Management of Arbitrations
Powers of arbitrators
Court review of awards
Discovery/disclosure
Security in aid of awards
Dismissal for want of prosecution
Security for costs

Vacatur of awards
Enforcement of foreign arbitral awards
Shortened procedures
Case management
Ethics
Forum selection clauses
Escrow accounts
Administrative organizations
Awarding costs and fees
Rules of evidence
Changes and innovations under the Woolf Reforms
Technology in arbitration

Mediation and Conciliation
Court directed
Non-binding/binding

Bills of Lading
Claused
Electronic
Misrepresentation

Sales and Supply Contracts

Vessel/Port Security, War Risk and Terrorism
Cargo and port security certifications duties and costs of charterers and owners

Voyage/Time Charter Parties
Breach of contract
Damages
Consequential damages; Foreseeability/remoteness
Mitigation
"Subject details"
Construction of contracts
Charter Party typewritten clauses
Warranties (performance, condition, position, etc.)
Owners' duty to maintain
"Arrived ship"
Due diligence
Arrest
Attachment
Time bars
Withdrawal due to late hire payment
Illegitimate or invalid last voyage

Marine Technical/Vessel Management
Fuel testing standards and certification
Cargo surveying standards
Vetting practices
Computerization of vessel operations
The use of expert evidence and expert's immunity
The single and joint expert

Insurance/Underwriting
Hull and Machinery
P&I / FD&D
War Risks

Miscellaneous
National arbitration rules and procedures
Dangerous goods
Pollution

TIME CHARTERS - Fifth Edition
By: Michael Wilford, Terence Coghlin and John D. Kimball

We have recently been advised that the Lloyd's Shipping Law Library are offering members of the Society of Maritime Arbitrators, Inc. a ten percent discount for this newest edition, published in June, 2003. This highly anticipated new release includes many significant new cases, from the UK and US, as well as incorporating important recent legislative developments including:

* Fully revised and updated to include developments since the last edition published in 1995;
* Recognized as the standard and most thorough reference work in its field;
* Written in a readable and convenient format making it an extremely accessible reference work;
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To order this at the discounted price of USD464 (normal price USD502) contact and quote special offer for SMA members.

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40TH ANNUAL MEETING

At the 40th Annual Meeting of the SMA on May 13, 2003, the membership elected David W. Martowski and Klaus C.J. Mordhorst as President and Vice President, respectively. Additionally, Katherine A. Pappas, Austin A. Dooley, Lucienne C. Bulow and R. Stanley Kleppe were elected to serve two-year terms on the Board of Governors.

The President has announced the following appointments: Austin L. Dooley - Treasurer and Michael A. van Gelder - Secretary.

SMA's Board of Governors for 2003/2004 is as follows (with their alternates in parentheses):

David W. Martowski (-)
Manfred W. Arnold* (George Hearn)
Jack Berg* (James J. Warfield)
Lucienne C. Bulow (Soren Wolmar)
Austin L. Dooley (Charles L. Measter)
Henry Engelbrecht (Donald B. Frost)
Svend H. Hansen, Jr. (Nigel Hawkins)
R. Stanley Kleppe (Eugene C. Spitz)
Klaus C.J. Mordhorst (Donald J. Szostak)
Katherine A. Pappas (John F. Ring, Jr.)
A.J. Siciliano (Thomas F. Fox)
Michael A. van Gelder* (Charles J. Aitcheson)

*By appointment of the President

The following Committee Chairs were appointed/reappointed:

Arbitrator - D.J. Szostak
Award Service - D. Letteney
By-Laws and Rules - L. Bulow
Education - M. van Gelder
Liaison - A.J. Siciliano
Luncheon - D. Frost
Membership - S. Kleppe
Professional Conduct - K. Mordhorst
Salvage - T. Fox
Seminars & Conventions - A. Dooley
Technology - D. J. Szostak
Ad Hoc Committees
Index & Digest - D.W. Martowski
Marketing & Promotion - Svend Hansen
SMA 40th Anniversary - K. Mordhorst
Small Craft - W. Wheeler

IN MEMORIAM

Joseph J. Homicki, Jr.

It is with deep sorrow that we report the passing of Joseph J. Homicki, Jr., a Stamford, CT resident, who died Sunday, July 6, 2003 at the Richard L. Rosenthal Hospice Residence in Stamford, CT at the age of 53. He was the Vice President of Operations and General Counsel for M.T. Maritime Management Corp. and a member of the Society of Maritime Arbitrators from April, 1991 until he resigned earlier this year for reasons of health. Memorial donations may be made to the Richard L. Rosenthal Hospice Residence, Shelburne Road at West Broad Street, Stamford, CT 06902.

QUANDARY FOR THE QUARTER

Just as we hear talk on both sides of the Atlantic about a falling-off in arbitration cases, an observation was mailed to our president that bodes well for arbitration's future (given the human condition and fortified by Mr. Franklin's judgment regarding the root cause of dispute resolution):

Dear David

I am receiving, periodically, through mail, THE ARBITRATOR. I always find the articles very interesting and I enjoy them a lot. Regarding your April/2003 edition I was particularly taken with the article, SUBJECT DETAILS. I am continually astonished how people do business making offers and sometimes accepting them without considering that the terms are not very clear. I am amazed how experienced people accomplish their business without foreseeing that open terms may lead to a terrible conclusion. In such circumstances, you arbitrators are very lucky, because, while people are doing contracts with conflicting terms, you will be kept busy!

I hope you like my modest comment.

Best Regards

Paulo Fernandes, Operations Manager, Petrobras

QUONDAM QUISLINGS FOR THE QUARTER?

Since William Shakespeare's time, at least, it has been a common tendency to blame the lawyers for the disputatiousness of society, but Mr. Fernandes has clapped on the culprits, as had the dearly departed Benjamin Franklin:

A Lawyer being sick and extreme ill
Was moved by his Friends to make his Will,
Which soon he did, gave all the Wealth he had
To frantic Persons, lunatick and mad;
And to his Friends this Reason did reveal
(That they might see with Equity he'd deal):
From Madmen's Hands I did my Wealth receive,
Therefore that Wealth to Madmen's Hands I leave.
[from Poor Richard's Almanack July 1734]

Quos deus vult perdere prius dementat?
(Author unknown.)

For THE ARBITRATOR

Donald J. Szostak
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PRESIDENT'S CORNER

With spring approaching our Society is entering its election season, to be consummated at the Annual Meeting in May for members only. Meanwhile, we continue to provide a forum for the dissemination of ideas and information at our monthly luncheon meetings. In this issue we present two summaries of luncheon speeches heard by our members and guests in February and March. The luncheons are an important aspect of the Society's educational effort and I quote Michael Marks Cohen from his introductory remarks at the February luncheon:

> "I regard these luncheons as second in importance only to the Society's efforts in support of *ad hoc* maritime arbitrations conducted by its members. The luncheons are critical to making arbitrators and the bar known to each other. Young lawyers in particular meet and take the measure of arbitrators whose names they will recommend to clients. Young lawyers, too, get a chance to network with their colleagues in other firms with whom they will grow up in the practice of admiralty law. For the rest of us, especially if our appearances in court or arbitration hearings become less frequent as we get older, the luncheons are a gathering place to meet friends of long standing. I treasure these luncheons and congratulate the SMA for providing such a valuable, additional service to the industry."

I could not have stated the intention, the purpose or the effect more succinctly. To all who receive this quarterly newsletter and who periodically find themselves in New York, I encourage you to check our website for the luncheon schedule. If at all possible, try to attend. You will be most welcome and I promise a great meal along with informative presentations and active discussion.

Periodically we also provide seminars involving arbitrators and MLA members for the purpose of enhancing understanding and cultivating ideas for assisting in the general educational development of arbitrators and the bar. Such was the case when Jim Textor of Cichanowicz, Callan, Keane, Vengrow & Textor, LLP discussed proposed procedures for expediting arbitration. He reviewed the following in detail: 1) Request for Admissions

similar to FRCP Rule 36; 2) Offers of Proof; 3) Stipulations; 4) Direct examination by written affidavit; and 5) Sealed Offers of Judgment similar to FRCP Rule 68. Those who weren't there missed some informative discussion.

I am pleased to note that the Society's merits continue to be expounded globally, the latest in an article by SMA Past President Manfred W. Arnold in the March 2003, No. 46, *WaveLength*, the bulletin of The Japan Shipping Exchange, Inc. If you aren't on their mailing list you can access the periodical by going to *http://www.jseinc.org./index_e.htm* .

Finally, the Society will be celebrating the 40th anniversary of its founding with a gala party to be held in New York City in the Fall with a date to be advised. More will follow on this in the coming months.

David W. Martowski

SUBJECT DETAILS

By Michael Marks Cohen, Esq.

At common law in the mid-Twentieth Century it was assumed that parties did not intend to be bound by a contract if any terms were left open, for example, a charter party where parties did not agree on the freight rate or the cargo quantity. But it is not against public policy to have a binding contract with open terms.

Parties must indicate in some way if they want to be bound even though some terms may still be open. For example, assume that in charter negotiations, parties agree to incorporate York-Antwerp Rules for General Average, but forget to discuss whether the 1974 or 1994 versions of the Rules apply. Looking at the negotiations as a whole, a court could conclude that the parties intended to be bound to the charter notwithstanding the open term.

There is a distinction between a contract with open terms and a preliminary agreement. Parties could be negotiating a charter with many open terms and agree that the charter was not yet binding, but they might commit themselves to continue negotiations in good faith in an effort to complete them. Lawyers would say this is an agreement to agree. In England, such an agreement is simply unenforceable. But here such arrangements can sometimes be binding as so-called preliminary agreements. The problem with them is damages. There never was a binding charter, just a preliminary agreement. If a charterer runs away from a preliminary agreement, should he be liable for damages under a charter which might never have been agreed? Or should he instead be liable only for the wasteful delay and expenses incurred by the owner in finding new employment for the ship?

The term "subject" in a charter party is a buzz word introducing a condition. There are essentially two types of conditions. A condition "precedent" is an event which must occur before there will be a binding contract, e.g. "subject stem." A condition "subsequent" presupposes that there is a binding contract, but if the event occurs, the contract will be terminated early, e.g. war risk clauses which provide that if war breaks out between two members of the U.N. Security Council, the charter comes to an end.

Under a decision named the *JUNIOR K,* in England and virtually everywhere except here, if a contract is subject to later agreement about "details" there is a condition precedent and the contract is not binding until all details have been agreed. As previously noted. If some details are never agreed because, for example, they were overlooked or they were deliberately left open, even in England, there can be a binding charter party if the parties have somehow indicated that they didn't intend the open terms to stand in the way.

An advantage of the English position is that when charters are fixed subject details, everyone generally knows where they stand - there is no charter - either party is free to walk away. This is good for trade in a fast moving market. But it can be unjust. Brokers are often the most outspoken because they may have invested large amounts of time and money in a project, only to see a fixture subject details, and their hopes for large commissions, evaporate when negotiations suddenly break off because one party or the other got a better

deal elsewhere. BIMCO denounces such conduct as unprofessional.

Even those who walk away can at times appear ashamed of themselves, and in an effort to put the blame on the other side, they announce an impossibly short deadline for agreement on details. In effect they are proposing to convert the negotiations into a short preliminary agreement. In rare cases, where this has happened to clients of mine who really need to keep the fixture, I tell them to go back immediately accepting all the details proposed by the party who is threatening to walk. To be sure, my clients may thereby end up with some details they don't like, but they are pretty certain to get the ship and the unfortunate details will not be difficult to live with. Remember, the main terms have been agreed and courts in England and the U.S. in this type of case will not permit an agreed main term to be changed, or a detail to be proposed which in reality is a main term.

Starting in the 1970's, judges in the U.S. heard a number of cases involving shipping enterprises which had walked away from a sub details fixture. They treated whether the parties intended there to be a binding charter as a factual issue. At trial, the court was informed that charters on printed forms were fixed in two stages - main terms and details - and that filling in the blanks in the form did not open up the whole earlier negotiations. Indeed in the *Great Circle* case, the court was advised that when a ship was fixed subject details on a printed form, if the parties failed to discuss a specific term in the printed form, they would be taken as having agreed to that term.

This was all true, but the court was never told, and clearly did not understand that if a party gave notice of an objection to a specific term in the printed form, the term was not part of the charter. The judge concluded instead that if one party liked a term in the printed form and the other party did not, they were both bound to the details in the printed form. In short, under the decision in *Great Circle*, a fixture subject details was not a contract with open terms at all. The fixture was a fully completed contract as provided in the printed form unless the parties later agreed to change them.

The *Great Circle* case introduced a gigantic schism into chartering - and later into ship sales. If suit to compel arbitration went forward in London in a subject details case, the suit would fail. If such a suit were brought in the U.S., arbitration might well be ordered even if the charter party called for arbitral proceedings in London.

The *BIN HE* was just such a case. A Chinese owner fixed a ship with an American charterer through American brokers on a printed form providing for arbitration in London. The ship had several subjects including subject satisfactory inspection and subject details. There was never any negotiation of the details because the parties were waiting to see if the other subjects would be lifted. One of the brokers passed on information that the surveyors had not been happy with the ship. The owner understood this information to mean that the inspection subject would not be lifted and actually sold the ship elsewhere. The charterer protested that what the owner had been told by the broker had not originated with the charterer who felt the inspection was satisfactory and it lifted the inspection subject. When the owner objected that it was too late, the charterer demanded arbitration.

I should point out that in one of the cases before *Great Circle* was decided, an argument had been made that if the printed form contained an arbitration clause, the court should sever the clause and treat it as a separate agreement to arbitrate, thereby sending the parties to arbitrate the issue before shipping people of whether a fixture subject details was binding. But the court did not accept the point and decided itself that the fixture was binding. In subsequent cases occasionally parties would specially agree to send the issue to arbitration. Each time experienced SMA arbitrators found there was no fixture. [SMA No. 3208 (1995); SMA No. 1924 (1983)]

In the *BIN HE*, the owner proposed to arbitrate in London whether or not there was a binding charter. The parties negotiated toward agreeing on a special ad hoc arbitration panel, but at the last minute, the charterer walked away from this side deal, and sued to compel arbitration in London under the charter, asking the court to treat the fixture

with all of its subjects as binding. The trial judge ruled that by fixing sub details on a printed form, the parties agreed to arbitrate in London as provided in the printed form. *Sua sponte* - i.e. not argued by counsel - he went on to hold that it wasn't necessary for him to decide whether the other subjects had been satisfied. He left those issues for the arbitrators.

On appeal the owner argued for uniformity. The rest of the world was not going to change. *Great Circle* was at odds with the *JUNIOR K* and should be overruled. Three years later the Second Circuit affirmed, deciding all of the issues except subject details. The panel noted that *Great Circle* was "unpopular" but said it had no power to overrule a precedent, which could be done only by an *en banc* court of 12 judges.

The owner requested an *en banc* rehearing. The court asked several organizations, including the SMA, for their views. The SMA urged the court to reconsider *Great Circle*. But after another year and a half, the Second Circuit, without explanation, declined to convene the 12-judge court. The sub details schism between London and New York persists.

(Mr. Cohen, a partner at Nicoletti Horning Campise Sweeney & Paige, a New York maritime law firm, delivered an expanded version of these remarks at the February, 2003 SMA luncheon.)

SERVICE CONTRACTS A WAY TO AVOID SKY REEFER

By Paul M. Keane, Esq.

The subject of my little talk today is service contracts, their importance in the liner trades and, of specific interest to the SMA, the importance of arbitration to resolve conflicts between carriers and shippers in regard to service contracts and the blunting of the effects of SKY REEFER in the Liner Trade.

In the event that there is anyone in the audience today who is not fully familiar with what a service contract is, it is basically a long term contract of affreightment pursuant to which a shipper agrees to ship a specific volume of containerized cargo across a set period of time with a specific carrier and that carrier in return offers the shipper a more attractive rate than that which would be appearing in the carrier's tariff.

% of Cargo Moving Via Service Contract

The first question the SMA members here today may ask is "what relevance do service contracts have to the SMA?" The fact of the matter is that 90% of the containerized cargoes moving in the Transpacific Trade and about 80-85% of the containerized liner traffic moving in the Atlantic Trade are moving via service contracts. That means on average 85-90% of all liner cargoes moving in the major trade lanes to and from the United States are being shipped pursuant to service contracts and those contracts each contain law and jurisdiction clauses most of which specify litigation or arbitration in the United States. Since there are literally thousands and thousands of such contracts, the majority of which specify some form of arbitration, that should be reason enough for the SMA to have an interest in service contracts.

No More Common Carriage

Another factor which is significant to note is the effect that service contracts have had on the concept of common carriage. While the FMC retains the façade of supervising common carriage, service contracts as drafted after the Ocean Shipping Reform Act of 1998 (which I will hereinafter refer to as OSRA) have virtually eliminated common carriage standards in the liner trade. In effect, common carriage in regard to the liner trades is dead.

What happened to destroy common carriage? Prior to OSRA, service contracts were completely available for public review under the Shipping Act of 1984 and similarly situated shippers had the right to "me too" an attractive service contract. What this means is that any competing shipper could basically force the carrier to give him the same contract. The public notice of the rates in the service contracts and the right to "me too" kept the illusion of common carriage alive.

In 1998, Congress passed OSRA which completely destroyed most semblances of common carriage in regard to service contracts. Under OSRA, there was no public filing in regard to the rates, service commitments, liquidated damages and other negotiated terms. All that had to be filed in the essential terms ---- which is the only publication available to the public ---- were the origin and destination port ranges, the commodities involved, the minimum volume to be shipped and the duration of the agreement. All other provisions in the service contract were confidential and not available to public scrutiny. What this meant was that competing shippers and/or NVOCCs would not know what the market rate was for specific commodities being shipped under service contracts because that information would not be publicly available. Bigger shippers could obtain lower rates than medium and small size shippers and medium shippers could likewise obtain better rates than smaller shippers. In addition, shippers could negotiate privately a wish list of provisions that the public would never see.

In reality there are 3 types of service contracts that are on the market. The first kind is the carrier's own boiler plate, which is imposed upon smaller shippers on a "take it or leave it" basis. The second type are shipper generated service contracts which are basically imposed on the carrier on a "take it or leave it" basis. As a side note, OSRA has led to an explosion of shipper generated service contracts. The third type consists of agreements that either start out as a carrier boiler plate or shipper agreement and then, after negotiations, fall somewhere in between. My discussion today will be limited predominantly to the shipper generated contracts, and the tweeners.

Shipper Generated Service Contract = Common Carriage Charter Party

Shipper generated service contracts are supplanting bills of lading as the actual contract of carriage. Because of over tonnaging in the dominant trade lanes and because of the virtually non-existent U.S. export trades, shippers have been able to extract extensive concessions from carriers in return for the shipper providing large volumes of cargo. In effect, the shipper generated service contracts have basically become common carriage charter parties or, to be more precise, common carriage space charters. Comparing a charter to a shipper generated service contract, you can see certain similarities. For instance, both are for a specific duration of time and while service contracts don't have speed warranties, they do have JIT clauses, that is "Just-In-Time" clauses, pursuant to which the carrier has to guarantee that the cargo will arrive within a certain specific period of time otherwise, the carrier will be liable for consequential damages including, in some contracts, loss of business and shutting down the assembly line.

Service contracts have force majeure clauses and interestingly enough many of the service contracts now are requiring that the carriers provide vessels that are less than 15 years old, and demand that the carriers provide warranties as to their vessels' performance under the contract.

Some other clauses, however, are causing carriers, and their P & I Clubs as well, to have headaches. For instance:

(1) Many of the service contracts require that the carriers give up all COGSA defenses. Even the ones that don't require giving up all COGSA defenses, may require the carriers to give up $500 package limitations or vessel limitation or general average and salvage contributions, fire defenses and a host of other defenses that are included in COGSA or in the carrier's usual form of bill of lading. The way the shippers do this is to include a supersession clause which states that in the event of any conflict between the terms of the carrier's bill of lading and the service contract, the service contract shall apply. More sophisticated shippers are now going further. They are saying that the bill of lading is nothing more than a receipt and that for any terms of the bill of lading to apply, it has to be approved by the shipper and inserted in the service contract terms and conditions.

(2) In regard to damages, shippers are insisting not only on 100% CIF but many of the larger shippers are now insisting on market value and instead of having to prove what that market value is, they actually have a liquidated market value based upon a percentage of CIF, e.g. 120%, 140%. Some

shippers have what they call a claims settlement formula pursuant to which there are different levels at which the carrier has to pay for cargo loss or damage.

Many of the service contracts now have indemnity provisions whereby the carrier is assuming third party liability of millions of dollars without the carrier having recourse to its bill of lading defenses or COGSA. In short, the larger shippers are trying to force the carriers to basically become insurers of the cargo.

Of significant interest to many of the lawyers here are the hazardous materials provisions in which the shipper assumes no responsibility for the properties of the cargo and tries to make the carrier fully responsible in the event of any problems arising from the nature of the cargo, it's packaging, etc. Many of the attorneys or their firms who are here today have had recent cases where chemical cargoes inside containers have ignited or exploded and basically caused total losses of vessels which were carrying the cargos.

Majority of Shipper Service Contracts Specify Arbitration

All of the foregoing may be interesting, or maybe not, as far as the people here are concerned. In fact you may still be asking what relevance does this have to the SMA. Well, I am going to tell you. Of the shipper generated service contracts I have received in the past 10 years, I have found that almost 95% of these agreements contain arbitration clauses. The arbitration clauses that we see, however, are not your standard arbitration clause that you would see in the New York Produce Exchange Charter Party. One dispute resolution clause I have seen was three and a half pages long. It started off with the salesmen talking to each other and if they couldn't resolve the dispute, then going to the sales managers, then going to the officers of the company, then if the officers in the company couldn't resolve it, then going to mediation, then if mediation didn't work, then going to arbitration and then finally if arbitration didn't work going to litigation. This is more like a trial by ordeal than dispute resolution.

Many of these arbitration clauses specify SMA arbitration. You will be interested to know that if you are appointed on some of these cases, you will wind up arbitrating in places like Kingsport, Tennessee or Little Rock, Arkansas or Minneapolis, Minnesota because while the arbitration clauses in these contracts specify SMA arbitration, the arbitration is supposed to take place in the headquarters city of the shipper.

A substantial number of the agreements, however, do not have SMA arbitration but have AAA arbitration. We have attempted to get the shippers in these contracts, at least on the service contracts that my firm has been reviewing for its clients, to change to SMA arbitration on the basis that AAA arbitration is too bureaucratic and expensive and their arbitrators generally have no knowledge of the maritime industry. In this regard, we find that a substantial number of the shippers will change to SMA arbitration provided the arbitration takes place at their home city.

We have also noted a trend whereby certain major shippers in the United States trade are consulting with admiralty lawyers throughout the country for advice on what they want included in service contract from the shipper's point of view and the admiralty lawyers, especially those in New York who are plaintiff's lawyers, have been suggesting SMA arbitration be included in the shipper's service contract format. The net effect is that the SMA in the near future could be a primary forum for adjudicating service contract disputes including cargo claims.

Case Law Enforce Service Contract Arbitration Over Bill of Lading Jurisdiction Clauses

I would be remiss if I did not point out that case law in the Southern District of New York has upheld the terms and conditions of service contracts which specified arbitration as against the bill of lading contract which specified foreign jurisdiction and litigation. What this means is that in every contract in which you have a supersession clause, whether carriers boiler plate or shipper drafted, the arbitration clause or jurisdiction clause in the service contract has a significant chance of being upheld as

opposed to the foreign jurisdiction clause contained in the carrier's bill of lading. In short, a New York arbitration clause in a service contract has an excellent chance of nullifying a foreign jurisdiction clause in the carrier's bill of lading depending once again on whether there is a supersession clause favoring the service contract.

This brings us to the reason why I have mentioned as part of the talk that service contracts are a way to avoid SKY REEFER. In the event that there is any person in the audience who doesn't know what the SKY REEFER decision is, it is a legal decision involving a vessel called the SKY REEFER in which the U.S. Supreme Court upheld a foreign arbitration clause in a bill of lading. In previous case law, specifically in the Second Circuit in a case called *Indusa*, the Courts had held that such foreign jurisdiction clauses were unenforceable because they, in effect, decreased the carrier's liability by forcing a U.S. claimant to travel overseas to enforce his bill of lading and COGSA rights. While SKY REEFER was originally involved with a foreign arbitration clause, it has been extended to jurisdiction clauses enforcing foreign litigation. As a result of SKY REEFER, a substantial number of carriers have specifically included foreign arbitration or jurisdiction clauses in their bills of lading in order to avoid litigating in the United States. The SKY REEFER decision has had a devastating impact on the rights of U.S. consignees and shippers to bring lawsuits in the United States for cargo loss or damage arising during shipments to or from the United States.

However, based on the case law upholding the jurisdiction and arbitration clauses in service contracts as opposed to a carrier's boiler plate bill of lading jurisdiction or arbitration clauses, there is a substantial possibility that in the liner trades the service contract clauses will trump the bill of lading jurisdiction clauses. Looking at the numbers and percentages of cargoes that are moving under service contracts means that designation of New York and other arbitration sites in service contracts could lead to the evisceration of SKY REEFER dismissals of law suits brought by U.S. shippers at least as far as the liner trade is concerned.

As previously stated, the critical clause in service contracts which will determine the enforceability of a service contract arbitration clause is the supersession clause which would state that in the event of any conflict between the service contract on the one hand and the tariff and/or bill of lading on the other, the terms of the service contract would prevail.

What is interesting to note is that a substantial number of the carrier boiler plate service contracts do include U.S. jurisdiction clauses specifically New York or Los Angeles. Thus depending upon the wording in the boiler plate, specifically the supersession clause, there is a legitimate possibility that a court could uphold the arbitration and jurisdiction clause in the carrier's boiler plate service contract as opposed to the foreign jurisdiction clause in the carrier's boiler plate bill of lading.

Summary

To sum up, therefore, the overwhelming majority of liner trade cargoes moving in the east west trade routes and a substantial portion of the trade moving north and south is being moved pursuant to service contracts. Of those, probably about 50% of the service contracts or more are carrier generated, i.e. boiler plate, most of which do have arbitration or jurisdiction clauses in them specifying some site in the United States. The remainder of service contracts, which, for the most part, include most of the major shippers in the United States, are moving pursuant to shipper generated service contracts, most of which require arbitration of disputes including cargo claims. Such arbitrations, one would think, should be the bailiwick of the SMA.

However, one note of caution is if the cost of arbitrating disputes under a service contract exceeds the cost that shippers and carriers would incur if the matter were litigated and if the time to decide these cases in arbitration vastly exceeds the time it would take to get a decision or settlement in litigation, the practicality of arbitration will be severely diminished. Many of the shippers have realized the increasingly high cost of arbitration and have set

limits in their arbitration clauses that all submissions will be in writing and witnesses will only be allowed if the arbitrators unanimously deem it necessary or if the parties mutually agree. All in all, however, it is the cost factor which will determine whether SMA arbitration will be stipulated. If the cost to carriers and shippers is too high, there is no benefit to carriers and shippers to arbitrate as opposed to litigate because in litigation, at least you don't have to pay the Judge.

(Mr. Keane, a partner at Cichanowicz, Callan, Keane, Vengrow & Textor, LLP, a New York maritime law firm, delivered these remarks at the March, 2003 SMA luncheon.)

SALVAGE CONTRACTS

SMA member Mr. Robert Umbdenstock of Extreme Marine Services, Inc. submitted the following article. This is the conclusion, with Abstract repeated, of a two part series, the first of which appeared in the January 2003 issue of THE ARBITRATOR.

Salvage Contracts: Why Terms Matter

Abstract

Marine salvage is a tough business requiring entrepreneurial and technical risk. In recent years, opportunities to provide salvage have been decreasing as marine casualties have decreased in number with improved safe operating practices and tougher legislation setting stiff penalties for pollution. Given the more stringent operating arena, a salvor must be careful that the contract contains adequate guidelines regarding the scope of work and assignment of liabilities. The salvor anticipates payment for meeting the guidelines stipulated in the contract. Contract format selection and terms should encourage proactivity, perseverance and productivity in the salvage operation. Changing the terms or interfering with the effort puts the salvor's reward and potential profit at risk. A hesitant or unmotivated salvor may not be the best agent for the public welfare.

Open Forms

To preclude the need to negotiate and delay operations, open forms contain standard terms and conditions for performing the work and making payment. They do not specifically address money. Compensation is settled between the parties after the job or through an arbitration venue. By virtue of their standardized wording and substantial body of precedent, it is rare that the wording of an open form is modified but additional clauses may be appended to them.

The most familiar open form is the storied "LOF" or Lloyd's Open Form or Lloyd's Standard Agreement NCNP. While not the originator of NCNP, Lloyd's is the most formal and experienced forum for arbitrating salvage awards. LOF has been rewritten in the last 25 years to adjust it to the realities of marine response in the contemporary world or rapid communications and media exposure. The most recent modification is an optional clause, SCOPIC (Salvage Compensation P&I Clause). On the simplest level, SCOPIC replaces NCNP with a standardized rate sheet.

Though always relatively rare in U.S. waters, the use of LOF or any other open form has declined here with the general decline in large scale marine hull casualties. As business opportunities have become more infrequent, the availability of professional salvage assets has also declined. Salvors who do continue in the business often find themselves a great distance from the casualty site and must compete or co-venture with local "salvors of opportunity" and other contractors uncomfortable with NCNP. The impact of a loss of pollutants from the vessel can be unpredictably severe. Moreover, today official oversight of casualty responses is the standard in this country. All of these factors reduce the salvor's freedom to pursue the cure thus clouding the prospects for achieving success. Raising the ante poses the specter of an even greater loss if the salvage is unsuccessful.

Fixed Price

When a survey can be conducted or the casualty circumstances are relatively clear and stable, salvors may offer a fixed price or lump sum

for the doing the job. They do so confident of the scope and cost to them of the work required. In doing so, they include a margin for profit in the price. The profit "built in" is likely to be substantial, especially if there is a lack of competitive bids, because the salvor assumes much of the risk of a poor initial assessment or of conditions changing during the work. Urgency, ambiguity and fluidity of conditions are incompatible with setting a fixed price. This type of contract is infrequently seen in salvage but is quite common in wreck removal especially when time is not the overriding factor.

While a fixed price contract may seem to be a very simple concept, it can lead to very complicated results. If success is realized easily, the customer may claim the salvor knowingly set an extortionate price. Conversely, if the work goes badly, the salvor may elect to abandon the job or seek renegotiation before continuing. If authorities interfere with a salvor on a fixed price contract, they alter the original circumstances and the repercussions are likely to result in claims for redress.

Daily Hire

Daily hire (or day rate) exhibits confidence in the salvor's resources and expertise, but may also indicate a lack of confidence in the apparent scope of work required, ultimate success, or a salvor's disinterest in managing the entire operation. It sets a per diem rate for people and equipment (often called "the spread") that includes a profit margin but leaves the project schedule open to absorb the impact of the potential contingencies going into the job. Daily hire is often used to survey the casualty and develop a salvage plan then replaced or rewritten with specific provisions. The salvor can start work quickly and develop a plan as familiarity with the casualty circumstances improves. It is common for daily hire contracts to include a provision for the reimbursement of the salvor's expenses for supporting resources, materials or consumables that cannot be projected before the job gets going.

Daily hire is likely to include provisions for customer review of the salvor's daily tally sheets, for submission of invoices at set intervals or at preset milestones, and for partial payments on account.

This type of salvage contract is best suited to situations where the circumstances are unclear or evolving, salvage options are limited, yet time is a critical factor. A salvor may insist on a daily hire contract when regulatory oversight is likely. Daily hire may also be used for an operation that employs the salvor's plan and refers to that plan's projected schedule. This gives the salvor a way to predict cash flow and sets a performance benchmark for earning a bonus for rapid completion. The format is attractive to a customer since it establishes a "burn rate", permits monitoring of expenses and keeps a running tab.

Since a daily hire contract is open-ended unless structured otherwise (e.g., not to exceed ## days, or $$ dollars), it is also used when the salvor is working for another project manager, or perhaps is only a specialized part of a larger work effort.

Time & Materials (T&M)

Hardly unique to marine salvage, T&M contracts reflect either or both of two likelihoods. First, the fact that circumstances are uncertain meaning the salvor cannot determine a finite scope of work and/or secondly, control of the operation may be retained by the customer or seized by authorities. Not knowing what services may be required, the salvor works under a reimbursement contract and is paid at agreed rates for the precise times that particular resources used in the work assigned and for associated out-of-pocket expenses. Profit may be included in the rates, as a percentage added to the charges or expenditures, or paid according to some other preset formula, such as so many dollars per day. This format insulates the salvor from the risk that circumstances may deteriorate, the scope of work may be expanded or events may conspire to thwart success.

As with daily hire contracts, time and materials contracts usually include provisions for customer review of the salvor's daily tally sheets, for submission of invoices at set intervals or at preset milestones, and for partial payments on account.

T&M is the norm for spill response operations but not typical for salvage.

Contract Incentives

The traditional incentive to salvors lies in the preservation of values and works best with open form and fixed price contracts. Rapid response and effective operations limit the casualty hull's exposure to damaging conditions. Less damage to the salved ship and cargo usually means greater reward for the work.

Contract incentives may be written to reward the speed at which success is achieved and for controlling costs, for minimizing pollution risks or to take advantage of other job-specific opportunities.

As noted earlier, salvage is an investment heavy business, and since salvage operations often demand large upfront expenditures, favorable terms for payment are a prime incentive. These may include some financing of expenses, partial progressive payments and quick resolution of invoices.

Payment

The salvage contract describes the payment for the specific scope of work. The experienced salvor will work hard to stay focused on the object of the operation and will be reluctant to spend any money that may not be recovered in the final settlement. Invoiced amounts for work not essential to success may be rejected. Salvors are also concerned about who will be guaranteeing payment of the bill.

In the context of this paper, the amount of compensation is of less interest than the terms of payment. Without a casualty, hull and cargo values to quantify or a salvage effort to evaluate, appropriate compensation levels cannot be discussed. However, successful salvage may bring a big payday but it may also leave the salvor happy to break even.

Salvors know that their claim for work pertinent to success is legally secured by the residual value of the ship and cargo. They prefer, generally, to be paid in cash and will check a customer's credit and insurance standing carefully while negotiating terms. Contracts with a financially weak customer may stipulate advances, progress payments, escrowed monies, letters of credit and the like. The prudent salvor never forgets that an owner will be looking to the underwriters to cover the loss and that the latter may reject any claim for any work not covered under the policy. Going into a contract, salvors may require provisions that the underwriters guarantee or even make payments directly.

Any mid-operation departures from the scope of work or obstructions to the salvage plan or schedule might threaten the salvor's profit under the original contract. If directed to do additional work by the customer or authorities, for example, the salvor may demand an addendum to the contract or a payment guarantee such as a letter of undertaking from underwriters, funding of a special escrow account or approval of access to supplementary public funds.

In addition to bonuses for early success, salvors may also place a value on a guarantee of immediate payment or of payment soon after invoices are submitted. A customer may actually face a penalty for delaying payments unreasonably.

When invoices are received for advances, progress payments or partial payments on account, it is common for the customer to withhold a percentage until the satisfactory completion of the work and review of the final invoice.

Ever mindful that the contract is a one-time arrangement addressing unique and stressful circumstances, the prudent salvor is certain who is paying the bills and how payment will be made before signing the contract.

Security

The salvor's traditional refuge in collecting payment for services lies in the residual or salved values of the property recovered meaning the vessel and cargo. The vessel and cargo can be arrested and sold to cover the salvage claim. If the salved values are obviously questionable, security is sought in the form of an escrowed reserve, irrevocable letter of credit or the like from the customer or underwriters or both. In the event that the scope of work expands

or changing conditions make additional work necessary, the salvor may request an increase in such security. Should there be a failure to post adequate security, work may not start or, in the extreme instance, the contract may collapse mid-operation.

Sources of Payment

Most professional salvors have started a job, at some time, before the source of funding has been clarified. It is always a tentative situation and the salvor must carefully gauge the advisability of investment in the work until satisfactory security is established.

Normally the salvor looks to the customer for payment, that is, to the entity that called for services. The ship or cargo owner is most often that customer. In the event that a customer's credit is weak, the salvor may insist that the underwriters sign the contract. Public funds may pay for salvage when a casualty's owner cannot be identified and the substantial threat of pollution exists.

When payment is coming from an insurance carrier or a public fund, the salvor must be certain that the services requested fall under the provisions of the policy or within the purposes for which the fund was intended.

Summary

Contracts should encourage effective salvage. The terms and conditions set out in a salvage contract constitute the rules under which a particular marine response operation is undertaken. Proper contracts intend that work get going quickly and reward efforts that minimize the impact of the casualty on the ship, cargo and, most importantly, the environment.

The contract format applied must fit the circumstances. An open form will not work when values are questionable or environmental damage is likely. No salvor will offer a fixed price for work of an indeterminate scope. The format that works in the primary response to mitigate damages might be replaced as work proceeds after the casualty has been stabilized.

The salvor pursues the work according to the effective contract terms. If the contract leaves all risk to the salvor, such as an open form or fixed price, he will strongly resist giving up any control of the operation and expect a substantial reward. When working on a daily hire or reimbursable contract, the salvor may look to others for guidance in defining the scope of work or the schedule since he can expect payment for all the work assigned. If others assume more of the risks, the salvor will expect a more modest award.

In situations requiring close oversight by authorities or where necessary service requirements may increase beyond those that are strictly salvage, it is appropriate to all parties that the salvor work under a more flexible format such as a time and materials contract.

Any contract that puts either party at a disadvantage at any time is likely to become counterproductive. Any unilateral or third party change in the effective terms and conditions is liable to doom the salvage effort. The best hope for operational success bringing satisfaction to all is fairness in contract wording and compensation. Interested authorities should understand typical salvage contract formats, know which one is being used during a salvage response and consider the ramifications of its use.

(You may contact Bob Umbdenstock, the author of this article, at blakbell@earthlink.net)

RECENT AWARD
PERSEVERANCE PREVAILS

On September 25, 1998, Hurricane Georges hit the Florida Keys causing severe damage to various tourist facilities and marinas in the area. A number of houseboats owned and operated by Westrec Marina's Faro Blanco facility in Marathon, Florida were badly damaged and partially sunk. Titan Maritime Industries, Inc. ("Titan"), a well known and respected international salvage company was selected to organize the salvage of these boats at an agreed price per unit raised. The first houseboat came up rather easily so Westrec acknowledged it would pay the agreed price but then terminated the agreement when Titan refused to

modify the arrangement. Titan demobilized its equipment and left the premises.

About a month later, the parties agreed that Titan would resume its salvage operations, recover the remaining houseboats and it would now be paid an agreed daily rate. However, before the work could go forward, Wetrec's financial backer, Marina Funding, assumed control of the marina's operation and the supervision of Titan's salvage effort. Marina Funding agreed the work could go forward on this modified basis so Titan mobilized its equipment, raised four houseboats between December 10 and 20, 1998, but was then ordered to stop work, demobilize its equipment and leave the premises, which it did. Titan prepared a final invoice for daily services rendered and associated costs but was never paid despite repeated demands.

Marina Funding rejected Titan's demand for arbitration in May 1999, and instead commenced litigation in state court in Florida, alleging fraud in the inducement, trade defamation and negligence. Titan removed the state court action to the United States District Court for the Southern District of Florida, filing a motion to stay the litigation and compel arbitration. The Titan salvage contract contained an arbitration clause that stated, in part:

> *Any dispute arising under this agreement shall be settled by arbitration in New York, in accordance with the rules of the Society of Maritime Arbitrators of NY Inc.*

In November 1999, Judge Hurley stayed the litigation but declined to compel arbitration, stating, "Under the Federal Arbitration Act, when an arbitration agreement contains a forum selection clause, only the district court in that forum may compel arbitration." A month later, Titan filed a petition to compel arbitration in the United States District Court for the Southern District of New York. As a preliminary matter, the court noted that it had personal jurisdiction over both parties, Titan by virtue of its bringing the case before the court, and Marina Funding by well established Second Circuit law. The court further held that Clause 14 mandated arbitration in New York and, therefore served as a forum selection clause agreed to by the parties. By agreeing to arbitrate in New York:

> "[Marina Funding] must be deemed to have consented to the jurisdiction of the court that could compel the arbitration in New York. To hold otherwise would be to render the arbitration clause a nullity."

Marina Funding argued before the court that its claims sounded in tort rather than in contract, stating Titan acted negligently in performing its operations, fraudulently induced Marina Funding to sign the contract and repeatedly slandered Marina Funding in pursuit of payment. The court held that as the claims related to Titan's failure or inability to perform and Marina Funding's corresponding refusal to pay, they plainly arise under the contract.

The petition to compel arbitration was granted in October 2000. The process had now been delayed for almost two years. The panel was finally constituted in April 2001, documentary evidence, witness testimony and closing briefs were exchanged in August 2002. Titan's claim was for the value of its outstanding invoices, interest and costs and Marina Funding claimed for the value of the lost houseboats, revenue it would have earned on the houseboats and other sundry costs.

The panel's final award in October 2002 unanimously concluded that Titan's billing fairly represented the work it did and that its salvage effort was consistent with the terms and conditions of the contract. Marina Funding's claims were denied. While it was not essential to the panel's findings, it noted that the motivation for Marina Funding's approach to the salvage effort became abundantly clear when a hearing transcript of a court proceeding in a related action was introduced into evidence. The testimony in that proceeding indicated Marina Funding thought the houseboats "were a bunch of junk" and they were "not going to authorize funding for their repair or removal." What they would like to do "is just take two and a half million dollars from the insurance company and just take the money and run …"

The panel further granted Titan reimbursement for its extraordinary costs and counsel fees, noting Marina Funding's tactics resulted in inordinate delays and expense.

Just as it resisted arbitration at the outset, Marina Funding refused to voluntarily pay the award, so Titan applied for an order from the USDC for the Southern District of New York confirming the arbitration award. Judge Hellerstein confirmed the award in all respects in November 2002. So, approximately four years after Hurricane Georges did its damage and Titan performed its salvage, the case finally came to a close. [See **Titan Maritime Industries, Inc. v. Marina Funding Group, Inc., SMA 3758**.

CORRECTION and CLARIFICATION

1) **CORRECTION** - Your Editor apologizes, with regret, for the misspelling of the last name of Richard H. Sommer in the obituary memorial in the last issue.
2) **CLARIFICATION** - As the dissenting arbitrator on the **ATLANTIS TWO** panel, Mr. Stephen H. Busch advises that he found our precis of the case in the January 2003 issue misleading. He correctly reminds that **AWARD SMA 3725** was not unanimous. We apologize for any misunderstanding.

ITEMS OF MISCELLANEOUS INTEREST

ICMA XV:

We are advised that the ICMA XV website is up and running. The address is www.icmaxv.org.

ICMA XIV:

The SMA still has a number of ICMA XIV items for sale:

- Complete set of Congress Papers - $100
- Black leatherette shoulder bags - $35
- Black leatherette Note-Pads with calculator - $10
- Sterling Silver Tiffany Key-Rings - $40
- Ball-point pens - $5
- Compact Disks (New York melodies) a real bargain at $2

Please contact Sally at the SMA office or email your request to info@smany.org

SMA ROSTER:

The current roster of SMA members may be found on the SMA website at www.smany.org.

SMA SURVEY REMINDER:

This is a second request and reminder that the SMA has devised an interactive survey for completion by Owners, Charterers, Brokers and the Maritime Bar. We hope for a strong response that would give a comprehensive picture of the manner in which maritime disputes have been resolved in recent years. It should also provide insight as to why resolution was or was not sought under SMA rules. And finally, it should elicit perceptions, good and bad, of the SMA's effectiveness for potential users. We urge your participation at the following link:

http://www.smany.org/sma/survey_01.html

HUMOR FOR THE QUARTER

In it's July 2001 issue, THE ARBITRATOR offered a glimpse of "The two Travelers and the Oyster," a 1901 version. (You can look it up on our website.) An earlier version, perhaps the original, has come to light.

The Benefit of Going to LAW.

Two Beggars traveling along,
One blind, the other lame,
Picked up an Oyster on the Way
To which they both laid claim:
The matter rose so high, that they
Resolved to go to Law,
As often richer Fools have done,
Who quarrel for a Straw.
A Lawyer took it straight in hand,

Who knew his Business was,
To mind nor one nor the other side,
But make the best of the Cause;
As always in the Law's the Case:
So he his Judgment gave,
And Lawyer-like he thus resolved
What each of them should have;
Blind Plaintiff, lame Defendant, share
The Friendly Laws impartial Care,
A Shell for him, a Shell for thee,
The Middle is the Lawyer's Fee.

[*Richard Saunders, aka Benjamin Franklin, in* Poor Richard's Almanack - 1733]

For THE ARBITRATOR

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PRESIDENT'S CORNER

In early November, the Society moved offices - without missing a beat - thanks to the team efforts of several members and, of course, our dedicated Sally Sielski. Our new contact details are:

Society of Maritime Arbitrators, Inc.
30 Broad Street - 7th Floor,
New York, N.Y. 10004
Tel: 212 344 2400
Fax: 212 344 2402
Web Site: www.smany.org
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On November 7th, the SMA and maritime bar colleagues presented a mock arbitration at the ASBA/BIMCO Seminar held at Orlando that drew sixty enthusiastic delegates from the United States, Canada, Latin America Caribbean, Europe, Scandinavia, Asia and Middle East. This and previous presentations at the Panama Maritime Conference in February and to the Houston energy community in April, have been well-received and similar events are planned in the New Year.

In January we will kick-off 2003's SMA luncheon schedule. Please mark your calendars to reflect the following dates and speakers:

January 15 - Bill Honan
February 12- Michael Marks Cohen
March 12- Paul Keane

You will note below that the Society is conducting a "user survey" and I encourage your participation.

The Steering Committee of the International Congress of Maritime Arbitrators is already hard at work planning ICMA XV which will be hosted by our LMAA colleagues at the Millennium Mayfair Hotel, London, on April 26-30, 2004. Additional details will soon follow.

The Society's Board of Directors joins me in conveying our warmest best wishes to our fellow members, friends and colleagues here and abroad for a happy, healthy, prosperous and peaceful New Year.

David Martowski

SMA SURVEY

The SMA has devised an interactive survey for completion by Owners, Charterers, Brokers and the Maritime Bar. We hope for a strong response that would give a comprehensive picture of the manner in which maritime disputes have been

resolved in recent years. It should also provide insight as to why resolution was or was not sought under SMA rules. And finally, it should elicit perceptions, good and bad, of the SMA's effectiveness for potential users. We urge your participation at the following link:

www.smany.org/sma/survey

CANADIAN MARITIME ARBITRATION

John Weale, the President of the Association of Maritime Arbitrators of Canada, spoke at the October SMA luncheon. His talk was quite comprehensive and so interesting as to warrant reproduction in full in these pages:

MARITIME ARBITRATION IN CANADA

As some of you may know, Canada is that large empty piece of real estate located to the north of the USA which you last tried to annex about 150 years ago. Its population is believed to be about the same as Mexico City. 90% of them live within 350 miles of the USA, and about one in two inhabits a narrow corridor between Quebec City and Windsor - which is the small settlement lying just south-east of beautiful down-town Detroit.

As you may also know, Canada really owes its foundation as a modern independent state to the American Civil War. As they observed this appalling carnage occurring less than a century after the Declaration of Independence, the British North Americans quickly came to the conclusion that federations soon fall apart unless they are much more heavily centralized than the experiment to the south.

That was one factor. Another was actually a maritime matter which eventually went to international arbitration: the American demand for reparations from a declared neutral, Great Britain, for the damage inflicted by the "***ALABAMA***", which had been built in Birkenhead. With limited tact (at least as the Canadians see it), Washington suggested that a nice compensation might be the northern territory which they had unsuccessfully tried to invade 50 years before. Rather as with the Falkland Islands, the British could not quite get their minds round the idea of voluntarily ceding to a foreign power any territory which they themselves had grown tired of governing. Whence the British North America Act of 1867, and modern state of Canada.

Prior to Canada's adoption of the UNCITRAL Model Law in 1985, there was a tendency, at least in some parts of Canada, to view commercial arbitration as stepping on the toes of the courts, and therefore contrary to public policy. Indeed, it has been said that "*the almost unqualified enthusiasm with which Canada adopted the Model Law was largely explicable by the primitive state of its arbitration law and the attraction to reformers of a comprehensive model code.*" In fact, Canada was the first country to adopt the Model Law; and I have been told that this is the only piece legislation ever enacted simultaneously by the federal government and all of the provinces.

Canada's physical geography, which essentially works on north - south divisions, coupled with the lateral distribution of its population, has resulted in fairly wide cultural and political differences between its east and west coasts - far more, I think, than in the USA. And this helps to explain why Canada has, not one, but two maritime arbitration associations: the Association of Maritime Arbitrators of Canada (AMAC), which draws its membership predominantly from the maritime community between Toronto and the maritime provinces, and the Vancouver Maritime Arbitration Association (VMAA), which is very much focused on the west coast.

My experience is as a member of AMAC, and so I cannot speak from first-hand knowledge about the VMAA, although we do have some members in common. All I can say is that we are working with them in an effort to harmonize our rules, so that there would be a single set for all Canadian maritime arbitrations; and earlier this year we jointly, and successfully, mounted a mock arbitration as part of the Grain World conference in Winnipeg.

Unlike the London Maritime Arbitrators Association, neither AMAC nor the VMAA has any

full-time arbitrators. In that sense, maritime arbitration in Canada is much closer to what you had here twenty or thirty years ago. But the volume of activity in Canada is unlikely ever to reach a level which demands or will support what I may call professional arbitrators; and so it is probable that it will remain essentially peer-based.

Last year, we had a visit from a large Chinese delegation who were on their way to ICMA XIV here in New York. They were surprised and puzzled to find that AMAC had no permanent staff, no fixed address and no standing to charge a fee for arbitrations conducted under our auspices. But we are not that kind of institution at all. We are simply a group with the common aim of promoting and facilitating arbitration for the shipping and related industries by providing a procedural framework which will lead to a fair hearing of disputes.

Before I speak about our rules, however, I should perhaps say something about the modern attitude of the courts, both federal and provincial. Today, that attitude is definitely positive; and the courts will go to considerable lengths to respect the contractual intention of the parties under an agreement to arbitrate.

This tendency is reinforced by the restricted scope for appealing an award: as in the United States, the grounds for appeal are strictly limited, and relate mainly to bias or misconduct rather than the merits. Canadian arbitrators are required to apply the law; but the failure to do so would have to be egregious before the courts would be prepared to entertain any complaint in this regard.

In fact, as a generalization, I would suggest that an owner or charterer who was familiar with the arbitration process under SMA rules would get no nasty surprises if he had to arbitrate in Montreal under AMAC rules. The similarities are certainly much greater than the differences.

Like the SMA, we have set of procedural rules. Like you, we also have a code to be followed by our arbitrating members. Like you, we offer a set of mediation rules. Like you, we favor fairly full plain-language submissions of claim and defense, as opposed to the archaic formal pleadings so dear to the hearts of the London lawyers. And most of all, like you, we try to be fairly pro-active and intolerant of needless delay.

Two of the most obvious differences which would strike you if you had to arbitrate in Montreal under the AMAC Rules are cost and speed. I say this not to make a virtue of it, but simply to record it as an objective characteristic.

That the costs are less is largely an obvious result of the weak Canadian dollar; but it is also true that part-time arbitrators will almost always tend to think in terms of a lower hourly rate than those who must rely on this activity for their livelihood: as a rough guide, I would suggest that most AMAC arbitrations are based on a notional hourly rate in the region of $125-150 Canadian per hour, or $1,000-1,200 per day - although in the event, the actual fee, especially for the smaller cases, is likely to equate to something much less.

As to the speed with which the proceedings are brought on and the award rendered, we have a fairly tight schedule for the exchange of submissions. The Claim Submission is to be served within 4 weeks of the tribunal being set up, and the Defense and any Counter-claim within 4 weeks after that. The claimant then has 4 weeks to serve its Reply, and the respondent then has a further 4 weeks to serve its response to the Reply as appropriate.

The AMAC rules state that the tribunal is normally expected to render its award within 6 weeks of the closing of the proceedings; and I would say that, so far as we know, this is generally adhered to. Again, I tell you this as a mere fact: it is what happens when you have an essentially local peer-based system with a fairly low volume of cases. In such a situation, the arbitrators take pride in giving the matter their full and immediate attention; and, because they are normally wrapped up in only one case at a time, this translates into a fairly rapid turn-round of the written award.

The third difference is not very significant, but it might surprise you. For reasons which I cannot begin to explain, the maritime bar is extremely reluctant to agree to hearings being held at the offices of their antagonists. The result is that the chairman has to be quite ingenious to find some suitable “neutral” ground to stage the arbitral

tournament. To most of us, this makes no sense at all; but that is how it is. Especially when there is a witness involved, someone has to rent or borrow premises elsewhere.

Like lawyers everywhere, the Canadian maritime lawyers dislike putting things in writing: they are always happier if they can argue their case orally. And I would say that written briefs are far from universal in Canadian arbitrations. But, at least within AMAC, the arbitrators tend to resist this tendency to oral argument, insisting as a minimum on receiving in advance a written outline or skeleton argument. This naturally has the effect of reducing the time required for hearings; but it probably also simplifies the drafting of the award. It also has the effect of turning the presentation of argument into a dialogue between the lawyers and the tribunal which some lawyers, more accustomed to the formal procedure of the Trial Division, find somewhat distressing.

Like the SMA, AMAC has a Code for the guidance of arbitrators, which is also designed to give the users of the system some idea of what they are entitled to expect. Although we have elected to call this a Code of Conduct, rather than a Code of Ethics, I believe you would find that this covers familiar territory.

We do, however, also address certain procedural matters which can sometimes prove troublesome in an adversarial context, such as the right of an umpire to participate in the hearings (but not the deliberations of the two party appointments). The Code also stresses the desirability of all members of the tribunal basing their fee on the same hourly rate, and recommends that the division of the total fee between the individual arbitrators should be kept confidential. It also deals with the desirability of dealing with liability separately from damages, and also of consolidation, provided that none of the parties will be prejudiced.

Until a few years ago, we used to print a booklet containing our rules and another with our list of members; but now, like you, we rely mainly on our website, the address of which is: www.amac.ca. If anyone wants a hard copy of our rules or other documents, we simply print it to order and have it authenticated. The advantages of this are obvious, and we have found it quite easy to accommodate the few members and outsiders who do not have Internet access.

Unlike the SMA, we have allowed practicing lawyers to become arbitrating members of AMAC. The only condition which we impose is that their professional status and affiliation is clearly identified in the list so that prospective users will be made aware of it. We did this because, perhaps inevitably, our main disadvantage is a shortage of suitably experienced and qualified arbitrators. Over time, we hope that this will change; but it is to some extent a chicken-and-egg situation.

You may not have noticed this so much in the SMA: but to us it is obvious that most people are creatures of habit, and intellectually lazy. If a charterer is persuaded to insert an AMAC clause in a contract, and no disputes arise, he will naturally, if illogically, tend to believe that that is a good clause, and continue to insert it in future contracts - if, that is, he bothers to think about it at all. We have found that the number of agreements which refer to AMAC arbitration has been increasing exponentially over the last few years.

Of course, unless the arbitration agreement says so, there is nothing to require the appointment of an arbitrating member of AMAC: it is usually a matter for the parties to decide; but over time, we are confident that the pool of suitable candidates will be enlarged. We realize how unlikely it is that Montreal, or any other Canadian city, will become an international centre for maritime arbitration; but that is not what we try to achieve. Our aim is to provide a competent and qualified service for the local and domestic industry.

Very recently, however, there has been a legislative change which may well have a significant effect on maritime arbitration in Canada. Last year, the federal government enacted the Marine Liability Act, which pulled together the liability sections of a number of existing acts, and also introduced certain new provisions. The areas covered include personal injury (taken from the existing Canada Shipping Act); apportionment of liability (new); limitation (introduction of CLC 1976); liability for passengers

(1974 Athens Convention); pollution; and - what interests us here - carriage of goods.

The carriage of goods section is, in the main, a simple re-enactment of the existing legislation, which incorporates the Hague-Visby Rules, with a provision requiring the Minister of Transport to take soundings every 5 years with a view to a possible switch to the Hamburg Rules (a change, by the way, which is not generally regarded as very likely within the foreseeable future). But there is also a completely new provision, Section 46, which is broadly similar to Article 22 of the Hamburg Rules.

What Section 46 says is this: where a contract of carriage provides for the adjudication or arbitration of claims outside Canada, a claimant may start judicial or arbitral proceedings in Canada provided the actual or intended port of loading lies within Canada, or the defendant has a place of business, branch or agency in Canada, or the contract was made in Canada. As you will realize, this is very similar to the parallel section of the draft USA COGSA which was initiated by the MLA a few years ago: that is now the law in Canada.

The application of Section 46 is limited to bills of lading (i.e. to those contracts of carriage to which the Hague-Visby Rules apply by statute), and so it will not apply to charter parties. Nor does it appear to allow the defendant carrier to introduce a pre-emptive motion of its own, so as to circumvent the venue provision of the contract. Nevertheless, it does seem likely to have the effect of increasing the number of cargo claims which have to be arbitrated in Canada.

I have spoken briefly of the AMAC Rules of Procedure. The principle which underlies the drafting of these Rules (and this is the main source of the difference between AMAC and the VMAA) is that the provisions of the Model Law should not be varied in those cases where they state: "*unless otherwise agreed by the parties*..."; and the relevant sections of the Model Law are incorporated into the Rules as a Schedule.

A few years ago, we added a rule providing for the immunity of arbitrators, because there was some doubt as to whether this would apply by law or not. We introduced this shortly after the UK brought in its 1996 Arbitration Act, which deals expressly with this point: we felt it was important that arbitrators should be able to function without having to worry about the personal effect of possible litigation initiated by the losing party.

We also have a set of Mediation Rules, which are attached as a Schedule to the Arbitration Rules. These were introduced simply to ensure that parties who had agreed to the AMAC procedure would have a ready-made set of rules to hand if they should wish to seek a mediated settlement.

Although I was asked to speak about arbitration, I should perhaps mention that AMAC is very active as an important part of the marine community. We regularly hold general meetings every six weeks or so between October and May, which are open to anyone who wishes to attend, whether a member or not. We also arrange mock arbitrations: in the last 12 months, we have participated in the one in Winnipeg which I have already mentioned, and we also mounted one for our Chinese ICMA delegation.

Here, I should also mention that our most recent effort of this sort was a one-day seminar on chartering problems which took place last week. We had a very good attendance; and the content and presentation both seem to have been very well received. As some of you will know from experience, these events take a great deal of effort to organize: if I had known then what I know now, I would have hesitated before agreeing to come and speak to you only six days later. I say this, not to excuse the slightly scrappy nature of my remarks, but simply because I have found that you do get rather sick of the sound of your own voice!

In closing, I would like to touch on the issue which is often seen as the most sensitive, but which we feel is the most important: publication. Our rule states that the award will be published unless the parties have agreed otherwise in advance (which we generally take to mean before any oral hearing). If one of the parties wishes the identity of the disputants to be kept confidential, we will normally respect that; but we do feel that the process has to be transparent to be fair, and to be seen to be fair. We

also feel very strongly that the identity of the arbitrators should be disclosed.

In this area, I realize that I am preaching to the converted. But some of you may be supporting members of the LMAA. If so, I would urge you to convey to them how desirable it is to avoid unnecessary secrecy, and the resulting inner circle of initiates who alone are privileged to know how the individual arbitrator has decided any given case. Clearly, the parties are entitled to privacy if that is what they have agreed; but otherwise an arbitration award should be no different than a court judgment: it belongs in the public domain.

(John Weale, President, Association of Maritime Arbitrators of Canada)

SALVAGE CONTRACTS

SMA member Mr. Robert Umbdenstock of Extreme Marine Services, Inc. submitted the following article . It will be published in two parts, the second to appear in our April 2003 issue.

Salvage Contracts: Why Terms Matter

Abstract

Marine salvage is a tough business requiring entrepreneurial and technical risk. In recent years, opportunities to provide salvage have been decreasing as marine casualties have decreased in number with improved safe operating practices and tougher legislation setting stiff penalties for pollution. Given the more stringent operating arena, a salvor must be careful that the contract contains adequate guidelines regarding the scope of work and assignment of liabilities. The salvor anticipates payment for meeting the guidelines stipulated in the contract. Contract format selection and terms should encourage proactivity, perseverance and productivity in the salvage operation. Changing the terms or interfering with the effort puts the salvor's reward and potential profit at risk. A hesitant or unmotivated salvor may not be the best agent for the public welfare.

Introduction

Marine salvage is a business. Commercial salvors are among the most pragmatic of business people and practice their trade knowing that it entails substantial investment, sustained readiness and acceptance of risk on the job. Salvage is an unforgiving business that rewards fortitude, perseverance and ingenuity but also penalizes those who fail to negotiate a contract that reflects the realities of the work demanded. When salvors take on a response, they do so with the expectation that they will be able to perform their specialized services in anticipation of a fair payment. Characteristically, salvors are also independent and self-reliant contractors. They develop their own plans and rely on their own expertise in tackling evolving problems.

At its simplest, all business is quid pro quo, literally "this for that", the exchange of goods or services for some remuneration. Delivery of the "quid" presupposes exchange of the "quo" thereby evidencing the satisfaction of both parties to the agreement. Usually the "quid" and the "quo" are agreed in advance defining a deal between the parties and essentially constituting the basis of a contract. Contracts clarify "terms" describing the "quid", the "quo" and establish conditions for how the one begets the other. Parties signing the contract presume each other's compliance. The devil resides in details concerning control such as management control, change orders, operational plans, projected schedules, contingent liabilities and final payments.

Most traditionally, salvors are encouraged to pursue the given task aggressively for a reward to be determined after the delivery with the understanding that no delivery meant no reward. Unique to salvage, the renowned "no cure no pay" may be the most poignant term found in any services contract. As such, it may also be the starkest illustration of "Why Terms Matter."

Marine Casualties & Salvage

Major marine casualties put all interests at risk not only those of the ship and the cargo but also, most importantly, the public welfare from environmental damage. The public welfare has an

interest in seeing a successful salvage. Marine casualties commonly exhibit certain characteristics. They are likely to be progressive, which is to say, they do not resolve themselves. Unchecked, conditions are likely to deteriorate. Action is necessary despite possible risks to people, equipment and the environment, and although the defining circumstances and appropriate services may not be entirely clear, in nearly every case, it is prudent to take some kind of fast action. Delay in responding often means undertaking a more uncertain and certainly more expensive operation later. Public pressure to action is also certain.

Having said all that, remember the adage that all salvage jobs are unique. This is certain because every casualty is defined by the characteristics of the particular ship and cargo, the location and ambient conditions. Moreover, the type of salvage assets available may determine the type of operation possible and predict its chance of success. The selection of the response methodology best suited to a particular job may be critical to achieving the most favorable resolution but success can hinge on the business aspects of the work as well.

Salvage services are performed either as "true salvage" or "contract salvage", but in reality, there is always a contract. Also known as "pure" salvage, the former, well known in marine commerce and admiralty law, is based on a long, colorful history and, though rare, persists today. The International Convention on Salvage, 1989 made the most recent affirmation of the basic general criteria that any mariner (1) voluntarily coming to (2) the successful aid of (3) an imperiled vessel has the right to a reward. Standards for evaluating such a claim and assessing an award are established in admiralty precedent. Together these constitute, in effect, the "terms" under which true salvage is performed and the "conditions" for payment. This is the harsh realm of "no cure - no pay."

As navigation and communications improved in the last century, contract salvage became the norm in marine commerce but the ends remained the same. The contract sets the path for the speediest and most effective response. In contract salvage, the salvor renders assistance according to the terms of an agreement, usually written, reached with the ship's interests before the work is undertaken. A productive salvage contract considers the ambiguities of the casualty circumstances and becomes the compromise basis for work to mitigate losses and resolve the situation.

Salvage Contracts

If the science of salvage is the application of seamanship, engineering and technology to resolve a marine casualty, the art of salvage may lie in finding suitable pricing, terms and conditions for doing the work. The salvage contract always defines the given task and it always tells how the contractor is to be paid. While it may or may not name a price for the accomplishing the work, the contract will include specific conditions to be met by each party as the work is pursued and payment is transferred. Combined in a contract, these are rules by which the particular game is to be played within given regulatory boundaries.

There are several types of contract, each with possible variations. Each type can encourage or impede effective salvage if used inappropriately. With any salvage contract, however, changing the rules during the game can change the game itself. Given the likely urgency or contingent liabilities of the casualty, salvage contract terms should be handled with care in writing and observed scrupulously in operation. A cavalier attitude toward contractual terms and conditions at any time during a contract's life can jeopardize all interests, not only the salvor's compensation.

The best contracts work equally well for those who do the work as for those who ask that it be done. Successful completion of the work resolves a need and fair payment rewards that accomplishment. Ideally, the most efficient success results in the most complete satisfaction. Salvage contracts are no different. An efficient salvage operation preserves the most benefit for the customer and maximizes the salvor's compensation for the work done and risks taken.

The perfect salvage contract for any job, therefore, is one that motivates the contractor to

deliver the most value for the compensation proffered. The salvor enters into the contract knowing what is to be accomplished, the size of the potential reward for success and how payment will be made. Each party has security in the event of failure by the other to live up to the terms of the contract. All work proceeds toward the goal of mutual satisfaction.

"Good" contracts are productive and enhance the prospects for success since they offer a fair price and terms friendly to each side and assign responsibilities of each side very clearly. Such contracts, by virtue of their inherent fairness to each party, also benefit the public interest in seeing a casualty attacked quickly and with the goal of minimizing environmental consequences. "Bad" contracts are counterproductive and may discourage perseverance and efficient performance and may even reward ineptitude or actually drive the salvor off the job.

It is important to note that salvage work is a specialized field and is likely to be conducted under fluid circumstances, so control of the work is a critical issue. Operational control is often stipulated in the salvage contract and interference with the salvor's control puts the contract at risk. The professional salvor should be left to analyze the situation and manage his resources according to a plan of his own design.

Types of Salvage Contract

There are several types of contract used to conduct salvage work. In the right application, each can be advantageous to all involved. Many salvors offer their own pro forma contracts and several "neutral" organizations such as Lloyd's and the New York Society of Maritime Arbitrators publish forms for public use. Pro forma contracts help in getting work underway quickly, but it is common for original contracts to be negotiated when time is available and the work involves a large casualty or threatens high liability exposure. The various basic types of salvage contract format are:

Open form, no cure no pay (NCNP)
Fixed price or lump sum
Daily hire
Time and materials

Each type of contract may be modified in order to meet needs of the parties or the situation or to be competitive when more than one salvage contractor option is available. Modifications can be high impact factors. Among the common alternatives are:

Combinations (e.g., Fixed price, no cure no pay; day rate plus materials)
Bonus clauses (e.g., for rapid completion; for minimizing damage to the ship or cargo)
Penalty clauses (e.g., for delays or excessive damage)
Partial payments (e.g., advances or progress)

Any type of salvage contract should make provision for contingencies such as bad weather, war, acts of God, and government oversight, and also stipulate necessary insurance coverage, mutual indemnifications, arbitration venue, applicable law and the like. However, while negotiators can attempt to include guidelines for every contingency, the effective wording of any contract may only be established after a dispute is argued before a judge. Overt departure from the wording during the operation, however, may obstruct the agreement and seriously complicate the consummation of the deal described in the contract.

(The conclusion of this article will appear in the April 2003 issue of THE ARBITRATOR and will provide a detailed description of each of the types of salvage contracts. You may contact Bob Umbdenstock, the author of this article, at blakbell@earthlink.net)

RECENT AWARDS

Two recent SMA Awards have been summarized by David Martin-Clark:

INTERNATIONAL COFFEE AND FERTILIZER TRADING CO. V. MERMAID SHIPPING CO. LTD.

In this award, arbitrators from the Society of Maritime Arbitrators in New York ruled that damages flowing from a breach of a voyage charter were not limited to those necessary to put the aggrieved party where it would have been had there been no breach. Damages could also include costs incurred by third parties in arranging substitute cargo – where they were reasonably foreseeable - and legal fees incurred in protecting the interests of the voyage charterers in court proceedings over the judicial sale of the carrying ship. The award also stated that SMA arbitrators had the power to award legal costs to the successful party, even in cases where the arbitration was not governed by SMA Rules and there was no provision regarding the award of costs in the arbitration agreement.[See **ATLANTIS TWO - SMA 3725**]

GIANT SHIPPING LTD. V. TAUBER OIL COMPANY

The Arbitration panel held by different majorities that Owners had an implied obligation to take all reasonable measures to ensure that tanks were well drained and stripped, even if they met the charter party description of being "free of any liquid and pumpable residues." As a consequence, when the ship arrived at her loading port with an excessive amount of cargo remaining on board, she was not in a condition to give a valid notice of readiness and laytime could only commence once loading began.

Charterers, once they had assumed responsibility for the further tank cleaning operations, were held responsible for the consequences of engaging incompetent contractors. By so doing, they failed to mitigate their damages arising from the Owners' breach of contract in tendering the vessel for loading in a discrepant condition. As a consequence, Charterers could not recover the amounts they had paid the contractors and the Owners were entitled to damages for detention for the time the contractors spent in their fruitless efforts to clean the ship's tanks. .[See **POSIDON - SMA 3732**]

DMC CaseNotes can be activated at www.onlinedmc.co.uk.

HAPPY DAY - RE-REVISITED

Our thanks to Michael Marks Cohen, Esq for the following correspondence to **THE ARBITRATOR**:

"I refer to the item about the **HAPPY DAY** decision in the last issue of The Arbitrator. Although the decision of the English Court of Appeal in the **HAPPY DAY** is a small improvement over the trial court's decision, it still is a disappointment for those who strive to bring English law into line with commercial expectations.

Maritime arbitrators on both sides of the Atlantic have consistently ruled in dry cargo trades that when NOR is given prematurely, out of office hours, it takes effect when office hours next begin. So too, they have ruled, especially in tanker cases, that an NOR which is otherwise premature, but not part of a scheme by Owners to misrepresent the vessel's arrival or her then existing state of readiness - takes effect at the earliest moment when it would have been timely.

That is still the principle applied by New York arbitrators. Thank goodness.

Unfortunately, the English courts have declined to allow London arbitrators to apply this sensible principle, insisting instead that a premature NOR (unless prematurity arises solely from delivery outside office hours), is a nullity, and a second NOR is required whenever it would be timely.

Accordingly, shipowners who are forced to arbitrate their disputes in London would be well advised to insist on a rider clause providing:

NOR, if premature, shall take effect for purposes of laytime at the earliest moment when it would have

been timely; provided that under local custom and practice, or the particular circumstances, it was reasonable for the Master to give NOR when he did so, and such NOR was not intended to deceive Charterers about the arrival of the vessel or the then existing state of her immediate readiness to perform under the charter."

ONLINE DISPUTE RESOLUTION

The following announcement appeared in the Maritime Global Net/Hong Kong International Newsletter in November and should be of interest to arbitrators, maritime lawyers and owners alike:

Online Dispute Resolution Service Launched

London-based Chartered Institute of Arbitrators and Marine Liens Ltd have formed a strategic alliance to assisting the resolution of online disputes between maritime contractors or suppliers and vessel owners. Marine Liens owns global maritime-lien database at www.MarineLiens.com,

The year-old MarineLiens.com, a forum for posting and searching maritime lien claims, maintains its own online resolution process. Once a claim of lien is posted, notification is sent to the owner of the vessel, who then has the opportunity to refute. Notification of rebuttal is sent to the claimant, who then has 30 days to respond. If s/he does not respond, the claim is automatically marked as settled. Should the claimant respond to the vessel owner's challenge, the claim stands and the dispute must be resolved outside of the Web site.

MarineLiens.com encourages parties who are unable to resolve liens through its Web site to seek any available outside resources to facilitate settlements. The Chartered Institute of Arbitrators (CIA) has developed an online dispute-resolution process that dovetails well with the MarineLiens.com process. The CIA has tailored a procedure and fee structure that provides for resolution of maritime lien claims through mediation and arbitration—all through the Internet.

The MarineLiens.com site—designed for professionals who finance, insure, or service boats of all sizes and values—provides a free system for posting lien claims against vessels for monies owed involving any vessel-related services. MarineLiens.com's current database of three million registered vessels is expected to expand to 30 million during the next three years.

DEFINITION FOR THE QUARTER

Lawsuit: A machine which you go into as a pig and come out as a sausage.

[*The Cynic's Word Book* (1906); later republished as *The Devil's Dictionary*]

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IN MEMORIAM

Konstantinos N. Livanos

On December 9, 2002, Konstantinos N. Livanos passed on suddenly. A native of Greece, Kosta was a valued member of the SMA and a longtime friend to several of its members.

Ironically, he had only recently retired from his employment at Eastwind Maritime Inc., where he had served as Operations Manager. Prior to working ashore, Kosta had served aboard merchant vessels for twelve years including service as Chief Officer. Kosta was well known among his colleagues for professionalism and good humor.

At his funeral several SMA members and many prominent members of the New York maritime community paid their respects to his wife Elaine and son Nick. May Kosta rest in peace.

Richard H. Sommer, Esq.

Richard H. Sommer, Esq. of Montville, NJ was laid to rest on December 28, 2002. Dick, who died on Christmas Day, was a senior partner at Kirlin, Campbell and Keating, New York City, where he worked for over 40 years as a specialist in maritime law. He was a friend of New York arbitration and of the SMA and will be missed by our community.

For THE ARBITRATOR

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PRESIDENT'S CORNER

The Fall season is in full swing! Our next SMA luncheon will be held on October 16th at The Captain's Ketch, 70 Pine Street, New York City, when John Weale, President of the Canadian Maritime Arbitration Association, will address a subject he knows very well - *Canadian Arbitration*.

Future luncheons will feature the following speakers who need little introduction: November 20 - Robert Shaw - *Maritime Arbitration from Different Perspectives and How to Accentuate the Positive;* December 18 - Joe Hughes - *New York Arbitration from a Club Viewpoint;* January 16 - Bill Honan - *The Doctrine of Adequate Assurance*.

These luncheons not only serve as a platform for speakers with something to say but, just as importantly, provide an excellent opportunity for users of the system, the maritime bar and arbitrators, to get together socially. Such occasions do not arise as frequently as in years past and I strongly urge you to support your arbitral community by attending.

Our Board of Governors had its first Fall meeting in mid-September and is hard at work with the Bar planning events designed to promote New York arbitration. A mock arbitration - similar to those presented at the Panama Maritime Conference in February and to the Houston energy community in April - will go forward at the ASBA/BIMCO Seminar to be held in Orlando on November 7-8.

The Society will be moving with the American Hull Insurance Syndicate from 14 Wall Street to new offices at 30 Broad Street within the next few months - with formal announcement to follow.

Maintaining New York as a viable arbitral center is not a spectator sport and we need your ideas, energy and support. If you would like to join these efforts, please contact me at 201-557-7344 or via email at david.martowski@thomasmiller.com.

David Martowski

SUPREME COURT FINDS COAST GUARD HAS LIMITED AUTHORITY OVER UNINSPECTED VESSELS

By George Weller, U.S. Coast Guard Office of Maritime & International Law

The Supreme Court this year answered the question of which government agency has authority to regulate safety on uninspected vessels. In its January 2002 ruling in Chao vs. Mallard Bay Drilling, Inc., the Supreme Court found that where

the Coast Guard has not exercised its statutory authority to regulate working conditions onboard uninspected vessels, that authority resides with the Occupational Safety and Health Administration (OSHA). Conversely, if the Coast Guard has exercised its authority over working conditions on those vessels, OSHA is pre-empted.

On June 16, 1997, a well being worked over by an inland drilling barge operated by Mallard Bay Drilling, Inc., in Little Bayou Pigeon, La., blew out. Mallard Bay evacuated the off-duty crew, but the rest stayed onboard to try to bring the well under control. Before it could be brought under control, gas found its way into compartments on the barge, and exploded, killing four individuals and injuring two others. The Coast Guard investigated the marine casualty, and following guidance in the Marine Safety Manual, forwarded the report of the investigation to OSHA for further action because the Coast Guard determined that it did not have any jurisdiction over the drill barge or its drilling activities, as it was an uninspected vessel.

OSHA took enforcement action under the Occupational Safety and Health Act against Mallard Bay Drilling, Inc., for failure to comply with OSHA marine safety standards by failing to evacuate the personnel onboard, failing to develop and implement emergency response plans, and failing to train the employees in emergency response. Mallard Bay challenged OSHA's jurisdiction in the 5th U.S. Circuit Court of Appeals, which has jurisdiction in the states of Texas, Louisiana and Mississippi. The 5th Circuit agreed with Mallard Bay's contention that the Coast Guard has exclusive jurisdiction over safety of seamen on vessels on navigable waters, and that, as a result, OSHA was pre-empted from asserting jurisdiction over the drilling barge, notwithstanding that the vessel was not subject to Coast Guard inspection and certification. At the request of the government, the Supreme Court agreed to hear the case because the 5th Circuit's holding was contrary to the law applicable in the rest of the country, as announced by the courts of appeals which had considered similar issues, some involving uninspected towing vessels.

The case turned on whether the Coast Guard had statutory authority to regulate, and had in fact regulated the safety aspects of the working conditions of the seamen on the Mallard Bay drilling barge that were pertinent to the blowout, the resulting explosion, fire and deaths onboard. If the Coast Guard had regulated those working conditions, or had articulated a position that such conditions need not be regulated for safety reasons, then OSHA was pre-empted; if the Coast Guard had not regulated (or articulated a position that no such regulation was necessary or desirable), then OSHA was not pre-empted. The government, on behalf of the secretary of labor, joined on the brief by the Coast Guard and the U.S. Department of Transportation, argued that not only had the Coast Guard not regulated the particular working conditions involved in the explosion, fire and deaths, but the Coast Guard had no statutory authority to regulate those conditions onboard that particular type of uninspected drill barge. In fact, the government argued that the only Coast Guard regulations that applied to the Mallard Bay rig, while it was engaged in the workover operation in the inland waters of Louisiana, were the Coast Guard marine sanitation device regulations.

Various industry groups, including the American Waterways Operators, the Transportation Institute, Associated General Contractors, Dredging Contractors of America and the National Maritime Safety Association, filed "friend of the court" briefs in support of Mallard Bay Drilling, Inc. The Court heard oral argument in the D.C. Circuit Court of Appeals because the Supreme Court was closed due to an anthrax scare, and issued its decision on Jan. 9, 2002.

The Supreme Court reversed the decision of the 5th U.S. Circuit Court of Appeals. The Court of Appeals noted that although 14 U.S.C. 2 seemed to grant the Coast Guard broad authority to regulate to achieve safety of seamen on vessels, Congress had enacted an elaborate regime for Coast Guard "inspected" vessels, but had given the agency much less authority over uninspected vessels, including the Mallard Bay inland drill barge involved in the case. The Court noted that the Coast Guard and

OSHA had agreed in a 1983 Memorandum of Understanding that the Coast Guard had exclusive jurisdiction over inspected vessels, but this case involved an uninspected vessel. In order to determine whether OSHA was pre-empted onboard an uninspected vessel, the particular working condition involved in the case must be examined. If the Coast Guard had regulated that working condition (risk of explosive gas accumulating in a confined space onboard the vessel), or articulated a formal position that no regulation was necessary or appropriate, OSHA was pre-empted. The Court found no such Coast Guard regulation dealing with that particular risk, and no statement that no regulation was appropriate, and therefore, ruled that OSHA was not pre-empted. In so holding, the Court returned the law in the 5th Circuit's jurisdiction to that of the rest of the country.

There have been many questions about the impact of the Court's ruling by those involved in the various uninspected vessel communities, including the Passenger Vessel Association, the American Waterways Operators, smaller uninspected towing vessel industry groups, and the Commercial Fishing Vessel Safety Advisory Committee. The Coast Guard does not foresee any change in its regulatory posture as a result of the ruling by the Court of Appeals. Further, it does not anticipate any change in the regulatory posture by OSHA. Rather, the Coast Guard anticipates that the Court of Appeals' ruling merely restored the two agencies to their respective regulatory jurisdiction and posture in the Gulf Coast states that existed before the 5th Circuit's ruling.

For the future, the Coast Guard expects to work closely with its industry partners, as well as OSHA, to further the goals of maritime safety. The Coast Guard hopes that by working together, the government and industry can bring their collective talents and resources to bear on the problem of how to make the nation's waterways safer without unduly burdening commerce and the independence of the small operator. Such action may involve revisiting the 1983 Memorandum of Understanding with OSHA to expand its scope to cover uninspected as well as inspected vessels in order to bring more certainty to the regulated public as to which agency—OSHA or the Coast Guard—has primary governmental responsibility for maritime safety on uninspected vessels.

This article appeared in the U.S. Coast Guard Journal of Safety at Sea: PROCEEDINGS of the Marine Safety Council, April-June 2002 edition.

HAMLET REDUX
A Case for Brevity & Reasoned Enquiry

By Rodney Elden

Polonius: *"What do you read, my Lord?"*
Hamlet: *"Words, words, words."*

How often I feel Hamlet's pain when confronted with the mile-high stacks of briefs and counter briefs that are the arbitrator's lot. Not to mention the endless inventory of documentation that is politely tendered as evidence of a client's grievance. Log and Bell books, Notices of Readiness, Surveys, Overtime Sheets, Stevedore Damage, Escalation and Weather Reports — a hurricane of words and figures! A creative owner once even presented a bill for limes to assuage his crew's thirst in the tropics! Is the Orinoco beyond *Institute Warranty Limits*?

Having been a passenger (en route to ICMA XIII in Paris) on TWA Flight 800 a few days before the Flight 800 tragedy that took 230 lives, I was recently amazed to see a report that the weight and volume of investigatory documentation covering this casualty now equals the takeoff weight (875,000 pounds) of this Boeing 747 aircraft! The legendary Broadway producer, David Belasco, would have said that he could write the proximate cause of this accident "on the back of my business card." It would probably read "Loss of Buoyancy."

Compounding the propensity for excess verbiage these days is the exponential increase in equipment technicality. In World War II, a fine naval fighter aircraft, the Grumman Wildcat, was constructed and maintained with a total documentation of about 800 pages. The current documentation required for the building and

maintenance of a North American F-16 fighter plane is approaching 80,000 pages! Ocean-going ships are not far behind. A liquified natural gas carrier costing $250,000,000 is one of the most complicated structures and systems ever devised. The complete drawings and manuals required to build and operate such a ship, no doubt, equal those for an F-16 or a 747 Jumbo Jet.

John Paulos, noted professor of mathematics at Temple University, tells us that "most adults are unable to model situations mathematically, seldom estimate or compare magnitudes and, most distressing of all, hardly ever develop a critical, skeptical attitude toward numerical, spatial and quantitative data or conclusions." A few examples of this paucity of understanding should be instructive.

The Perils of Ambiguity

As an arbiter, I have too often witnessed disputes that were superficially about matters common to maritime controversy, but in reality, *masked problems* that the parties preferred not to expose to public or regulatory scrutiny. The case of the MV Golden Ego is instructive. The 20 year old bulk carrier had called at Hyandry Shipyard in Cartagena to complete her Special Survey prior to loading grain at New Orleans. The shipyard's claim was for $98,765 in overtime for welders and shipfitters renewing structural steel in the cargo holds and tunnels that was outstanding of record.

The owner claimed that the shipyard had expressed confidence that adequate labor was available to complete the repairs in time for the vessel to meet her canceling deadline in New Orleans. The owner further claimed that he had forbidden the use of any overtime work. The shipyard claimed that the scope of the steel renewals could not possibly be ascertained in the initial survey on arrival of the vessel and that overtime had to be worked to meet the sailing date demanded by the owner. The completion date was met and the vessel arrived New Orleans the day before the cancellation.

Now, what was really going on here was a classic case of unrealistic expectations, intentionally ambiguous orders and a knowing creation of a future dispute! *In the course of the arbitration, one of the witnesses testified that while he was standing in the starboard wing tunnel of No. 4 hold, he could see the forepeak bulkhead through wasted steel on the tunnel side plating!* The vessel was in shipyard for only nine days, meaning that only six or seven days were available for full production. Under the threat of falling out of Class and missing his canceling date, the owner hoped to avoid American repair prices and patch up a seriously deteriorated hull structure at low cost under relaxed regulatory control.

The shipyard, knowingly short of labor, hoped to keep the customer happy by completing on time with the judicious use of overtime. The vessel was not arrested but sailed on time, leaving behind a substantial bill for overtime which the owner had, in classic ambiguity, both prohibited and authorized in daily demands for a completion date which could not be met on straight time. No shortage of words, pleas and threats here but there was no contractual understanding.

The Central Park War

On January 16th, 1991 the consolidated military forces of several nations acting under a U.N. Resolution attacked the forces and military installations of Iraq which had unlawfully invaded the kingdom of Kuwait. The United States had a great majority of the personnel in the combined operation and the number was repeatedly stated (by both doves and hawks) to be about half a million soldiers, sailors and marines from the U.S. and overseas garrisons.

Now the air war, which involved several thousand missions daily and the preparations for the ground war which involved thousands of vehicles and hundreds of ships to carry them, captivated the interest of the country 24 hours a day through on-site television reports and constant references to the commitment of half a million men to fight in a country larger than California and with a population greater than New York State.

The mind set and vision created by these quantifications was one of endless hordes sweeping across the entire face of the Middle East. Not so, for

if perceived in human scale with the entire half million American force encamped in one place like a Boy Scout Jamboree, they would fit, including their pup tents, in half of New York's Central Park between Central Park South and 86th Street, leaving plenty of room for the mess cooks and the Marine Band to play Semper Fidelis in the old 72nd Street Band Shell. A great war or a Boy Scout jamboree?

Gin & Bitters on Bligh's Reef (Punishment of the Innocent)

At nine minutes past midnight on March 24, 1989, the Exxon Valdez, loaded with Alaskan crude oil, struck Bligh's Reef in Prince William Sound and spilled approximately 258,000 barrels of North Slope crude oil into the sound and the North Pacific Ocean. While "barrels" is the industrial and maritime measure of this commodity. The press usually multiplies it by 42 to obtain "gallons", a more dramatic figure, and a measure more easily envisioned by motorists.

The master of the Exxon Valdez and its crew have been endlessly and unjustifiably excoriated for the past decade as though they intentionally spilled the oil in an act of willful negligence, and as though the oil reached the beaches of the world from Malibu to Martha's Vineyard, from Perth to Portofino, from Bondi to Brooklyn, and from Valparaiso to Vina del Mar. Not so!

The oil drifted and dispersed over a relatively small part of the 6,600 mile Alaskan coast which, incidently, comprises over 50% of the U.S. Continental coastline. As large as the Alaskan coastline is, however, it is still only two percent of the world's 372,00 miles of coastline. If we had stayed awake in tenth grade geometry and read only two paragraphs of Heinrich Helmholtz (1821-1884), we would know that if the world were in human scale - that is, with a diameter the height of the Washington Monument (555 feet), then the Exxon Valdez, in the same scale, would be three-sixteenths of an inch long which is the size of an average household ant! A catastrophic oil spill indeed!

The investigation early revealed that the master had been drinking, had previously been professionally treated for the disease of alcoholism and was not on the bridge when the vessel grounded. The investigation apparently overlooked the major seminal fact that every agent, superintendent, Coast Guard inspector, surveyor, manager, or corporate officer to whom the master answered must have known that the master had a serious problem and failed to take action. But nowhere in this *culture of cozy friendship* was there a mouse brave enough to bell the cat!

Professor Paulos Redux

Recently on Martha's Vineyard I was fortunate to hear an address by David Baltimore, Nobel Laureate and President of the California Institute of Technology. Dr. Baltimore reviewed his past five years as president of CalTech and some interesting highlights of his experience in the life sciences and the world of Alfred Nobel. He gave us front row opinions on the future of human and therapeutic cloning that gave rise to no concern in a sophisticated audience.

In the question and answer period that followed, Dr. Baltimore (who taught for many years at M.I.T.) was asked, "Given equal credentials, which would you hire as a research assistant, a graduate of CalTech or a graduate of M.I.T. ?" With diplomatic aplomb, he answered "Either one would be fine, for they would both be superior to the graduates of any other institution in their critical ability to comprehend and assess numerical and quantitative data or thinking."

In the tenth grade at George Washington High School in 1935, Miss Cunningham taught us that words were tools we would need to think with and that maths were tools we would need to reason with. I'm grateful that I was listening.

Mr. Elden is a management consultant, arbitrator and mediator in New York. He has been involved in arbitral proceedings since 1959 (SMA 911). He is former Chairman, Board of Governors of the California State Maritime College and is a Licensed Chief Engineer Steam and Motor Vessels (Issue No. 15). He is author of Ship Management, a Study in Definition & Measurement (1962), to be republished in 2002, Cornell Maritime Press.

Misdelivery in the Absence of Original Bills and Exemption Clauses

By William Leung

One of the key provisions of the bill of lading, so far as the shipper is concerned, is the promise not to deliver the cargo other than in return for an original bill of lading. The requirement to deliver the goods only against presentation of an original bill of lading is therefore one of the main objects of the contract. A shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. If the shipping company did not deliver the goods to any such person, they are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. If they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them, they are therefore liable in conversion unless likewise so protected. This principle protects the shipper from fraud and also protects the shipowner.

A shipowner is not bound to deliver goods except in exchange for the bill of lading. He is not bound to take on trust that he knows the consignee and that no intermediate rights had been created. Neither the owner, his agent, nor the master can be called upon to accept a banker's or any other guarantee of an indemnity, though such a thing is not unknown.

In practice, if the bill of lading is not available, delivery is effected against an indemnity. Where the bill of lading is lost, the remedy, in default of agreement, is to obtain an order of the Court upon tendering a sufficient indemnity. The loss of the bill of lading is not to be treated as a defense.

The court's approach to exemption clause has always been that clear words would be required for the parties to be held to have contracted out of it. The clause should be constructed so as to enable effect to be given to one of the main objects and intents of the contract, namely that the goods would only be delivered to the holder of an original bill of lading. As a matter of construction, it is permissible to limit the ambit of a particular clause in the light of that fact. In ***Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.*** [1959] 2 Lloyd's Rep. 114; [1959] A.C. 576, the manufacturer shipped from England to Singapore bicycle parts under a bill of lading requiring the goods to be delivered "unto order or his or their assigns", with the exemption clause therein provided that:-

> **"....the responsibility of the carrier....**

whether as carrier or as antodian or bailee of the goods … shall be deemed… to cease absolutely after the goods are discharged from the ship."

This is a classical standard "before and after" clause devised by the shipowner trying to claim exemption from potential liability from shipowners. Lord Denning said:

> *"The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea…. There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it; and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for…But their Lordships go further.*
>
> *If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract…, has, as one of its main objects, the proper delivery of the goods by the shipping company, "unto order or his or their assigns," against production of the bill of lading.*
>
> *It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else,*

> *to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see* ***Glynn v. Margetson & Co.****[1893] A.C. 351 at Pg. 357****; G. H. Renton & Co. Limited. v. Palmyra Trading Corporation of Panama****.[1956] 1 Q.B. 462 at Pg. 501;[1955] 2 Lloyd's Rep.722 at Pg. 741.*
> *To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery… deliberately disregarded one of the prime obligations of the contract. No Court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause..."*

Most of the delivery clauses in modern container bills of lading give wide rights to the carrier to deal with the goods where they have not been collected. These may well use the language of a "cesser" of liability and purport to excuse for a wider variety of events than the standard "before and after" clause. The express clauses often give the right to store the goods and to charge the costs of storage to the cargo interests. In some cases the costs of storage may be set out in the carrier's tariff. In addition to the storage costs, there may well be demurrage claims. Where there is no documentation available, for example, because the bill of lading is delayed in the banking system or no bill of lading has ever been issued, the costs incurred by the carrier (including unpaid freight) could well exceed the value of the goods themselves. The carrier may be faced with claims for delivery from a number of potential claimants in circumstances where it is not clear to whom delivery should be made. In such cases the carrier may decide to interplead and claim relief from the court. In general, the carrier would be entitled to claim that the costs of preserving the cargo and the legal costs of the interpleader relief. The carrier may retain any fund held by the carrier when, for example, where the cargo was sold. The carrier may also require such amount of sums to be paid as a condition of releasing the cargo, for example, to allow the cargo to be sold so as to minimize any future costs. It seems that where a carrier seeks interpleader relief, it can never be at risk of damages for conversion.

The provisions in the contract should be constructed as not excluding the responsibility of the shipowners where they or their agents misdeliver the goods regardless of whether they did so in deliberate and conscious disregard of the rights of the cargo owners.

The question is thus whether the words in any of the clauses relied upon are sufficient to excuse misdelivery of the goods after discharge.

In ***The 'Ines'*** [1995] Lloyds' Rep. 144, the exemption clause provides:

> ***"3. PERIOD OF RESPONSIBILITY***
> *Goods in the custody of the carrier or his agent… before loading and after discharge… are in such custody at the sole risk of the owners of the goods and thus the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the ocean vessel… …*
>
> ***5. FORWARDING, SUBSTITUTE OF VESSEL, THROUGH CARGO AND TRANSSHIPMENT***
> *… the Carrier to be at liberty to… store the goods… on shore…*
> *The responsibility of the carrier shall be limited to the part of the transport performed by him in a vessel under his management and no claim will be acknowledged by the carrier for damage or loss arising during any other part of the transport…*
>
> ***7. RECEPTION OF THE GOODS***
> *(a) The Receiver… must be ready to take delivery of the goods as soon as the vessel is ready to unload…*
> *(b) Receiver cannot demand delivery of goods direct from ship without special agreement…*
> *(c) General local clause Landing… of the goods to be arranged by Carrier's agents for the risk and expense of the Shipper whether delivery is taken overside or in the quay."*

The defendants' shipowner submitted that the effect of those clauses was that the responsibility

of the carrier was to cease on discharge of the ship and that any loss caused by any event occurring thereafter is not recoverable. In particular, they said that by Clause 3 the carrier was to have no responsibility whatsoever for the goods subsequent to their discharge from the ocean vessel. It follows, they submitted, that they were not liable to the plaintiffs cargo owners on the facts of this case because the misdelivery occurred some days after discharge when the goods were delivered without production of an original bill of lading. They rely upon a number of authorities and say that the only circumstances in which the carrier would have been liable would have been where he acted either in deliberate disregard of the rights of the plaintiffs cargo owners or dishonestly.

It was held by Clarke J. that Clause 3 "concerned with loss of or damage to the goods and may well include the case where the goods are stolen, but it is not concerned with misdelivery." It was also held that Clause 5 "does not seem to be concerned with misdelivery." There is however no hint in the wording of Clause 7 that carrier is to be entitled to deliver otherwise than in return for an original bill of lading or even that he is not to be liable if he does do. Thus Clause 7 also does not concern misdelivery. Although the plaintiffs were in breach of Clause 7 because they were not ready to take delivery as soon as the vessel was ready to discharge, any loss suffered by them was not caused by that breach but by the delivery of the goods without presentation of an original bill of lading.

In a recent Hong Kong case (handled by the author of this article, Mr. William Leung for the plaintiff) ***Center Optical (Hong Kong) Limited -v- Jardine Transport Services (China) Limited and Pronto Cargo Corporation (Third Party)***,[2001] Lloyd's Rep. 678, the goods consisted of two consignments of optical frames and sunglasses. Both consignments were shipped from Shanghai to Miami in mid-1998.

In March, 1998, the plaintiff suggested to the buyer that it should ship direct from Shanghai to Miami. This was agreed with the buyer suggesting the use of Jardine Freight Services (HK) Ltd. This company referred the plaintiff to Jardine Transport Services (China) Limited ("JTSC"), the defendant in Shanghai.

On May 25, 1998, JTSC issued the *Alligator Wisdom* bill which was in "Dynamic Container Line" ("DCL") form, named the plaintiff as shipper, the consignee as "To Order" and the notify party as "Center Optical HK Inc." The third party in the proceedings, Pronto, was named as "F/Agent." Shanghai in China was named as the load port and Miami in the United States was named as the port of discharge. The number of packages represented by this bill was stated to be 248 cartons and the bill itself was marked "freight collect."

The issuance of this bill led to a chain of sub-bills which named JTSC as shipper and Pronto as consignee and notify party. A like sequence occurred with regard to eight shipments of 348 cartons of sunglasses on *Hanjin New York*. On arrival at Long Beach, the seventh and eighth shipments were railed from Long Beach to Miami at which point the relevant containers were destuffed. Thereafter, facilitated by presentation in each case of the respective bills, Pronto were able to gain possession of these goods and via a power of attorney issued by Miami Center Optical, to clear these shipments through the United States' Customs.

On the evidence, the two shipments were released from storage by Pronto to Miami Center Optical without the production of the original DCL bills of lading in respect of each shipment. Attempts were made by the plaintiff to obtain payment for the goods from Miami Center Optical but without much success.

The defendant relied upon the definition of "port to port" shipment in Clause 1 of the bills, Clause 6(2) relating to "port to port" shipment and Clause 14 relating to delivery, to contend that obligations under the bills ceased on discharge or on storage of the goods after such discharge. The particular Clause 14 in question reads as follows:

"14. DELIVERY OF GOODS

If delivery of the Goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, the carrier shall be entitled without notice to remove from a

*Container the Goods or that part thereof if stuffed in or on a Container and to store the Goods or that part thereof ashore afloat, in the open or under cover at the sole risk and expense of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon the liability of the Carrier in respect of the Goods or that part thereof shall cease.***"**

The learned Judge Stone J. held that the established English jurisprudence in this area, being to protect the integrity of the bill of lading as "the key to the floating warehouse," was to be followed.

Stone J. declined to hold that the plain wording of Clause 14 was sufficiently clear to "impinge upon the cardinal principle requiring delivery by the (ship) owner or his agent only against production of an original bill of lading" although he accepted that "this particular clause purportedly is drawn in terms of cesser of responsibility."

Conclusion

The Hong Kong Commercial Court has preserved the long well-established principle that a carrier has the prima facie fundamental obligation to deliver goods upon presentation of original bills of lading, failing which any misdelivery will be at the carrier's own risk and peril. Any exemption clause attempting to exempt the carrier's liability for deliberate or even conscious misdelivery whether without any original bill of lading or against a forged bill of lading will be construed strictly against the carrier. The attitude of the Hong Kong Court is unsympathetic to any exemption clause which may have the effect of allowing a carrier to be exempted from liability upon deliberate or conscious misdelivery of goods. This is in accordance to common sense in that the commercial value of a bill of lading to its holder has to be fully respected and protected by the law in order that both international trade and its financing may be facilitated.

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RECENT AWARDS

Two recent SMA Awards have been summarized by David Martin-Clark:

Baltimore Form C Grain Bill of Lading - Cargo Damage

The first case concerned a claim by cargo insurers for heating and sweat damage sustained by a cargo of US yellow corn in the course of a voyage from a port in Louisiana to Japan.

The award addressed the issue whether or not, in a case where the carrier alleges inherent vice of the cargo, as here, cargo interests can make out a *prima facie* (at first sight) case against the carrier simply by evidencing a clean bill of lading on loading and damage on outturn. The panel found that, where the inherent vice is alleged to consist, as in this case, of a factor such as high moisture content, which is not apparent to the human eye, then clean bills of lading are not sufficient to establish a *prima facie* case against the carrier.

The panel also found, on the facts of the case, that the damage to the cargo had been caused by inherent vice. In this regard, the panel also noted evidence from the surveyors appointed by the Owners' P&I Club, that seven other ships had, during the previous six months, experienced similar damage with cargoes of US yellow corn. [See **TENG FEI HAI, SMA 3726**]

NYPE - Arbitrability

The second case concerned the issue whether charterers were able to bring a claim in arbitration over the alleged failure of the ship to vacate its final discharging berth in accordance with the charterers' instructions. The owners alleged that such a claim fell outside the scope of the charterparty arbitration clause and should, therefore, be brought before the court in tort.

In an award on a preliminary issue of jurisdiction, which the parties had determined that the arbitrator should decide, the arbitrator found that a claim which arose from an alleged breach of charter, occurring during the period of the charter, was within his jurisdiction, even if the event which gave rise to the damages claimed occurred after redelivery.

Normally under American law, questions regarding an arbitrator's jurisdiction are to be determined by the courts but in this case the parties agreed that the arbitrator should have the power to determine his own jurisdiction. This he duly did, holding that the charterers' claim was within the scope of the charterparty arbitration clause. [See **YARDIMCI, SMA 3731**]

Notice of Readiness and Laytime Commencement - *Happy Day* Revisited

In the October - 2001 issue, THE ARBITRATOR, under the heading "Notice of Readiness and Laytime Commencement" offered thinly veiled criticism of the result in the "*HAPPY DAY"* affair. The court of Appeal decision is in and confidence in the system has once again been restored. David Martin-Clark has summarized this decision:

> In this decision the Court of Appeal overruled the decision at first instance. It held that, (a) where a charterparty provides that a notice of readiness is to be given before laytime commences, (b) a notice of readiness is given that is invalid for prematurity, [namely, given before the ship had reached its contractual destination or had achieved the required state of readiness] (c) no reserve is made in respect of the invalid notice and (d) cargo operations begin without any further notice of readiness being issued, charterers were deemed to have waived reliance on the original invalid notice as from the time cargo operations began. Laytime would therefore commence in accordance with the regime provided in the charterparty, as if a valid notice had been served at that time. See **Glencore Grain Ltd. V. Flacker Shipping Ltd. "The Happy Day"** [Case No. DMC/SandT/19/02]

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ARBITRATORS' FEES

It was April 2000 that THE ARBITRATOR last addressed the subject of arbitrators' fees. At that time we briefly reviewed the difference between London and New York in the matter of collecting those fees. We now pose a few questions to our members regarding collection of panels' fees and expenses.

1) Should the panel insist on the escrow of arbitrators' estimated fees and expenses, as allowed under Section 37 of the SMA Arbitration Rules?
2) Presuming the answer to 1) to be "yes", at what stage should the request be made?
3) What should the panel do if one or both parties fail to abide by the panel's ruling to contribute to such an escrow account?
4) How should the arbitrators enforce an award of arbitrators' fees and expenses?
5) Should there be a commitment and/or a cancellation fee to cover contingencies such as settlement prior to an award or a stay in the process due to bankruptcy proceedings?

These questions have recently become more relevant if we are to believe the scuttlebutt heard in New York arbitration circles about the number of arbitrators who have been "stiffed." Considerable discussion has transpired about adopting tougher collection procedures, and even not going forward

without first receiving payment on account from the parties. Two cases before the New South Wales Supreme Court earlier this year, while not entirely on point for a variety of reasons, offer some precautionary insight into this matter.

The first case concerned a situation where the respondent proposed arrangements for payment of the arbitrators' fees including a non-refundable booking fee at a set daily rate for the period for which the hearings were scheduled. The tribunal, in turn, required payment of agreed upon per diem rates for all hearing time set aside and the lodgement by the parties of the full estimated amount in an escrow account as security for fees, costs and expenses. There ensued what amounted to a negotiation between the panel and the parties with the panel declining to proceed prior to obtaining agreement as to cancellation fees and payment thereof. The respondent eventually agreed with the arbitrators. The plaintiff, however, would not agree and took the position that the panel was applying undue pressure and were concerned that the tribunal, having had its proposals rejected would see the plaintiff as having taken a stand against their interests and that in the hearing of the matter the plaintiff might suffer in the arbitrators' assessment of the case. The plaintiff believed that the arbitrators were prepared to place their own interests in securing the parties' agreement to pay a cancellation fee before their obligation to properly discharge their duties as arbitrators. The plaintiff requested the arbitrators to offer their resignations, which request was denied. The plaintiff then resorted to the Court with the request that the panel be dismissed because of misconduct. The judge ordered the removal of the arbitrators, having been satisfied that each of the arbitrators misused his position in applying pressure to the parties to agree to a cancellation or commitment fee and that constituted misconduct in terms of the relevant statutes. The judge stated:

> " . . . *This case demonstrates the wisdom of an arbitrator reaching agreement with the parties as to his or her remuneration upon appointment. Here the arbitrators had not done so and their concern to have agreement upon a cancellation or commitment fee ultimately assumed such importance in their minds that they allowed themselves to be swayed by this concern to the detriment of their duty to maintain the appearance of acting in the interests of bringing down a just award.*"

As a concluding observation, it is interesting to note that the tribunal comprised a retired judge and a member of the bar.

[See **ICI Pty Ltd v Sea Containers Ltd [2002] NSWSC 77**]

The second case is less complex. A sole arbitrator, after having been appointed and accepted by the parties, requested security into his company's trust account prior to proceeding. The crux of the matter had more to do with the allocation, i.e., who paid how much of the ordered security rather than should security be paid. The judge's ruling on the propriety of the order is enlightening:

> "*There seems little dispute between the parties that the arbitrator's point of view that he would not do any work for these parties without security was a reasonable one. The real difficulty is that the arbitrator should have made this stipulation before his appointment, not afterwards.*"

[See **McKensey v Hewitt [2002] NSWSC 145**]

Both of these cases suggest that arbitrators should proceed gingerly to secure their fees, not abuse the considerable powers which they wield, and whenever possible, establish their fees, or the basis upon which they will be charged, sooner rather than later in the process.

HUMOR
EAT WHAT YOU WANT

From Andrew Tobias, *Demystifying Finance*

"I became famous in our family (with just one sibling, it was hard to be an unknown) for the simple observation to my indecisive cousin – age five at the time, like me, and unsure of a piece of

Thanksgiving dinner – 'Michael! If you want the ham, eat the ham. If you don't want the ham, *don't* eat the ham. But let'th not asCUTH it all the time!' It is vaguely in that vein that this bit of internetiana could be read, forwarded by **Eric Loeb**. You may already have seen it:

The Japanese eat very little fat and suffer fewer heart attacks than the British or Americans.

The French eat a lot of fat and also suffer fewer heart attacks than the British or Americans.

The Japanese drink very little red wine and suffer fewer heart attacks than the British or Americans.

The Italians drink excessive amounts of red wine and also suffer fewer heart attacks than the British or Americans.

CONCLUSION: Eat and drink what you like. Speaking English is apparently what kills you."

QUOTE FOR THE QUARTER

ALL CLEAR

It took me forty years on earth
To reach this sure conclusion
There is no Heaven but clarity,
No Hell except confusion.

ALL CLEAR: Jan Struther, *A Pocketful of Pebbles*, Harcourt, Brace & Company, New York, 1946

For THE ARBITRATOR

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FORWARD

This is the second issue of THE ARBITRATOR to be produced entirely in virtual format. Some members were concerned about possible loss of readership when we decided to eliminate the hard copy edition. We invited all previous subscribers to provide e-mail addresses to facilitate their continued receipt of this publication.

There has been a drop off of some traditional subscribers, but these have been largely offset by new subscribers, thanks to a great extent to the folks at Maritime Advocate Online, who mentioned our intent to go digital. Our thanks is also extended to David Martin-Clark who continues to provide excellent press for the SMA and its work product, the Award Service. David has provided us with a clever description of his Case Notes website, which we gladly reproduce herein for our readers.

We continue our effort to provide timely articles of interest to the maritime arbitration community. In this issue we touch on two unsettled topics: the inclusion of the Clause Paramount in charter parties and, perhaps less thorny but no less perplexing, the issue of what is a vessel.

We have visited the Clause Paramount issue in the past. In the enclosed article we believe Ray Connell covers the subject in a comprehensive and lucid fashion.

In our last issue we took a light-hearted glance at the gender of ships. In this issue Wade Hooker and Terry Stoltz take a serious view of what is a vessel, citing examples where a floating object is a vessel and a self-propelled ship is not.

We have also included up to date information regarding the SMA Board of Governors and Committee assignments.

Finally, don't you just hate the forwarding of jokes over the Internet? We've included a couple to stay in tune with the times.

We hope you enjoy this issue and that you will continue to benefit from your subscription to THE ARBITRATOR. Please tell your colleagues and associates about us. We would love to expand our subscription list.

PRESIDENT'S CORNER

Congratulations to the Society's newly-elected Governors - Henry Engelbrecht, Svend Hansen, Klaus Mordhorst and Tony Siciliano. Soren Wolmar and Austin Dooley have been appointed Secretary and Treasurer, respectively, and the Board is off to a running start with a full agenda!

On April 17th a Houston seminar on "Dispute Resolution: The New York Arbitration

Alternative" was sponsored by Poten & Partners, Inc., Teekay Shipping (USA), Inc., the SMA and New York law firms Burke & Parsons, Cichanowicz Callan Keane Vengrow & Textor, Freehill Hogan & Mahar, Haight Gardner Holland & Knight, Healy & Baillie and Nourse & Bowles. The event was inspired by Jim Textor and primarily targeted the New York firms' energy clients who were involved or had an interest in New York arbitration. More than eighty attendees heard presentations on the history, legal background and framework of arbitration; the inner workings of the New York maritime process - from panel appointment through award issuance; flexibility illustrated by emergency hearings, documents only, deposition and telephonic testimony and mediation; recovering attorneys' fees; similarities and differences between SMA, AAA and LMAA procedures; and energy-focused discussions of New York tanker awards, vetting and Oilvoy clauses, and a mock arbitration that proved to be the event's highlight. Poten's Jeff Goetz gave a stimulating luncheon address on the current and short-term prospects of the tanker market against international geo-politics. The success of the seminar was measured by question and answer sessions that were robust and candid. A reception followed which provided an opportunity for participants and attendees to share additional thoughts over a cup or two of nectar. Bar-SMA participants included Peter Gutowski, Ray Burke, LeRoy Lambert, Jim Textor, Jay Pare, Jack Greenbaum, Keith Heard, Tom Fox, Tony Siciliano, Lucienne Bulow, Don Szostak, Soren Wolmar, Joe Homicki and yours truly.

I stated in this column soon after assuming office a year ago that my priorities would concentrate on an active and cohesive membership, a close working relationship with our maritime bar and vigorous promotion of the Society here and abroad. Participation in February's Panama Maritime VI World Conference, the Houston seminar and more such future events are designed to promote and highlight what the New York maritime arbitral community has to offer and I encourage you to get onboard.

David Martowski

CHARTER PARTIES AND THE "CLAUSE PARAMOUNT"

By Raymond A. Connell, Esq.

At the close of the nineteenth century, the United States Congress enacted the Harter Act, 46 U.S.C. §190, et seq. (1893), to protect American shippers from comprehensive limitation of liability clauses found in bills of lading issued, primarily, by British liner companies carrying American goods to England. Among other things, the Act makes it unlawful to insert in bills of lading any clause (1) relieving the carrier from liability for loss or damage arising from negligence, fault or failure in the proper loading, stowage, custody, care, and delivery of cargo, or (2) lessening or weakening the obligation to exercise due diligence to make the vessel seaworthy, or to carefully handle, stow, care for, and deliver the cargo. 46 U.S.C. §§ 190, 191. Clauses placed in bills of lading in contravention of §190, "shall be null and void and of no effect." 46 U.S.C. §190.

Provided the carrier exercises due diligence to make the vessel in all respects seaworthy, the carrier is exonerated for damage or loss resulting from errors in navigation and management of the vessel, and from a variety of other causes unrelated to fault, e.g., "dangers of the sea or other navigable waters." 46 U.S.C. §192.

The Harter Act is compulsorily applicable to carriage of goods "from or between ports of the United States and foreign ports." 46 U.S.C. §190.

In an attempt to ensure Harter Act protection was afforded by the courts of the country of destination for American exports, shippers insisted bills of lading issued in the United States include a provision expressly stating the bill of lading "is subject to all terms and provisions of, and exceptions from, liability contained in [the Harter Act]…." See Selvig, The Clause Paramount, 10 Am.J.Comp.L. 205, 206-07 (1961) (explaining the historical background of Harter Act incorporation into bills of lading).

When called upon to construe a bill of lading covering goods damaged on a voyage from Baltimore to Liverpool, terms of which incorporated the Harter Act, Lord Esher set the standard by which courts would also treat mandatory legislation

designed to govern bills of lading, where such legislation is incorporated into charter parties:

> [W]hat we have to do is to construe the bill of lading, reading into it as if they were written into it the words of the Act of Congress. If this is done, it will have this effect: that some provisions will appear twice over, because they have put words extremely like those of the Act into the bill of lading, and then introduced the whole of the Act. That would, of course, do no harm, but it is clumsy to the last degree. [Dobell & Co. v. The S.S. Rossmore Co., Ltd., [1895] 2 Q.B. 408, 412 (C.A. 1895)]

On the international level, the Hague Convention signed at Brussels in 1924 sets out a series of rules (the "Hague Rules") to govern the rights and obligations of shippers and carriers under ocean bills of lading, or similar documents of title. On the one hand, the Convention requires the carrier to "properly and carefully" load, handle, stow, keep, care for, and discharge the goods carried. Article III(2). On the other hand, the carrier is relieved from the implied warranty of seaworthiness in favor of the lesser obligation, "before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy," and, it is excused from liability for a series of named events, including negligence in the navigation and management of the vessel. Articles III(1), IV(1) and (2).

If Articles III(1) and (2), and IV(1) and (2) are "the heart" of the Convention, its teeth are in Article III (8):

> Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening of such liability otherwise as provided in this convention, shall be null and void and of no effect.

Article III(6) provides:

> "In any event, the carrier and the ship shall be discharged from any liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

In 1936, the United States implemented the Convention by enactment of the United States Carriage of Goods by Sea Act ("COGSA"), now found at 46 U.S.C. App. §§1300-1315. Generally speaking, the American version of the Hague Rules kept to the original text, but there were some departures. Among other things, §1300 subjects to COGSA's provisions both inbound and outbound bills of lading; §1305 expressly states COGSA "shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter;" and, §1312 requires "every bill of lading or similar document of title which is evidence of a contract for the carriage of goods from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of [COGSA]."

The application of the COGSA to inbound, as well as to outbound, bills of lading represented a significant geographic expansion of the Hague Rules. The limitation of COGSA's application to bills of lading and similar documents of title to the exclusion of charter parties made explicit what, in any event, was the case under the Hague Rules, the application of which was limited to bills of lading. Unless domestic legislation provided otherwise, bills were not required to contain a statement the carriage was governed by legislation implementing the Rules, but it was common practice to include such a statement in bills of lading, even when the carriage itself would not otherwise be subject to the Rules.

It is the Statement, required by §1312 to be placed in outbound bills of lading that has come to be known as the "USA Clause Paramount." COGSA does not expressly provide a remedy for failure to include a Clause Paramount in outbound bills, but one authority is of the view that where an outbound bill of lading subject to COGSA fails to

contain the required Clause Paramount, "it may not seem too drastic to hold the carrier estopped from claiming the benefit of the statute, or of the exceptions in his illegal bill, while permitting the cargo to claim whatever benefit the statute gives…." Gilmore, The Law of Admiralty, 186 (2d ed. 1975). Where a charter requires inclusion of a Clause Paramount in bills of lading, and Charterers fail to do so, they will be responsible for any prejudice to Owners on claims by cargo interests brought under the bill. See, e.g., Lux Challenger v. Blue Anchor Line, 1992 A.M.C. 841 (Arbitration at New York, 1991) (J. Berg, sole arbitrator).

The practice of conjoining legislation governing bills of lading and charter parties followed enactment of the Harter Act. See The Agwimoon, 24 F.2d 864 (D.Md. 1928), The Westmoreland, 86 F.2d 96 (2d Cir. 1936); The Tregenna, 121 F.2d 940 (2d Cir. 1941). It has been suggested the Clause Paramount found its way into charters as a consequence of brokers adopting the practice of adding to the charter by attachment, or by verbatim transcription, the same Clause Paramount required to be included in bills of lading. See Shoenbaum, Admiralty and Maritime Law, 361-62 (1987). "No matter what the reason: 'The parties to a charter party frequently have no specific idea why it contains or should contain a paramount clause.'" Selvig, The Paramount Clause, 10 Am. J. Comp. L. 205, 209-10 (1961).

The simple form of "USA Clause Paramount" reads:

> This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights and immunities or an increase of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

In 1958, the House of Lords addressed the question whether the U.S.A. Clause Paramount, drafted for inclusion in a bill of lading, but nonetheless physically attached to a consecutive voyage charter on a "Tank Vessel Voyage Charter-Party" form, affected rights and liabilities of parties to the charter. In what is recognized as the leading case on the subject, a unanimous court in Anglo-Saxon Petroleum Co., Ltd. v. Adamastos Shipping Co., Ltd. (The Saxon Star), [1958] 1 Lloyd's L.Rep. 73 (H.L.), held that it did: "If the Paramount Clause is to have any meaning or effect at all 'This bill of lading' must be held to be a misnomer for 'This charter party'…." [1958] 1 Lloyd's L. Rep. at 90 (Reid, L.). However, when it came to the consequences of incorporation for the claim involved, i.e., economic loss sustained as a result of a series of delays attributable to unseaworthiness, some of which occurred in trading without the United States, and some of which occurred on ballast voyages, the Lords divided (3-2). The majority found (1) COGSA as incorporated into a charter for worldwide trading applied to all voyages, loaded and unloaded, without regard to §1300's geographical limitation to voyages to and from ports in the United States; and, (2) when incorporated into a charter, the reference in §1304(1) and (2) to "loss or damage," is not limited to physical loss or damage to goods - it includes other classes of damage, such as economic loss suffered as a consequence of delays which forced a reduction in the number of voyages capable of being performed within the charter period. The practical consequence for Owners was that their obligation to provide a seaworthy vessel was not governed by an absolute warranty of seaworthiness, but rather, by the lesser "due diligence" standard of §1304(1) brought into the charter by the Clause Paramount.

American courts have also reformed the "U.S.A. Clause Paramount" so that its introductory phrase "This bill of lading…" is read as "This charter-party…." See Sun Company, Inc. v. S.S. Overseas Arctic, 27 F.3d 1104 (5th Cir. 1994); Shell Oil Co. v. M.T. Gilda, 790 F.2d 1209 (5th Cir. 1986); United States v. Wessel, Duval & Co., 115 F. Supp. 678 (S.D.N.Y. 1953).

Despite the willingness of courts to reform language of the standard "USA Clause Paramount"

to facilitate incorporation into a charter party, an intention to incorporate must nonetheless be clearly stated. A charter provision requiring "Bills of lading are to include" a Clause Paramount, the terms of which are quoted, but which makes no reference to incorporation into the charter, is insufficient to bring COGSA terms into the charter. Associated Metals & Minerals Corp. v. S.S. J. Jasmine, 983 F.2d 410 (2d Cir. 1993). Previously, the Second Circuit in The Stolt Lion, 617 F.2d 907, 913 n.7 (2d Cir. 1980) had avoided addressing the question of proper incorporation where the charter provision required "All bills of lading issued hereunder shall have effect subject to the provisions of COGSA…," but it took note of Standard Oil Co. of Calif. v. United States, 59 F.Supp. 100, 102-03 (S.D. Calif. 1945), aff'd, 156 F.2d 312 (9th Cir. 1946), where such a clause was deemed an effective incorporation of COGSA terms into the charter. In the writer's view, The S.S. J. Jasmine represents the better view. A charter provision containing a clause requiring "All bills of lading" issued thereunder to contain a Clause Paramount, is an attempt to ensure Charterer's compliance with §1312, and to ensure that on any suit by endorsees of negotiable bills, Owners and their vessel, inter alia, have the protection afforded by §§1303 and 1304. There is no basis for rewriting this clause under guise of a Saxon Star style reformation for the purpose of drawing COGSA terms into the charter itself.

A charter provision incorporating only a portion of COGSA, will be deemed an intention to exclude unmentioned portions. See Ralston Purina Co. v. Barge Juneau, 619 F.2d 374 (5th Cir. 1980); In re Sulphur Queen, 460 F.2d 89, 102-03 (2d Cir. 1972) (incorporation of only select sections of COGSA did not require application of burden of proof rules which would govern had COGSA been fully incorporated). A simple statement that: "Paramount Clause [is] deemed to be incorporated in this charter party" has been enforced as a reference to the Hague Rules: "It seems to me that when the 'Paramount Clause' is incorporated, without any words of qualification, it means that the Hague Rules are incorporated…. I mean, of course, the accepted Hague Rules, not the Hague-Visby Rules, which are of later date." The Agios Lazaros, [1976] 2 Lloyd's L. Rep. 47, 50 (C.A.) (Denning, M.R.). More recently, the court in The Bukhta Russkaya, [1997] 2 Lloyd's L.Rep. 744 (Q.B.) found charter party incorporation of "the general clause paramount" referred to a clause published by BUIMCO in 1994, which provided for incorporation of the Hague Rules as enacted in the country of shipment, but, if none, of the Rules as enacted in the country of destination, but, if none, of the 1924 Convention; but, if the Hague-Visby Rules are made compulsorily applicable by the legislation either of the country of shipment, or of the country of destination, of the 1924 Convention as amended by the Hague-Visby Rules. On a voyage from Japan to Mauritania, where Hague-Visby was not in force, the unamended Hague Rules governed, despite the fact the charter contained English choice of law and London arbitration provisions, and Hague-Visby had been in force in the U.K. since 1977.

Where a U.S.A. Clause Paramount is properly incorporated into the charter, COGSA terms do not have "statutory rank," but the incorporated text "is converted into a binding consensual obligation." United States v. M.V. Marilena P, 433 F.2d 164, 170 (4th Cir. 1969). The same standard that had been adopted by the court in Dobell & Co. v. The S.S. Rossmore Co., Ltd., [1895] 2 Q.B. 408 (C.A. 1895) with respect to incorporation of the Harter Act into American export bills of lading.

The consequence of incorporation is simply stated:

> [T]he terms of the specific contract and the Hague Rules are fused together. The combined terms interact between themselves. There is no line of demarcation or difference in quality or effect save that if the incorporated clause is also a paramount one the Hague Rules will not merely supplement the specific contract but will operate also to modify any incompatible clauses in it. [The Agios Lazaros, [1976] 2 Lloyd's L. Rep. 47, 59 (C.A.) (Shaw, L.J.)]

The interplay between COGSA (or the Hague Rules) and the provisions of the charter to which it is appended, is not so easily resolved:

> The courts have not found it easy to make sense of the Hague Rules in the context of a charter-party since clearly those rules were not designed to be incorporated in such a contract. [The Standard Ardour, [1988] 2 Lloyd's L. Rep. 159 at 163 (Q.B. 1987) (Saville, J.)]

From Charterers' perspective, the Clause Paramount is of benefit since charter provisions attempting to exonerate Owners from liability as a COGSA carrier, are incompatible with incorporation of COGSA terms, rendering the exoneration provisions "null and void." Bunge Corp. v. Republic of Brazil, 353 F.Supp. 64 (E.D.La 1972); but see The Granville, 1961 A.M.C. 2229 (Arbitration at Oslo, 1961) (Clause Paramount did not deprive Owners of benefit of exoneration provisions of Baltime 1939 standard printed Clauses 9 and 13).

Therefore, the presence of a Clause Paramount has rendered a charter party Refrigeration Clause purporting to exonerate Owners from liability for negligent operation of refrigeration equipment, "null and void." Horn v. Cia de Navigacion Fruco, S.A., 404 F.2d 422 (5th Cir. 1968), cert. denied, 394 U.S. 943 (1964). It has overriden a "trade custom" of granting Owners a .05% allowance on shortage claims. Sun oil Co. of Pa. V. M.T. Carisle, 771 F.2d 805 (3d Cir. 1985). It has displaced charter clauses purporting to relieve the vessel from liability "for any consequences arising out of shipping more than one grade of cargo." Standard Oil Co. of California v. United States, 59 F.Supp, 100 (S.D. Calif. 1945), aff'd, 156 F.2d 312 (9th Cir. 1946). It has even been found to defeat an obligation to arbitrate in a foreign forum where the country whose version of the Rules are incorporated, deems foreign jurisdictional clauses contained in bills covering goods loaded at, or carried to, ports within its jurisdiction, void. Wilson v. Compagnie des Messageris Maritimes, [1954] 2 Lloyd's L. Rep. 544 (Austl.) (applying §9 of the Australian Sea Carriage of Goods Act, 1924); see also, The Amazonia, [1990] 1 Lloyd's L. Rep. 236 (C.A. 1989); contra, Associated Metals & Minerals Corp. v. S.S. Michaelis Angelos, 234 F.Supp. 236 (S.D.N.Y. 1964).

There are limits to the Clause's paramountcy. Where the presence of a Clause Paramount creates a conflict with specially negotiated charter party provisions, especially where they apply to a limited and clearly defined circumstance, it is the Clause Paramount, "a clause … taken off the peg, or as is so often said about these clauses, picked out of a drawer and applied to the charter-party," which must yield. The Mariasmi, [1970] 1 Lloyd's L. Rep. 247 (Q.B.) (typed provision added to Gencon form placing responsibility on Owners for expenses resulting from lack of readiness to load was unaffected by Article 4(2) exception for negligent navigation brought into charter by Clause Paramount); see also The Westmoreland, 86 F.2d 96 (2d Cir. 1936) (charter party incorporation of Harter Act did not impose upon an unconditional typed provision stating: "Cargo to be loaded on skin of vessel at charterer's risk," a condition that Owners must exercise "due diligence" to make "the skin" seaworthy for stowage of cargo); The Tregenna, 121 F.2d 940 (2d Cir. 1941) (specific printed charter party provision unconditionally exempting carrier from liability for negligent stranding was not qualified by incorporation of Harter Act, which by §3 conditioned exception to liability for negligent navigation upon exercise of "due diligence" to make vessel seaworthy.).

When The Saxon Star was before the Court of Appeal, one of the justices observed: "It is a strange thing to find a shipowner relying on a paramount clause to exempt himself from liability. Historically, its purpose was to make him liable." [1957] 1 Lloyd's L. Rep. 271, 277 (C.A.) (Denning, L.J.). Actually, Owners have put the Clause Paramount to good use. As occurred in The Saxon Star, where the presence of a U.S.A. Clause Paramount was successfully employed to cut down the implied warranty of seaworthiness to an obligation to exercise due diligence to make the vessel seaworthy, Owners have enlisted the aid of

the Clause Paramount to take advantage of COGSA (or Hague Rule) exceptions to avoid charter party liabilities ranging far beyond physical loss or damage to cargo.

In The Satya Kailash, [1984] 1 Lloyd's L. Rep. 588 (C.A. 1983), OCEANIC AMITY was chartered under an NYPE form to lighten SATYA KAILASH. Owners of SATYA KAILASH were Charterers of OCEANIC AMITY. During lightening damage was sustained by SATYA KAILASH as a consequence of contact with OCEANIC AMITY attributed to negligent navigation of the Master. In defense, Owners of OCEANIC AMITY asserted the Negligence in Navigation exception of COGSA's §1304(2), incorporated into the NYPE by Clause 24, the "Clause Paramount." Guided by Adamastos Shipping Co., Ltd. v. Anglo-Savon Petroleum Co., Ltd., [1958] 1 Lloyd's L. Rep. 73 (H.L. 1958), and by Australian Oil Refining Pty. Ltd. v. R.W. Miller & Co. Pty., Ltd., [1968] 1 Lloyd's L. Rep. 448 (Austl. 1967), the court upheld the defense. The immunities set out in §1304(2) were applicable to the full range of performance contemplated by the charter - "Under the charter-party Oceanic Amity was chartered to lighten grain from a mother ship. It follows that loading grain from the mother ship was a contractual activity to be performed by Oceanic Amity under the charter; and we can see no reason why, in principle, the benefit of the immunities contained in [§1304(2)] should not be available to [Owners of OCEANIC AMITY] in respect of damage caused to the appellants [Owners of SATYA KAILASH/Charterers of OCEANIC AMITY] in performance of this activity…" [1984] 1 Lloyd's L. Rep. 596. See also, The Marivic, S.M.A. #1732 (Arbitration at New York, 1982) (U.S.A. Clause Paramount bars Charterers' claims for consequential damages resulting from negligent navigation); The Aliakmon Progress, [1978] 2 Lloyd's L. Rep. 499 (C.A.).

In the United States, application of §1303(6)'s one-year limitation period to claims asserted under a charter containing both an arbitration provision, and a Clause Paramount, is for arbitrators to determine. Son Shipping Co. v. DeFosse & Tanghe, 199 F.2d 687 (2d Cir. 1952). New York arbitrators have barred cargo claims where the arbitration demand comes subsequent to expiration of the one-year limitation period. The Uranus, 1977 A.M.C. 586 (Arbitration at New York, 1976) (2-1 award); The Prairie Grove, 1976 A.M.C. 2589 (Arbitration at New York, 1976). Quite properly, the one-year limitation period has not been applied to bar indemnity claims. The Lacerta, S.M.A. #3515 (Arbitration at New York, 1999). To fall within the purview of the time bar provision, the claim need not relate only to physical loss or damage, e.g., claims for financial loss caused by late delivery of the goods, or by slow discharge, have been deemed claims "in connection with the goods," subject to COGSA's one-year limitation period. See The Stolt Sydness, [1997] 1 Lloyd's L. Rep. 273 (Q.B. 1996); The Stena Pacific, [1990] 2 Lloyd's L. Rep. 234 (Q.B. 1989). Despite application of COGSA exceptions to aspects of charter party performance beyond physical loss or damage to cargo, courts have tended to restrict the one-year time bar to claims for loss or damage to, or in connection with, the goods: "It seems to me, therefore, that as a matter of construction, that is to say as a matter of trying to ascertain the intentions of the parties from the words they have chosen to use, they can only have intended the time limit to apply to claims for loss or damage relating to the goods carried or perhaps to be carried…." The Standard Ardour, [1988] 2 Lloyd's L. Rep. 159 (Q.B. 1987) (claim for loss arising out of delay in issue or release of bill of lading was not subject to COGSA's one-year limitation period).

In a more general sense, perhaps the best guide to proper construction was stated by Judge Learned Hand over sixty years ago when considering a charter incorporating the Harter Act:

> [I]t is idle to invoke the canon against redundancy in the interpretation of such a maritime document such as this. Courts have again and again observed the curious, often fantastic incongruities in charter-parties, bills of lading and insurance policies, composed as they so often are, of a motley patchwork of verbiage thrown together

> apparently at random, often in an unfamiliar diction three hundred years old. Particularly in such a document meant to do service in varying situations each word of such a discordant medley need not be made to count as we seek to make all words count of carefully prepared contracts drawn for a particular occasion…. [I]nterpretation is always a question of the ensemble….” [The Tregenna, 121 F.2d 940, 945 (2d Cir. 1941)]

In New York, determination whether COGSA, or Hague Rule, terms brought into the charter by the Clause Paramount supplement, or override, more conventional charter party provisions, or, as the courts in the United Kingdom put it, are “insensible” to resolution of the dispute at hand, is a call to be made by commercial arbitrators, especially members of the Society of Maritime Arbitrators. The ingenuity of attorneys, and the myriad fact patterns of charter party disputes may not bode well for ease of resolution, but it should ensure the interest of arbitrators charged with the responsibility of making sense out of “the ensemble” created by joinder of the charter party, and the Clause Paramount.

Mr. Connell is a Member of the New York Law Firm McMahon & Connell, P.C.

The Case Notes Website - the Inside Story

by David Martin-Clark

In the last edition of THE ARBITRATOR, Lucienne Bulow wrote an article on her award in the case of Anchor Shipping Co. v. Alianca. In doing so, she referred to a note of the case that I had prepared and published on the website DMC’s CaseNotes @www.onlinedmc.co.uk. That prompted your editor, Don Szostak, to invite me to write an article for this edition of The Arbitrator on the challenges that running a website single-handed can present, and why I have taken them on!

So, here it is, in the shape of an imaginary interview between your editor and me, conducted in early June 2002.

Don Szostak: *Well David, apart from seeing you at the ICMA XIV event in New York last October, the last time that we worked together was when I was a Director of the UK PandI Club and you were the Senior Partner in Millers. How come that I now find you editing a legal case notes website?*

David Martin-Clark: A long story, but one easily cut short! When I retired from ‘active service’ in Millers on my return from the Hong Kong office in May 1999, I wanted - in addition to my on-going work as a consultant - to develop other career paths, that would help me recycle myself around the shipping, transport and insurance industry that I knew and loved.

So that brought you to electronic publishing?

David: Well, yes and no. First and foremost, I wanted to develop a practice as a mediator and arbitrator. To that end I obtained accreditation from CEDR - the Centre for Effective Dispute Resolution - the leading mediation agency in the UK, and I joined the London Maritime Arbitrators Association. Initially you begin there as a Supporting Member, progressing to full membership after you have gained the requisite experience.

We still haven’t got to electronic publishing!

David: Not quite. You see, I realised that, to be effective as a mediator and arbitrator in the disciplines in which we work, I had to keep up-to-date with the law. To me, that means reading the cases, as the decisions appear. If I read the cases, I need to make a note of them. So it was not a huge lateral leap to think of writing up my notes in such a way that I could share them with others who might be interested to read them.

OK, your initial motivation was very practical then. But why a website? Why not authorship of a more traditional type?

David: The possibilities of electronic publishing had begun to attract me strongly in my later years at Millers. I guess also that something of the excitement of the dotcom boom got to me. I was stimulated too, by the output and outreach that other e-zine editors had achieved, such as Chris Hewer at Maritime Advocate online and Sam Ignarski, a former colleague both in the TT Club and in Hong Kong, with BowWave.

But isn't building a website quite demanding technically? Did you have the skills to do it yourself?

David: Yes and No, and No! The prospect of learning an application such as Microsoft's FrontPage was at first quite daunting. Then one weekend in April last year, I screwed up my courage, went to the local computer store and bought the software and the manuals. After two days of trial and error, and pressing every key and combination of keys that my laptop had to offer, I had a basic site ready for uploading to the web.

Are you saying that you were able to master the technology in the space of 48 hours?

David: To say 'master' would be a gross overstatement! But I had learnt enough to launch the site, with just one case note, the Hill Harmony, the House of Lords decision on the right of charterers to give routing instructions to the master. The shock waves of that case were still reverberating around the London legal and shipping community, so it seemed a good place to start.

Are you maintaining the site yourself?

David: Yes, with the help of one or two good friends, when I get really stuck.

And what types of cases are you annotating?

David: Initially I divided the site into four sections, Shipping & Transport, Insurance, Professional Indemnity and Electronic Commerce - all sectors of which I had had experience in Millers. But I quickly found that I could not manage all of them. So I put first the Electronic Commerce section and then the Professional Indemnity sections on hold - officially I describe them as 'under development'. What it really means is that they are 'under developed' and will remain so until I find the time, the energy, or maybe, a partner, to bring them back to life.

You are concentrating now on the Shipping & Transport and Insurance sections, then?

David: Yes, that's it. There are about 50 Shipping & Transport case notes on the site, and about 20 Insurance cases. I am up-loading on average, I would say, two case notes a week.

And who reads them?

David: That I cannot answer with great accuracy, because I have not yet invested in the software that would track all visitors to the site. But the case notes are not aimed primarily at the legal profession; rather, they are aimed at industry professionals, the type of person I used to meet every day in the Miller business, people working in shipping, transport and insurance companies who needed to be up-to-date with the law but who would probably never read a law report in their lives. And then there are the students of course, the coming generation.

But with so many cases on the site already, how can I find what I want? How do you index the site?

David: The indexing is very simple. When the number of cases in any section becomes unwieldy, I sub-divide them into topics. So, for example, the Shipping & Transport section is divided into 'Carriage of Goods', 'Time Charters', 'Voyage Charters', 'Admiralty' and so on. The site also has a good search facility, which I downloaded from Google.

OK, I see, but if your target audience is largely lay, I mean, non-legal, does that affect the way in which you write up the cases?

David: Yes, indeed! Firstly, I try and avoid all legal jargon and certainly all Latinisms. I am still having difficulty finding a synonym for 'obiter'! Secondly, I describe the parties by name, rather than by their role in the litigation. That way we can avoid confusion between who are the appellants and who the respondents! Thirdly, I aim to describe the facts in sufficient detail for the reader to make the connection with his or her daily work. I want them to say "Hey, we were in that position last month!" And, lastly, if the case turns on the construction of a contract, I will quote the relevant provisions in full, so that the case note makes sense on its own, without the need to refer elsewhere.

And do you comment on the cases?

David: I am getting braver in that regard! Yes, I will now comment on the cases, particularly if they seem to be taking the law into new territory - such as the recent English Court of Appeal decision in the Happy Ranger case.

Did I see some notes on SMA awards on the site?

David: Yes, indeed you did. When I was in New York last October, the Board of the SMA agreed that I might summarise their awards and publish notes of them to the site. I am delighted with this arrangement and enjoy the flow of interesting decisions that comes to me down this channel. In return, I have created a special page on the website, dedicated to the SMA, with hyperlinks to your own website. I only wish I could do the same with the LMAA awards, but that nut is - for various good reasons - more difficult to crack!

And what about the other firms with web pages on your site, where do they fit in?

David: You mean the other 'International Contributors'? Yes, there are several of them now, all from common law jurisdictions, such as Singapore, Australia and, of course, the USA, and there are more in the pipeline. The great thing about the Contributors is that they broaden the reach and interest of the site, by bringing to it decisions from their own jurisdictions. They also help me a lot, as many of them prepare the first draft of the case note for me.

I guess that saves you a lot of time.

David: It certainly does.

You offer a mailing list facility with the site - I know that, as I am on it!

David: Yes, it's a simple alert facility. Whenever I up-load a new case note to the site, I send an email to the mailing list for the section concerned. This will tell them a little about the case and give a hyperlink reference to the relevant page of the site. If the recipient is interested, (s)he can access the case note there and then - or later, of course. If the case is of no interest, you simply delete the message!

And does it cost to join the mailing list? I don't remember being asked to pay when I joined.

David: You are right. Joining the mailing list is absolutely free. So is access to the site itself, of course.

What sort of person joins the mailing lists?

David: As you would expect, all sorts - shipping professionals, insurance people, lawyers, P&I Club claims handlers, Club correspondents, students, academics, seamen and pilots - even the US Navy!

And how many people are on the list today?

David: Currently about 350. I am delighted with that number and it is growing daily.

And where is all this leading?

David: A good question. I don't know exactly. At the moment, I am very happy just to see the number of hits on the site growing week by week and I enjoy meeting (in the electronic sense!) the people joining

the mailing lists. I am building a very interesting network of contacts, and there have already been a number of spin-offs. And, at the end of the day, the website could be the foundation for a book or two, who knows!

Well, David, our time is up. Thanks for talking to us, and keep up the good work!

David: Don, my thanks to you for inviting me to contribute to The Arbitrator in this way. It has been a pleasure talking to you. I value very much my relationship with the SMA and with my many friends among its members. See you soon.

David Martin-Clark is a Shipping & Insurance Consultant, Arbitrator and Mediator. His Case Notes website can be accessed at www.onlinedmc.co.uk .

WHAT IS A VESSEL?

By Wade S Hooker Jr., Esq. And Terry L. Stoltz, Esq.

Identifying whether a structure is a vessel is important because the jurisdiction of a court in admiralty may depend upon the answer. Over the centuries, the concept of a vessel has been flexible to accommodate new types of waterborne structures and a variety of factual circumstances.

In many cases, the decision whether to characterize a structure as a vessel was fairly obvious. Thus, with the advent of mechanization, steamboats and motor vessels were embraced within the concept of a vessel. Barges are also vessels even if unmanned.

In other cases, the conclusion is the same but less obvious. Mobile offshore drilling units (MODUs) are vessels despite their main purpose of drilling for oil. Even a submerged oil drilling barge sitting temporarily on the ocean floor has been characterized as a vessel. Despite their size, jetskis and surfboards are also termed vessels.

However, not all structures that float will be vessels. A floating drydock is not a vessel. Nor in one case was an unpowered wharfboat. A seaplane is generally not considered a vessel, but is charged with following navigation rules while on water and if sunk may be deemed a vessel for salvage purposes.

The difficulties in determining whether a floating structure is a vessel is illustrated by two court decisions issued. Sometimes, as implied by these decisions, a structure can be categorized as a vessel for certain purposes and not a vessel for other purposes.

In one, *Hyundai Heavy Industries Co. v. M/V SAIBOS FDS*, 163 F.Supp.2d 1307 (N.D. Ala. 2001), the court grappled with the issue of when a vessel under construction becomes a vessel. During construction, maritime liens cannot attach to the hull, and suppliers of components and services are limited to their rights under local law. After the vessel has been completed and launched, however, any labor or components furnished to the vessel will constitute repairs or renovations and will be entitled to a maritime lien against the vessel.

In *M/V SAIBOS FDS*, the plaintiffs were sub-contractors for the construction of a pipe-laying vessel, responsible for supplying pipe-laying equipment. The construction contract called for construction in South Korea, but was later amended to provide that only certain components of the pipe-laying equipment would be supplied in Korea with the remaining components delivered and the equipment installed in Mobile. After construction of the hull in Korea, it underwent sea trials and was christened, delivered and accepted by the owner, was granted a certificate of interim class by Det Norske Veritas subject to installation of the pipe-laying equipment, and sailed under its own power to Mobile.

Nevertheless, despite all these characteristics of a vessel, the court denied the maritime lien claims of the equipment suppliers, holding that for such purposes the hull had not become a vessel since the pipe-laying equipment was essential for its operation and thus the hull would not be completed until such equipment was delivered and installed.

In contrast to these maritime lien claims, the case of *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919 (11th Cir. 2001), involved whether a waterborne structure was a vessel for purposes of applying an evidentiary presumption in the context of a maritime tort claim..

In *Bunge Corp.* a hull was under construction, but had not been subject to sea trials and had not even been rigged for steering. It had, however, been moored in navigable waters and during a storm had broken free of its moorings and allided with a grain-loading conveyor facility. The owner of the grain facility then brought action for

the ensuing damages against the manufacturer and owner of the hull.

Under the rule of *The Louisiana*, 70 U.S. (3 Wall) 164 (1866), when a moving vessel strikes a stationary object, there is a presumption of fault on the moving vessel. So the question in *Bunge Corp.* was whether the hull under construction was a "vessel" within the meaning of *The Louisiana* rule.

The court in *Bunge Corp.* found that the hull was a vessel by applying the two-part locality and nexus test to determine that there was admiralty jurisdiction. The locality test was satisfied because the hull had broken loose during the storm and drifted down a navigable waterway before striking the grain facility. The nexus test was also satisfied because a hull with no steering capability adrift on a navigable waterway is a potential disruption to commercial activity and the mooring (however imperfect) of a nearly complete hull bears a substantial relation to traditional maritime activity. Having found the hull was a vessel, the Court applied *The Louisiana* rule, even though it recognized that the hull might not be considered a vessel "elsewhere in admiralty jurisprudence."

Thus, the courts provide a broad definition of a vessel for purposes of applying presumption rules in admiralty tort cases, while applying a narrow interpretation of when a hull under construction becomes a vessel for purposes of determining whether a party who had contracted to supply material or labor to the hull during its initial construction will have the benefit of a maritime lien on the hull.

Messrs. Hooker and Stoltz are Partners in the New York Law Firm Burlingham Underwood LLP.

US COURT RULES ON TITANIC Artifacts

A US court has decided that the salvor of the ill-fated White Star liner Titanic is not the owner of the wreck and related artifacts. According to the judgment the company RMS Titanic, Inc. only has salvage rights which do not include title to items recovered from the wreck. The ruling means the salvor cannot go ahead with its planned sale of artifacts. According to Dennis Bryant of US law firm Haight Gardner Holland & Knight the judgment was that the role of salvors was save the property for the owner, for which they become entitled to a reward from the owner or from the property.

Story provided by Hong Kong Shipping News International

39TH ANNUAL MEETING

At the 39th Annual Meeting of the SMA on May 8, 2002 the President announced the election of Henry E. Engelbrecht, Svend H. Hansen, Jr., Klaus C.J. Mordhorst and A.J. Siciliano as two year term Governors.

David W. Martowski and Donald J. Szostak continue as President and Vice President, respectively, serving the second year of their two-year terms. Austin L. Dooley and Soren Wolmar were appointed as SMA's Treasurer and Secretary, respectively.

SMA's Board of Governors for 2002/2003 is as follows (with their alternates in parentheses):

David W. Martowski (-)
Manfred W. Arnold* (George Hearn)
Austin L. Dooley (Dean Tsagaris)
Henry Engelbrecht (Donald B. Frost)
Thomas F. Fox (Konstantinos Livanos)
Svend H. Hansen, JR. (Nigel Hawkins)
R. Stanley Kleppe (Gene Spitz)
Klaus C.J. Mordhorst (Jack Berg)
Katherine A. Pappas (David Letteney)
A.J. Siciliano (Robert Umbdenstock)
Donald J. Szostak (Paul Hedger)
Soren Wolmar* (Jerry Georges)

*By appointment of the President

The following Committee Chairs were appointed/reappointed:

Arbitrator - D.J. Szostak
Award Service - D. Letteney
By-Laws and Rules - K. Pappas
Education - M.W. Arnold
Liaison - A.J. Siciliano
Luncheon - R. Rosner
Membership - S. Kleppe
Professional Conduct - D. J. Szostak
Salvage - T. Fox
Public Relations - Svend Hansen
Ad-Hoc Digest - D.W. Martowski

Ad-Hoc Liaison with BIMCO - S. Wolmar

Two additional Ad-Hoc committees have been established. Lucienne Bulow has been asked to spearhead an effort to revise the SMA publication "Maritime Arbitration in New York," the so-called "blue book." Ron Rosner will lead the search for alternative office space in New York City for the Society's administrative headquarters.

Tony Siciliano will continue to prepare the Headnotes for the Award Service and assist with the contents of the Arbitrator. Soren Wolmar will continue to provide the "In This Issue" section of the Award Service as well as the yearly Index.

HUMOR

The Texas Three-Kick Rule

A big-city California lawyer went duck hunting in rural Texas. He shot a bird, but it fell into a field on the other side of a fence. As the lawyer climbed over the fence, an elderly farmer drove up on his tractor and asked what he was doing. The litigator responded, "I shot a duck and it fell in this field, and now I'm going to retrieve it."

The old farmer replied. "This is my property, and you are not coming over here."

The indignant lawyer said, "I am one of the best trial attorneys in the U.S., and if you don't let me get that duck, I'll sue you and take everything you own."

The old farmer smiled and said, "Apparently, you don't know how we do things in Texas. We settle small disagreements like this with the Texas Three-Kick Rule."

The lawyer asked, "What is the Texas three-Kick Rule?"

The Farmer replied. "Well, first I kick you three times and then you kick me three times, and so on, back and forth, until someone gives up."

The attorney quickly thought about the proposed contest and decided that he could easily take the old codger. He agreed to abide by the local custom.

The old farmer slowly climbed down from the tractor and walked up to the city feller. His first kick planted the toe of his heavy work boot into the lawyer's groin and dropped him to his knees. His second kick nearly wiped the man's nose off his face. The barrister was flat on his belly when the farmer's third kick to a kidney nearly caused him to give up.

The lawyer summoned every bit of his will and managed to get to his feet and said, "Okay, you old coot now it's my turn."

The farmer smiled and said, "Naw, I give up. You can have the duck."

QUOTE FOR THE QUARTER

Michael LeBoeuf: "A university creative writing class was asked to write a concise essay containing the following elements: 1. Religion, 2. Royalty, 3. Sex, 4. Mystery. The prize-winning essay read: 'My God,' said the Queen, 'I'm pregnant. I wonder who did it?'"

For THE ARBITRATOR

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PRESIDENT'S CORNER

February and March were active months for the New York maritime arbitral community. As will be April.

On February 24 - 27th, the Panama Maritime VI World Conference & Exhibition was held in Panama City and attracted over 300 delegates from the international shipping community. Conference Chairman Tomas Avila; Juan Felipe Pitty, President of the Panama MLA; Bill O'Neil, Secretary of the IMO; and Her Excellency Mireya E. Moscoso, President of the Republic of Panama, contributed to a rousing opening ceremony. A mock New York arbitration was presented by a New York team consisting of panel members Austin Dooley, Svend Hansen and yours truly, with LeRoy Lambert and Ray Burke serving as counsel for the disputants. Austin and Panamanian attorney Yuri Moreno moderated the event which focused on the attractions of the New York process. Chairman Avila cited the presentation in his closing remarks as one of the Conference's highlights and we have been invited back for an encore at Panama Maritime VII to be held in 2004.

On March 6th, the London Maritime Arbitrators Association held its 42nd Annual Dinner at Carpenters' Hall. I was the guest of my friend and colleague, LMAA President Chris Moss, and US attendees included former SMA Presidents Lucienne Bulow and Manfred Arnold, New York's Pat Martin and New Orleans' Harvey Gleason. It was a grand and well-attended affair, highlighted by a robust and entertaining question and answer session between Chris Moss, Steve Martin and S.R. Kverndal.

On April 17th, a Houston seminar will be sponsored by Poten & Partners, Teekay Shipping (USA) Inc., New York law firms Burke & Parsons, Cichanowicz Callan Keane Vengrow & Textor, Freehill Hogan & Mahar, Haight Gardner Holland & Knight, Healy & Baillie, Nourse & Bowles and the SMA, on the subject of "Dispute Resolution: The New York Arbitration Alternative", and is expected to draw over 100 attendees from the energy community.

In closing, I also wish to thank those SMA members who generously contributed to the Society's coffers.

David Martowski

LONDON AND NEW YORK ARBITRATIONS COMPARED

John Besman was the invited speaker at the March 2002 monthly SMA luncheon. He presented a paper entitled THE 1996 ENGLISH ARBITRATION ACT - What's New - What's Different? While providing his discourse, Mr. Besman highlighted many differences which exist between New York and London arbitration, including:

- Disclosures: NY - Yes; London - No.
- Witnesses and Panel sworn: NY - Yes; London - No.
- Transcript: NY - Yes; London - No.
- Awards: NY - Reasoned; London - Reasoned by agreement, failing which reasons given but not part of award and disclaimer they may not be used in any court.
- Interest: NY - Simple; London - Compound
- Publication of awards: NY - All; London - More interesting awards published but without names of parties

The full text of the paper, "with much material inspired by Clifford Chance's Maritime Review," follows:

THE 1996 ENGLISH ARBITRATION ACT: WHAT'S NEW - WHAT'S DIFFERENT?

1. Introduction

The Acts that the 1996 Act replace are those of 1950 (the basic Act); the Act of 1975, which basically dealt with the enforcement of foreign (to England) arbitral awards and consolidated much of the earlier legislation; and the 1979 Act, which was a complementary adjunct to the 1950 Act and which went some way to limiting the supervisory powers of the English courts over arbitrations.

You will note I keep referring to the Acts and courts as being English and not U.K. Acts and courts. The full name of the country severally known as the U.K., or Great Britain, is "The United Kingdom of Great Britain and Northern Ireland." The laws and structure of Scotland are totally different and not subject to the 1996 Act, which only applies to England, Wales and Northern Ireland.

Unlike the 1975 and 1979 Acts, which served to modify and complement the 1950 Act, this Act will serve, *inter alia,* to cause these to gather dust, except for any arbitrations commenced before 1997. The effective date of the new Act coming into force is January 31, 1997.

2. Structure

The Act is divided into four parts, consisting of its main provisions in Part I and dealing with the arbitration agreement and stay of any legal proceedings commenced in breach of such agreement. It then sets out provisions relating to the commencement of arbitration proceedings and the appointment and jurisdiction of the tribunal (panel). It then deals with the conduct of the proceedings which includes a fall-back framework for the conduct of the arbitration where the parties have not agreed to it themselves. Finally, this Part deals with the award and its costs, both legal fees and those of the arbitrators, as well as the grounds on which the award can be challenged. More about this later.

Part II deals mainly with domestic arbitrations. Part III sets out the law concerning recognition and enforcement of foreign awards under the Geneva and New York Conventions, where there are few changes. Part IV contains general provisions.

Due to the length of the Act, comprising some 59 printed pages and containing some 110 sections and 4 appendixed schedules, I have had to make a selection of matters that I thought were likely to interest an American audience.

The golden thread through the entire Act is '*laissez faire*' and giving to the parties and the arbitrators a greater measure of authority and a 'do it yourself' doctrine on matters previously and exclusively reserved to the courts.

3. Founding Principles

As an example of 'do it yourself' doctrine, I quote the provisions which are unusual in an English statute, as it cites three guiding principles which underpin it:

a) "The object of the arbitration is to obtain the fair resolution of disputes by an impartial tribunal (of arbitrators) without unnecessary delay or expense;"

b) "The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;"

c) "In matters governed by this Part the court should not intervene except as provided by this Part."

4. The Arbitration Agreement

This is defined as "...an agreement to submit to arbitration present or future disputes (whether they are contractual or not)."

Where the parties agree orally, but with reference to arbitration terms which are themselves in writing, that will be sufficient to bring the Act into effect. Thus an oral agreement on the terms of Lloyds' Open Form would fall within the Act.

5. Time for Commencement of Arbitration Proceedings

Often, arbitration agreements contain a time bar for appointment of arbitrators. Under the 1950 Act, the court had power to extend the time in certain cases of undue hardship. The power to extend the time now remains, but more restrictedly in that the court shall make an order to extend time:

"....**only** if satisfied -

a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed to the provision in question and that it would be just to extend the time, or

b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question."

6. Appointment of Arbitrators

The parties are now free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire. Absent an agreement, the tribunal shall consist of a sole arbitrator. Where the agreement provides for two arbitrators, or any other even number, this will require appointment of an additional arbitrator as Chairman.

In the case of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

If the tribunal is to consist of two arbitrators, each party shall appoint an arbitrator not later than 14 days after service of a request in writing by either party to do so.

If the tribunal is to consist of three arbitrators:

a) each party shall appoint an arbitrator not later than 14 days after service of a request in writing to do so, and

b) the two so appointed shall forthwith appoint a third arbitrator as chairman of the tribunal.

If the tribunal is to consist of two arbitrators and an umpire, the provisions of paragraph a) above apply and

c) the two so appointed may appoint an umpire at anytime after they themselves are appointed and shall do so **before** any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration. (Emphasis supplied)

It should be noted there are substantial changes for the better from the previous three Acts. The 1950 Act provides that if one party failed to appoint an arbitrator within 7 clear days of the first arbitrator's appointment then the party who has appointed could advise the other that his appointee would act as sole arbitrator. Moreover, it also called for the tribunal to consist of two party appointed

arbitrators and an umpire (if they later disagreed) even when the arbitration agreement called for a tripartite panel as found in the NYPE time charter.

This latter was amended by the 1979 Act under its section 9 which, in fact, stated that an NYPE arbitration clause means what it says, viz., a tripartite panel operating from the beginning.

The '96 act states that if one party refuses or fails to appoint an arbitrator within the specified time, the other party may notify the defaulting party that he proposes to charge his appointee to act as sole arbitrator should the party in default not make the required appointment within 7 clear days of the non-defaulting party's nomination. The sole arbitrator's award (if any) shall be binding on both parties.

All of this must mean that resort to the courts will be rarer to compel arbitration by a delinquent party. Also, the clear time limits imposed will enable the parties to know what to do and when.

7. Umpires

Where there is to be an umpire the parties are free to agree what his function shall be; whether he is to attend the proceedings and be supplied with all documentation furnished to the other arbitrators; whether he is to have the power to make decisions, orders and awards. Failing such agreement, the umpire shall attend the proceedings and be supplied with all documentation. Decisions, orders and awards shall be made by the other arbitrators unless they cannot agree whereupon the umpire shall replace them as the tribunal as if he were sole arbitrator.

8. Immunity of Arbitrators

An arbitrator is not liable for anything done or omitted in the discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

9. Jurisdiction of the Tribunal

The arbitral tribunal may rule on its own jurisdiction as to whether there is a valid arbitration agreement; whether the tribunal is properly constituted; what matters have been submitted to the tribunal in accordance with the arbitration agreement. Where an objection is duly taken to the tribunal's jurisdiction, the tribunal may make a ruling on the matter in an award as to jurisdiction or deal with it in its award on merits.

10. Discovery

It shall be for the tribunal to decide all procedural and evidentiary matters, which include when and where proceedings are to be held; the language(s) to be used; whether any statements of claim and defense are to be used; which documents or classes of documents should be disclosed and produced by the parties, and at what stage; whether any questions should be put to and answered by the parties; whether to apply strict rules of evidence as to admissibility, relevance or weight of any material (oral or written) sought to be tendered on any matter of fact or opinion; whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law; whether there should be oral or written evidence or submissions.

11. Consolidation

The parties are free to agree to it and that concurrent hearings shall be held, but unless they agree to confer such powers on the tribunal, it shall have no such powers.

12. Tribunal's Appointment of Experts or Legal Advisors

The tribunal may appoint experts or legal advisors to report to it and the parties, and may allow them to attend the proceedings. The fees and expenses of such persons appointed by the tribunal are expenses of the arbitration and thus will be paid by the tribunal in the first instance and be included in the award as arbitrators' costs on top of their own fees.

13. Swearing of Witnesses

The tribunal may direct that a witness shall be examined on oath or affirmation, and may administer such oath or affirmation itself.

14. Powers of Tribunal in Case of Default

If the tribunal is satisfied there has been inordinate delay by the claimant in pursuing his claims, which delay gives rise, or may do so, so that it is not possible to have a fair resolution of the issues in the claim(s), or that it has caused, or is likely to cause serious prejudice to the respondent, the tribunal may make an award dismissing said claim(s).

If a party fails to attend or be represented at an oral hearing, or where matters are to be dealt with in writing, fails to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of the defaulting party, or absent written evidence or submissions in a documents only arbitration, the tribunal may make an award on the evidence before it.

15. The Award

The tribunal shall decide the dispute in accordance with the substantive law chosen by the parties.

16. Awards on Different Issues - Interim Awards

The tribunal may make more than one award at different times on different aspects of the arbitration on matters before it, including an award to an issue affecting the whole claim(s), or part only of the claims or cross claims submitted to it.

17. Interest

The tribunal may award simple or compound interest from such dates and rates as it considers meets the justice of the case.

18. Form of the Award

The award shall be in writing signed by all the arbitrators assenting to it and containing the reasons for it, unless the parties specifically have agreed to dispense with same.

19. Places Where Award Is to be Made

Any award shall be treated as having been made in the seat of the arbitration regardless of where it is signed, despatched or delivered to any of the parties.

20. Lien on Award for Arbitrators' Fees

The tribunal may refuse to deliver an award to the parties except upon full payment of the arbitrators' fees and expenses.

21. Correction of the Award - Former Slip Rule

The tribunal may, on its own initiative or on the application of a party, correct an award to remove any clerical error or one arising from an accidental slip or omission, or clarify or remove any ambiguity in the award; or make an additional award in respect of any claim, including interest or costs, which was presented to the tribunal but not dealt with in the award. These powers shall not be exercised without first affording the parties a reasonable opportunity to make representations to the tribunal. Any correction to an award shall be deemed to form part of it.

22. Costs of the Arbitration

These are deemed to include arbitrators' fees and expenses, those of any arbitral institution concerned, plus legal and other costs of the parties. The tribunal shall award costs on the general principle that costs should follow the event, except as otherwise decided by the tribunal as appropriate.

23. Challenging the Award

A party may (upon notice to the other and the tribunal) apply to the court challenging the award as to the tribunal's substantive jurisdiction; or for an order declaring an award on the merits to be of no effect because the tribunal did not have substantive jurisdiction. The tribunal may continue the proceedings and make a further award while an application to the court is still pending. The court may either confirm the award, vary it or set it aside in whole or in part.

A party may also apply to the court to challenge an award by reason of serious irregularity affecting the tribunal, the proceedings or the award itself. "Serious irregularity" includes the tribunal exceeding its powers, its failure to deal with all the issues that were put to it, and uncertainty or ambiguity as to the effect of the award. In such cases the court may either remit the award to the

tribunal in whole or in part for its reconsideration, or set it aside in whole or in part, or declare it to be of no effect, in whole or in part.

24. Appeals on Points of Law

An agreement to dispense with reasons in an award shall be considered as excluding the court's jurisdiction. An appeal may only be brought with the agreement of all the other parties (emphasis supplied) to the proceedings, or with the leave of the court.

Leave to appeal shall only be given if the court is satisfied that the determination of the question(s) will substantially affect the rights of one or more of the parties; that on the basis of the finding of fact in the award the tribunal's finding is obviously wrong; or the question(s) is/are of general public importance and the tribunal's decision is at least open to serious doubt. An application for leave to appeal shall identify the question of law to be determined with alleged grounds for it to be granted. Leave of the court to appeal shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

An application or appeal may not be brought if the applicant has not first exhausted any available process of appeal or review under paragraph 21 above.

25. Loss of Right to Object

If a party takes part, or continues to take part in the proceedings without making any objection forthwith or within such time as is allowed by the arbitration agreement or that set by the tribunal, that the tribunal lacks substantive jurisdiction, or that the proceedings have been improperly conducted, or any other irregularity affecting the tribunal or the proceedings, that party may not raise an objection on these grounds at a later date.

[Mr. Besman is a Founding Member, Honorary Director and Past President (1967-1969) of the SMA]

SEAWORTHINESS

by Patrick V. Martin, Esq.

This article is the text of a speech by Patrick V. Martin before the New York arbitration community at the February 2002 SMA luncheon..

The concept of seaworthiness runs through virtually every aspect of shipping and maritime law. It is a relative term and its definition depends on the context in which it is being used. Maritime arbitrators observe seaworthiness through the glasses of charter parties and bills of lading. The purpose of my speech is to show that seaworthiness can be seen through various types of glasses.

There are various broad categories of seaworthiness. There are implied warranties, statutory warranties and express warranties. The latter can, at least in charter parties, be defined by the parties.

I would like to first set forth the different definitions and then focus on how they are commercially applied, and sometimes misapplied, to charter parties and bills of lading.

Implied Warranties

In every contract of private carriage there is an implied warranty of seaworthiness that is absolute in nature. The usual wording is: "that the ship is tight, staunch and strong and in every way fitted for the voyage." According to the Oxford dictionary "staunch" when applied to a ship, means "..strong, watertight, airtight." Strong is defined as: "having the power of resistance; able to withstand great force or opposition; not easily damaged or overcome."

This implied warranty when applied to contracts of carriage has been defined as "being absolutely responsible for the safe arrival of the goods unless the damage was caused by an Act of God, the public enemy or inherent vice and the carrier was not negligent." (Gilmore & Black, 2d. ed., p139) The undertaking is not merely that the shipowner will do and has done his best to make the ship fit, but that the ship really is fit in all regards to carry her cargo safely to its destination…(Scrutton, 16th ed., p.98). This is a personal warranty, i.e., the duty cannot be delegated. It does not depend on the owner's knowledge. For instance, if a reputable yard

makes a bad repair and the ship has an ingress of water damaging cargo, the owner is responsible even though it could not have discovered the faulty repair with the exercise of due diligence.

A very similar warranty covers every maritime worker on a ship. There is an implied warranty that the vessel, its equipment and crew "are reasonably fit for their intended purpose." The courts have given this definition a very liberal and wide meaning. This warranty is independent of the standard for negligence set forth in the Jones Act, although in many fact patterns they overlap. For example, a yard worker spills grease on deck. A minute later a member of the crew comes along and slips and is injured. A court would find that the ship was "transitory" unseaworthy.

> "The duty of the vessel owner to provide a seaworthy vessel requires that the vessel and its parts and equipment must be reasonably fit for their intended purposes. The duty to provide a seaworthy vessel is absolute and the owner may not delegate the duty to anyone. Liability for an unseaworthy condition does not in any way depend on negligence or fault or blame. If an owner does not provide a seaworthy vessel, then no amount of care or prudence excuses him, whether he knew or should have known of the unseaworthy condition.
>
> On the other hand, the owner of a vessel is not required to furnish an accident-free ship. The duty of the owner is only to furnish a vessel reasonably fit for its intended purposes."
>
> Schoenbaum, 3rd ed., Vol. 1, p.352

Mitchel v. Trawler Racer Inc., 362 U.S. 539 (1960), involved an issue of transitory unseaworthiness. A seaman on a trawler slipped on the ship's rail while going ashore and was injured. The rail had been covered by fish slime. The trial court had issued jury instructions to the effect that the slime had to be there for a sufficient period of time for the owner to have noticed and remedied the defect. The Supreme Court rejected this view and made quite clear it was the condition itself that made for the unseaworthiness.

A somewhat more concise definition of, or test for, unseaworthiness is: Would a prudent shipowner have required the defect to be remedied before sending the ship to sea if he had known about it? If he would, the ship is unseaworthy.

Passengers and lawful invitees aboard a vessel are not entitled to the implied or express warranty of seaworthiness. The shipowner has a lesser duty "to exercise reasonable care under the circumstances." [Schoenbaum p126]. They have no action for the breach of the warranty of seaworthiness. Thus, if a passenger or tradesman slipped on the same grease spot at the same time, his recovery for injury might not be as certain.

There is also an implied warranty of seaworthiness in every hull policy given by the owner/insured to the underwriters. However, the owner/insured meets this warranty by showing that it did not "…knowingly permit the vessel to break ground in an unseaworthy condition." [Schoenbaum, p577]

In *Saskatchen Government Insurance Co. v. Spot Pak, Inc.*, 242 F.2d 385 (5th Cir. 1957), the vessel was seaworthy at the inception of the policy but on a subsequent voyage a circuit breaker failed. A new circuit breaker was brought on board but the chief engineer decided not to install it. On the next voyage, the vessel caught fire and was a total loss. It was admitted that the vessel was unseaworthy when she sailed but that the owner had no knowledge that the breaker was uninstalled. The court allowed recovery under the policy. The court indicated that the result may have been different if there was an express warranty of continuing due diligence.

There is no implied warranty, given by the assured in a P&I or other types of third party liability policies. (The position under English law is somewhat more complicated.) Neither is there an implied warranty in a cargo policy. (Please bear in

mind since these insurance policies are "private" contracts, the underwriters sometimes insist on various express warranties of seaworthiness being placed in the policy.)

So far, I have been speaking about the implied warranty of seaworthiness under the general maritime law. I now will switch to how the implied warranty has been changed by statute and contract, particularly in charter parties.

Statutory Warranties

Obviously, the most important change has been COGSA. As you know COGSA was a compromise between cargo interests who very much liked the broad implied warranty and shipowners who kept putting exculpatory clauses in the bills of lading. In particular, it was the smaller cargo interests who had no real strength in negotiations who wanted some assurances that they would have a fair contract of carriage.

COGSA states:

> "Section 3(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy."

This applies to every bill of lading that is a contract of carriage. The carrier cannot put any term into the bill of lading which would lessen its obligations under COGSA. It does not apply to charter parties or any form of private carriage where no bills of lading are issued.

Let's take a common occurrence in the tanker trades. In many charter parties, such as the ASBATANKVOY, there is a clause that the vessel's tanks shall be cleaned to the charterer's inspector's satisfaction. The inspector passes the tanks; cargo is loaded; it out turns contaminated by the remnants of a prior cargo. The tanks were not clean and had been improperly inspected. The carrier resists the claim on the basis that the charterer passed the tanks. In a case governed by COGSA, the carrier would lose this argument on the basis that such a clause is in violation of COGSA because it lessens the carrier's overriding obligation to use due diligence to have the tanks in a "seaworthy condition." In other words, a carrier cannot shift this fundamental obligation to the shipper or charterer. If the case is not COGSA governed, i.e., private carriage, then the shipowner would have a much stronger legal foundation to base its position that it has no liability. (It is beyond the scope of this paper to go into a discussion of the exercise of due diligence and the burden of proof.)

Express Warranties

I will now turn to the express warranties of seaworthiness that appear in virtually every charter party. As we know, charters are private contracts and the parties are free to negotiate whatever terms they can. I must emphasize that this statement is legally correct; but in the real world we mostly deal with the printed form and the boilerplate terms are very hard to vary, especially on a one off basis.

I will start with a brief mention of bareboat and time charters and then focus on voyage charters. As will be seen, the printed forms vary considerably. In general terms, the shipowners give very few and often weakly worded warranties in bareboat charters and the charterer obtains much stronger warranties in many "charterer oriented" voyage charters.

Examples of bareboat charters are:

BARECON 89
Clause 2.
The delivery to the charterers of the Vessel and the acceptance by the charterers… shall constitute a full performance of the Owners of all the Owners' obligations under this clause and thereafter the charterers shall not be entitled to make any claim for any conditions, representations, *or warranties expressed or implied* [concerning the seaworthiness of the vessel].

BARGE CHARTER PARTY
Inspection: Charterer acknowledges that it has had an opportunity to inspect the vessel and is chartering the vessel "as is , where is" based on such inspection.

Warranties:
"Owner specifically does not warrant that the vessel is free of latent defects and does not warrant that the vessel is seaworthy."

These are very typical clauses because the owners hand over the entire control of the vessel to the charterers. Believe it or not, in financing deals where the owner is really a bank or a financial institution, even this is considerably weakened to the extent the charterer has to accept the vessel regardless of condition and, indeed, make any repairs.

An interesting case which points out the failure to read and have matching terms in contracts is *McAllister Lighterage Line v. Insurance Company of North America and Scott Paper Co.*, 244 F.d 867 (2d Cir. 1957). McAllister chartered a 40 year old wooden barge to Scott. Under the charter Scott had the obligation to insure the hull for both owner and charterer "as interest may appear." It insured the scow with INA. Prior to the attachment of the risk, INA had its surveyor call McAllister and he was assured that the barge was being repaired and would be in good shape for the charter. Paragraph 4 of the charter provided:

> "The acceptance of said scow by the Charterer is to be conclusive evidence of the seaworthy condition of said scow at the commencement of the charter."

Scott accepted the barge at McAllister's yard where she had just finished repairs to the hull including recaulking. Unfortunately, the repairmen had failed to recaulk 18 inches of an underwater seam. Soon after she left the yard in Scott's employment, the seam sprung and the barge had to be beached where she became a total loss. McAllister sued INA and Scott. The court of appeals denied recovery against INA because the scow was unseaworthy at the inception of the policy in breach of the implied warranty. It allowed full recovery against Scott because Scott had waived the implied warranty by accepting the scow. In the court's analysis it made no difference if the uncaulked seam was a latent or a patent defect. (If COGSA was applicable to the charter, Clause 4 would have been void.)

The standard wording for seaworthiness is typically different when dealing with time charters. A few examples:

NYPE 46
"The vessel … with hull, machinery and equipment being in a thoroughly efficient state."

NYPE 93
Clause 2: Delivery
…"The vessel on her delivery shall be ready to receive cargo with clean swept holds and tight, staunch, strong and in every way fitted for ordinary cargo service…"

This is an absolute warranty and please note that it is not dependent on the exercise of due diligence. If the gear does not work for whatever cause or reason, the ship is not in compliance with this warranty. Some of the cases suggest that this would be a sufficient reason for the charterers to reject the vessel at the time an owner gives the NOR. However, once the vessel is accepted, Charterer cannot thereafter reject it on the claim of unseaworthiness. If the vessel breaks down thereafter, then clause 17, Offhire, comes into play.

The charter also incorporates a Clause Paramount, which requires the Owner to use due diligence to maintain the seaworthiness of the vessel. Most time charters have similar clauses and structure. The owner gives over the commercial control of the vessel to the time charterer but remains responsible for the vessel's seaworthiness. Sometimes, these clauses are varied to make the time charterer responsible for any unseaworthiness arising out of cargo operations.

I now turn to voyage charters which have the most variation in terms. The following have very strong express warranties taken from the cases defining the implied warranty discussed above:

BALTIMORE FORM C

1. That the said vessel, being tight, strong and in every way fitted for the voyage.

AMWELSH 93
1. That the said Vessel being tight, staunch and strong, and in every way fitted for the voyage.

Some voyage charters track the language used in COGSA limiting the express warranty to the "exercise of due diligence."

TANKERVOY 87
Condition of the Vessel: 1. The vessel's class as specified in Part I shall be maintained during the currency of this charter.
The Owners shall: (a) before and at the beginning of the loaded voyage exercise due diligence to make the vessel seaworthy…

NUVOY 84
18. Vessel
(a) Prerequisites - Owners shall ensure that:
(aa) The vessel shall be classed and… Owners shall exercise due diligence to maintain that class

The charter contains no other clause about the vessel's seaworthiness and it would seem to be an open question whether the above negates the implied warranty of seaworthiness or is just an explicit reference to maintaining class.

GENCON
2. Owners' Responsibility Clause:
The owners are to be responsible for loss or damage to the goods…. Only if the loss has been caused by personal want of due diligence on the part of the owners… to make the vessel in all respects seaworthy …

FERTIVOY 88
Preamble:
"…that the said vessel being classed… and warranted tight, staunch, and strong and in every way fitted for the voyage, so far as due diligence can make her so…"
Warranty:
"The vessel…being seaworthy… and being in every way fitted for the voyage, so far as the foregoing conditions can be attained by the exercise of due diligence."

Conclusion:

When arbitrators are faced with the issue of deciding in a particular dispute whether a vessel is seaworthy or not, they must first look at the precise wording of the clauses in the charter. If there are no express warranties, then the very strong concept of the implied warranty should be used. If COGSA is applicable by law or by incorporation into the contract then the "due diligence" standard is to be applied. If the charter contains language severely limiting the warranty of seaworthiness, then that standard is to be used.

It is only after the arbitrators have determined the proper contractual standard, can they assess the owner's conduct and the vessel's condition and decide whether the vessel is seaworthy or not.

SHIPPING AT RISK: PORT AND MARITIME SECURITY

The Admiralty Committee of the Association of the Bar of the City of New York (ABCNY) have organized a seminar on issues related to maritime and port security in the aftermath of September 11th. The seminar, entitled SHIPPING AT RISK: CURRENT ISSUES IN PORT AND MARITIME SECURITY, will take place on May 17th.

A series of presentations is planned, followed by question and answer periods. Topics of interest include:

- Overlapping and Competing Jurisdiction at U.S. Ports
- Legislative Initiatives to Improve Maritime and Port Safety
- Domestic and International Security Issues - the U.S. Coast Guard Perspective
- U.S. DOT Initiatives on Container Security

- New Security Standards Affecting Marine Terminal Operators
- Current Risks Facing Marine Terminal Operators and the Role of Insurance
- Tightened Security: Customs and International Trade Issues

The seminar will also address war risk insurance and charter party issues that arose, or could yet arise, in the wake of the terrorist attacks.

Lawyers may obtain 4.5 CLE credits (Professional practice/Practice management).

For reservations, please contact Customer Service, CLE Center at Tel: (212) 382-6612. Registration fees are $125.00 for ABCNY Members and $185.00 for Non-members.

RECENT AWARD
Service Contract Decision

By Lucienne C. Bulow

Summary

In this recent SMA Arbitration, an NVOCC recovered substantial damages from an ocean carrier for breach of a Service Contract. The Service Contract was subject to the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act ('OSRA') of 1998, and, by its terms, to the general law of contract of New York. It was held that failure to file amendments to the Service Contract with the Federal Maritime Commission ("FMC") did not render those amendments void. Where a service contract was breached, proven damages could be recovered. The Shipper's right to recover damages was not dependent on whether the contract contained a clause providing for liquidated damages against the Carrier.

Facts

Disputes arose under a Service Contract between Anchor Shipping, an NVOCC (Non-Vessel Operating Common Carrier) based in Miami, Florida and Alianca, a container liner operator engaged in trade between the USA and South America. The Service Contract was one of the first to be concluded after OSRA came into effect. It was effective from May 6, 1999 until May 6, 2000 and provided for Anchor to ship a minimum of 500 TEUS over the one-year period. The Contract covered five principal routes between US East Coast ports and the East Coast South America, Venezuela and West Coast South America. Alianca undertook to accommodate 5 TEUS per scheduled sailing. Any shipment in excess of this figure would be carried, subject to space availability, and if there were no space on that sailing, Alianca was to make space available on its next sailing. The Service Contract provided that it was to be governed by the Shipping Act of 1984, as amended, and regulations issued by the Federal Maritime Commission pursuant to the Act. To the extent that issues of construction related to matters of contract or other law, the contract provided for New York law to apply.

The Claims

Anchor claimed that Alianca had breached the service contract by refusing to accept bookings under it and eventually canceling it as regards all services other than the East Coast South America southbound route. The reason for the breach, according to the Shipper, was that rates on the other services had started to rise dramatically about the time the Service Contract went into effect. Anchor also contended that Alianca's continued refusal to honor bookings caused it to lose customers who would otherwise have generated profitable business for it. The heads of damages were:

a) damages related to refused bookings;

b) damages related to lost profits on 328 unshipped TEUS;

c) legal fees and expenses in the amount of $57,000 and $39,000 for time incurred by its president in presenting the case.

These claims totaled US$510,000. Anchor also claimed general damages for loss of business, together with punitive damages.

Alianca denied Anchor's claims and advanced counter-claims amounting to US$105,000, including a claim for liquidated damages for Anchor's failure to meet its minimum volume commitment. Alianca claimed legal fees and expenses in the amount of $226,000.

Interim Award

As a preliminary point, Alianca had argued that Anchor could not claim monetary damages as a remedy for any failure by Alianca to ship cargo, since the Service Contract did not include a liquidated damages clause in respect of claims against the Carrier. The arbitrator held, however, in an Interim Award, that parties to a Service Contract are entitled to proven monetary damages under New York general contract law, when a breach of contract has occurred.

The Award

As a threshold issue, the arbitrator decided that two prior service contracts had been integrated within the Service Contract of May 6, 1999, even though this variation to the Service Contract, contrary to the terms of the Shipping Act, had not been effected in writing and lodged with the FMC. The arbitrator found that there was a clear agreement between the parties to integrate the contracts and that it was Alianca's responsibility under the Shipping Act to file the corresponding amendments with the FMC. It had not done so, but could not profit from this failure. "Failure to file cannot be used to deny an agreement by a party when it was within the power of that party to file or not to file" (Award p.14). The arbitrator noted that there was nothing in the Shipping Act which stated that failure to file a correction or amendment renders an agreement void. She referred to a previous ruling of the FMC, affirming a decision by an Administrative Law Judge in *Vinmar Inc. v. China Ocean Shipping Co*. That ruling explained that the Shipping Act does not state that a service contract only comes into existence upon its filing with the Commission and held that "there is no indication that the 1984 Shipping Act was intended to supersede contract law with respect to the formation of service contracts." In that case, failure to comply with the Shipping Act did not mean that there was not a valid contract.

On the main issue, the Arbitrator found that Alianca had not acted in accordance with the "fundamental principle of contract law, especially as it pertains to common carriers," laid down in the case of *William R. Adair v. Penn-Nordic Lines Inc*., "that persons entering into contracts must act in good faith to seek to accomplish the purposes of the contract and not to do anything to hinder performance." In breach of the Shipping Act sections 10(b)(3) and (10), Alianca had "delayed or never filed amendments with the FMC as a means of retaliating against Anchor for refusing to agree higher rates and to service route cancellations." The Arbitrator found that Alianca did not treat Anchor in accordance with the standards of behavior delineated by the Shipping Act, as amended by the Ocean Shipping Reform Act of 1998, and that Alianca had treated Anchor unfairly in many instances.

The arbitrator held accordingly that Alianca had breached the Service Contract in respect of all services other than the East Coast South America southbound and that, in consequence, Anchor were:

1. entitled to damages amounting to US$47,435 in the form of freight differentials for cargoes which should have been shipped under the Service Contract but which Anchor had to ship with other carriers since Alianca refused service;

2. entitled to lost profits on cargoes which it would have shipped, had there been no breach. Damages under this head were calculated at US$262,298, based on 293 containers out of the 500 referred to in the Service Contract.

Anchor's claims for loss of customers and business was denied; so too, was its claim for punitive damages. Whilst the arbitrator found some bad faith on the part of Alianca in its dealings with Anchor, she did not think Alianca's "breach of contract rises to the high standards of fraud and tort 'directed at the public generally' which is deemed necessary for such an award under New York law." Anchor was also awarded its reasonable attorney's fees, plus US$12,500 as compensation for the time and expenses of its president in preparing the case leading up to the interim award, before counsel was engaged. The arbitrator noted that under Rule 30 of the SMA rules which governed the proceeding, the arbitrator is empowered to award costs incurred by a party in prosecuting or defending a case. The arbitrator's fees were allocated 65% to Alianca, 35% to Anchor.

The arbitrator awarded Alianca $31,255.00 in balances of freight but denied its counterclaims for liquidated damages for short shipment because a

party cannot benefit from its own breach and take advantage of an obstacle to performance which it had created (11 Williston, Law of Contracts, 3d, §1296). [See **Anchor Shipping Company v. Alianca Navegacao e Logistica Ltda - SMA Award No. 3698**]

Thanks are owed to David Martin-Clark of DMC Notes for his summary which forms the basis of this article.

MANIFEST DISREGARD OF LAW

This article was written by LeRoy Lambert and appeared in Healy & Baillie' LLP's MAINBRACE, February, 2002, entitled ***"SDNY RETAINS RESTRICTIVE VIEW OF 'MANIFEST DISREGARD OF LAW' AS A BASIS FOR VACATING MARITIME AWARD"***

As arbitration becomes more common in areas of the law traditionally left to the courts, such as employment and consumer law, courts that have not previously had to deal with petitions to vacate awards under the Federal Arbitration Act have issued decisions regarding the non-statutory ground of "manifest disregard of law." New York is the traditional site of maritime arbitrations in the United States, and the United States District Court for the Southern District of New York is the court most likely to hear and decide motions to vacate such awards. Recent court decisions involving awards in other areas of law, and even one purely commercial dispute, *Westerbeke Corp. v. Daihatsu Motor Co.*, 162 F.Supp.2d 278 (S.D.N.Y. 2001)(Judge Marrero)(appeal pending), have caused maritime lawyers in New York to wonder whether judges in the Southern District of New York may now be more inclined to vacate an award in a typical maritime dispute.

The answer so far for maritime cases seems to be: "No." See, e.g., *Page International Ltd. v. Adam Maritime Corp.*, 53 F.Supp.2d 591 (S.D.N.Y. 1999)(Judge Berman); *Duferco, S.A. v. Ocean Wide Shipping Corp.*, 2001 AMC 536 (S.D.N.Y. 2000)(Judge Berman); *Possehl v. Shanghai Hai Xing Shipping*, 2001 U.S.Dist. LEXIS 2169 (S.D.N.Y. 2001)(Judge Sweet). *Zorra Transp., Inc. v. Seaboard Trading & Shipping*, 2001 U.S. Dist. LEXIS 4923 (S.D.N.Y. 2001)(Judge Jones); *E.I. du Pont de Nemours & Co. v. JO Tankers B.V.*, 172 F.Supp.2d 405 (S.D.N.Y. 2002)(Judge Koeltl); and *Stolt Tankers, Inc. v. Marcus Oil & Chem.*, 2001 U.S. Dist. LEXIS 19750 (S.D.N.Y. 2001)(Judge Chin); *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 01 CV 6438, slip. op. (S.D.N.Y. Feb. 11, 2002(Judge Swain). In each cited case, the court refused to vacate the award.

Adhering to precedent, the judges reaffirmed that the court's role in deciding whether to vacate an award was quite limited "in order to avoid undermining the two goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." In particular, the non-statutory ground of "manifest disregard of law" remains a "high hurdle" to overcome. There must be "something beyond and different from a mere error of law or failure on the part of arbitrators to understand and apply the law."

Accordingly, it remains difficult to persuade a court to vacate a maritime arbitration award on the basis of "manifest disregard of law." As a result, the decision of maritime arbitrators in New York in any given dispute will most likely be the final word on the dispute.

THE GENDER OF SHIPS

The following article appeared on navalweb.com on March 21, 2002:

Ships now "it"

Lloyd's List has opted to refer to ships as "it" rather than the customary "she." Julian Bray, the paper's editor, reported "Ultimately they are commodities . . . not things that have characters."

Why is a ship referred to as "she?" The US Naval Historical Center says it has always been customary to personify certain inanimate objects and attribute to them characteristics peculiar to living creatures. Some objects are regarded as masculine. The sun, winter, and death are often personified in this way. Others are regarded as feminine, especially those things that are dear to us. The earth as Mother Earth is regarded as the common maternal parent of all life. In languages

that use gender for common nouns, boats, ships, and other vehicles almost invariably use a feminine form. Early seafarers spoke of their ships in the feminine gender for the close dependence they had on their ships for life and sustenance.

Vessels are also known to have "sister" ships and the tradition of referring to sailing vessels as "she" dates back to the mariners of Ancient Greece. It seems sad to give up such a venerable and harmless tradition that has been part of maritime culture for millenniums.

Research into "Origins of Sea Terms" by John G. Rogers resulted in additional background, if not edification:

She *Much has been said and written about why ships and boats are referred to in the feminine, and it all appears to be happy guesswork. Here are a few of the guesses: (1) A ship upon which one's life could depend was as near and dear as one's wife or mother. (2) A ship is as capricious, demanding, and absorbing as a woman. (3) The Roman goddess of navigation was Minerva, and in her honor all Roman ships were considered as feminine. It may be interesting to note that another ship being watched from the bridge or cockpit is often spoken of as "he." This refers to the other skipper or watch officer rather than to the vessel, sometimes in wonderment as to what "he" is going to do next.*

GONE DIGITAL

Beginning with this issue, THE ARBITRATOR will only be available by e-mail or by accessing the SMA website [www.smany.org]. In the January 2002 issue, we appealed for readers to forward their e-mail addresses for future electronic distribution of this free, quarterly publication. The response has been so overwhelming that we have taken this next, obvious step. Thanks to all of you for your cooperative responses. Please pass the word on to your friends and colleagues about the current and future availability of THE ARBITRATOR.

QUOTES FOR THE QUARTER

Mr. Descartes, having been asked if he would like another cup of tea, replied, "I think not." Whereupon, he disappeared.

Thanks to Capt. Henry Engelbrecht for this bit of cyber-sidled humor

For THE ARBITRATOR

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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

We live in a much different world since September 11th and the Society's sympathies and condolences go out to the New York maritime community and all others affected by those horrific events.

We decided to press on with ICMA XIV and 140 world-wide delegates were in attendance during the week of October 22nd. The Congress was opened at the Waldorf-Astoria Hotel with a salute to those present - particularly delegates traveling from faraway places - for their loyal support during these tumultuous times. Admiral Rick Larrabee, Director, Port Commerce Department of the Port Authority of New York & New Jersey, officially welcomed the delegates, followed by the invocation from Reverend Peter Larom, Executive Director of the Seamen's Church Institute.

Ten plenary sessions included papers and panel discussions on a great variety of global subjects, sparked by candid and robust exchanges from the floor. The Honorable Mr. Justice William Waung, Chief Admiralty Judge of Hong Kong, delivered the Cedric Barclay Memorial Lecture on the timely challenges presented by international terrorism. The full text of his address appears below. Judge Charles S. Haight, Jr., Senior United States Judge for the Southern District of New York, spoke at Tuesday's luncheon on the judiciary's role in the arbitral process and urged delegates to remain in close contact - "For it is upon friendships between peoples of different nations, brought together by a shared devotion to the rule of law and the peaceful resolutions of conflict, that the security of our world may largely depend."

The Congress was not all work. The New York maritime bar, led by Ray Burke, sponsored a lively reception at the Sky Club and we are grateful for the generous support of Burke & Parsons, Freehill Hogan & Mahar, Haight Gardner Holland & Knight, Healy & Baillie, Nourse & Bowles, Burlingham Underwood, Cardillo & Corbett, Hill Betts & Nash, Hill Rivkins & Hayden, Lyons Skoufalos Proios & Flood, Poles Tublin Patestides & Stratakis, Reitler Brown, Skoufalos Llorca & Ziccardi, Thacher Profitt & Wood, Tisdale & Lennon, and Watson Farley & Williams.

Wednesday was a day of leisure and many enjoyed the Hudson River cruise from lower Manhattan to Tappan Zee followed by a luncheon at the elegant Beau-Rivage. The formal dinner dance was held on Thursday evening at Cipriani's where delegates and guests danced the night away to the strains of Peter Duchin's orchestra.

The final plenary session was brought to a close on Friday morning and the International Steering Committee announced that ICMA XV would be held in London in April, 2004.

By all accounts, ICMA XIV was a success - made even more memorable by the gathering of friends and colleagues during troubled times. Our special thanks to ICMA XIV's Organizing Committee under the leadership of Klaus Mordhorst and to The Maritime Law Association of the United States, The Connecticut Maritime Association and The New York Area P&I Club Correspondents and Representatives for their support.

The Society wishes you, your families, friends and colleagues happy holidays and a kinder, more peaceful New Ye

David Martowski

THE FIFTH CEDRIC BARCLAY MEMORIAL LECTURE

THE NEW MILLENNIUM, TERRORISM & ARBITRATION

The Honourable Mr. Justice Waung
New York, 23rd October 2001

I am very honoured to be asked to deliver this Fifth Memorial Lecture in memory of Cedric Barclay. My wife and I have been very much looking forward to be in New York on this special occasion. But we wish we could have come in happier circumstances.

In 1972 when Cedric Barclay first established in Moscow the ICMA, International Congress of Maritime Arbitrators, although there was the cold war, the world was relatively speaking, orderly and predictable and certainly for the ordinary person less dangerous. There would be no question of our children and our parents asking us whether it was absolutely necessary to go to a city like New York for a conference. After the terrible terrorist attacks, what would Cedric Barclay (a man never lost for words) say to this audience in New York about the future of arbitration.

New York, 11th September 2001 was the day which changed not only the United States of America but the whole world. Even at the risk of merely putting forward some random thoughts of an Admiralty Judge from Hong Kong, it seems to me worthwhile on an occasion such as today at the Waldorf-Astoria (only a few miles from the World Trade Center) in front of this August body of international maritime arbitrators to reflect briefly on the relationship between terrorism and arbitration in the New Millennium.

"Terrorism" is defined in Section 2656(f) of Title 22 of the United States Code as meaning:-

> "premeditated, politically motivated violence perpetuated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience."
>
> "International terrorism" is defined as: "terrorism involving citizens or the territory of more than one country."

A definition of "international terrorism" acceptable to the world community proved to be impossible over the last thirty years. In 1972 international terrorism as a topic was first placed on the agenda of the General Assembly of the United Nations but countries could not agree on the definition of international terrorism or the measures necessary to combat it. Since that time the United Nations has adopted a number of Conventions on Terrorism including:-

- in 1979, the Convention against Taking of Hostages;
- in 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
- in 1997, the Convention for the Suppression of Terrorist Bombings;
- in 1999, the Convention for the Suppression of the Financing of Terrorism.

To date, 12 Conventions have been adopted by the United Nations. But a Comprehensive

Convention on International Terrorism or an agreed definition of international terrorism is still not within reach.

While the diplomats and politicians debated on the words and the contents of Conventions, international terrorism spread and gathered its fatal force. The world learnt about:-

- the downing of the Pan Am Lockerbie flight in 1988,
- the Tokyo subway gas attacks in 1995,
- the Luxor tourist killings in 1997,
- the bombing of US embassies in Nairobi and Dar Es Salaam in 1998,
- the USS Cole killing of sailors in 2000 in Aden.

The world condemned the violence of these terrorists acts but the violence did not change our way of life. They were too remote for most of us.

The General Assembly of the United Nations in 1994, in its Resolution 49/60 of Declaration on Measures to Eliminate International Terrorism, said:-

"…. Terrorists acts are in any circumstance unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious or of any other nature that may be invoked to justify them ..."

This universal sentiment however was not reflected in the full participation of every country of the world in the UN Conventions against international terrorism. A large number of countries did not sign and even more did not ratify. Many countries did not have proper domestic legislation against international terrorism. In Hong Kong only some 7 pre-1980 UN Conventions apply and we do not have a sufficiently comprehensive domestic legislation dealing with suppression of international terrorism. I believe this lack of adequate domestic legislation on full suppression of international terrorism is probably true for the countries of many delegates to this Conference.

In the USA, domestic legislation dealing with international terrorism had been enacted for some time. An example of this is the Anti-terrorism and Effective Death Penalty Act of 1996 which provides for the designation by the Secretary of State of terrorist groups as Foreign Terrorist Organizations (FTOs). It is unlawful in the USA to provide funds or other material support to a designated FTO and banks are required to block funds of designated FTOs. I understand that on 5th October 2001, the Secretary of State of the USA amended the list of designated FTOs from 26 to 28, a full list of which, with Background Information, is set out in the attached Annex. A casual look at the contents of the Background Information on the 28 terrorist groups suggest that for some time we have had in this world a large number of international terrorist groups which have carried out terrorist attacks or which are likely to do so in future.

In the context of terrorism having been for some time a "clear and present danger to the international community" it is surprising that a major terrorist attack did not take place earlier. What caused the world to finally wake up in horror on the 11th of September was that for the first time, the terrorists attacked massively inside an urban center of the West. Previously the killings were done in and to embassies, ships and planes. This time the terrorists killed thousands of non- combatant civilians in the financial heart of America. The full force of the murderous brutality of the World Trade Center attack was brought home on the 11th of September 2001 to everyone through their television sets everywhere in the world and it struck terror into the heart and soul of every single person in the world. There was the sudden realization that international terrorism could hit at any time, at any place and kill large numbers of people in one single attack, including you, me, our family, our friends and our neighbours.

America and her allies have started the war on terrorism and in particular against Al-Qaida and its leader Bin Laden. This war might take months or years. President Bush was reported last Thursday as saying that the war could take 2 years. This war might result in the total elimination of Al-Qaida and its leader Bin Laden or it might not. What will be the international political and economic landscape after the war? Will we go back to normal after the war, or will we have a different world whatever happens with this war?

It is my belief that international terrorism will trouble our world for a long time to come, whatever might be the outcome of this war and I say this because:-

(A) there appears to be social and political discontent in many parts of the world to such an extent as to enable fanatic terrorist groups not only to operate in secret for long periods of time but to recruit successfully new members to join the terrorist groups. The reported ability of Al-Qaida to recruit young fanatical Saudi and Egyptian Muslims into the Al-Qaida Group is an example of the appeal of such terrorist groups;

(B) it is unlikely that the tension between the capitalist west and some of the people of Islamic countries will disappear in the near future. The tension was described by Samuel Huntington thus:-

> "The underlying problem for the West is not Islamic fundamentalism. It is Islam, a different civilization whose people are convinced of the superiority of their culture and are obsessed with the inferiority of their power. The problem for Islam is the West, a different civilization whose people are convinced of the universality of their culture and believe that their superior, if declining power, imposes on them the obligation to extend that culture throughout the world." (*underlining supplied*)

The inability to accept global multi-culturalism (arguably on both sides) is one underlying reason for the insecurity of the world. The insecurity is most acute and dangerous in the economically deprived areas of the world where Islamic fundamentalism has the greatest attraction for the people;

(C) terrorist groups by nature and definition operate in secret and it is extremely difficult to fight against enemies who work in the dark, not in open view. War against international terrorists who have no fixed address cannot be waged like a conventional war against the Iraqi army with tanks and large formation of troops;

(D) the United States of America has declared long-term war against international terrorism. A study of the 28 designated FTOs will reveal that some 18 of these are middle eastern groups with heavy emphasis on Muslim or Islamic leadership and the rest (including Japanese, Basque, Irish, Greek, Peruvian and Colombian) are spread over the rest of the world. Being a novice in this area, I cannot say whether these 28 Designated FTOs have established any record of staying power. However it is very probable, given the background and nature of some of these FTOs, this war, even if successful, will still leave sufficient groups of secretive and dangerous terrorists in active operation as to keep many of the security agencies of the western world very busy for the next decade. The difference between this war and the war against Iraq is that in the Iraqi war, there was a beginning and an end, against a clear single enemy operating from a known fixed location. No one can say now what will amount to an end to this war as there had been no clearly stated war objectives: one, two and three. So, for example, even the death of Bin Laden tomorrow might not necessarily mean the end of this war. The worldwide struggle against international terrorism might not come to an end for a very long time because until there is political and cultural stability in most of the underdeveloped parts of the world (especially in the Muslim world) there will be plenty of room for international terrorism. This struggle against international terrorists will be unlike any previous wars we have known. The West, led by America, will be fighting against enemies of unknown identities, unknown attributes, unknown numbers and unknown networks.

It is therefore the theme of my Lecture today that 9/11 has changed our world. We cannot go back to the old world where terrorism was a mere inconvenient item every two or three years on the television evening news. The World Trade Center attack has changed all that. Whatever might take place in and after the present war, we will have to live in a world where international terrorism and steps taken to prevent and suppress international terrorism will become part of our political, social, cultural and economic life. How would such a new world affect arbitration and what impact will it have on arbitration?

What I will be saying now is largely an exercise in speculation as there is not a great deal from past history to guide us as to what might happen in the next few years or decade. Being aware that this is something of a crystal-ball look into the future, it seems to me that in the new world facing us, there are three areas which would be affected by international terrorism:-

(A) Direct and indirect consequence on persons, properties and economic activity as the result of a particular terrorist attack;

(B) Direct and indirect consequence on persons, properties and economic activity as the result of steps (including violent steps) taken to find and punish the particular terrorist attackers;

(C) Direct and indirect consequence on persons, properties and economic activity as the result of steps taken to suppress terrorism generally including terrorist activities or the funding of terrorist activities.

Before delving into the three areas affected by terrorism, it seems worthwhile to state that the World Trade Center attacks have brought about a sea change in the world attitude to international terrorism. What is the sea change?

First, I believe that there will be an accelerated programme of domestic legislation against terrorism in practically all countries of the world. All activities everywhere will be affected by such new domestic legislation. Previously international conventions had made very little impact on such activities and before 9/11 most countries did not regard the passing of domestic legislation in conformity with their UN Conventions obligations as a matter of first priority. 9/11 has changed that and domestically there will be demand for an accelerated programme of legislation against international terrorism. I read with interest that a new substantial anti-terrorist bill is now before the British Parliament.

Secondly, the increasing appreciation of the relevance and importance of terrorism and anti-terrorism legislation will in a short time cause many contracts (with arbitration clauses) to be differently written. Terrorism can no longer be hidden behind standard clauses but would probably be the subject of elaborate treatment in contracts. Many lawyers amongst you will be very busy with advising and drafting relevant clauses exempting liability arising out of terrorism or for not taking sufficient steps to prevent terrorism. I expect many law firms in all urban centers of the world have already received requests from companies asking for advice on and relating to terrorism. In many cases, security experts will have to be brought in to advise on the exposure of a particular company on terrorism.

With the above sea change as the background, I will try to take a look into the first area of the future after a terrorist attack.

TERRORIST ATTACK

Persons

The first immediate casualties of a terrorist attack are normally the innocent civilian victims who happen to be at the scene of the attack. In the case of the WTC attacks, I would include in this category not only those directly on the top floors of the World Trade Center but also those firemen or policemen who were not there at the time of the attack but who bravely and selflessly went to the rescue of the victims. The death and/or bodily or psychological injuries as a result of terrorist attack often trigger off contractual rights, the dispute of which require resolution by arbitration. Examples of this would be life, accident or health insurance policies, contracts of employment and pension schemes. Persons injured might have claims which would be subject to arbitration clauses. A typical example of persons injured by a terrorist attack would be passengers injured on board a cruise ship which was seized by terrorists who gained access to the ship as a result of inadequate security system of the cruise ship. A claim by the passengers against the ship could be met with exclusion clauses in the ticket conditions. An arbitrator would have to resolve such disputes.

Properties

Loss of properties as a result of the major terrorist attack at the World Trade Center is a subject of such complexity that the matter may have already engaged the professional attention of many of the attendees of this Conference. Properties lost would include, naturally, both real and personal property, namely immovables or movables. In respect of immovable properties I suspect many offices in the World Trade Center would be the subjects of leases, subleases or agreements with arbitration clauses. In relation to shops, the possible permutation of contractual arrangements might be even more diverse and many of these may have arbitration clauses providing for dispute resolution. Property lawyers can probably spend days discussing the implications on the leases arising from the collapse of the World Trade Center buildings.

In July 2001, Silverstein Properties apparently acquired the lease of the World Trade Center from the Port Authority of New York. The Herald Tribune reported recently that Silverstein Properties was seeking $7.2 billion from the insurers. The insurance claim was made on the basis of two separate occurrences under the insurance and therefore entitling Mr. Silverstein's company to collect twice on $3.6 billion for each occurrence of attack. The underwriters were reported to contend that there was only one occurrence as the two attacks were coordinated. I do not know if the insurance contract in question contained an arbitration clause but if it does, then the arbitration over the insurance claim will certainly be one of the largest arising out the of terrorist attack on the World Trade Center or possibly the largest insurance claim for loss arising out of a terrorist attack. In respect of personal movable properties, whether they be in the form of equipment, appliances, vehicles, goods, personal belongings or even works of art, inevitably very large losses would be suffered as result of a terrorist attack. Some $100 million works of art were reportedly destroyed in the WTC. Computers destroyed amounted to over $10 billion in value. Borders Bookstore at the World Trade Center was my favourite bookshop in New York where I had spent many happy hours. All the books lost in that Borders store might well be the subject of a number of arbitration disputes between Borders and the various publishers or suppliers. It is in fact difficult to imagine what a full list of properties lost at the World Trade Center would look like. I suspect it will take many months to compile such a list let alone deal with claims arising from the destruction of the properties. Undoubtedly these properties would be the subject of a huge number of contracts and the working out of the economic consequence of these contracts arising from the destruction caused by the terrorist attacks would be the difficult task facing many professional arbitrators in the next few years. As with arbitration over lives lost at the WTC, the arbitrators will be faced with heart-renderingly difficult decisions the reaching of which might well prove to be the most painful and difficult for even the most experienced of professional arbitrators.

Loss of Economic Activities

What is even more difficult and almost of unprecedented complexity will be the working out of economic loss from inability to carry out contractual obligations arising out of the destruction of the WTC. Tens of thousands of contracts must have been affected by the terrorist attacks on the WTC and many of these will require dispute resolution by patient arbitrators.

In the past, when terrorist attacks were confined to embassies, warships or planes, the economic losses resulting from such attacks were relatively easy to work out and did not give rise to many disputes requiring resolution by arbitration. But the World Trade Center destruction was of a totally different order. It is not just a case of 5,000 lives lost but it was total destruction of the most important workplace in America, where huge amounts of business activities were carried on and where these enterprises had entered into hundreds of thousands if not millions of contracts, many of which were adversely affected by the attacks. Take for example one of the security houses such as, I believe, Lehman Brothers which had to find quickly alternative office in a Sheraton hotel nearby. Or the tragic case of Kantor Fitzgerald, the unique bond dealer, which lost some 80% of its staff. Outsiders could not even begin to speculate as to how these

companies and their contracts were affected by the attacks. But one thing is certain, if any contract was affected and there was a dispute and such a contract contained an arbitration clause then the arbitrator would have to decide such a tragic case. The World Trade Center attack was vicious and on an enormous scale, but it is possible to think of worse situations. If there was a secret and successful attack, say, on the air supply or the water supply of a major city like Chicago, or London, or Paris, and millions die, how would the contractual loss arising from such attacks be resolved?

It is therefore not too speculative to conclude that any terrorist attack involving loss of life, loss of property and loss of economic activity will result in disputes of contracts requiring resolution by arbitration. The arbitration work from a small attack can be easily handled but the arbitration community probably would be hard pressed to cope with the consequence of a really major or huge terrorist attack.

FINDING TERRORIST ATTACKERS

After a terrorist attack, inevitably there would be a hunt for the attackers. I suspect in most cases, the suspects will be drawn from a small known circle of terrorist groups and the hunt would be to find them physically and bring them to justice. There would also be efforts made to freeze their assets and immobilize their ability to use their funds.

In terms of the operation to find the attackers, most likely physical force would be used both in the country where the attack took place as well as anywhere else where the attackers or their associates could be found. If there was physical conflict (which would most likely to be the case as it is difficult to imagine that the attackers would be giving up quickly without any resistance), then damage to persons as well as properties would likely occur and in such situation, the same categories of loss could be suffered as in the case of terrorist attacks. In all these situations, arbitration clauses in the affected contracts would call for disputes to be resolved by arbitration.

In the case of operation to find not the attackers but the funds of the attackers, as legal means would be used by the Government pursuant to whatever power they have under their domestic legislation, there would be little scope for claims for personal harm or injury or physical damage to property. But what is likely to occur would be economic loss suffered as result of the banks or third parties taking steps pursuant to directives from the Government or some semi-official agencies. Let us imagine a case of a west European bank freezing the local bank account of a company suspected of some connection abroad with the attackers. The west European bank acted prematurely without a legally enforceable order of its Government. The local bank customer was wholly innocent of any terrorist connection. And because of the freezing of the account, the company was not able to carry out a certain transaction and claim was made by the company against the bank for the loss suffered by the customer company. If there was an arbitration clause in the bank/customer contract then the dispute will have to be resolved by arbitration and it may well be that the bank has no defense to the claim brought by the customer.

There are reports of terrorist groups doing business for profit as well as using front organizations to carry out their activities. Even charities or religious foundations are said to be involved. Any company therefore which had dealings with such organization or charity or foundations might suddenly find itself the subject of inquiries or actions taken by third parties or banks resulting thereby in loss which could be subject of claims in arbitration.

SUPPRESSING TERRORISM

It is my belief that one of the most important legacies of the World Trade Center attacks of 11th September will be the accelerated pace of demand for new measures to prevent and suppress terrorism and in particular terrorist attacks. There will be, I think, great improvements in anti-terrorism in at least the following areas:-

(1) improved international convention on international terrorism;

(2) increased domestic legislation on prevention and suppression of international terrorism;

(3) increased measures taken or required to be taken by law to guard against terrorist attacks;

(4) increased measures taken or required to be taken to track down terrorist groups in advance of attacks by them.

In the past, the international community did not act with the greatest of urgency in the discussion, drafting and adoption of the various UN Conventions against international terrorism. I believe after 9/11, and especially after this war in Afghanistan, a new international attitude will press for a much faster adoption of a comprehensive convention against international terrorism. It is at present difficult to predict what detailed form such convention will take but after the lessons learnt from the World Trade Center attacks, I suspect the new Comprehensive Convention will contain requirements for elaborate measures to detect, prevent and suppress international terrorism and, most importantly, to work together to reach the aforesaid objectives.

On the domestic legislation front, there will be a compelling public pressure on each country and within each country (especially in the West) to enact domestic laws in compliance with the various UN Conventions and in many countries to go beyond such UN Conventions. There should be in the domestic legislation:-

(1) prohibitions against harbouring terrorists;

(2) prohibitions against the establishment and operations of terrorist camps;

(3) prohibitions against activities to encourage, organize, or finance terrorism;

(4) duty to exchange information and expertise on terrorism, terrorists, their movements, support, weapons and connections ;

(5) duty to catch terrorists for their prosecution or extradition.

Whilst the domestic legislation lays down duties and obligations principally on the government of the country to take the appropriate steps against terrorists and terrorism, the greatest impact on everyday behaviour of all enterprises would be the necessity to be vigilant at all times against terrorists. All important public places will be expected to have necessary procedures put in place so as to minimize the risk of terrorist attack. A cruise ship will be expected to put in place a proper system to protect its passengers at all times, not just at the time of boarding but even during the course of the cruise voyage and if there was a terrorist attack, the conditions of the contract might not be sufficient to protect the cruise line owners. The same goes for the airlines and an example of such inadequacy of security would be the deliberate failure to put in air marshals on board a known vulnerable flight for financial reason of saving money. An arbitrator might have to decide the question of the liability of the cruise ship or airline for such terrorist attack.

Such examples can be multiplied. Utilities consumers could hold the utilities company liable for loss caused by the interruption of the utilities services if there was insufficient measure taken by the utilities company to prevent terrorist attack.

Employers could be held liable to employees if inadequate steps were taken in respect of terrorist biological or chemical attacks. The US Congress closed down very quickly after the Anthrax attack last week and an improved system will have to be put in place to prevent similar future attacks.

A charterer or shipper or cargo could hold the ship liable for lack of adequate steps taken to guard against terrorist attack. Imagine a giant oil tanker which, due to inadequate security precaution, was allowed to sail into Hong Kong harbour and a huge explosion was set off by the terrorists causing widespread fire onto other ships in harbour and buildings on land, resulting in the closure of the Hong Kong harbour due to the sinking of the ships. Between the shipper of the oil cargo and the ship owner, the dispute as to liability might have to be decided by one of your members as to whether the bill of lading conditions or the charter party terms could protect the carrier from liability.

The common theme of all these disputes, requiring possibly difficult decisions by an arbitrator is that after the World Trade Center's ferocious terrorists attack, the protection and prevention standard expected from everyone (person, company, institution and government) is raised to a totally different level. The enormous danger and risk of

unexpected attacks from terrorists is now known and accepted by the world and certainly by the business community of the world. The question is no longer whether preventive steps should be taken but what reasonable and prudent steps ought to be taken in the circumstances having regard to the risk and expense. In the case of major public buildings, which are prime targets of attack, or major installations or vehicles of transport, which can be employed as means of mass destruction, such as a VLCC, I expect that much would be expected. In the case, say, of a very small craft, it would not be reasonable to expect the same expensive and elaborate security measures to be taken.

The duty of tracking down attackers and their funds so that their terrorist activities could be curtailed or shut down calls for a different kind of standard of behaviour, the breach of which might give rise to claims in arbitration. In general of course, the duty of tracking down would lie on the part of the government and government agencies. But let us assume that a large container terminal company in Europe was asked to supply to its government anti-terrorist agency information about a certain employee which would have led to the immediate capture of a terrorist group of which that employee was a member. The terminal company failed to either respond quickly or gave the wrong information as result of which the container terminal was blown up by the terrorists and a large number of the staff were killed and/or injured and hired appliances were destroyed. It would be up to the arbitrator to decide whether any exclusion provision in the employment contracts (in the case of death and injury claims by the employees) and in the appliances hire agreements could protect the container terminal company.

Examples of such disputes arising out of the new duty on many to track down terrorists and their funds could be repeated many times. A difficult question which might be asked is whether there is any duty to report on activities which give rise to suspicion of existence of terrorist activities. In the days before the World Trade Center, it could be argued that there was no such duty but after 9/11, I believe a good case can be made out for a duty on everyone, within reason and without exposing oneself or one's immediate circle to excessive danger, to report on possible terrorism and terrorists. How can I live in peace and security if you, my neighbour, do not take the reasonable step when you can see or sense terrorist danger around me? Security comes not only by the Government acting to protect us (by way of domestic laws or measures such as the taking over of the scanning machines at the airports) but security comes from everyone behaving differently from before, because the collective security for everyone is the collective vigilance and protection we can give to each other.

After what we have seen on television of the disaster at the World Trade Center, an arbitrator will most likely apply a very high standard if any dispute should arise as to the adequacy of vigilance of a person or company in respect of potential terrorism and terrorists.

Well drafted exclusion of liability from terrorism clauses could of course make a difference to the outcome of many of these arbitration disputes. In time, possibly the center of dispute in these cases will shift from whether there was inadequate security measures to whether the exclusion clauses are sufficient to protect such lack of security measures. Often the lack of comprehensive security measures is due to economic reasons of a company not wanting to spend the necessary money. If it is seen by government that socially and politically it is undesirable that companies escape liability with such exclusion provisions then legislation might be passed to make it mandatory for adequate security systems to be put in and it would be against the law to contract out of such statutory obligations. The above speculative scenario would provide much scope for arbitrators to wrestle with the difficult problems arising out of the necessity to prevent and suppress terrorism.

CONCLUSION

Have I painted a black picture of hell or is it all an illusion which will soon disappear and we can go back to relatively normal lives? It is not possible for us to see into the future but I have tried to speculate from present evidence of what the future might hold for the world and the role which might

be played by arbitration and arbitrators in such a world. If I am even half right in my prognosis, then you will agree with me that arbitration will be very active because it will be a new world which we are not used to, where we will have to live in fear of international terrorist attacks at any time and at any place. A lot of adjustment will have to be made for life in the new world and such adjustments often give rise to differences requiring arbitration.

When the atomic bomb was first dropped, fear gripped the world. We now live in fear of a different kind but no less deadly. Cedric Barclay, a man born in Istanbul in 1917 and who lived most happily amongst Muslims (he spoke Turkish and Uzbek and even carried pilgrims to Mecca in a shipping line founded by him) would understand the human dilemma facing the world today. As the founder of the International Congress of Maritime Arbitrators, he would probably suggest that differences of whatever kind could be resolved in arbitration by a firm and independent arbitrator.

Terrorism and arbitration are not strangers to each other. In practically all the UN Conventions there are provisions for arbitration in the event governments cannot agree on the interpretation or application of these Conventions on terrorism (see for example Article 16 of the 1979 Convention, Article 16 of the 1988 Rome Convention, Article 20 of the 1997 Terrorist Bombing Convention, Article 24 of the 1999 Financing Terrorism Convention, Article 23 of the draft Comprehensive Convention on International Terrorism). If one day the fundamental difference dividing most of the world from the terrorists groups could be referred to arbitration, then this world will be a safer place. But time for peaceful solution by such arbitration will not come unless the whole world begins to understand a great deal more of what causes a person or group of persons to become terrorists. Is the fundamental cause of the terrorism the great economic divide between the increasingly wealthy West and the increasingly poorer people of the Third World? The economic swamp that serves as the breeding ground of hatred of the world's wealthiest and most affluent countries, headed by the USA, is where the future terrorists of our children's generation are born. The cultural and political impotence of people of non-western religious faith and cultural tradition is also the source of rage which causes young and educated people in these undeveloped parts of the world to take up the ideology and practice of terrorism. We must find out, for example, why in the universities and madrasahs of Egypt, Pakistan or Algeria, young students learnt to detest the western or American world and their values. It is only when the world has understood the fundamental causes of terrorism can we begin to address the exceedingly difficult problem of terrorism and find the solution to the problem. In the meantime, all we can do is pray that another terrible attack will not take place, at least not easily or due to lack of vigilance on the part of the citizens of the world.

As a guest of New York and of the United States of America, I am sure I share the feelings of all the visitors here today of our admiration for the courage of the brave people of New York and the firm strong principle taken up by the great nation of the United States of America. Your President has been transformed by the 11th of September and I pray that all of us have also been transformed into vigilant citizens who demand a different world where we do not have to live in daily fear and where no international terrorist group can survive for long because it will be a world where his peers or fellow citizens will not allow them to cause cruel and senseless destruction. How that will come about I do not know, but if there is ever any need for a system of bridge building between two sides, then we have in this magnificent arbitration community, miracle workers of bridge building.

I thank you for granting me the indulgence of sailing with you into dangerous uncharted waters talking about a subject which I know so little about. For me it was a fascinating voyage of discovery allowing us to see something of the future, where a special place is reserved for arbitrators.

RECENT AWARD
Recoupment/Equitable Set-off

The principle of recoupment/equitable set-off remains a thorny issue. In a split decision, the panel majority ruled that a speed deficiency finding should be set-off by the value of under-consumed fuel oil.

The case involved the performance of the vessel M/V MONAGAS under a New York Produce Exchange time charter. Among the various claims and counter-claims, the charterer sought damages arising from the vessel's failure to perform in accordance with her speed and consumption warranties. The panel was unanimous in its finding that there was no question as to the vessel's speed deficiency. The panel, however, was divided on the concept of an equitable set-off of fuel savings.

The panel majority, citing PANAMAX VENUS, SMA 1979 (1984), found that, "in the absence of any specific language, the under-consumption cannot be an affirmative claim but rather a claim for set-off only." Consequently, in the interest of equity, they reduced the charterer's award by the value of the fuel saved.

The third arbitrator disagreed primarily on the basis that the charter party was silent as to the application of such set-off. He found this matter to be distinguishable from precedents wherein equitable set-off might be appropriate, i.e., instances where the vessel was capable of making contract speed, but simply did not. In this case, the dissenting arbitrator observed that the causes of the speed deficiency were engine problems and the vessel was incapable of making the contract speed. Thus, he felt that applying the set-off principle would reward the owner for satisfying their requirement to not exceed the fuel warranty. [See **MONAGAS**, SMA 3675]

A SUBJECT NEVER EXHAUSTED
Exxon Valdez Damages Excessive

A US federal appeals court ruled that ExxonMobil should pay punitive damages for the 1989 Exxon Valdez oil spill. However, it decided the $5Bn awarded in a 1994 jury trial was excessive and a district court must reduce the amount.

The three-judge panel found that the damages were too high, based on a recent precedent-setting Supreme Court case. The 17 to 1 ratio between punitive damages and actual damages far exceeded the constitutionally acceptable ratio of 4 to 1 suggested, the ruling said.

ExxonMobil said it had already spent $2.2Bn on the spill clean-up from 1989 until 1992, and voluntarily paid compensatory damage claims worth $300M after the accident to over 11,000 people and businesses. The Anchorage, Alaska trial in 1994 determined that actual damages totaled $287M, and rejected the plaintiffs' claims for additional compensatory damages, the company said. The current lawsuit was brought by fishermen against Exxon Corporation for economic damages resulting from Exxon Valdez oil spill.

Fairplay November 8, 2001

GOING DIGITAL?

THE ARBITRATOR is published quarterly as a free periodical and mailed throughout the world to interested readers in the maritime arbitration field. In its efforts to curtail costs, the SMA would prefer not to reduce the number of annual issues nor to institute a subscription charge. You can help us save mailing costs by agreeing to receive THE ARBITRATOR by e-mail. Please send your e-mail address to the editor and you will receive your next ARBITRATOR electronically.

All readers are reminded THE ARBITRATOR is posted to the SMA website soon after publication. Archived editions are also available on the SMA website:
[http://www.smany.org/sma/sma-pubs.html]

QUOTES FOR THE QUARTER

An elderly pensioner on being sentenced to fifteen years' penal servitude cried, 'Ah! My Lord, I'm a very old man, and I'll never do that sentence.'

The judge replied, 'Well, try to do as much of it as you can.'

Hugh Holmes [Lord Justice Holmes](1840-1916), Irish circuit judge [In Maurice Healy, The Old Master Circuit (1939)]

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PRESIDENT'S CORNER

The Fourteenth International Congress of Maritime Arbitrators - ICMA XIV

Registration for the Fourteenth International Congress of Maritime Arbitrators on October 22 through 26 at New York City's Waldorf=Astoria Hotel is progressing at full speed ahead!

ICMA was last held here in 1981 and this promises to be a historic gathering of prominent arbitrators, judges, attorneys, shipping executives, chartering managers, brokers, marine insurers and surveyors from the world's foremost maritime centers. Admiral Rick Larrabee (USCG - Ret.), Director of the Port Commerce Department of the Port Authority of New York & New Jersey, will welcome delegates and The Honorable Mr. Justice William Waung, Admiralty Judge of the High Court of Hong Kong, will deliver the Cedric Barclay Memorial Lecture. Papers will be presented at plenary sessions on Monday, Tuesday and Thursday, interspersed with panel and floor discussions on a variety of subjects of global interest. Continuing Legal Education credits will be available to American attorneys.

A sparkling array of social events that include New York's museums, theater, opera, concerts and city tours, will lighten the working sessions, and on Wednesday, the ROYAL PRINCESS will sail from lower Manhattan past the Statue of Liberty, under the George Washington Bridge, and up the Hudson River into Tappan Zee - at the height of New York's spectacular fall foliage. We will then be spirited away by coach to the Beau Rivage inn and restaurant overlooking the Hudson Valley for cocktails and lunch. After a relaxed stroll through parks of nearby historic estates, this happy group will be taken by coach on the return jaunt to the Waldorf=Astoria by way of Bear Mountain Park and the George Washington Bridge.

A dinner dance Thursday evening at Cipriani's spectacular ballroom with the Peter Duchin orchestra will cap the week's social events, and the Congress will be officially brought to a close at Friday's morning session.

ICMA XIV not only promises to sharpen our knowledge and skills as maritime arbitrators, practitioners and professionals, but also offers the perfect opportunity to see old friends and colleagues, as well as to meet new ones, in the industry we serve. If you have not already registered for the Congress, you may do so NOW by visiting its website at www.icmaxiv.org or contacting Meeting Partners at 703 329 8622.

David Martowski, President

ICMA HISTORY

Many of our readers have heard of ICMA and it certainly has been well covered in these pages, but, perhaps you have not focused on its history. In the Fall 2000 issue of THE ARBITRATOR, then President Bulow provided the essential story of ICMA's conception and founding.

The International congress of Maritime Arbitrators (ICMA) was established in 1973 to provide a forum for maritime arbitrators and admiralty lawyers from around the world to confer and exchange views and news of professional interest.

The first conference was conceived in a Moscow subway station in 1972. Michael van Gelder, then president of the Society of Maritime Arbitrators, Cedric Barclay and Clifford Clark, two future presidents of the London Maritime Arbitrators Association, and Roger Jambu-Merlin, then president of the Chambre Arbitrale Maritime de Paris were all attending an International Congress of Commercial Arbitrators then being held in Moscow. It was in that subway station that the decision was made to stage their own impromptu congress. A venue was provided by Professors Sergei Lebedev and George Maslov in Moscow. Thus was born the First International Congress of Maritime Arbitrators (ICMA I).

Cedric Barclay decided that this sort of exchange of ideas should be expanded to include arbitrators and admiralty lawyers from the world over. Building on the Moscow congress, Cedric Barclay pursued the idea and organized the second ICMA congress in 1974 at a beach hotel a few miles outside of Athens. It was the first exclusively maritime-focused arbitration congress. Papers were prepared in advance and maritime arbitrators and attorneys from twenty countries attended.

In tribute to Cedric Barclay's vision in organizing ICMA, and since his death in 1989, every Congress has held the Cedric Barclay Memorial Lecture. His widow, Mrs. Cora Barclay, has been an honored guest. Past speakers all have been learned and respected masters in dispute resolution.

As the following list indicates, a majority of previous ICMA congresses have been held biennially:

ICMA I Moscow 1972
ICMA II Athens 1974
ICMA III Santa Margherita 1976
ICMA IV London 1979
ICMA V New York 1981
ICMA VI Monte Carlo 1983
ICMA VII Casablanca 1985
ICMA VIII Madrid 1987
ICMA IX Hamburg 1989
ICMA X Vancouver 1991
ICMA XI Hong Kong 1994
ICMA XII Paris 1996
ICMA XIII Auckland 1999

ARBITRATION - A JUDICIAL PERSPECTIVE

By Honorable Charles S. Haight, Jr., United States District Judge for the Southern District of New York

Judges view arbitration with distinct favor. I prefer to think this is for professional, not selfish reasons. The latter possibility arises because of current conditions in the federal trial courts and in particular my own, the Southern District of New York. The court's judges have a median civil case load of about 300 active cases at any given time. A dozen or so litigated motions are filed each month. Prosecutors fashion single indictments charging 21 defendants

with six conspiracies in 178 counts which require judge and jury a year to try. Congress has enacted bail and sentencing statutes, optimistically captioned "reform," which require significantly increased evidentiary hearings in criminal cases both before and after trial (assuming conviction). These circumstances combine, as many readers of these pages know, to limit severely the Southern District's ability to hear civil cases. Small wonder, then, that judges welcome arbitration as a source of alternate dispute resolution.

But judges favor arbitration for worthier reasons than this. Federal jurisprudence has consistently viewed arbitration as a private contractual right made enforceable by public policy. The declarations of public policy are found in the Federal Arbitration Act of 1947, and the enactment in 1970 of domestic law implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Both elements, private and public, are crucial. Judges regard business men, accurately or not in a given case, as adults. Business men cannot be made to arbitrate commercial disputes against their will; but if they sign a contract agreeing to arbitrate, the court will compel them to do so. Thus far we see no more, but no less, than common law freedom of contract, with its attendant rights and obligations. But judges, in compelling arbitration and therefore entering judgment upon awards, are equally influenced by those statutes in which the Nation's voice is heard. A judge compelling arbitration, or declining to find one of the very limited grounds for *vacatur*, properly perceives himself as enforcing public policy.

These judicial perceptions of arbitration crystallize and come to full fruition in two recent Supreme Court decisions. Under those decisions, securities fraud claims against brokers (including that Pavlovian addition to civil pleading, the RICO count) must be arbitrated before the Stock Exchanges [see *Shearson/American Express, Inc. v. McMahon,* 107 S.Ct. 2332 (1987)]; and antitrust claims arising under United States law must be arbitrated in Japan [see *Mitsubishi Motor Corp. V. Soler Chrysler-Plymouth, Inc.* 105 S. Ct. 3346 (1985)].

By these striking expressions of confidence, the Supreme Court is saying that due process may be found in the arbitral process, even in the most challenging of cases. This is both a reflection of arbitrators' past achievements, and a calling for continued just and expeditious resolution of disputes by lay persons. I believe it to be more than coincidence that the Society of Maritime Arbitrators completes its first quarter century at this time of judicial approbation of arbitration. The Society and those who have served it have made the system work.

Judges regard arbitrators with favor, and the judges of my court regard the arbitrators of this Society with particular favor. We congratulate the Society on this milestone. Judges and arbitrators work together as laborers in the same vineyard of Justice. The procedural differences are less important than the substantive common purpose.

(This article has been drawn from the FORWARD of the SMA's brochure entitled MARITIME ARBITRATION IN NEW YORK. The original article was written in 1988 in commemoration of the Society's twenty-fifth anniversary.)

WHY ARBITRATION IN NEW YORK UNDER SMA RULES?

New York maritime arbitrators, along with the United States District Court for the Southern District of New York, offer an efficient, practical system for fair disposition of maritime disputes.

Practicality

Maritime arbitration panels normally are comprised of one's peers in the industry, commercial people who apply their knowledge and understanding in what are often specialized areas. The arbitral process

encourages practical decisions by commercial people well-versed in such maritime areas as charter parties, vessel and terminal operations, ship sales and purchases, cargo sales and purchases, ship construction and repairs, stevedoring, cargo loss or damage, brokerage, agency, finance, engineering, naval architecture, surveying, salvage, towage, maritime insurance and general average, collisions, liner agreements, management agreements, small craft and offshore drilling, to name a few. Expertise in more obscure or specialized areas is more easily found from such a "pool" of professionals.

Consolidation

Until recently, unless prejudice could be shown, the Federal District Court for the Southern District of New York, following its Appellate Division, the U.S. Court of Appeals for the Second District, would usually order the consolidation of arbitration proceedings involving similar factual or legal issues arising under separate but related contracts. In order to preserve consolidation, which simplifies the arbitration process, saves time and expense and avoids the possibility of inconsistent results from separate arbitration proceedings, Section 2 of the revised SMA Rules provides for the consolidation of such proceedings. Parties, who do not wish to include this provision in their agreement to arbitrate may do so by simply excluding Section 2 of the Rules from their contracts.

Security

One of the most important features of American maritime arbitration is contained in Section 8 of the Act which permits a claimant to obtain security for his claim by arrest or attachment of the other party's vessel or assets, including bank accounts. The courts have confirmed the arbitrators' power to order security. Attachment may be obtained at the start of the arbitration or at any time during its course.

Speed

Speedy and immediate resolution of a dispute is often essential under particular circumstances such as impending bankruptcy of the other party, problems with cash flow, or a contractual crisis requiring immediate disposition to avoid ongoing or catastrophic financial consequences deriving from a breach of contract. Such immediate resolution is usually not available through the court system. New York arbitration panels can easily be formed and briefed so as to render declaratory relief on short notice. In those special instances where time is of the essence, these panels are of invaluable assistance.

Remedies

Arbitrators have various powers which allow them to provide a fair hearing and grant relief to the disputants. Arbitrators have the power to subpoena recalcitrant witnesses and documents and to otherwise order discovery in the same manner as judges. They also have the power to award interest and may, at their discretion, set a rate at an amount which exceeds statutory limits for interest on judgments. Maritime arbitration panels consistently attempt to provide an aggrieved party with full relief by awarding interest at the prime commercial lending rate to businesses during the period in question. New York arbitrators also have the power to order the parties to bear attorneys' fees, where permitted, and costs of the proceeding in whatever apportionment they consider fair under the circumstances. Under the new SMA rules, arbitrators are empowered to award attorney fees and party costs whether or not the arbitration clause provides for such relief.

Reasoned Awards

Awards rendered by SMA members are always supported by full reasoned written opinions which serve as a body of "precedent," indispensable to the maritime community for future commercial conduct. Written awards also provide for a degree of predictability in the outcome of many disputes, even though arbitrators are not bound by precedents.

Finality

Another important benefit of New York arbitration is the finality of the award which is subject to judicial review only under the most limited of circumstances. Courts in New York enforce arbitration awards in a simple summary procedure with the resulting judgment enforceable in the same manner as a court decision. This finality puts an end to a dispute, frees the disputants from being

entangled in years of appellate proceedings and helps contain the expenses of obtaining a final, binding decision.

Enforceability Abroad

Because the United States is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to the Inter-American Convention on International Commercial Arbitration, awards in arbitrations held in New York are enforceable in any country which is a signatory to these Conventions.

Cost-efficiency

Justice in New York arbitration is swift and final. Such speed and finality can effectively reduce costs, particularly when compared to court proceedings, because the parties do not have to submit to overly lengthy and expensive discovery. The benefits of New York arbitration to the maritime community are many. After more than thirty years, the Society of Maritime Arbitrators, Inc. continues to provide an essential service in the adjudication of disputes.

Excerpted from the SMA publication MARITIME ARBITRATION IN NEW YORK, 1994 edition, pp 6-8

RECENT AWARDS - VETTING REVISITED

THE ARBITRATOR, in its July 2000 issue (Vol 31 No 4), editorialized on the "Catch 22" aspect of vetting clauses contained in various chemical tanker charter parties. With the issuance of another award on the subject, it might be useful to briefly compare the New York vetting dispute awards to date:

AMERICAN ENERGY - SMA 3141 (30 Jan 1995)
Relevant clause: ". . . Owners warrant that for the duration of this charter the vessel will be kept in a standard acceptable to all major chemical producers and all major oil companies (e.g., BP, Shell, Exxon, etc.). . . "
Dispute: Owner tendered vessel without vetting approvals and Charterer canceled.
Finding: The vetting clause, as stated, constituted a warranty requiring that approvals be in place, therefore, Charterer was justified in canceling the charter.

AMERICAN CHEMIST - SMA 3189 (22 Jun 1995)
Relevant clause: (same as **AMERICAN ENERGY**)
Dispute: Vessel operated under charter for 26 months without vetting approvals, at which time Charter placed the vessel off-hire and unilaterally reduced hire payments for various prior periods of operation.
Finding: Owner had breached its warranty that the vessel would be kept in a standard acceptable to majors at the time of delivery and for the duration of the charter. Charter had wrongfully declared the vessel off-hire. Panel measured Charterer's recovery in terms of vessel's worth expressed as her daily, reduced value (deficiency value), for periods of Owner's breach.

DIAMOND PARK/EMERALD PARK - SMA 3576 (30 Nov 1999)
Relevant clause: "Owner warrants that the vessel will meet the screening requirements and pass the inspections of all major oil and chemical companies."
Dispute: Original owner, having lost certain vetting approvals, agreed to reduced hire. New owner claimed immunity from such a supplemental agreement.
Finding: New owner only subject to the terms of the surviving charters. Regarding vetting, this clause requires that the owner will only be liable for the charterer's damages if and when the vessel fails inspection.

HAROLD K. HUDNER - SMA 3619 (8 May 2000)
Relevant clause: "Owners warrant they will arrange for inspection and have vessel approved and maintain such approvals during the Time Charter by major oil companies . . .within 90 days of delivery . . . provided representatives . . . are available. Should Owners fail to obtain or maintain such approvals during the term of this charter then Charterers have the option to take the vessel off-hire until such time when the approvals have been obtained or reinstated."

Dispute: In October, 1998 the vessel was scheduled to perform a Mobil lifting under an April 1996 time charter. Charterer then declared the vessel off-hire upon learning it was not approved by Mobil. Owner maintained the loss of only one vetting approval was not sufficient to invoke off-hire.
Finding: Owner was obligated to maintain vetting approvals of all of the major oil companies. Failure to have only one of those approvals in place, subject to inspector availability, subjected the vessel to off-hire until the lapsed vetting approval(s) was reinstated. Charterer's failure to enforce this right at an earlier time did not represent a waiver of its rights in this regard.

OPAL SUN - SMA 3664 (12 Feb 2001)
Relevant clause: "The vessel is to hold at all times during this time charter the vetting approvals of . . . (major oils) . . .Failure to have any such vetting approval reinstated . . . gives Charterers the option to call the vessel into off-hire status."
Dispute: The vessel operated some six months under the time charter without all relevant approvals in place. Charterer declared the vessel off-hire and demanded Owner agree on "vetting values" to be applied for periods when vessel did not fully comply with the vetting clause. Owner contended they were not in breach since it is not commercially feasible to obtain vetting approvals for a new building, and it is defensible to allow a reasonable time to obtain such approvals. The parties directed the quantum of "vetting values" be decided in arbitration.
Finding: The owner had indeed breached the vetting clause which required vetting approvals to be in place at all times during the charter. While agreeing with Owner that Charterer had not established their damages with reasonable certainty, the panel emphasized that the charter was silent on the value of the vessel without approvals in place, and that the parties desired a commercial settlement of their dilemma and specifically agreed that the arbitrators would establish a "vetting value" as the proper remedy for the deficiency. The majority established a "vetting value" of $2000 per day and directed Charterer to repay a portion of withheld hire.

Lessons learned: The findings in all of these cases reflect the reality that the market value of a non-vetted vessel is less than that of a fully vetted vessel. The **DIAMOND PARK/EMERALD PARK** majority suggested a standardized and commercial inspection program under which an owner would pay for the vetting inspection with the understanding that the survey would take place when requested and not at a time or place when convenient to a major. The **OPAL SUN** award reflected the panel's views that majors' vetting approval is essential in today's chemical trade, lack of such approvals detracts from a vessel's earning capacity, and the contracting parties could avoid disputes if they agreed on vetting values at the time of fixture.

Readers are encouraged to review these vetting awards as examples of arbitrators' use of strict contract language interpretation while remaining cognizant of commercial realities.

(This article was largely drawn from a paper entitled *Vetting Clauses*, authored by SMA President David W. Martowski, which will be published in its entirety in 26 TMLJ 2001, Copyright, TULANE MARITIME LAW JOURNAL. All rights reserved. *Vetting Clauses* will also be presented at ICMA XIV in New York in October, 2001.)

NOTICE OF READINESS AND LAYTIME COMMENCEMENT

Can laytime commence under a voyage charter party requiring service of a notice of readiness when no valid notice of readiness is ever served? If so, when does laytime commence? Stated differently, what are the rights of owners to demurrage and charterers to despatch where a charter party provides for notice to be given in order to trigger the start of laytime but only an invalid notice is given, yet the vessel commences and completes cargo operations in circumstances which would otherwise justify a substantial claim to demurrage?

Such questions were encountered in *THE MEXICO 1 [1990]* 1 LL: Rep 507. The problem was resolved after the charterers gave a waiver and, in effect, accepted laytime to start at the commencement of discharge. The Honorable Mr. Mustill counseled detailed exploration should these matters arise in the future without the offer of a waiver or implied agreement.

Now comes the *HAPPY DAY* decision of the High Court of Justice in the Queens Bench Division Commercial Court (No. 2000 Folio No. 334, 25 January, 2001). At the time of her arrival off the port, the vessel was unable immediately to enter the port because she had missed the tide. Nevertheless, the master gave notice of readiness at this point. The vessel was able to resume her voyage into port on the next tide. Thus, in the circumstances where the charter was a berth charter and there was no congestion at the berth, notice of readiness given outside the berth was invalid when given. No further notice was ever given. Discharge commenced on September 26th and was completed on December 25th.

A London arbitration panel found for the owners and determined, as a matter of fact, when laytime had commenced. Although the arbitrators recognized the lack of validity of the NOR, they failed to offer convincing reasons for their judgement, other than implying that the NOR was accepted because it was not rejected and the charterers were aware, at least once discharge commenced, of all the information required to be included in any further notice.

In the appeal, the charterers relied upon *THE MEXICO 1* as clear authority in support of the proposition that where a charter party stipulates that a particular notice of readiness is to be given in order to commence laytime, there is no room for a construction which allows a notice given in the wrong manner or from the wrong place subsequently to become effective or a construction which in effect dispenses with the requirement for a notice once the vessel has commenced discharging. Responding to submissions by the owners that such a conclusion was uncommercial and absurd, the charterers argued that the master should have given more than one notice to cover eventualities. The charterers maintained that if the parties intended for laytime to begin coincidently with cargo operations, or upon arrival at the port, the parties would have provided for that in the contract. In any event, the charterers continued, there was much to be said for the certainty of a notice (or notices) particularly where rights to demurrage under sub-contracts may be involved.

The Honorable Mr. Justice Langley reversed the arbitrators and found for the charterers. He concluded that NOR was invalidly given and there were thin materials indeed for the inference of any waiver, estoppel or agreement. Unless an acceptance or waiver of the original notice was given by the charterers, laytime never started at all. Consequently, not only were the owners not entitled to demurrage, they were obliged to pay the charterers despatch money for the whole of the laytime saved. Justice Langley reached this conclusion based upon his judgment that the issues presented were plainly questions of law.

No doubt the owners' reaction to this unfortunate turn of events is fairly summarized by Messrs. Chapman and Dickens in our Quotes for the Quarter to be found at the end of this issue.

LEGAL CITATIONS ARE ON TRIAL IN INNOVATION V. TRADITION

By WILLIAM GLABERSON

(This is an edited version of an article of the same name which appeared in the New York Times on July 8, 2001)

For a couple of centuries, judges and lawyers have been including arcane numbers smack in the middle of their writing. They call them sentence citations, see, e.g., Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

Lots of people call them annoying. Now, at the prompting of one of the country's leading authorities on legal writing, lawyers and judges are joining the ranks of the complainers. In court opinions and legal

briefs, they are flouting convention by tucking those numbers into footnotes.

In the process, they are irritating some of their colleagues and changing the look of legal documents from coast to coast. They say they are also taking an important step toward making the law slightly more comprehensible to people who have not spent three years in law school.

But the defenders of legal tradition say the rebels are ruining a superior system of legal citation with unorthodox ideas.

"It's a nuisance" and "aggravating" and "an obstacle to proper opinion writing," said Ned E. Doucet Jr., chief judge of a Louisiana appeals court that divided over the issue this spring. He exchanged tartly conflicting decisions with another judge over whether the new approach was a violation of all they held dear.

Still, some lawyers and judges in Texas, Michigan, Delaware, California, Alaska and many other states are trying the new, cleaner look in legal documents by putting their citations at the bottom of the page. Legal citations can include references to the date, volume and page number of legal publications where precedents can be found.

Some converts say they are making the switch to democratize the law because the public is put off by strings of numbers that can make legal prose seem even more impenetrable than it is.

"We hear that all the time: `Your opinions are oatmeal, they're not readable,' " said a Michigan Court of Appeals judge, William C. Whitbeck. "Judges see this as one way to respond."

Most of the judges did not think of the idea themselves. They have an authority to cite on the question: Bryan A. Garner, a silver-penned legal writing specialist who is, among other things, the editor of Black's Law Dictionary, a volume that has ruled the world of legal language since 1891.

Scott Turow, the best-selling writer and practicing lawyer, said the idea of putting citations in footnotes would only make legal briefs confusing. "By the time your eyes get to the bottom of the page," Mr. Turow said, "you forget whether you're looking for footnote 22 or 23."

In San Francisco, Judge Joanne C. Parrilli, a state appeals judge, agreed. She said she tried the Garner approach but all the looking up and down at footnotes "produced a certain amount of optical indigestion."

On the Delaware Supreme Court, Justice Joseph T. Walsh is the lone holdout on a bench where the four other justices have been putting their citations in footnotes.

Justice Walsh explained his allegiance to the traditional method. Whatever his colleagues in Delaware may be doing, he said, Mr. Garner has yet to win a single convert on the highest court of the land.

"If it's good enough for the Supreme Court," Justice Walsh said, "it's good enough for me."

Many lawyers and judges agree that stripping the numbers out of their paragraphs might make them more readable.

But it might be wrong to suggest that anything will make people wade through court decisions, said J. Michael Luttig, a judge on the United States Court of Appeals for the Fourth Circuit in Richmond.

"It would make it more accessible, but the lay public still won't read legal opinions," Judge Luttig said, sounding a little forlorn. "They're too complex, laborious and uninteresting to the lay public."

For opinions using the new citational footnotes see TXU Elec. Co. v. Public Util. Comm'n of Texas, 44 Tex. Sup. Ct. J. 854, 2001 WL 618186 Tex. LEXIS 53 (Tex. 2001) (Owen, J., concurring); Shaw v. State Farm Mut. Auto Ins. Co., 19 P.3d 588, 2001 Alas. LEXIS 24 (2001).

For a complete view of Mr. Glaberson's New York Times article please refer to: http://www.nytimes.com/2001/07/08/national/08LEGA.html?ex=995612072&ei=1&en=f76690071158428e on the internet.

ENDNOTES, FOOTNOTES OR SENTENCE CITATIONS IN ARBITRATION AWARDS?

Some authors of SMA Awards often include citations within the text of their writing. Others will utilize the footnote method for citing legal precedent

on which the panel or counsel have relied. A few have adopted the endnote approach, perhaps, because all foot notes are eventually transcribed as endnotes in the final volumes of the SMA's published Award Service.

This is not a matter of grave concern. However, since the subject merited an article in one of America's most prestigious newspapers, perhaps SMA members, lawyers and/or other readers of THE ARBITRATOR would welcome an opportunity to express their views.

What should it be, endnotes, footnotes or sentence citations? Is one method less confusing than another? Should a single standard be adopted?

Send your comments by letter, fax or email. But please, no endnotes, footnotes or sentence citations.

PRIME COMMERCIAL LENDING RATES THE CHASE MANHATTAN BANK

These are the interest rates normally employed by arbitrators when calculating assessed interest in awards:

EFFECTIVE DATE OF CHANGE	RATE
11/15/1994	8.5%
02/01/1995	9.0%
07/07/1995	8.75%
12/20/1995	8.5%
02/01/1996	8.25%
03/26/1997	8.5%
09/10/1998	8.25%
10/16/1998	8.0%
11/17/1998	7.75%
07/01/1999	8.0%
08/25/1999	8.25%
11/17/1999	8.5%
02/03/2000	8.75%
03/22/2000	9.0%
05/17/2000	9.5%
01/04/2001	9.0%
02/01/2001	8.5%
03/20/2001	8.0%
04/19/2001	7.5%
05/16/2001	7.0%
06/28/2001	6.75%
08/22/2001	6.5%

IN MEMORIAM

It is with deep sadness that we report the passing of Edward T. Hill on August 15, 2001. Mr. Hill, who retired from Maritime Overseas Corp. in 1989 as Assistant Vice-President & Manager Chartering Operations in 1989 after 19 years service, was a member of the SMA since February 1990. He will be missed.

QUOTES FOR THE QUARTER

"I'me asham'd the law is such an Ass."
[*Revenge for Honour* (1654), III,ii]
George Chapman (1559-1634)

"If the law supposes that," said Mr. Bumble, . . . "the law is a ass, a idiot."
[*Oliver Twist* (1837-1838), Chapter 5]
Charles Dickens (1812-1870)

One of the more interesting elements in life, as well as in arbitration, is the fact that not all communications articulate exactly what was meant. Some statements are the complete converse of their intended meaning. For example, no one interprets the following Massachusetts highway sign literally:

Trucks Prohibited <u>From</u> Left Lane

A recent trip to Seattle revealed that conundrums befall both coasts of our great country. The following two signs were seen within 50 feet of each other:

No Parking. Violators will be towed at vehicle owner's expense

and
No Loitering for Illicit Purposes

Finally, six year old Melanie's contribution to the Seattle Science Museum's children's exhibit of fired wall tiles, to demonstrate what it is that each child liked:

I lick bugs.

Have a nice quarter.

For THE ARBITRATOR

Donald J. Szostak
djszostak@hotmail.com

THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

VOL 32 JULY 2001 Number 4

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PRESIDENT'S CORNER

Don Szostak, our new vice president, joins me in thanking the SMA membership for its support, and congratulating our newly-elected Governors - Austin Dooley, Tom Fox, Stan Kleppe and Katherine Pappas.

The new Board's efforts over the next two years will be dedicated toward reinforcing New York as an arbitral forum that "gets it right", expeditiously, at a reasonable cost. There is no magic to this concept but rather it requires hard work and dedication which will focus on three fundamental areas - an active and cohesive membership, a close working relationship with our maritime bar, and vigorous promotion of the Society here and abroad. A few words on each.

Membership - The SMA membership offers to disputants a great pool of expertise and experience drawn from many shipping disciplines. I came from the law and when I joined the Society in 1984, there were some expressions of concern that our membership would shift away from commercial men. That has not happened and will not happen on my watch. The Society will continue to be open to those who qualify under our by-laws. But bear in mind, this is not a spectator sport and in order to thrive as a professional society, we need your proactive support, energy, enthusiasm and ideas. This is your Society and I strongly urge you to attend our lunches, subscribe to the award service, become involved in the Society's committee work, and participate in ICMA XIV which promises to be a sparkling event.

The Maritime Bar - The SMA shares a long and extremely valued relationship with the Maritime Law Association and the New York legal fraternity, and we will continue to develop and enrich this alliance which is essential to a viable arbitral forum.

Promotion of the Society - Arbitrators have to arbitrate and New York must enjoy its share of dispute resolution work. While results are clearly our best advertisement, each of us has untapped potential sources and I encourage you to think hard about this and share your ideas with me, Don or your Board of Governors so that they may be effectively explored. On a personal note, recent travels to Panama and London gave me the opportunity of promoting ICMA XIV and New York arbitration.

In closing, New York as an arbitration forum can be as great as you want it to be. I appreciate the opportunity to lead the Society during these challenging times and to work with you, the bar and all other supporters toward making it all happen.

David Martowski

ICMA XIV - HAVE YOU REGISTERED?

The Fourteenth International Congress of Maritime Arbitrators (ICMA XIV) will convene in New York City on October 22nd and continue through October 26, 2001. The planning committee, hard at work for more than a year, advises the registrations are rolling in, which promises a huge professional, educational and social success. In positive response to an earlier call for papers, more than seventy outlines have been submitted, assuring active and thorough discussion on a myriad of topics related to Maritime Arbitration.

The ICMA XIV program will provide the unique opportunity for attendees to meet, network, teach, learn and exchange related topics with their international peers. Program events include the Cedric Barclay Memorial Lecture, presentation of professional papers, a mock arbitration, a grand banquet, special guest activities and optional tours. The venue of New York City and the world famous Waldorf=Astoria Hotel in midtown Manhattan provides opportunity for cultural and tourist activity for New Yorkers and visitors alike.

Members of the international professional maritime community have been invited to participate. The Congress will be of particular interest to individuals and firms involved in chartering, ship operations, brokerage, insurance and maritime law.

Members of the maritime arbitration legal fraternity are especially welcome to the Congress. The Maritime Law Association of the United States, which is a co-sponsor of ICMA XIV and has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York, will issue CLE credits to New York Attorneys who attend the Congress. It is estimated that approximately 20 CLE credits (at 50 minutes per hour) will be issued to attorney attendees at the Congress. Attorneys from states other than New York may be entitled to CLE credits for attending ICMA XIV if their states grant reciprocity for CLE courses presented by Accredited Providers in New York.

The SMA is the host of ICMA XIV. Co-sponsors include leading law firms of the New York Maritime Bar, the Arbitration and Mediation Committee of the Maritime Law Association of the United States, the Association of Ship Brokers and Agents of the United States, the Maritime Association of the Port of New York/New Jersey and the Connecticut Maritime Association.

If you haven't registered yet, visit the website at www.icmaxiv.org or contact:

Meeting Partners
PO Box 4070
Alexandria, VA 22302
USA
Phone: 1-703-329-8622
Fax: 1-703-329-9420
e-mail: info@icmaxiv.org

CONSOLIDATION

Section 2 of the SMA Rules addresses consolidation involving related contracts. A recent **Memorandum Endorsement** by US District Court Judge Louis L. Stanton illustrates how that Section of the Rules is properly interpreted and applied. The parties involved initiated several arbitrations and have long since settled their differences prior to the issuance of an Award. The facts involved are adequately laid out in the Judge's Memorandum which is presented here in its entirety:

Navigator Gas Transport PLC, Navigator Holdings PLC, Navigator Gas Management LTD., Navigator Gas (IOM I-A) LTD., Navigator Gas (IOM I-B) LTD., Navigator Gas (IOM I-C) LTD., Navigator Gas (IOM I-D) LTD., and Navigator Gas (IOM I-E) LTD. V. Marlink Schiffahrtskontor GmbH and Marlink (Hong Kong) LTD., 00 Civ. 8284 (LLS)

Petitioners, collectively Navigator Holdings ("Navigator"), bring this action to compel consolidation of three arbitrations between Navigator and Marlink Schiffahrtskontor GmbH ("Marlink") and its subsidiary, Marlink (Hong Kong) Ltd., or to stay the pending arbitration until

this action is decided. The arbitrations concern three contracts relating to the financing, construction and operation of five Navigator ships. Marlink brought the pending arbitration relating to its claim of wrongful termination under the Master Commercial Marketing and Services Agreement ("CMA"). Navigator demanded two subsequent arbitrations concerning its right to terminate two technical agreements, the Agreement on Contract for Technical Matters, which the parties refer to as the Technical Supervision Agreement ("TSA"), and the Baltic and International Maritime Council Standard Ship Management Agreement ("TMA"), that it entered into with Marlink (Hong Kong).

This court has jurisdiction pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §201 et seq. Since the arbitration agreement arose "out of a legal relationship . . . which is considered commercial" and the dispute is between foreign nationals who agreed to arbitrate in New York. See 9 U.S.C. §202.

This court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate unless the parties agree to consolidation. See The Government of the United Kingdom of Great Britain etc. v. The Boeing Company, 998 F.2d 68, 74 2nd Cir. 1993). All three contracts contain identical arbitration agreements which provide for arbitration in New York before a three-member panel of arbitrators from the Society of Maritime Arbitrators of New York, Inc. ("SMA"). Rule 2 of the SMA provides: "The parties agree to consolidate proceedings involving related contract disputes with others arising from common questions of fact or law." Navigator claims that the three contracts are interrelated since they pertain to the financing, operation and management of the same five vessels and involve the same issues of agency law and fiduciary duties owed to Navigator by its agent Marlink, and that Marlink engaged in a deliberate scheme to breach its fiduciary duties affecting all three contracts in order to seize control of Navigator. Navigator further claims that Marlink and Marlink (Hong Kong) were operated as a single entity. Marlink opposes consolidation, arguing that the CMA involves commercial issues not related to the technical issues involved in the TSA and TMA arbitrations and that Navigator seeks consolidation as a means to delay and complicate the CMA arbitration. Marlink further argues that Navigator acknowledged that Marlink and Marlink (Hong Kong) were separate entities when it signed two novation agreements and that, in any event, the corporations are entitled to a presumption of separateness.

The first arbitration involves a dispute as to whether Navigator properly cancelled the CMA. Navigator claims that it cancelled this contract because Marlink, against Navigator's interest, disobeyed instructions to cease business negotiations, withheld information about charterers who sought to employ the vessels, engaged in unethical pricing schemes with customers, and retained a shipping company to assist in marketing without permission. These claims relate to the commercial aspects of the business arrangements. Navigator's reasons for terminating the TSA and TMA involve ship construction matters including delay, inadequate supervision of staff, improper billing for a standby crew, failure to issue monthly reports and produce invoices, failure to follow safety procedures and deviations from specifications.

Although all of Navigator's claims allege breaches of general principles of agency and fiduciary-duty law, as well as a common background, they do not present the same factual issues for the arbitrators' resolution.

The applications for a stay and for consolidation are denied, and the Clerk will enter an order dismissing the petition.

So ordered.

Dated: November 14, 2000
New York, New York
Louis L. Stanton
U.S.D.J.

RECOVERING LEGAL COSTS IN THE US

The following has been excerpted from an article which recently appeared in SIGNALS (Issue 43), the newsletter of the North of England P&I Club:

As, no doubt, many of our readers will be aware, where arbitration or court proceedings take place in England, costs will normally "follow the event" and the losing party will be ordered to pay the successful party's costs (as well as his own).

On the other hand, where proceedings take place in the US (either in court or arbitration) the general principle is that costs are not recoverable. That said, Members should be aware that if they are agreeing that claims will be subject to dispute resolution in the US, for example, New York, they can take steps to ensure that costs are recoverable.

One step Members can take is to ensure that agreement is reached that disputes will be determined in arbitration in New York in accordance with the SMA Arbitration Rules. The SMA Arbitration Rules specifically provide that the arbitrators have jurisdiction to make an award in respect of costs and, if costs are claimed, the arbitrators' practice is to award them to the successful party.

Alternatively, Members can ensure that a clause is incorporated in their contract which provides for the costs (including attorneys' fees) of any proceedings to be recoverable. If they do so, then, in most circumstances, the court or arbitration tribunal (as applicable) will proceed to give effect to the clause and will award costs.

RECENT AWARD
GOOD AND SAFE PORT

While performing under a time charter in which the trading limits clause provided, "The vessel may be employed trading with lawful harmless merchandise via good and safe berths/ports always afloat . . .", during inclement weather the containership **CHESAPEAKE BAY** grounded on Benghajsa Reef outside the entrance to Marsaxlokk, Malta.

Owner argued that Marsaxlokk was neither a good nor a safe port at the time the vessel called there for several reasons. First, the Benghajsa Reef Buoy was missing at the time and no warnings of this danger were ever given to the vessel prior to the casualty. Further, The Malta Maritime Authority failed to manage adequate port systems, did not ensure proper maintenance of aids to navigation and were derelict in issuing warnings of missing and/or defective aids to navigation.

Charterer, on the other hand, argued the port was safe and the master had ample opportunity to avoid the danger by simply observing elementary safeguards. Charterer claimed the vessel failed to post a lookout, failed to adequately plot and adjust its course, failed to properly utilize its GPS, improperly relied on a floating aid to navigation to determine its position and, most importantly, neglected to stand off the port in safe waters until squalls which obscured observations passed through the area.

A panel majority, consistent with English precedent, concluded that the addition of "good" to the "safe" port wording added nothing to Charterer's obligation to trade the vessel between safe ports. They pointed out that even if some additional obligation could be imputed by adding the word "good" to the safe port warranty, the obligation would still require, and be subject to, the vessel's duty to avoid danger by the exercise of good navigation and seamanship.

The panel majority concluded the port was safe under the universally applied and accepted standard:

A port will not be safe unless in the relevant period of time, the particular ship can reach it, use it, and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship. [The Eastern City, 2 Lloyd's Rep. 127 (1958)].

The panel majority concluded the vessel would not have stranded had the master made proper use of the facilities at his disposal. He would have come to the realization that the buoy was not in place. This conclusion was achievable using ordinary navigation skills.

The panel majority found the sole proximate cause of the incident was imprudent navigation by the master. The port of Marsaxlokk, being accessible using ordinary seamanship, was safe and

Charterer had no duty to forewarn of possible dangers easily discoverable using ordinary care.

The dissenting arbitrator noted there were no reported decisions on the "good and safe" language in American jurisprudence. He stated that the word "good" clearly had a meaning and the parties intended it to have one when they added it. Consequently, he was led to the conclusion that the port had to be very safe, completely safe or exceedingly safe. Thus, the addition of the word "good" augmented Charterer's responsibility to provide a safe port. He further concluded the Master was entitled to an alert about the absent buoy, reasoning the vessel did not have any independent means to determine the conditions at the time it approached Marsaxlokk. See**CHESAPEAKE BAY, SMA No. 3677 --** [2001]

38TH ANNUAL MEETING

At the 38th Annual Meeting of the SMA on May 8, 2001 the membership elected David Martowski to the office of President, to serve a two year term. Donald J. Szostak was elected Vice-President. Austin L. Dooley, Thomas F. Fox, R. Stanley Kleppe and Katherine A. Pappas were elected to the Board of Governors to serve two year terms.

Messrs. Wolmar and Letteney were appointed as SMA's Secretary and Treasurer, respectively. The SMA's Board of Governors for 2001/2002 is as follows (with their alternates in parentheses):

David Martowski (-)
Manfred W. Arnold* (George Hearn)
Lucienne C. Bulow (-)
Austin L. Dooley (Dean Tsagaris)
Thomas F. Fox (Konstantinos Livanos)
Svend Hansen, JR. (Nigel Hawkins)
R. Stanley Kleppe (Eugene Spitz)
David B. Letteney* (Peter W. Hartmann)
Katherine A. Pappas (James J. Warfield)
William E. Peters* (Klaus C.J. Mordhorst)
A.J. Siciliano (Robert P. Umbdenstock)
Donald J. Szostak (Paul L. Hedger)
Soren Wolmar (Jerry Georges)

*By appointment of the President

The following Committee Chairs were appointed/reappointed:

Arbitrator - D.J. Szostak
Award Service - D. Letteney
By-Laws and Rules - K. Pappas
Liaison - A.J. Siciliano
Luncheon - R. Rosner
Membership - S. Kleppe
Professional Conduct - D. Zubrod
Salvage - T. Fox
Seminars and Conventions - A. Dooley
Technology - J. Warfield
The Log - H. Engelbrecht
ICMA Planning - Klaus Mordhorst
BIMCO Liaison - S. Wolmar

Tony Siciliano will continue to prepare the Headnotes for the Award Service and assist with the contents of the Arbitrator. Soren Wolmar will continue to provide the "In This Issue" section of the Award Service as well as the yearly Index.

David Martowski will continue to supervise the project for the creation of a 35-year Consolidated Index and Digest of our Awards as well as the Index and Digest for the past five years.

HUMOR

The Two Travelers and the Oyster

As two men were walking by the seaside at low water, they saw an oyster, and they both stooped at the same time to pick it up. One pushed the other away, and a dispute ensued. A third traveler coming along at the time, they determined to refer the matter to him which of the two had a better right to the oyster. While they were each telling his story, the arbitrator gravely took out his knife, opened the shell, and loosened the oyster. When they had finished, and were listening for his decision, he just as gravely swallowed the oyster, and gave them each a shell. "The Court," said he, "awards you each a shell. The oyster will cover the costs."

Robert B. Thomas, The (Old) Farmer's Almanack . . . 1901, No. 109, p. 48. Boston: William Ware & Company. [1900.]

For THE ARBITRATOR

Donald J. Szostak
djszostak@hotmail.com

THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

VOL 32 APRIL 2001 Number 3

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PRESIDENT'S CORNER

This is my last message to you as President of the SMA. I am thankful to have had the opportunity to meet and discuss common goals with many of you. I am especially pleased to have played a small role in the continuing effort to maintain New York as the foremost commercial maritime arbitration forum in the United States. Further, I am gratified that during the past four years, the SMA has refined its role in educating the maritime industry and the public at large in the use of alternative dispute resolution procedures.

SMA Arbitration, Conciliation, Mediation and Salvage rules can all be accessed on our own dedicated web site (http://www.smany.org). Also posted on the web site, in both English and Spanish is our informative Guide to Maritime Arbitration in New York. This guide has been designed to answer many of the frequently-asked questions, which as President of the SMA I have received from users from all over the world. Other publications include the SMA's popular U.S. Open Form Salvage Agreement (codename "MARSALV") which has become a mainstay for salvage operations involving small and recreational craft as well as the SMA's newly revised Shortened Arbitration Procedure.

The SMA values its close relationship with many U.S. and foreign organizations. It is proud to have been a regular participant in the annual conference of the Connecticut Maritime Association. We are pleased to have co-sponsored industry seminars with the Maritime Law Association of the United States, the Admiralty Committee of the Bar Association of the City of New York, BIMCO, the Maritime Insurance Claims Association and the Association of Ship Brokers and Agents of the United States. Members of the SMA have participated in and delivered papers at conferences held by the International Refrigerated Transportation Association (IRTA), the Spanish Maritime Law Association, the Montreal Marine Associates, the German Maritime Arbitration Association, the Shenzhen International Congress on Maritime Law as well as other professional maritime international and domestic gatherings. Last month, I was privileged to represent the SMA at the LMAA annual dinner in London.

This fall, the SMA will host the International Congress of Maritime Arbitrators which is to be held at New York's world-famous Waldorf=Astoria Hotel from October 22 to 26, 2001. The ICMA Planning Committee is hard at work to ensure an exciting and memorable program. I encourage all who wish to attend to kindly access our special web site, www.icmaxiv.org for registration information.

During these past four years, I have talked about the importance of keeping the system fair, efficient and responsive to the needs of the users. We have achieved a great deal. We have very dedicated arbitrators who are willing and ready to sit all day in hearings. Some have taken mediation training.

Comparing the present with past practices, however, I am concerned by a certain lack of civility currently evident in arbitration these days. Formerly, lawyers and those who presented cases to arbitrators were courteous and civil toward each other and the arbitrators. Although still the exception, some advocates of the parties have become very aggressive and insulting to each other and even discourteous to the arbitrators. Such unseemly behavior does not impress arbitrators but only adds an unpleasant and unnecessary degree of contentiousness to the process.

Looking to the future, one can ask what is in store for the practice of arbitration? The advent of the computer and the recent move to prominence of the Internet offer some challenges and opportunities to the inexpensive resolution of disputes. Over the past twenty years, arbitration has been affected by the fact that almost everyone now communicates by fax and can do word processing on a computer. As with many changes which are often termed "progress", such capabilities produce both good and bad consequences. Thanks to computers, one can prepare a draft and make corrections without having to use "white-out" or re-type a document. One can send it quickly and know that the other party has received it. In hearings, we used to have a taped interview of a witness. Now we can have telephone testimony delivered by satellite and save the expense of paying airfare and a hotel room for such a witness.

Paradoxically, however, all these technological advances do not necessarily produce more efficiency or improve the process. More paper is being generated. Before, only the most important thoughts were passed on to the Panel. Nowadays, arbitrators receive volleys of long exchanges between the parties or the attorneys, which increase the time we spend on a case. Often, parties go on the Internet and produce a slew of documents, not all of them relevant or valuable in support of their case.

Word processing seems to translate in much longer letters. The ability to communicate by fax has caused parties to expect immediate reactions from the arbitrators and from each other. It also seems to cause many more "tit-for-tat" exchanges. Sometimes, arbitrators are forced to react to such side disputes and are asked to make rulings when they have not had the time to really examine all of the angles. The fax machine does not allow for one to "let things lie." Lawyers can cut deadlines very finely by faxing their submissions only on the due date. Arbitrators have complained that their fax machines are getting jammed by very lengthy transmissions. They then receive the same material by mail or through one courier service or another. Since arbitrators and lawyers charge by the hour, expenses obviously increase.

But how do we put reins on using all the technology and facilities available to us to keep a lid on the expense of arbitration? Restraint is indeed a challenge, as both parties and lawyers want to go "all out" to win a case.

I leave you with these thoughts. As this is my last message as President of the SMA, I wish to thank the Board Members and membership of the SMA for their encouragement, advice and continued support, as well as the users of New York arbitration and the advocates who represent them. It has been an honor to have been of service.

Lucienne C. Bulow

HOPE AND LIBERATOR THE SAGA CONTINUES?

In the January 2001 issue of THE ARBITRATOR, Donald Zubrod graced these pages with an interesting review of the first apparent New York arbitration to be recorded and published in the United States. This involved the record of two armed frigates named HOPE and LIBERATOR, how they came to be built, delivered and arbitrated. Readers will recall from the article that the LIBERATOR was bought in auction by the U.S.

Government while the HOPE was delivered to her new Greek owners and sailed, apparently, for the Aegean Sea. End of story? Not really!

When Mr. Zubrod presented his paper in Shenzhen, China at ICML IV, he met Nicholas G. Scorinis, Esq., an Admiralty Attorney from Piraeus, who offered to conduct a search of records in Athens for information related to what transpired to the HOPE after she left New York for Greece in October, 1826. The results of his investigation are reflected in the following message:

To: Donald Zubrod
From: Nicholas G. Scorinis, Esq.
Date: February 10, 2001
Re: Naval Frigate HOPE (Renamed HELLAS)
Dear Donald:

I had the opportunity to read the extracts of the book "The Navy in the History of Greece" which I mentioned to you in my last fax and I realized that they were irrelevant as far as the HELLAS (ex HOPE) herself is concerned, save the events I summarize herein, which were cross-checked with other sources.

The HOPE sailed from New York the first days of October 1826 with the crew being, in their majority, adventurers. The agent of the Greek government, K. A. Kontostavlos, was also on board.

The ocean passage was adventuresome. The crew failed in attempts to kill both the Master of the vessel as well as the agent Kontostavlos, and to sell the vessel in Colombia.

The HOPE arrived in Nafplion, Greece on or about 25 November 1826. The crew again tried to sell the vessel, this time locally to Ibrahim, Head of the Egyptian troops but the Rear Admiral Andreas Miaoulis, with the assistance of 30 brave and faithful mariners, sent the malefactors away.

After her arrival in Nafplion, three Rear Admirals (Miaoulis, Androutzos and Apostolis) took official delivery of the frigate and brought her to the island of Aegina, the then capital of Greece.

The frigate, renamed HELLAS, became the headquarters of the Greek Navy, led by Rear Admiral Miaoulis from November 1826 until August 1831. The frigate took part in various successful, but unimportant, sea battles in various places in the Aegean and Ionian Seas against the Turkish and Egyptian Navies and against Aegean pirates, as well.

On August 1, 1831, Miaoulis, who in the meantime had joined the political party established on the island of Hydra against Governor Kapodistrias, was asked by the Governor to deliver the Greek fleet to the Russian Admiral Ricord. Miaoulis refused to obey that order and threatened to scuttle the entire fleet under his command in the event of hostile movement by Ricord. When Ricord attempted to encircle Miaoulis and his fleet in the area near Poros Island, Miaoulis realized his threats, scuttled the fleet and escaped to Hydra Island in a small sailing boat. In addition to HELLAS, other scuttled ships were the corvettes HYDRA and SPETSAI.

VESSEL ROUTING - NAVIGATION OR EMPLOYMENT

By: Jack Berg, Member and Past President of the SMA

On December 7, 2000, the House of Lords reversed the decision of the Commercial Court [1999] QB 72 and Court of Appeal [2000] QB 241 and reinstated the arbitration Tribunal's award in the matter of Whistler International Ltd. V. Kawasaki Kisen Kaisha.

The dispute relates to two time charter voyages performed by the HILL HARMONY from Vancouver to Japan in January/February and April/May 1994. The voyages should have taken 16 and 13 days respectively but took about 10 days longer than usual and consumed additional bunkers because the Master refused to follow Charterer's voyage directions. Owner rejected Charterer's claim for about $90,000, contending the Master was not bound to accept Charterer's direction that the vessel take the shortest trans-Pacific route.

The Tribunal highlighted the principal issue, which was whether the Master justifiably disregarded Charterer's routing instructions for both voyages. The arbitration was conducted solely on documents and the essential facts were not in significant dispute.

The Master had experienced heavy weather damage on a prior voyage between San Francisco

and Japan in 1993 and it was this experience that apparently weighed heavily on his mind, causing him to reject Charterer's orders to proceed by the shortest route, which was the northern or "great circle route." The vessel took a more southerly and longer "rhumb line" route. The Tribunal majority concluded that the Master's decision, based upon his 1993 experience, was an unsatisfactory basis for disregarding Charterer's instructions. Therefore, a majority of the Tribunal held that Owner breached its obligation under the charter to prosecute the voyages with the utmost dispatch and to follow Charterer's orders regarding employment. The dissenting arbitrator concluded Charterer's instructions did not relate to vessel employment and that the Master had ". . . the ultimate decision and responsibility for navigation."

The Commercial Court reversed the arbitrators' decision in 1999, concluding the issue related solely to matters of navigation and not employment, therefore, Charterer was not entitled to give the orders it did. Nevertheless, the Court certified the award as one that raised important questions of law and gave leave to appeal.

The Court of Appeal dismissed Charterer's appeal in 2000, concluding that the selection of an ocean route was a navigational matter for the Master to decide, provided he acted in a bona fide manner. Whether the Master's decision was good or bad, justified or unjustified was held to be irrelevant because, in the Court's view, the decision concerned navigation, not employment.

The House of Lords' opinion candidly discusses the conflicting interests of owners and time charterers with respect to their particular rights and obligations, the manner in which vessels are scheduled and traded, noting that time chartered owners are not generally interested in saving time. The Justices accepted the Tribunal's finding that the northern route was the usual, shortest and most direct route between Vancouver and Japan and found that the Master had no rational justification for proceeding otherwise. In this respect, the Lordships stated:

My Lords, it follows from what I have already said that, on the findings of the arbitrators, the charterers were, by ordering the vessel to proceed by the shortest and most direct route, requiring nothing more than was in any event the contractual obligation of the owners. Therefore, the question whether the order was an order as regards the employment of the vessel is academic. But it was in truth such an order. The choice of ocean route was, in the absence of some over-riding factor, a matter of the employment of the vessel, her scheduling, her trading so as to exploit her earning capacity. The courts below, by contrast, accepted the owners' argument that it was necessarily a matter of navigation of the vessel.

The House of Lords emphasized that the conclusions of the experienced judges in courts below " . . are entitled to great respect but so is the decision of the commercial shipping arbitrators to whom the parties agreed that the resolution of their disputes should be entrusted." They further stated:

My Lords, the courts below were wrong to set aside the award of the arbitrators. Their award was not erroneous in point of law. The interpretation which they placed upon the utmost dispatch and employment clause was one which was open to them and it was likewise right for them, on the view they took of the state of the evidence, to conclude that the defence was not made out. The arbitrators' role in deciding a dispute of this kind draws upon their experience of the shipping industry and the problems it gives rise to . . .They stressed that if the owners wished to rely upon the navigation defence they must explain their position and justify what they had done. In so far as the arbitrators did have any explanation from the master, they rejected it as not providing any justification for not proceeding by the shorter northern route, the great circle route. The evidence of the recommendations of Ocean Routes was uncontradicted.

It is, indeed, refreshing to note the House of Lords' comment regarding the importance of commercial arbitrators' hands-on experience in disputes of this nature.

Interestingly, Charterer's argument before the House of Lords referred the Judges to Reefer Express Lines Pty Ltd. v. Cool Carriers AB, a published 1996 New York arbitration award, WHITE MANTA, SMA 3257 (1996) as support for its position. The House of Lords' decision referred to WHITE MANTA, commenting that:

New York arbitrators considered a charter party containing clauses similar to clauses 8 and 11 of the present charter, it being accepted that the master was the final authority with respect of matters of navigation and safety. On facts indistinguishable from the present, save that the master had somewhat better reasons for refusing to comply with the charterers' instructions to take the great circle route from Seattle to northern China, the arbitrators unanimously held that the master had breached his duty under the charter party by not following charterers' direction.

The relevant charter clauses and underlying facts in WHITE MANTA and HILL HARMONY are virtually identical - both vessels were being routed by reputable weather routing services, both services projected favorable weather conditions over the intended northern route and the Masters' decisions not to proceed on the most direct route were influenced by the experiences of others under different circumstances and during unrelated voyages. Neither the London nor New York arbitration panels were satisfied there was sufficient evidence to justify the Masters' refusal to prosecute their respective voyages with utmost dispatch, although one may conclude from the language of the decisions that the arbitrators would have been receptive to a reasonable basis for the Masters' refusal.

Quite apart from the identical substantive issues, one may note the divergent paths each proceeding took from start to finish. The spread in dates that the proceedings concluded reflects in a large measure the contrasting roles the courts play in New York and London arbitration processes. Both arbitrations took place in about the same time frame, involved similar amounts of money and were decided about the same time. The WHITE MANTA final award was issued in 1996. There was no judicial review of the award nor was there a basis for review under the United States Arbitration Act. The HILL HARMONY arbitration was subject to the Arbitration Act of 1979. The arbitration decision was reversed by the Commercial Court, an appeal was dismissed by the Court of Appeal but subsequently reversed by the House of Lords. The arbitrators' decision was reinstated in December 2000.

VESSEL ROUTING - NAVIGATION OR EMPLOYMENT

Master's Authority and Responsibility
The Other Side of the Issue

By Henry E. Engelbrecht, Member, Director and Past President of the SMA

The HILL HARMONY, (House of Lords, December 7, 2000) and WHITE MANTA (SMA 3257, January 24, 1996) have overturned centuries, if not millennia, of maritime tradition and law wherein the sole authority and responsibility for the safety of vessel, crew and cargo were vested in the Master. In my view, both fora got it wrong and in so doing created bad law. The extensive argument in HILL HARMONY on the navigation or employment issue is a distinction without a difference, since when at sea under either concept, the vessel is in the service of the charterer, subject to the clause for the Master to prosecute his voyages with utmost despatch, conditioned by his sole authority and responsibility.

In a general sense, authority and responsibility are inseparable but nowhere more so than on the sea where vessels still disappear without a trace and crews and cargo are still exposed to the perils of the sea, which call for the most careful planning of voyages, involving consideration of factors of which the charterer and the routing service have minimal knowledge and concern. Modern communications and improved routing services are useful tools in the Master's voyage planning but do not serve to dilute his paramount authority and command responsibilities for safety of vessel, crew and cargo.

In planning a hazardous winter voyage, such as one across the North Pacific or North Atlantic there is much more to consider navigationally, than merely plotting a rhumb line or great circle segments on the chart. In addition to the weather forecasts, other very important factors enter into the Master's decisions, among which are the vessel's horsepower and speed, size and tonnage, draft, stability, freeboard, loaded or light, with or without deck

cargo, and last but not least, the vessel's sea-keeping characteristics. Just as important as all of the above, is the Master's experience and judgement in planning the voyage. It is well recognized in general that the smaller the vessel, the more difficulty and damage it will suffer in heavy seas.

Even though the intermediate range forecasts might call for moderate weather a week or so in advance, Masters do not and should not always rely on them, particularly in the North Pacific where the weather is subject to rapid and violent change on short notice. Those who do so, when on a great circle route, might well find themselves faced with unexpected gale force winds and seas to match, unable to outrun a fast moving storm.

In the WHITE MANTA, a small reefer vessel, the panel faulted the Master for not taking the northerly great circle route ordered by the charterer and recommended by its routing service for a west-bound winter voyage across the North Pacific. Instead, the Master opted to take a more southerly route, where, contrary to his expectations, heavy seas and swells were encountered, as predicted by the routing service, causing loss of time and increased fuel consumption, for which the panel awarded the charterer its claims. Even though the vessel would have fared much better had it followed the recommended great circle route, in my view, given the limitations of the small reefer vessel, the Master acted prudently in taking the southerly rhumb line course for that time of the year, where prospects of fair weather were far better than in the North Pacific.

The panel's assertion that the Master was responsible for the safe navigation of his vessel invites speculation as to liability for damages to vessel and cargo, loss of time, deviation, port charges and related costs, had the scenario differed in that by following Charterer's instructions, unexpected gales were encountered which could not be avoided. Would Charterer and the routing service respond to the claims or deny them on the ground that the Master is responsible for the safe navigation of his vessel?

The facts in HILL HARMONY to a large extent mirror those in WHITE MANTA but involved two consecutive North Pacific rhumb line voyages, instead of the recommended great circle route. The House of Lords reversed the lower court's decision and upheld the original arbitration award for time lost and excess consumption of fuel.

As far as can be determined from the material to which I had access, the critical factors mentioned elsewhere in this paper, as having a major role in voyage planning, were not addressed in either of the two subject decisions. Both decisions, while tending to severely dilute the Master's authority to set courses, failed to reduce correspondingly his responsibility.

In my view, the utmost despatch requirement lay at the core of the disputes, however, subject to the Master's authority and responsibility for safety, and not that of the charterer nor its routing service, who have neither. Never forget that neither the charterer nor his meteorologist accompany the vessel to sea, but remain in their comfortable offices, couched in front of their computers!

As a final note I would like to draw attention to SOLAS, Chapter V, Regulation 10-1:

> "The master shall not be constrained by the shipowner, charterer or any other person from taking any decision which, in the professional judgement of the master, is necessary for safe navigation, in particular in severe weather and in heavy seas."

SALVAGE: SCOPIC and SCR

By Robert P. Umbdenstock, President, Extreme Marine Services, Inc., New Jersey, SCOPIC Shipowner's Casualty Representative and Member of the Society of Maritime Arbitrators. This is a synopsis of his presentation given at the February, 2001 SMA luncheon.

Introduction

Marine salvage is a complex enterprise. Risks may outweigh rewards. Contract relationships may become adversarial. The public has high expectations for an effective response.

While open form salvage contracts may seem to favor the salvor, salvors are always concerned that awards won't justify being in the business at all. The Special Compensation P&I Clause (SCOPIC) in Lloyd's Open Form 2000 is a compromise attempt to bolster response capability by assuring salvage remuneration when values are low or liabilities are

high while giving owners confidence in the level of the final award.

To appreciate the potential of SCOPIC, one need consider:

§ First, the new context in which salvage is practiced and problems arising from the changed conditions; and

§ Then, the role of Shipowner's Casualty Representative created to represent all ship interests openly during a salvage operation performed under SCOPIC.

Use of a standardized public contract combined with on-site representation is consistent with the contemporary demand for open and clear oversight in salvage management.

Keeping Pace with the Social Changes

OPA 90 and other laws establish that the purpose of salvage has shifted from "continuation of the voyage" to protection of the environment and the public good.

Media keep a merciless eye on response operations. Public opinion weighs heavily in the assignment of blame for a marine casualty or the ineffectiveness of a response.

While it may not yet address all of the developing issues, SCOPIC is international recognition that ground rules have changed. Like open forms since their appearance, SCOPIC encourages a salvage capability in the prevailing context -- that is, the new world of environmental liability.

What Changed?

Before: Salvors responded in anticipation of a reward commensurate with the risks confronted and effort required for success. The right to an award was secure in legal precedent around the world. As a volunteer, a salvor expected to be left to succeed or fail without interference. Salvage work rarely received sustained public attention.

Now: Environmental protection influences every casualty and every salvage plan. Salvage law is unclear regarding "environmental salvage" or "liability salvage" and "salvor immunity." The salvor may be held to impossible standards.

Today a salvor must expect to work within an authoritarian and public framework that may influence the salvage plan. No longer in absolute managerial control of the operation, salvors can be less confident of their success. Underwriters can no longer be sure of their options to control the loss. In a major casualty, every party involved in the voyage is likely to become enmeshed in the response.

It was an unintended consequence that new laws risked discouraging the existence of a competent salvage capability.

SCOPIC, the Special Compensation P&I Club Clause

Published in 1999 and reissued in revised form in October 2000, SCOPIC attempts to support salvors and owners by accommodating the potential impacts of:

§ limited salved values

§ environmental protection requirements, and § working under official oversight.

SCOPIC, which may only be invoked by the salvor, does this by replacing "no cure no pay" in Lloyd's Open Form with a time & materials format. The clause reiterates responsibilities for proper conduct of the salvage effort yet leaves room for cooperation with authorities. The salvor can proceed with confidence of being remunerated, even for efforts not traditionally salvage but considered necessary by officials.

While SCOPIC attempts to address the needs of all parties, the special representatives are meant to ensure that the salvage operation meets those needs.

Shipowner's Casualty Representative

SCOPIC specifies the roles of on-site representatives for the owner and the hull, cargo & liability underwriters. Foremost among these is the Shipowner's Casualty Representative (SCR). The SCR works alongside the salvage master while acting as liaison for the hull and cargo special representatives.

Generally, the role of the SCR is to "monitor the salvage services and liabilities and provide a Final Salvage Report which forms the basis for the

settlement of any claim for SCOPIC remuneration which the salvor may have against the ship owner."

Who are the SCRs?

The Lloyd's SCR committee (representatives from the ISU, International Group, IUMI and ICS) named thirty-one individuals with substantial backgrounds in salvage and marine insurance issues as members of an "SCR Panel." If SCOPIC is invoked by a salvor, the ship owner may only assign an SCR from the panel.

The committee's intent was that each SCR be qualified to judge the salvor's performance and to contribute to the development of a successful salvage plan while husbanding the owner's legal obligations. The SCR may register substantive exceptions but cannot direct the operations or bind the salvor, owner or underwriters to any agreement, nor be held liable for their actions.

SCR Duties

Per SCOPIC, "The primary duty of the SCR shall be the same as the contractor, namely to use his best endeavors to assist in the salvage of the vessel and the property thereon and in doing so prevent and minimize damage to the environment." This presumes the SCR's daily, on-site attendance to "report, observe, and consult with the salvage master, and produce dissenting reports (if necessary) and the Final Salvage Report."

The SCR must obtain sufficient data from the salvage master, the master of the vessel, and any others to enable him to independently evaluate the casualty, the salvage plan, operational progress and running costs, and to estimate any non-SCOPIC remuneration due for salvage services performed before the salvor invoked the clause.

The Salvage Master/SCR Relationship

The salvage master must cooperate since the SCR is entitled to:

§ all plans and progress reports,

§ free access to all operations, logs and inventories,

§ consultation on technical matters and non-tariff charges; and

§ offer advice or register concern.

The SCR confirms that the salvor's daily tallies are consistent with SCOPIC rates and the observed status of all resources. As the owner's technical representative on-site, the SCR can also expect to spend a substantial amount of time with attorneys, authorities and media.

The SCR must also establish the facts (albeit without suggesting cause) of the casualty initially and when SCOPIC is invoked, survey cargo and bunkers on board, evaluate any actions taken by the salvor prior to SCOPIC, monitor changing circumstances for affect on the salvage plan, record the salvor's use of ship resources, maintain a daily record of weather and sea conditions, and survey the condition of the ship, its cargo and bunkers aboard upon redelivery. In a complex or long-term SCOPIC operation, the SCR effectively becomes an owner's project coordinator.

The Benefits from SCR Attendance

While the SCR watches performance and cost closely, he also ensures that SCOPIC meets the needs of all the ship interests. Each succeeding casualty seems more expensive and litigious than the last. The SCR's role and the use of the records generated become crucial to future successful settlements.

In focusing on progress, costs, and regulatory compliance, the SCR is pivotal in all parties' realization of SCOPIC's intended benefits and central to the public mandate for environmental protection.

RULES FOR SHORTENED ARBITRATION PROCEDURE OF THE SOCIETY OF MARITIME ARBITRATORS, INC.

(This procedure applies to contracts entered into on or after March 1, 2001)

We provide herein the text of the newly revised Rules for Shortened Arbitration Procedure, beginning with a recommended supplementary contract clause:

Supplement to the Arbitration Clause

"Notwithstanding anything contained herein to the contrary, should the sum claimed by each party not exceed U.S. $ (Insert amount, exclusive of interest on the sum claimed, costs of the arbitration, and legal expenses), the dispute is to be governed by the 'Shortened Arbitration Procedure' of the Society of Maritime Arbitrators, Inc. (SMA) of New York, as defined in the Society's current Rules for such procedure, copy of which is attached hereto."

RULES FOR SHORTENED ARBITRATION PROCEDURE

1. Upon giving notice of a claim under these rules, the claimant shall nominate an arbitrator from the SMA roster to act as sole arbitrator and simultaneously request the respondent's agreement. Failing a response by the respondent within 10 days of this initial nomination, the arbitrator so nominated shall become the sole arbitrator. The arbitrator shall promptly submit his/her disclosure statement to the parties, as required under Section 9 of the standard SMA Rules.
2. If the respondent does not agree to the nominated arbitrator as sole arbitrator, the respondent shall propose three other persons from the SMA roster to serve as sole arbitrator. Failing agreement on a sole arbitrator, either party may request that the President of the SMA appoint the sole arbitrator. This appointment shall be binding upon the parties.
3. Within 15 days of appointment, the arbitrator shall establish a written schedule for the prompt submission of the claimant's initial statement of claim with all supporting documents. The respondent shall submit its response and any counterclaim with all supporting documents within 20 days of receipt of claimant's submissions. In the event of a counterclaim, the first moving party shall respond within 20 days or sooner. At the arbitrator's discretion, the schedule may be varied by a few days. Short replies by both parties to each other's defenses may be exchanged consecutively or simultaneously, at the arbitrator's discretion.
4. The arbitration shall proceed on documents alone.
5. There shall be no discovery except as deemed necessary by the arbitrator.
6. The total items of dispute submitted by both parties under this procedure shall not number more than four, the combined total of which shall not exceed the figure agreed in the contract. At the arbitrator's sole discretion, a reasonable amendment to this limitation may be permitted.
7. The parties may be represented by attorneys or commercial advocates. An allowance towards legal expenses or time and expenses incurred by the parties in the prosecution or defense of the case may be awarded at the discretion of the arbitrator, but any such award shall not exceed $2,500.
8. The award will be issued within 30 days of receipt of the final replies or the arbitrator's declaration that the proceeding is closed.
9. The fee and expenses of the arbitrator shall not exceed $1,500.

For THE ARBITRATOR

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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

The Shortened Arbitration Procedure of the SMA was introduced in January 1989 as a replacement for the little used SMA Simplified Arbitration Procedure. The Shortened Arbitration Procedure was designed to provide a quick and inexpensive method to resolve small and simple disputes such as uncollected demurrage and despatch which did not require a full-scale arbitration. Following its introduction, the London Maritime Arbitrators Association (LMAA) introduced its own Small Claims Procedure. The Shortened Procedure was last revised in 1991. The LMAA Small Claims Procedure has been revised several times.

In recent years, New York arbitrators have found that many disputes being arbitrated under the Shortened Procedure of the SMA are much larger and far more complicated than was originally intended for this Procedure. In late 1999, I appointed Michael van Gelder, past President of the SMA, as chairman of an ad-hoc committee to re-visit the Shortened Procedure and to offer suggestions as to how it might be revised to better accomplish its original purpose. The ad-hoc committee has completed its review and has recommended a number of changes to the Shortened Procedure which Michael explains in a separate article in this same issue of the ARBITRATOR.

Interestingly, the problem of misapplying the Shortened Procedure is not limited to New York arbitration. In a recent bulletin of the LMAA, an arbitrator complained that disputes which are neither small nor simple are being arbitrated under the LMAA's Small Claims Procedure in London, as well.

Parties should be aware that the newly revised Shortened Arbitration Procedure calls for the appointment of a single arbitrator and elimination of the oral hearing. If more than a single arbitrator or formal hearing is required, the procedure is no longer "short" and will be arbitrated under the Standard Arbitration Rules The parties' submissions will be limited to an exchange of claim, defense, counterclaim (if any) and reply briefs/summaries. The award will still be issued within 30 days, and the arbitrator's fee will be limited to $1,500.

The newly revised Shortened Arbitration Procedure, which becomes effective March 1, 2001, will soon be available on the SMA Web Site [http://www.smany.org} or upon request from the SMA Office.

Lucienne C. Bulow

THE HISTORY OF MARITIME ARBITRATION IN NEW YORK

By Donald Zubrod, Member and Past President of the SMA

Background

The earliest maritime arbitration in New York, or the United States for that matter, that I have been able to unearth transpired in New York in 1826. The Government of Greece in Exile in London contracted the previous year for the construction at New York of two armed frigates. To be named HOPE and LIBERATOR, they were to be assigned to the Eastern Mediterranean Sea in support of the Greek attempt to rid itself of 400 years of occupation by the Ottoman Empire. When it became apparent that funds to supplement the progress payments effected during construction were not forthcoming, delivery of the completed vessels was withheld by the local financial group that had arranged the building and outfitting of the ships.

The parties then agreed to binding arbitration to resolve the situation, and jointly appointed three arbitrators. The Submission Agreement directed the panelists to receive evidence and testimony related to construction expenses and certify their actual cost. Uniquely, title to both frigates was concurrently formally conveyed to the arbitrators. Further, once they had decided unanimously or by majority the cost issue, the arbitrators were authorized to sell one of the frigates, at public auction, to enable payment for both ships.

The arbitrators collectively determined on August 3, 1826 that the building coalition was entitled to $894,908.62 for construction, plus $34,246.44 for shot, extra spars, rigging and cables sufficient to cruise for three years.

Shortly thereafter, the LIBERATOR was auctioned by the arbitrators to the United States Government. The HOPE was released from lien, delivered to her new owners by the arbitrators, and departed for the Aegean Sea.

All of the above and a myriad of intriguing detail are contained in a 72 page volume entitled REPORT OF THE EVIDENCE AND REASONS OF THE AWARD. That document was generated for the following reasons set forth in its preamble:

". . . the prominent facts relating to that enterprise have gained publicity; and in a form grossly caricatured and incorrect. The Arbitrators therefore feel constrained by a respect for public opinion, and a just regard for their own character, to make an exposition of the subjects of controversy submitted to them, with the grounds of their award."

It is evident that the only reason the arbitrators issued their subsequent REPORT OF THE EVIDENCE AND REASONS FOR THE AWARD was the substance of adverse public criticism evoked by the award's contents. The final paragraph of the report reads:

"In conclusion, we freely admit the probability, that in deciding on the multifarious and complicated questions of law and fact in this controversy; we have committed many errors. We were bound to hear the parties with patient attention; and to examine and decide with impartiality, with firmness, and with the best efforts of our understanding. We are conscious of having thus discharged our duty: and we are responsible for nothing more. We know that we are heirs of human frailty, and daily experience admonishes us of our own fallibility: but standing on solid ground of truth, and conscious rectitude; we submit our conduct, and our motives, to the enlightened discernment, and the candid judgment of our Country."

Arbitrators of this era are not prone to admitting the possible existence of errors in their awards. But doubtless, errors do transpire now and then. To me, it is genuinely inspiring to learn that long, long ago, these three gentlemen publicly conceded that human frailty and fallibility had probably caused errors in their award. It was also stimulating to observe that in their opinion, through exercise of the best of their understanding, they had satisfied their responsibilities and were answerable for nothing more.

The Federal Arbitration Act

Historical records indicate that around the turn of the Twentieth Century and up to enactment of the Federal Arbitration Act ("FAA") in 1925 there were a number of what are termed "Common Law Arbitrations." But lacking a federal act designating

and controlling arbitration, enforcement or collection of awards was impossible, unless voluntarily offered, and those arbitrations did not become a popular means of resolution of disputes.

Enacted on February 12, 1925, the FAA was codified on July 30, 1947 and became "United States Code Title 9." A number of amendments thereto came into effect over the intervening years. They were technical adjustments conforming with United Nations provisions related to arbitration. Newly formed Chapter 2 of the Act embraced the Convention on the Recognition of Foreign Arbitral Awards of June 10, 1958. The Inter-American Convention on International Commercial Arbitration was rendered enforceable by the Act under Chapter 3. Otherwise, the language and intent of the FAA have remained unmodified since enactment.

Evolution of Maritime Arbitration in New York

Although a Federal Arbitration Act had not yet been legislated in the United States, establishment of the Produce Exchange Time Charter Party in New York in 1914, because it contained an arbitration provision, laid the groundwork for its utilization following the Act's legislation in 1925. That document, somewhat amended over the years, is still used extensively in worldwide shipping trades for time chartering of vessels for periods and voyages.

A moderate number of maritime arbitrations took place following introduction of the Act. But it was not until termination of the World War II in 1945 that its appropriateness for dispute resolution expanded remarkably. Surviving United States vessels, supplemented by an armada of Government owned Liberty and other type vessels sold to American citizens and abroad, were engaged in transport of massive quantities of American exports to war ravaged countries overseas. Attorneys of New York admiralty firms began to apply themselves to conduct of the arbitral process for resolution of their clients' disputes. Individuals employed within local maritime trades were asked to serve as arbitrators.

The Society of Maritime Arbitrators, Inc. ("SMA") was established in 1963 by a small group of active maritime arbitrators with the object of promoting sound arbitration procedures and ethical standards for its membership. It is a professional, non-profit organization. It does not administer arbitrations, nor does it charge fees to disputants who arbitrate their contractual disputes in accordance with SMA Rules.

The SMA maintains an Award Service on a subscription basis containing in excess of 3600 awards at present. Also, the Award Service's entire library is available from the LEXIS research data bank. It further distributes its quarterly newsletter, THE ARBITRATOR, to over 1000 readers worldwide.

The SMA sponsors seminars and conferences related to maritime arbitration and law, for its membership, attendees from local admiralty firms and representatives of users of the arbitral process.

The SMA established Rules for the conduct of maritime arbitration in New York in 1963. They have been amended a number of times since, most recently in 1994. They conform basically with requirements of the FAA. That amended version was undertaken in cooperation with the Arbitration Committee of the Maritime Law Association of the United States, toward better efficiency of the arbitral process and generation of greater acceptability.

(This article was excerpted from a paper by Mr. Zubrod, delivered at the Fourth ICML in Shenzhen, P.R., China in October 2000.)

BIMCO SEMINAR - TANKER TIME CHARTERS

The latest of the BIMCO Shipping Courses, "Towards Better Decisions", was held in New York City on Tuesday, October 31, 2000. The Society of Maritime Arbitrators, Inc., The Maritime Law Association of the United States, The Connecticut Maritime Association, Inc. and The Association of the Bar of the City of New York Committee on Admiralty joined to sponsor the seminar on Tanker Time Charters. The roster of speakers was outstanding and audience participation was particularly lively, assuring that the approximately

ninety delegates who attended had an instructive and entertaining day.

As reported in the July 2000 issue of THE ARBITRATOR, this seminar was intended to introduce and address the new BPTIME 3 form. Alas, due to the need to review a number of issues relating to the Speed and Performance clause and the BPTIME 3 Questionnaire, the final publication of the new form has been temporarily postponed. Nonetheless, there was ample material discussion of SHELLTIME 4 and the new EXXONMOBIL TIME 2000

Mr. Jim Poole, Manager for ExxonMobil Refining & Supply Company, Fairfax, Virginia moderated the sessions. In his opening remarks, Mr. Poole stressed his perception of the current industry challenge: higher spot rates dictate that an attitude of fairness should prevail.

Mr. Peter Grube, Head of Sales, Marketing and P.R. of BIMCO, was the first speaker. He presented a brief history of BIMCO followed by a description of the services offered by his organization.

Michael Marks Cohen, Senior Partner, Burlingham Underwood LLP, discussed "Strengths and Weaknesses of SHELLTIME 4 and Other Tanker Time Charters." His presentation was originally billed as a comparison between SHELLTIME 4 and BPTIME 3, but for obvious reasons, had to be modified. He, nonetheless, liberally sprinkled references to the new, but as yet, unissued form. Mr. Cohen was, as usual, both entertaining and masterful in comparing SHELLTIME 4, BPTIME 3 and EXXONMOBIL TIME 2000. He concluded that BPTIME 3 is not an overall improvement over SHELLTIME 4 since many insertions and rider clauses will be needed to restore balance and fill in the gaps. Moreover, he viewed the draft terms of BPTIME 3 to be more owner-friendly than any other forms in current use. On the other hand, his review of the draft of EXXONMOBIL 2000 revealed terms so favorable to charterers that he would be surprised if tanker companies agreed to accept the form at all, except for fixtures to EXXONMOBIL.

Mavis R. Hawkes, Commercial/Chartering Manager, BP Shipping (USA), spoke on the topic, "Transportation Costs - A Charterer's Viewpoint." She discussed how BP Shipping satisfies its tonnage requirements through a portfolio mix ranging from ownership/operations, time charters, consecutive voyage charters, contracts of affreightment and spot charters. She gave a well reasoned and focused dissertation on the merits and consequences of each type of transaction. She explained how BP Shipping weighs and balances the various factors, including market, operational, economic and Health/Safety/Environmental risks in its transportation decisions.

John D. Kimball, Managing Partner, Healy & Baillie, LLP, offered a dissertation on "Redelivery", what it is and when and where it should take place within the context of EXXONMOBIL 2000, STB TIME AMENDED, SHELLTIME 4 and TEXACOTIME 2 charter forms. He discussed the concepts of "overlap" and "underlap" in charters with a fixed or "flat period" and how damages are normally decided in the case of breach.

Mr. Robert J. Flynn, President, Mallory-Jones-Flynn and Associates, provided an intriguing glimpse into the future of the business of chartering in his presentation entitled "Capitalizing on Change - How the Broker Can Add Value to Services Offered." He evaluated the fixing of ships in future tanker markets in terms of securities trading and the possible attrition of the human factor. To attain the fullest potential and benefits of e-commerce, he emphasized the need to better standardize peculiar shipping terms, such as vetting requirements, and to develop the notion of forward trading, a concept absent in tanker markets today.

Dr. Rudolph Kassinger, Technical Consultant, DNV Petroleum Services, transformed an obviously complex subject into a surprisingly comprehensible matter in his discussion of "Marine Fuel Quality - Past, Present, Future." He took the audience through the petroleum refining process with emphasis on the primary marine fuel, commonly known as Bunker Fuel. He showed test tube samples of this by-product, which only reinforced the impulse to marvel that the stuff burns

at all. He forecast that, due to environmental constraints, customer demands regarding metals content and ignition quality, and the Kyoto Protocol, marine fuel might move from being a by-product to a prime product of the production process, with attendant price increases.

The final speaker of the seminar was A.J. Siciliano, President, Sentry Marine Services, Inc. and a past president of the SMA. Tony spoke on "Off-hire and Deduction from Hire." He discussed the application of off-hire and permitted deductions from hire clauses under differing forms of time charter parties. He focused upon past New York arbitral decisions dealing with pumping and cargo heating deficiencies, deviation for purposes of carrying out emergency and planned repairs, tank cleaning, vetting issues and letters of indemnity for delivering cargo at a port other than named in the original bill of lading.

BIMCO and the various seminar sponsors are to be congratulated. The gathering was most informative and provided a unique forum for the exchange of ideas. Hopefully, the tradition of annual presentations in New York will continue.

Sponsors of the social periods and luncheon included BP Shipping (USA); Burlingham, Underwood LLP; Watson, Farley & Williams; DeOrchis, Walker & Corsa, LLP; Healy & Baillie, LLP; DNV Petroleum Services; Snow Becker Krauss P.C.; and Haight Gardner Holland & Knight.

NEW GUIDANCE ON SEAWORTHINESS OBLIGATIONS

By James Hooper, Esq. who is a solicitor in Sinclair Roche & Temperley's litigation department.

The Court of Appeal's decision in *The Fjord Wind* * gives important new guidance on the obligations on owners and disponent owners in relation to seaworthiness.

Three issues of significance are covered in the Judgment. The first is how to reconcile the apparent conflict between an absolute obligation of seaworthiness and an obligation to exercise due diligence to ensure seaworthiness. The second is what is meant by seaworthiness. The third is what an owner or disponent owner needs to show to prove that they have exercised due diligence, particularly where certain tasks have been delegated.

Background Facts

The vessel was owned by the Second Defendants, time chartered by them to the First Defendants on the NYPE Form and voyage chartered to the First Plaintiffs on the Norgrain Form for the carriage for cargo of soya beans from the River Plate to Europe.

The voyage charter provided at clause 1 that "*The said vessel, being tight, staunch and strong and in every way fit for the voyage, shall...proceed to [the River Plate]...and their load...".* Clause 35 provided "*Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy...*". The bill of lading stated that it incorporated all the terms, conditions and exceptions of the voyage charter.

Shortly after loading the vessel suffered an engine failure due to a crank pin failing. Lengthy repairs were required and the cargo had to be transhipped. Cargo owners made a claim for delay and expense against owners and disponent owners on the basis that the vessel was unseaworthy.

Previously the vessel had suffered a number of crank pin problems. The owners had investigated these with the assistance of MAN, the engine manufacturers. They were unable to discover the cause of the problem.

Seaworthiness Obligations

The Court of Appeal addressed the apparent conflict between clause 1 of the voyage charter party which suggests an absolute obligation of seaworthiness, and clause 35 which suggests an obligation of due diligence only. They referred to the defining decision on contract interpretation of *ICS v. West Bromwich Building Society* [1998] 1 WLR 896, in which Lord Hoffmann said *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in a situation in which they were at at the time of the contract."*

The argument was raised that it is unlikely that the parties would have agreed a different regime for cargo damage under the bill of lading and under the charterparty and a different regime for ballast and laden voyages. The Court of Appeal, applying Lord Hoffman's approach, accepted the submission that it was extremely unlikely that the parties would have agreed for different regimes and that they would be expected to apply a Hague or Hague-Visby Rules regime and not to have agreed an absolute warranty of seaworthiness. Clarke L.J. (who gave the leading judgment) accepted that if clause 1 stood alone it would be likely to be held to impose an absolute obligation of seaworthiness, but commented that the general approach in *The "Adamastos"* [1957] 2 QB 233, [1959] AC 133, (in which the House of Lords held that the opening words of a paramount clause reading "this bill of lading" could be construed as meaning "this charterparty") would be included in the background knowledge which the parties would have had in their mind if they had thought about it.

In conclusion they found that the disponent owners' obligation as to seaworthiness at each stage was the same, namely to exercise due diligence to make the vessel seaworthy.

Unseaworthiness

In considering whether the vessel was unseaworthy on leaving the load port the Court of Appeal did not really advance established case law in any way but merely applied it. The classic test is that the ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage, having regard to the probable circumstances of it. Would a prudent owner require that the defect be made good before sending his ship to sea, had he known of it? Seaworthiness is not an absolute concept but is relative to the nature of the ship, to the particular voyage and even to the particular stage of the voyage.

The Court of Appeal considered the catastrophic consequences which can follow from the failure of a crank pin bearing and concluded that the vessel was unseaworthy when she left the load port.

Due Diligence

It is well established that once a claimant has proved unseaworthiness, the burden of establishing due diligence is on the owners and that they must establish that due diligence to make the vessel seaworthy was exercised, not only by themselves, their servants and agents but also by their independent contractors. The issues of interest in *The "Fjord Wind"* were what the owners have to do to show that their independent contractors exercised due diligence and in what circumstances it is possible to show that due diligence has been exercised if the cause of the problem is not discovered.

The owners consulted the engine builders, MAN, for advice and assistance as the problems arose, but failed to adduce evidence from MAN as to what they did at crucial stages. Clarke L.J. said "*The question is whether the owners have proved that MAN conducted as thorough an investigation as they could reasonably have been expected to conduct in the circumstances*." He commented that given that the owners did not carry out such investigations themselves, the only way which they could discharge the burden would be if they could show both that they delegated to MAN the responsibility of carrying out a thorough investigation into the true position, and that MAN themselves exercised all proper care and skill in doing so.

Clarke L.J. concluded,

"A very thorough investigation was required in order to identify the cause of the problems which had occurred on a number of occasions, bearing in mind the very serious consequences bearing failure may have. The more serious the possible consequences, the greater the effort must be made to identify the cause of the problem and if possible to eradicate it."

In the absence of evidence as to what investigations were in fact carried out and why, the owners failed to discharge the burden on them.

Conclusions

Although owners may take comfort from the approach to a construction of their obligations that the obligation on the ballast voyage in circumstances

such as these is of due diligence rather than absolute, the non-delegable nature of that obligation makes it a particularly onerous one. It is clearly not enough for owners simply to rely upon the services of contractors, however high the reputation of the contractors in question. Owners will have to satisfy themselves that they will be able to establish that no line of enquiry which competent experts could reasonably have expected to have been pursued has been overlooked.

** See L.L.R. 307 (Q.B. 1998) aff'd [2000] 2 L.L.R. 191 (C.A. June 8, 2000)*

SMA RULES FOR SHORTENED ARBITRATION PROCEDURE

By Michael A. van Gelder, Member and Past President of the SMA

The use of the SMA's Rules for Shortened Arbitration Procedure has grown quite substantially over the last few years. Under normal circumstances, this would be regarded as a very good move showing that the SMA has produced a system that the industry likes and has adopted.

But all is not well. A problem has arisen in several cases where the sums involved and the complexity of the matters were such that the disputes more properly should have been decided by the usual full scale arbitration procedure. Those members who brought this problem to the attention of the Board of Directors indicated that the parties concerned were using our formula on the wrong type of dispute and, in effect, were taking unfair advantage of the arbitrators. In fact, they were trying, and unfortunately succeeding, in obtaining the special level of fees set out in the rules for the shortened procedure when this was not justified.

I was appointed chairman of an ad-hoc committee to review the rules as they presently exist and to try to formulate a new set that will maintain the facility of a shortened procedure for the industry while also properly protecting the interest of the arbitrators. Thanks to the efforts of a small committee, this project is well under way.

A little background is in order at this point. When the SMA originally instituted the Shortened Arbitration Procedure, it was intended to provide a method whereby parties who had *very small claims* could recover the funds due them without the need to hire lawyers and be subject to the heavy costs which would, in most cases, wipe out any recovery. As the rules were developing, input from various sources indicated that it would be necessary to allow the parties to determine the level of a "small" claim that would give rise to the use of the Shortened Arbitration Procedure. For reasons that remain rather vague, some of the cases that started by properly incorporating the procedure, turned into the equivalent of full-scale arbitrations, aided and abetted by attorney involvement. It seems that many lawyers' expectations of full documentary discovery, delays in presentation and the need for very thorough processes contravenes the very idea of a short and simple procedure. Thus, a Shortened Arbitration Procedure might not allow an attorney adequate opportunity to fully develop a case for his/her client's benefit.

The "new" rules will try to ensure that cases under the Shortened Arbitration Procedure will have a sole arbitrator. If the parties cannot agree to a single individual, they may apply to the SMA for assistance. Should that not be workable, resulting in a tripartite tribunal, the Rules for Shortened Arbitration Procedure will no longer apply. No hearings will be permitted and the arbitrator's schedule for submission of evidence and briefs will be final, even when either of the parties elects to hire legal representation. We will include a slight adjustment in the arbitrator's fee.

These new rules are well advanced, thanks to committee efforts, and I hope to have them in final form early in the new year. Once approved by the Board of Directors, they will be promptly distributed to the membership and to the industry.

QUOTES FOR THE QUARTER AND BEYOND

"There is a point beyond which even justice becomes unjust."

Sophocles

"Even a dog knows the difference in being stumbled over and being kicked. We do."
U.S. Supreme Court Justice
Anthony Kennedy

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THE ARBITRATOR
SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

The International Congress of Maritime Arbitrators (ICMA) was established in 1973 to provide a forum for arbitrators and maritime lawyers from around the world to confer and exchange views and news of professional interest.

The Congress is generally held biennially. It has met over the past three decades in such exciting cities as Athens, Santa Margherita, London, New York, Monaco, Casablanca, Madrid, Hamburg, Vancouver, Hong Kong, Paris and Auckland, New Zealand. The upcoming Congress, which will be the fourteenth, will take place October 2001 in New York.

Not only are ICMA Conferences interesting, but the origins of ICMA are equally intriguing. The first conference was conceived in a Moscow subway (underground) station in 1972. Michael van Gelder, then president of the Society of Maritime Arbitrators, Cedric Barclay and Clifford Clark, two future presidents of the London Maritime Arbitrators Association, and Roger Jambu-Merlin, then president of the Chambre Arbitrale Maritime de Paris were all attendees of an International Congress of Commercial Arbitrators which was being held in Moscow. They decided there and then (actually, in the subway station) to stage their own impromptu Congress, the first International Congress of Maritime Arbitrators (ICMA). Professors Sergei Lebedev and George Maslov of Moscow provided the place and a large audience.

Cedric Barclay, a vibrant and talented multi linguist with a great sense of humor and a true "hands-on" arbitrator, decided that this sort of exchange of ideas should be expanded to include arbitrators and maritime lawyers from all over the world. Building on the Moscow Congress as the "original" ICMA, Cedric Barclay pursued the idea and organized the second ICMA Congress in 1974 at a beach hotel, a few miles outside of Athens. It was the first organized, exclusively maritime-focused arbitration Congress with papers prepared in advance, and was attended by maritime arbitrators and attorneys from twenty countries.

An example of Cedric's humor: I remember that after I delivered a long, serious paper on Dangerous Cargoes at ICMA VIII in Madrid in 1987, he got up and told the story about the transportation of a circus by ship. The elephants became agitated by the proximity of tigers, and their actions turned them into a "dangerous cargo" (in his seasoned view) which nearly caused the vessel to capsize!

In tribute to Cedric Barclay's vision in organizing ICMA and since his death in 1989, every Congress has held the Cedric Barclay Memorial Lecture, in his memory. His widow, Mrs. Cora Barclay has been an honored guest. Past speakers all have been highly respected as masters in dispute resolution.

ICMA has grown to host delegates from, on average, 26 countries presenting approximately 50 papers. The international maritime conferences are generally composed of arbitrators, lawyers, owners, charterers, other industry professionals and their guests. A black tie dinner dance is a tradition, as are one or two cocktail parties.

Aside from providing a forum for discussion and serious, scholarly papers, the Congress always includes a social program for accompanying persons and delegates. The ICMA XIV Planning Committee, headed by past SMA president Henry Engelbrecht, is hard at work to provide a most interesting and enjoyable stay in New York City. Our city offers a wide spectrum of opportunities for artistic enjoyment: Broadway and off-Broadway theater, a great variety of museums, the Metropolitan Opera, New York City Opera, etc. New York and its surroundings are particularly striking in October. A trip up the Hudson Valley should display the beautiful Fall Foliage at its best.

Unlike other organizations, which may have an executive directorate, ICMA is an ad-hoc event which is arranged by the host organization. The ICMA Permanent Steering Committee, whose primary duty is to select the next venue for ICMA and to appoint the chairman of the ICMA Topics Committee, is traditionally composed of a delegate each from New York and London and a representative from the organizing committee of the previous and current ICMA locales. Normally the president of the host organization would serve on this committee. For the sake of diversity, however, to avoid two representatives from New York, the current Steering Committee comprises one delegate, each, from New York and London, and representatives from ICMA XII and ICMA XIII, which were held in Paris, France and Auckland, New Zealand, respectively.

The ICMA Topics Committee has the important task of proposing topics, collecting the delegates' papers and organizing the working sessions of the Congress. Philip Yang of Hong Kong, Chairman of the Topics Committee, has prepared a Call for Papers. All papers are normally published in the Proceedings of the Congress. In order to stimulate extended discussion, the ICMA XIV Topics Committee is encouraging participants to organize panels across national boundaries to elicit vigorous debate on various topics.

ICMA XIV will be held from Monday, October 22 (early arrival on Sunday, October 21) to Friday, October 26 in the elegant and beautiful Waldorf-Astoria in midtown Manhattan within walking distance of Fifth Avenue and Rockefeller Center. Mailings with more detail should reach you shortly. I look forward to welcoming you at ICMA XIV.

Lucienne C. Bulow
President

ASBA HOME STUDY COURSE IN CHARTERING

The Association of Ship Brokers and Agents (U.S.A.), Inc. has announced that applications are now being accepted for the 2000-2001 session of the home study course "**The Basic Principles of Chartering**." This is an ASBA Certificate Course designed for vessel owners or operators, importers, exporters, brokers or traders who require an overview of the chartering field. Accountants, lawyers, consultants and students have traditionally enrolled in the course to aid them in their related work. The course includes study material for the following topics: Chartering Terms, Freight Derivatives, Voyage Estimating, Tanker Chartering, Arbitration, Laytime, Legal Principles of Chartering and Admiralty Law.

It is billed as the only course of its kind, worldwide. It has been enthusiastically endorsed by the past student body as it enters its twenty-second session. The basics of chartering from A to Z are presented in a clear, concise and easy-to-read textbook copyrighted by ASBA.

ASBA also announces the availability of courses on your desktop. Their program "**Maritime Learning Online**" advises that students are monitored and assisted by a highly qualified Professor of Maritime Studies at the Graduate Level on a scheduled basis. Two such online ASBA Certificate Courses are available: "**Shipbroking & Chartered Vessel Operations**" and "**Maritime Law for Ship Brokers & Agents**." Soon to be announced is "**Year 2000 in Review - Major Charter Party Arbitration.**"

For application and tuition information please contact ASBA via mail at 510 Sylvan Avenue, Suite 201, Englewood Cliffs, NJ 07632, phone (201) 569-2882, fax (201) 569-9082 or Email: asba@asba.org, or check out the website: www.asba.org. Don't delay. If you are interested in vessel chartering call ASBA today.

PROCEEDINGS TO CONFIRM, VACATE OR MODIFY AWARDS - VENUE

William H. Hagendorn, Esq., when offering the following article, commented, "Those of us who are lawyers must deal all the time with questions of confirming, vacating or modifying awards. Although the arbitrators' work is finished when the award is issued, I hope that they have a healthy interest in how their awards are treated by the courts."

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CORTEZ BYRD CHIPS, INC. v. BILL HARBERT CONSTRUCTION COMPANY, INC.

U.S., 120 Sup. Ct. 1331, 146 L.Ed. 2d 171, 68 USLW 4214

2000 U.S. Lexis 2194 (March 21, 2000)

Federal Arbitration Act - Proceedings to Confirm, Vacate or Modify Awards - Venue

The United States Supreme Court has resolved a conflict among the Courts of Appeals for the various Circuits by holding that proceedings to confirm, vacate or modify an arbitral award may be brought in any District Court in which an ordinary lawsuit between the parties could be brought, as well as in the District where the arbitration award was made. The District Court in the Northern District of Alabama and the Eleventh Circuit Court of Appeals had both held that sections 9, 10 and 11 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 9, 10 and 11, which deal respectively with confirming, vacating and modifying awards, and authorize applications to and orders of "the United States court in and for the district within which such award was made", were exclusive specifications of the proper venue for such applications, and precluded such applications in any other district. The Supreme Court reversed them and held that the venue permitted in these sections supplemented but did not supplant the general venue statute for District Courts, 28 U.S.C. § 1391, which permits civil actions to be brought in several venues, including the district in which the defendant resides and the district in which a substantial part of the events giving rise to the claim arose.

The issue arose because Cortez, which had lost in the arbitration, filed an application to have the award vacated or modified in the Southern District of Mississippi (the place where the construction work under the contract had been done). Seven days later Harbert filed an application to have the award confirmed in the Northern District of Alabama (where the arbitration had been conducted and the award made). Cortez asked the Alabama court to defer to the court of first filing, i.e. the Mississippi court, which should normally be done where the two cases raised basically the same issues between the same parties. However, the Alabama court held that it was not required to do so because, under FAA sections 10 and 11, the first case should not have been brought in Mississippi.

Since the Supreme Court decided that sections 10 and 11 were not exclusive and that Mississippi was a proper venue, the Alabama judgement in favor of Harbert was reversed, and the case will probably be heard in the Mississippi court.

The Supreme Court gave several reasons for holding that Congress intended sections 9, 10 and 11 to be non-exclusive. Although all three sections use the word "may" instead of "shall" in referring to the district where the application may be made or the court order issued, and "may" is normally an indication of a permissive intent, the Court did not rely heavily on this argument. Instead it took note of the venue and jurisdictional rules in 1925 when the FAA was first enacted, which were quite restrictive and limited mainly to the district of the defendant's residence, and concluded that Congress intended to liberalize them to permit additional districts to deal with arbitration matters when appropriate. For example, section 9 also recognized and deferred to the jurisdiction and venue of any court specified by the parties in their arbitration agreement, which was a liberalizing change in 1925. The Court also pointed out that if sections 9 - 11 did establish exclusive venues, no United States court would have venue to confirm, vacate or modify an award made outside of the United States, a violation of United States treaty obligations.

The Supreme Court also pointed out that an exclusive interpretation of sections 9, 10 and 11 would be inconsistent with its previous holding in Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932), that a District Court which is given jurisdiction by section 3 of the FAA to stay a pending civil action in order to permit arbitration, retains jurisdiction and venue to confirm, vacate or modify the resulting award. The same holding should apply to a court given jurisdiction by section 4 to compel arbitration. The Court in effect expanded its 1932 ruling to hold that in all cases orders to confirm, vacate or modify authorized by sections 9, 10 and 11 may be issued by District Courts in districts in addition to the district where the award was made.

William H. Hagendorn, Burlingham Underwood LLP

PRE-HEARING PRODUCTION OF DOCUMENTS BY THIRD PARTIES

A recent Memorandum Order (2000 WL 364997 (S.D.N.Y.)) ("Order") confirmed an arbitrator's authority to provide for pre-hearing production of documents from third parties. The issue in the case was whether the Court could compel compliance with an arbitrator's subpoena calling for discovery of documents from a third party prior to the arbitration hearing. The Court, pursuant to its authority under Section 7 of the Federal Arbitration Act ("FAA"), which formed the basis for the Court's jurisdiction in the matter, directed the third party to comply with the arbitrator's subpoena.

The case revolved around an arbitration between American Color Graphics, Inc. ("ACG") and its former employee/executive, Douglas Brazell. Brazell claimed that he was entitled to certain benefits under an Employment Agreement and ACG's Supplemental Executive Retirement Plan. ACG, in its counterclaim, alleged inter alia that ACG was entitled to restitution and damages for breach of contract, because Brazell had violated certain clauses of the Employment Agreement in dealings with Laser Tech Color Corporation ("LTC"), a competitor of ACG.

In order to obtain information relevant to its counterclaim, ACG obtained a subpoena for certain documents from the arbitrator and served it on LTC, a third party. After a series of unsuccessful negotiations in an effort to pare down the subpoena request, ACG applied to the Court for an order compelling disclosure of the documents from LTC under the FAA, Section 7.

The Order reviewed the applicability of Section 7 of the FAA relevant to arbitrators' authority to subpoena witnesses and order production evidence deemed material and the federal district court's authority to assist arbitrators in obtaining such evidence, including pre-hearing discovery.

Specifically, the Order stated:

"Courts outside this district have permitted pre-hearing discovery from non-parties. The most often cited case on point is Stanton v. Paine Webber Jackson & Curtis Inc., 685 F.Supp. 1241 (S.D.Fla.1988). In that case, the court found that under the FAA, 'arbitrators may order and conduct discovery as they find necessary.' Id. At 1242; citing Mississippi Power Co. V. Peabody Coal Co., 69 F.R.D. 558, 564 (S.D. Miss 1976) (finding that arbitrators, in their discretion, may permit and supervise the discovery they deem necessary). The court concluded that the FAA permits pre-hearing appearances by non-party witnesses for deposition and production of documents. Id. At 1243. In another case, the court upheld a subpoena by an arbitration panel ordering a non-party to produce documents for inspection by a party, prior to the arbitration hearing. See Meadows Indem. Co. Ltd. V. Nutmeg Ins. Co., 157 F.R.D. 42, 44-45 (M.D. Tenn.1994) (stating that '[t]he power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing'); see also Gary B. Born, International Commercial /Arbitration in the United States 844 (1994) (finding that while the FAA 'can be read' as only authorizing arbitrators to require witnesses to attend arbitral hearings, '[l]ower courts have not, however, construed §7 in this fashion')."

The Court noted that "one court in this district has stopped short of authorizing a subpoena to compel third parties to submit to depositions. See Integrity Ins. Co. V. American Centennial Ins. Co., 885 F.Supp.69 (S.D.N.Y. 1995) (Scheindlin, J.) (Finding that arbitrator lacks authority to compel nonparty witness to appear for depositions prior to arbitration hearing, as witnesses who are not parties to arbitration agreement 'never bargained for or voluntarily agreed to participate in an arbitration')."

The Order continued, "It is true that the Integrity court's holding may be read to partially conflict with the holding in Stanton. However, Judge Scheindlin distinguished Stanton and Meadows on the ground that these cases dealt, at least in part, with the pre-hearing production of documents, and that Integrity focused solely on pre-hearing depositions. Id. At 72. The court found that pre-hearing depositions were more burdensome. The court stated:

'Documents are only produced once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice - - once for the deposition and again at the hearing.' Id. At 73."

The Order further noted that the Integrity court's holding was limited to depositions: "'[T]his Court concludes that an arbitrator does not have the authority to compel nonparty witnesses to appear for pre-arbitration depositions.' Id. At 71. The court also acknowledged that 'courts should interpret the [FAA] so as to further rather than impede, arbitration.' Id. At 71 (citing Bigge Crane and Rigging Co. V. Docutel Corp., 371 F.Supp. 240,246(E.D.N.Y. 1973)."

"In sum," the Order recapitulates, "the case law, and specifically Stanton, Meadows and Integrity, support the arbitrator's authority to provide for pre-hearing production of documents from third parties."

RECENT AWARDS - SPLIT COGSA DECISIONS

At least one of the benefits sought by the incorporation of COGSA in a charter party is a uniformity of result on claims under such a charter party and on claims under bills of lading, subject to COGSA, which have emanated from that charter party. Likewise, consistency is one of the benefits of New York arbitration extolled by the SMA. Arbitrators continue to struggle toward unanimity in disputes involving private contracts where COGSA

has been incorporated as part of the parties' agreement.

In a matter involving **FELIZ DUCKLING**, charterer/shipper, Glencore, brought a claim pursuant to the bill of lading and under COGSA rules. The panel majority found for the owner, Makedonia Marine S.A., indicating that the charterer/shipper failed to carry its COGSA burdens of proof beyond its initial prima facie case. The dissenting opinion questioned the validity of the exculpatory exceptions offered by the owner which had been accepted by the majority.

Scrap had been loaded into the vessel and the bill of lading quantity was determined by a draft survey. Unbeknownst to Glencore and its surveyor, the vessel had on board more than a thousand tons of frozen ballast. Not surprisingly, the outturn quantity reflected an apparent shortage of approximately one thousand tons. The claimant argued that the owner is responsible for delivering the cargo quantity certified on the bill of lading. Glencore had paid its suppliers and the vessel owner based on the bill of lading quantity and contended that the owner's error in calculating the wrong tonnage and issuing an incorrect bill of lading neither exculpates it from liability nor excuses Makedonia from having to make the charterer whole.

The owner, admitting that the loading draft survey erroneously included a sizable amount of frozen ballast, argued that it should be relieved because it satisfied its burden of proof obligation, having brought itself within the exculpating exceptions and having provided a reasonable explanation as to the cause of the loss.

The panel was unanimous in the following: that the bill of lading was the relevant document; that it represented the contract of carriage; that COGSA was incorporated in the bill of lading; that the apparent short delivery was caused by frozen ballast; that Glencore established its *prima facie* case; and that the cargo receiver paid for scrap based on the bill of lading quantity which the owner admitted was incorrect.

The majority found the owner liable only to the extent of the freight corresponding to the difference between the bill of lading and the outturned quantities at the applicable freight rate, plus interest. They ruled that Makedonia satisfied its burden to explain the loss, having offered a plausible and persuasive explanation of how and when the discrepancy between the loaded and outturn weight occurred. The majority dismissed Glencore's claim for failure to meet its burden of proving that the cargo claimed short-loaded was actually loaded.

The dissenting arbitrator asserted that the admission of an untoward event, in and by itself, is not a basis of exoneration from liability under COGSA. Further, he observed that, rather than arguing that short-landed cargo was actually loaded, Glencore sought to recover damages it sustained because of the owner's failure to issue a bill of lading which properly reflected the quantity received for carriage. See **FELIZ DUCKLING,** SMA 3611 [1999]

In an award involving the parcel tanker **JO ELM**, a panel wrestled with the most elemental question regarding burdens under bills of lading subject to COGSA versus those under a private contract of carriage which incorporates COGSA by reference. The panel majority found that, since the pertinent shipment was an intra-company transaction, the bills of lading were merely receipts and not documents of title. They determined that the parties' rights and obligations were as stated in the COA and rejected the claim on the basis that the claimant failed to identify the cause of the loss.

JO Tankers, as time chartered Owner, and E.I. Dupont de Nemours and Company, as Charterer, entered into a contract of affreightment. JO Tankers were identified as the Carrier and Dupont de Nemours International ("DP International) as the Consignee under the bill of lading. Cargo was delivered in apparent good order but was discovered to be contaminated on the vessel once loading commenced. Rather than delay the sailing, Dupont ordered the loading to continue and the voyage to proceed. Dupont eventually claimed as damages all of its costs in handling and reprocessing the contaminated product.

Dupont claimed the cargo was shipped under the bill of lading, that COGSA burdens of proof

rules apply and that they had shown that the contamination occurred after the cargo left their custody. The Owner contended that the cargo was shipped pursuant to a private contract of carriage, was an intra-company transfer and the COGSA rules which apply to common carriers were not applicable to the disputes at hand. The panel majority found for the Owner and concluded that the burden of proof was Dupont's. They observed that neither side had a persuasive explanation as to how the contamination occurred.

The dissenting opinion is well worth perusing. Readers are encouraged to review it, not so much for its differences regarding findings of fact, but for the interesting review, with citations, of the burdens under COGSA and those under private contracts which have incorporated COGSA by reference or in a Clause Paramount. See **JO ELM**, SMA 3617 [1999]

LETTERS TO THE EDITOR

In its April 2000 issue THE ARBITRATOR posed the question, "Do current SMA Members or others involved in the arbitral process perceive there to be a fee collection problem?" We received two letters:

To the Editor:

In the ARBITRATOR, Vol 31 No 3 of April 2000 under NY ARBITRATORS' FEES is stated that according to Manfred Arnold "The method of settling arbitration fees is just one of the procedural features which distinguishes London from New York." He is of course right. But he adds, "In London, payment of the fees is due upon issuance of the award, and either party upon full payment of its fee liability (emphasis supplied) can pick it up."

This is totally erroneous. In London, when the award is ready to be published, both sides are advised it may be picked up at the issuing arbitrator's office on payment of its total fees, the apportionment (if any) of which will be indicated in the award.

In this manner without having received the award yet, the parties will still be in the dark (as they should be) as to which is the prevailing party.

I trust this clarification will prove helpful.

Yours sincerely,
John B. Besman

(Mr. Besman is a full time arbitrator, a founding member of the SMA and currently its only Honorary Director)

To the Editor:

On this side of the Atlantic there are certainly anecdotal accounts of uncollected awards - presumably both parties fearing they have lost! Obviously if this were to occur the parties could be pursued for the outstanding fees, practically though it would look a bit 'messy' having said that they can't have the award unless they pay, and the parties having virtually said "Don't want it then."

More frequently (one suspects ... arbitration is poor in data) parties settle with greater or lesser involvement of or contact with the arbitrators. This may be because the tribunal has so crystallized the issues that the parties see clearly what they should have long since, allowing an amicable settlement. At the other extreme it may be that they come to fear the tribunal more than each other.

So, practical as it is, the concept of the award being taken up by either party on payment of all outstanding fees is not without its potential problems for the arbitrator(s) ... or perhaps they are not problems, just natural 'checks and balances' that any system must have?

Michael Chapman,
mchapman@mchapman.com

(Mr. Chapman is the Principal of a consultancy practice located in France, not far from Geneva, specializing in toxicology, chemical safety and pharmaceutical licensing. He is an occasional commercial arbitrator, Editor of the electronic "European Arbitration" (www.interarb.com/ea) and a founder of "interarb", a publisher of works related to international commercial arbitration.)

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WHY ARBITRATORS MUST KEEP THEIR WITS ABOUT THEM AND REMAIN COOL, DISCREET AND CIRCUMSPECT IN LANGUAGE AND DEMEANOR

THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

VOL 31 JULY 2000 Number 4

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BIMCO SEMINAR

Tanker Time Charters - Negotiating and Operating Under Tanker Time Charter Parties

(BIMCO Publications A/S has issued the following announcement)

On 31 October 2000, BIMCO will hold its renowned Towards Better Decisions seminar in New York for the second consecutive year. We intend to follow up on last year's successful seminar on Tanker Voyage Charter Parties with a new seminar on tanker chartering - this time addressing Time Charter Parties and introducing the new BPTIME 3 form.

BIMCO is delighted that Robert Curt, General Manager of Marine Transportation at ExxonMobil Refining and Supply Company has agreed to chair the seminar and to lead what is certain to be a productive discussion among participants and speakers.

A number of recognized industry experts will guide attendees in their search for improved knowledge of the intricacies of tanker time charters. Seminar topics have been selected to offer specific details of common problems in tanker chartering and operations, and more importantly their solutions. An introduction to BPTIME 3 followed by a comparison to SHELLTIME 4 and a charterer's view on transportation costs are a few of the many issues to be covered during this one-day seminar. Other problematic areas to be discussed include re-delivery, how the broker can add value to the services offered, fuel quality problems, and off-hire and deduction from hire. In addition, participants will have the opportunity to meet and discuss the issues with their peers during the seminar's luncheon and cocktail party.

The Maritime Law Association of the United States, the Society of Maritime Arbitrators, the Connecticut Maritime Association and the Association of the Bar of the City of New York are sponsors of the seminar.

Application for Continuing Legal Education accreditation of this course in New York is currently pending. For the seminar last year participants received 7.0 CLE credit hours.

COMPREHENSIVE STUDY OF AMERICA'S MARITIME HISTORY LAUNCHED

The American Maritime History Project, Inc., an ambitious effort to record, preserve and communicate the 400-year story of America's rich seafaring history, was formally launched earlier this year at the U.S. Merchant Marine Academy.

Dr. Alex Roland, the project's editor, described plans for the first phase to the project's board of directors and advisory committee. Dr. Roland, a professor and former chairman of the Duke University History Department, is a specialist in military history and previously served as historian for NASA. He introduced four other scholars who will contribute chapters to the initial, summary volume of a planned comprehensive history of American maritime activity from 1600 to 2000. Later, there will be additional volumes focusing on particular periods within that span.

"This is an exciting enterprise," said Dr. Roland. "Maritime activity -- transporting goods and passengers by water -- was America's largest industry from earliest colonial times until the middle of the 19th Century. Waterborne commerce, not only on the oceans but the Great Lakes, rivers, canals and other waterways, built this country and remains vital today. Yet the impact of maritime activity on American history remains little studied and poorly appreciated. We hope to correct that shortcoming."

Participants urged the historians to weave together such continuing threads as the national and global economic impact of maritime activity, the role of technology and the effects of government policy, while tying into the story the many ancillary businesses that support the maritime industry. There was general agreement on the need to write so as to appeal to a broad audience, a major challenge given the complexity of the subject.

Eliot H. Lumbard, a New York lawyer who chairs the not-for-profit enterprise, noted that "Water remains the lowest-cost method of moving cargo and people, and thus our history informs the future." He said successful initial fund-raising efforts have made it possible to engage the historians to begin their work immediately.

The historians are Dr. Roland; Dr. Alexander Keyssar, Professor of History and Public Policy at Duke; Dr. David B. Sicilia, Professor of History at the University of Maryland; Dr. W. Jeffrey Bolster, Professor of History at the University of New Hampshire, and Dr. Raymond E. Ashley, Executive Director of the San Diego Maritime Museum and Professor of Public History at the University of San Diego.

In addition to publishing the volumes describing and analyzing American maritime activity in the context of each period of American history, the project will also prepare more specialized supporting volumes and materials, including materials for school children.

Dr. Charles R. Cushing, President of the Naval Architecture firm C.R. Cushing & Co., Inc. and a member of the SMA, serves on the project's Advisory Committee. Brian D. Starer, Esq., a New York Maritime Attorney and Partner with Haight Gardner Holland & Knight, is also a member of the Advisory Committee. President Bulow has asked Mr. Donald E. Zubrod, SMA member, to act as the Society liaison with The American Maritime History Project, Inc.

COGSA 2000 - AN UPDATE

An interesting seminar entitled The Proposed Amendment to The Carriage of Goods by Sea Act (COGSA): Legislative Update and Prospects was held in New York on May 23, 2000, sponsored by the New York County Lawyers' Association Admiralty and Maritime Law Committee and Seaman's Church Institute. Chester D. Hooper, Esq., past President of the MLA and currently Partner, Haight Gardner Holland & Knight (New York), Karyn A. Booth, Esq., Partner, Thompson Hine &

Flory L.L.P. (Washington, DC) and Henry P. Gonzalez, Esq., Partner, Rodriguez O'Donnell Fuerst Gonzalez & Williams (Washington, DC) were the panelists. James Hohenstein, Esq., Partner, Haight Gardner Holland & Knight (New York) moderated the event.

The seminar was particularly notable because the three presenters, each with a background representing divergent interests in the COGSA amendment debate, raised neutral positions in their discussions. Mr. Hooper, active with the MLA in drafting the amendment, has represented carrier interests in the past. Ms. Booth spoke principally from the shippers' perspective, while Mr. Gonzalez represented freight forwarders and Non-Vessel Operating Common Carriers (NVOCC's).

Mr. Hooper presented an overview of the Hamburg/Hague-Visby/COGSA relationships along with a brief history of the proposed amendment and a summary of the amendment's ramifications. Ms. Booth presented a detailed tabular comparison of the Hamburg Rules, Hague-Visby Rules and the proposed COGSA amendment. All panelists seemed to agree that, while many changes to COGSA are proposed, there are three key reforms: 1) increase in the package limitation to conform with Hague-Visby, 2) carrier defenses to liability to be the same as Hague-Visby, except that the error in navigation defense is eliminated; 3) in choice of forum, Hamburg Rules are essentially adopted.

Mr. Gonzalez highlighted the fact that freight forwarders and NVOCC's are entirely separate interests. Freight forwarders, being agents or fiduciaries, are excluded from common carrier designation. The NVOCC's, on the other hand, have common carrier responsibility but they desire the same protections as carriers and shippers in a service contract regime. It is a fact that approximately 80% of U.S. cargo moves under confidential service contracts which, except where bill of lading controls survive the private agreement, are not governed by COGSA. Since NVOCC's may not enter into service contracts and would remain subject to liabilities under COGSA, they have little incentive to support the proposed amendment.

Traditionally, shipper interests have preferred the Hamburg Rules while carrier interests, including P&I clubs, favored Hague-Visby. Lobbying efforts in Congress to amend COGSA to incorporate these divergent interests have resulted in a stalemate. Legislative representatives are effectively awaiting a consensus from the industry. The panelists agreed that the current proposed amendment is the compromise of positions needed for Congress to act.

Opponents of the measure fear proponents are moving too fast. Foreign carrier interests, after giving early support to the proposed amendment, now object to it as being in conflict with the Ocean Shipping Act of 1998. The seminar panel members expressed their confidence that the proposed amendment will soon be introduced to start the Congressional debate.

THE SUPREME COURT'S INTERTANKO DECISION

Craig S. English, Esq., Partner, Kennedy Lillis Schmidt & English (New York) was the speaker at the SMA's April 2000 luncheon. Mr. English spoke on the topic entitled "The Supreme Court's March 6, 2000 Intertanko Decision - Its Impact on Tanker Operations and Charter Party Practices." He was kind enough to provide THE ARBITRATOR with the following text:

Since the EXXON VALDEZ oil spill in 1989, there has been a difficult legislative and judicial climate for tanker owners and operators. After the EXXON VALDEZ, many states felt free to supplement Coast Guard regulations and international standards for tankers with their own regulatory schemes. Lower courts upheld this extensive state regulation. Finally, on March 6 of this year, the Supreme Court in Intertanko v. State of Washington overruled the lower courts and

invalidated most of Washington State's tanker regulations.

The Supreme Court found that most of Washington State's attempts to regulate tankers were preempted by the Ports and Waterways Safety Act of 1972. Title I of the Act gave the Coast Guard the authority to set up vessel traffic systems and to control the movements of vessels in U.S. waters where the Coast Guard felt it was needed. Title II of the Act required the Coast Guard to issue regulations for tanker design, construction, alteration, repair, maintenance and operation. An amendment to Title II in 1978 added equipping, personnel qualification and manning to the fields of regulation already assigned to the Coast Guard.

Under Title I of the Ports and Waterways Safety Act, the Supreme Court held that states could not regulate tanker movements where the Coast Guard had issued regulations on the subject or determined that there should be no regulation. Under Title II, all of Washington State's regulations concerning tanker design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification and manning were invalid because Congress directed the Coast Guard to issue these regulations and there was no room for state court regulations.

The Supreme Court ruled specifically that four Washington State regulations were invalid: First, training requirements unrelated to transits in the State of Washington's waters; second, staffing regulations which dictate how a tanker operator must staff vessels, even at the beginning of a voyage; third, rules for navigation watches which are different from Coast Guard standards; and fourth, rules for reporting casualties and near-misses which were more extensive than Coast Guard requirements. The Supreme Court sent the case back to the lower courts to determine whether other Washington State regulations were invalid under the Court's ruling.

The practical result of the Intertanko decision is that all of the Washington State regulations will probably be declared invalid under Title I and II of the Ports and Waterways Safety Act, except for a regulation requiring vessels anchoring and departing anchorages in Port Angeles to use assist tugs. This regulation survives because it is a local traffic rule which under Title I would not be preempted because there is no Coast Guard regulation on the subject, nor has the Coast Guard determined that there should be no regulation.

The Supreme Court also held that OPA 90, Section 1018, which preserved the rights of the states to impose additional liability or requirements with respect to oil pollution, referred only to state regulations regarding oil pollution liability and compensation. This was a big blow to the states, which had relied on the broad language of Section 1018 for authority to regulate tanker operations.

It is likely that most of the California regulations will also be declared invalid, if challenged. California contends that its regulations supplement federal standards in a way which does not conflict with the Coast Guard regulations. The Supreme Court in Intertanko rejected this type of argument, stating specifically that states cannot avoid preemption because their regulations are similar to federal requirements.

Some state regulation survives. All state regulation of liability and damages for pollution will remain in effect because it is specifically preserved by Section 1018 of OPA. There is also a range of state regulation which survives the Supreme Court's ruling under older decisions of the Supreme Court permitting states to regulate, for instance, air pollution from ships, and to issue quarantine regulations.

Last, the Intertanko decision deals only with tankers. Any state regulation of oil aboard dry cargo vessels is not affected by the Intertanko decision, although there is a comprehensive Coast Guard scheme for dry cargo vessels which should preempt state action just as the Ports and Waterways Safety Act does for tankers.

So, 11 years after the EXXON VALDEZ, the difficult legislative and judicial period for tanker owners is finally beginning to subside, at least until there is another major spill in a sensitive area.

MANIFEST DISREGARD -STANDARD OF REVIEW

Arbitration decisions are frequently appealed but rarely vacated. A recent Award regarding PUNICA was confirmed by U.S. District Court Judge Berman (SDNY). A review of the actual Award follows. Judge Berman's Order confirming the award contained a detailed review of the standard which must be met if an Award is to be vacated. The following is taken directly from Judge Berman's Order, [DUFERCO v. OCEAN WIDE SHIPPING CORPORATION, and CANADIAN FOREST NAVIGATION COMPANY LTD., 99 Civ. 2951 (RMB), 7,8 (SDNY 2000)], citations omitted:

The Court's role in reviewing arbitration awards is appropriately limited "in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." The U.S. Court of Appeals for the Second Circuit has recognized that an arbitration award may be vacated if it is in "manifest disregard of the law."

The "manifest disregard" standard is a high hurdle for the party seeking to vacate an arbitration award, requiring "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." The court must find that "(1)the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." The error must have been "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."

Erroneous application of rules of law or erroneously deciding the facts are not grounds for vacating an arbitration award. Further, a court "must not disturb an award simply because of an arguable difference of opinion regarding the meaning or applicability of the laws." Courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." So long as the arbitrators explain their conclusions "in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result."

THE MASTER'S DUTY
Clause 8 of the NYPE Form Revisited

The following summary of a recent award, authored by William N. France, Esq., Partner, Healy & Baillie, LLP (New York), appeared in his firm's newsletter **MAINBRACE** and is reprinted with permission:

In a significant decision concerning Clause 8 of the NYPE form of charter, a New York consolidated arbitral panel in "Ocean Wide Shipping Corp., owner of the PUNICA v. Canadian Forest Navigation, Trans Sea Transport N.V. and Duferco S.A. Lugano as charterers," awarded owner recovery of deviation and restowage expenses necessitated by a shift of a steel slab cargo while the vessel was off the Tunisian coast in January 1995. The panel majority also awarded owner $150,000 towards its attorneys' fees and costs.

Charterer entered into a purchase contract with ILVA Laminati Piani S.p.A. ("ILVA"), a large steel manufacturer and exporter, as shipper. Charterer and Trans Sea entered into a Gencon form of charter for a vessel to be named to carry steel slabs from Taranto, Italy to Sparrows Point, Maryland. That charter was "free in/out stowed, lashed, secured and dunnaged." Trans Sea, in turn, time chartered the PUNICA from its disponent

owner Canadian Forest Navigation ("CFN"). CFN had previously time chartered the vessel from her owners, Ocean Wide. The trip time charter was, in relevant respects, identical to the head time charter on the NYPE form. Clause 8 remained unamended except to add the word "discharge" to charterers' obligations.

ILVA acted as charterer's stevedore under the Gencon charter, loading about 15,500 mt of slabs. The slabs ranged in weight from about 14 mt to about 23 mt. They were stowed by what ILVA called the "California Block Stow" ("CBS") method developed by California Steel Industries in which steel slabs are loaded fore and aft in free standing, dunnaged stacks, secured by Signode strapping using the "Olympic" lashing method. Under the CBS method, stacks are not braced to the vessel structure except that the bottom-most slab is intended to contact the junction of tank top and wing tank slope plating. Otherwise, Signode strapping is applied to the top two tiers of slabs in athwartship stacks to bind them into a "cap" The strapping also binds the "cap" to the next several tiers in the outboard stacks only.

The PUNICA's master had never carried a steel slab cargo before this voyage and was initially skeptical of the CBS method, suggesting that the slabs be winged-out to the sloping sides of the hopper tanks. ILVA advised this was not possible because of difficulties in discharging slabs stowed outboard of the hatch square. ILVA persuaded the master that the CBS method was widely used and that ILVA was expert in its application. Thereafter, loading, stowage and lashing were conducted by ILVA. The chief officer confirmed that the vessel had adequate stability. On completion of loading, ILVA presented the master with a form letter stating that the "...cargo has been loaded, stowed, secured and lashed under [the master's] supervision and up to [his] complete satisfaction. The vessel is in all respects seaworthy and is ready to carry on her voyage." The master signed the letter.

The PUNICA sailed on 10 January. Three days out, while rolling moderately in Beaufort Force 6-7 seas with swell, the PUNICA took a sudden port list of about 12 degrees. On inspection, it was found that the steel slab stow had collapsed and shifted to port in all five cargo holds. The master was able to reduce the list to about five degrees by ballasting. After consulting with Owners, the vessel deviated to Cagliari, Sardinia as a port of refuge, where Owners declared general average.

At Cagliari, Surveyors representing all parties attended. While each prepared a separate report, the surveyors jointly agreed that PUNICA could not proceed on her voyage without restowing the cargo. Because of the Cagliari stevedores' inexperience with steel slabs, restowage was not completed until 8 February. Thereafter, the voyage was completed without incident. Arbitration of claims for hire and fuel during the period of deviation and restowage costs followed.

The panel majority found "... no basis for criticizing the Master's ship handling." The panel majority concluded that "... because of deficiencies in the stowage and securing of the cargo, moderate rolling conditions were sufficient to cause the stow to collapse." Charterer's contention was that the overarching duty to provide a seaworthy vessel rested with the owner, notwithstanding the charterer's obligation to load, stow, trim and discharge the cargo under the charter. Charterer pointed to ILVA's form certificate signed by the master at Taranto reciting that the stowage and securing had been performed to the master's satisfaction. Charterer also argued, in view of the master's admitted inexperience with steel slab cargoes, that he had an obligation to familiarize himself with the cargo and to supervise the loading. Charterer claimed that the master made no such inquiries, took no interest in the cargo operations at Taranto and, therefore, failed to satisfy his affirmative obligation to make appropriate inquiry about cargo stowage and securing.

The panel majority analyzed these issues as follows: Clause 8 of the NYPE form confers a twofold duty on the master - he is responsible for carrying out the owners' obligation to furnish a vessel fit for sea and for charterers' cargo, in which role he and the crew act as servants of the owner. The master is also responsible for supervising the loading, stowing, trimming and discharging of the cargo. In that role he and the crew act as the borrowed servants of the charterer in fulfilling their charter obligations under Clause 8. The panel majority cited with approval Nichimen v. The Farland, 462 F. 2nd 319 (2nd Cir. 1972), which concluded under Clause 8 that primary liability for improper cargo stowage rested with the charterers.

Responding to the charterer's argument that the master accepted responsibility by virtue of the signed form certificate approving the loading and stowage, the panel majority concluded that "...the master was, by his own open admission, unfamiliar with the carriage of steel slabs, and relied entirely on the assurances and representations given him by ILVA." The panel majority emphasized that ILVA's representations were not casual. ILVA held itself out as an expert in the CBS method and generally in stowing and securing steel slabs, thereby usurping supervision of the cargo operations.

Acknowledging that the master "... had a duty to protest and intervene if he became aware of an unsafe condition affecting the vessel's seaworthiness ... ILVA's assurances gave him no reason to suspect there was any fault with the stow or securing which would require his intervention." The majority concluded that:

... we cannot accept that [the master's] signing of ILVA's stowage approval letter somehow transferred all liability for the faulty stowage from [Charterer] to Owner ... The argument that this form letter relieves [Charterer] of all responsibility for this casualty would require us to ignore the dominant role played by ILVA. There is no doubt in our minds that when the master signed the letter he was relying completely on ILVA's expert representations that the cargo was properly stowed and secured.

Charterer challenged the majority's Award in the United States District Court for the Southern District of New York, claiming that it was rendered "in manifest disregard of the law." Owners, with CFN, moved to confirm the award. Judge Berman issued a lengthy order on April 7, 2000 confirming the award. See **PUNICA, SMA No. 3513** [1999]

VETTING - "Catch 22"?

A recent award involving the vessels Diamond Park and Emerald Park was particularly interesting because of its scope and accompanying detail. The panel reviewed the concepts of "novation", "restitution" and "vetting." Readers are encouraged to review the Final Award to appreciate the interrelationships of these issues and the complexity of consequences which resulted. It is not a surprise that this was a split decision. One arbitrator dissented on the liability decision but no one on the panel could concur on damages, the chairman's analysis prevailing.

We comment herein on the apparent "Catch 22" situation illustrated in this matter but experienced elsewhere in various major oil company time charters. Simply stated, owners are responsible under the charter party for obtaining and maintaining vetting approval status of their vessels. Theoretically, the owner has a free hand in scheduling and procuring vetting approvals from the various oil companies.

But wait! Many major oil companies will not inspect a vessel in which they have no "economic interest." Without oil company cooperation, owners cannot meet the charter party requirement to obtain vetting approvals. The conundrum becomes contorted since it is the charterer and not the owner who has the potential contractual relationships with the oil majors to establish the necessary "economic interest." Thus

the owner finds himself "between a rock and a hard place" - the contemporary equivalent of a "Catch 22" mode.

Perhaps the very term "vetting" engenders the concept of an animal chasing its tail: An owner promises a charterer that he will obtain a major oil company vetting approval for his vessel, but the charterer can't offer the vessel to the major oil company until it is vetted and the major will not vet the vessel on the grounds that it doesn't have an "economic interest" in the vessel.

This "chicken and egg" dilemma has several possible solutions among which are: reducing the vessel hire during the non-approved period; penalizing the owner to the extent the charterer proves his damages; or letting the charterer swallow his losses. The panel in the instant case suggested the possibility of instituting more specific clauses or, alternatively, establishing a standardized "commercial inspection program under which an owner would pay for the vetting inspection with the understanding that the survey would take place when requested and not at a time or place when convenient to a major."

How about utilizing more careful contract language clearly identifying liability in the event of lack of vetting approval, vetting inspection failure and/or loss of vetting approval? Until then, arbitration panels will continue to struggle to make sense out of this "Catch 22" situation. See **DIAMOND PARK/EMERALD PARK,** SMA 3576 [1999].

DEFINITIONS - VETTING

What is the origin of the term "vetting" as used in the article "Recent Award: Vetting - 'Catch 22?'" We offer the definitions from Merriam-Webster's Collegiate Dictionary & Thesaurus and leave the etymologizing to the reader:

vet, vet • ted, vet • ting: verb transitive

1 a: to provide veterinary care for (an animal) or medical care for (a person)

b: to subject (a person or animal) to a physical examination or checkup

2: to subject to expert appraisal or correction; evaluate

syn: SCRUTINIZE 1, canvass, check over, check up, con, examine, inspect, study, survey, view

idiom: go over with a fine-tooth comb

37TH ANNUAL MEETING

At the 37th Annual Meeting of the SMA on May 9, 2000 the President announced the election of David Martowski, A.J. Siciliano and Soren Wolmar as two year term Governors. Svend Hansen, Jr. won a subsequent run-off election for the fourth seat.

Lucienne C. Bulow and Pieter L.M. Vismans continue as President and Vice President, respectively, serving the final year of their two-year terms. Messrs. Sondheim and Wolmar were re-appointed as SMA's Treasurer and Secretary, respectively. Mr. Sondheim will be assisted in his duties as treasurer by Messrs. Peters and Warfield.

SMA's Board of Governors for 2000/2001 is as follows (with their alternates in parentheses):

Lucienne C. Bulow (-)
Manfred W. Arnold* (George Hearn)
Austin L. Dooley (Klaus Mordhorst)
Henry Engelbrecht* (Thomas Lynch)
Thomas F. Fox (Konstantinos Livanos)
Svend Hansen, JR. (Nigel Hawkins)
David Martowski (Thomas Bradshaw)
Katherine A. Pappas (James J. Warfield)
A.J. Siciliano (Stanley Kleppe)
Herbert Sondheim (William Peters)
Pieter L.M. Vismans (David Letteney)
Soren Wolmar (Donald J. Szostak)

*By appointment of the President

The following Committee Chairs were appointed/reappointed:

Arbitrator - D.J. Szostak
Award Service - D. Letteney
By-Laws and Rules - K. Pappas
Education - M. van Gelder
Liaison - A.J. Siciliano
Luncheon - A. Dooley
Membership - S. Kleppe
Professional Conduct - D. Zubrod
Salvage - T. Fox
Seminars and Conventions - M. Arnold
Technology - H. Sondheim
The Log - H. Engelbrecht
Ad-Hoc ICMA Planning Committee - H. Engelbrecht
Ad-Hoc Shortened Arbitration Procedure - M. van Gelder
Ad-Hoc Liaison with BIMCO - S. Wolmar
Ad-Hoc Escrow Terms - M. van Gelder

Tony Siciliano will continue to prepare the Headnotes for the Award Service and assist with the contents of the Arbitrator. Soren Wolmar will continue to provide the "In This Issue" section of the Award Service as well as the yearly Index.

David Martowski has agreed to supervise the project for the creation of a 35-year Consolidated Index and Digest of our Awards as well as the Index and Digest for the past five years.

Bill Peters, in addition to his continued support with the Treasurer's function, will help with the organization of ICMA XIV.

HUMOR CORNER

Of course it would be unseemly for THE ARBITRATOR to enter upon the rich field of "lawyer jokes." We offer, instead, a paltry "tribunal story:"

Raphael D. Legalis, Esq. found himself before that final bench, pleading for his place in eternity. There sat the Archangel Raphael, the claimant's guardian angel, and St. Michael, the Archangel and defender of tradition, as the party appointed members of the panel. St. Peter, Chairman, rounded out the tribunal.

"Make your case," snorted St. Peter.

"Well, I've worked hard all my life. In fact, I think it was hard work that killed me," the witness retorted.

"What does the evidence show?" asked the Chairman.

"Well," sighed Archangel Raphael, "his book of life shows that he arrived at the office quite late each day. However, he did stay well into the evening hours and often worked on weekends."

"No, no! That will never do," snapped the Chair, "It's good works that we are looking for. Are there any of those?"

The defendant had a ready response. "Oh, yes," he offered, "I once gave a quarter to a blind man."

St. Peter looked quizzical. St. Michael rolled his eyes and asked, "Is it in the book?"

"It's there, alright, but it does seem meager, doesn't it?" responded Archangel Raphael.

"But, wait," interjected our sweating petitioner, "I tripped over a crippled child a few months ago and I gave her two quarters," upping the ante.

"That's in the book, too," said Archangel Raphael, "but not much else. However, I think two good deeds have some value."

"What say you, Michael?" asked St. Peter.

"I say we give him back his six bits and tell him to go to hell!"

Finally, most arbitrators and lawyers are aware that logic often can take a curious turn. In a personal injury matter arising out of a polo match incident, an eyewitness was asked, "How many ponies are required for a polo team." Her answer: "I believe each player brings his own horse."

For THE ARBITRATOR
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THE ARBITRATOR
SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

When asked to identify the single, foremost cause of avoidable delays and increased cost in New York arbitration, the near unanimous opinion of the arbitrators so queried continues to focus on discovery issues.

Two years ago, at the *Vive la Difference* seminar, which was organized by the SMA in conjunction with the Maritime Law Association (MLA) and the New York Bar, a blue ribbon panel made up of Judge Haight of the U.S. District Court for the Southern District of New York, SMA members and members of the Arbitration Committee of the MLA discussed ways of streamlining proceedings to deal with the increasing problems posed by demands for discovery and delays which result from such demands. During that seminar, Judge Haight's reaction was most interesting. He expressed great surprise that discovery was even an issue in arbitration. Arbitration is, in fact, supposed to have very limited discovery. That is what distinguishes it from litigation. In the past, if there was any discovery at all, parties would exchange documents willingly without the Panel's intervention.

Nowadays, in many cases, involving both substantial and complicated issues, and even in some that do not, arbitrators are asked by the attorneys representing the parties to rule on discovery requests. Often, endless bickering about discovery ensues and voluminous documentation is submitted to the Panel. In such cases, arbitration more resembles litigation than arbitration, and high expense and delay become inevitable. This is a situation which should be of great concern to all involved in arbitration. Parties and their attorneys should endeavor not to involve the arbitrators in their discovery requests and should cease to inundate the Panel with all their correspondence about discovery. Otherwise, they should expect delays and increased cost.

On another subject, some may look to the process of mediation as the answer to the problem of high cost and delay. In effect, it is often represented to be what arbitration used to be, quick and inexpensive. While mediation would clearly not be the answer in many cases because parties to maritime disputes often want to know whether they are right or wrong and mediation does not explicitly deal with the merits of a case, the SMA has promulgated Rules for Mediation. To be ready for those parties who would like to try mediation, several SMA members have undertaken mediation training.

Meanwhile, it is abundantly clear that parties continue to choose arbitration as the preferred alternative dispute resolution process for maritime disputes in New York as well as in London. It is, therefore, our collective responsibility to continue to improve the process of arbitration and keep it from resembling litigation.

Lucienne C. Bulow, President

NEW YORK ARBITRATION AT THE MILLENNIUM
THE DYNAMISM OF A FLEXIBLE FORUM

(*The following article appeared in the June 1999 issue of NAFTIKA CHRONIKA and has been reprinted with permission*)

The current world-wide shipping recession has cast doubt on the survival of some ship owners, operators, charterers and others in the industry. Yet as we approach the dawn of the new millennium, history tells us that there remains a vibrant market for international trade and commerce.

Interdependence of all nations is likely to increase and trade will flourish. Since airplanes still cannot approach the cargo volume of containerships or bulk carriers, shipping will likely remain the primary source of economical large-volume transportation for generations to come.

For decades, commercial disputes in the shipping industry routinely have been referred to arbitration in New York, broadly recognized as one of the premier centers for maritime arbitration. While other cities have developed as centers for maritime arbitration, there is a natural demand for New York arbitration due primarily to is traditional role as a center of commerce, financing and legal development. Although many shipping companies have moved their headquarters out of New York for a variety of reasons, the city has retained its importance as an arbitral center.

At this historical juncture, predating the start of a new millennium, it is logical to focus serious discussion on the elements of New York arbitration, haw it has changed through the years and to look through the crystal ball to see what the future portends.

HOW IT WORKS

There is no single set of rules by which all New York arbitrations are governed. The choice of arbitration over courthouse resolution is one to which the contracting parties must consent. Accordingly, the arbitration process is actually decided by the contractual agreement of the parties. That is, by choosing the arbitral forum, the parties generally adopt that forum's rules.

The rules of institutional arbitration fora, such as the American Arbitration Association (AAA) differ from those of the International Chamber of Commerce (ICC). The choice of the forum is determinative of how the arbitration will proceed. The Society of Maritime Arbitrators (SMA), however, as an ad hoc forum, gives the parties the flexibility to opt not to be bound by the rules of the SMA. For purposes of this article, we will refer to the rules of the SMA, founded in 1963, specifically to resolve commercial shipping disputes. These rules are constantly being re-evaluated, having gone through four revisions, the last of which was in 1994.

Under any set of rules, the parties' consent to arbitration can occur at one of several points: First, prior to the existence of an actual dispute, the parties can negotiate an arbitration agreement. Such an agreement could be included as an arbitration clause within a contract. Second, the parties can make an arbitration agreement after a controversy arises. This could happen in either a contract or tort situation. When the post-dispute agreement to arbitrate occurs, the parties draft an arbitration submission agreement by which their consent to arbitration is manifested.

Standard arbitration clauses call for each party to appoint one arbitrator and for these two to agree on a third arbitrator to chair the panel and, in effect, to act as the tiebreaker. In some cases, the parties will designate a sole arbitrator; other agreements call for the two arbitrators to try to decide the dispute before resorting to a third person. Prompt hearings to decide important immediate disputes can be arranged, by agreement of the parties, on short notice.

Once the arbitrators are appointed and the panel is approved by the parties, the arbitrators take an oath to act fairly and judiciously. It should be noted that the procedure is not complicated by the requirement of pre-hearing formal detailed pleadings, as required in other jurisdictions. The chair then sets a schedule for hearings and the submission of legal papers by each side. The parties can submit any evidence they deem relevant and the arbitrators and parties are not restricted by any rigid pre-set rules of evidence - the goal is the plain, clear efficient and economical presentation of facts and law to the panel.

ARBITRATOR'S POWERS

An arbitrator has substantial powers over the conduct of the case: in many ways, this power is greater than that of most judges. In an article written several years ago, John Poles of Poles, Tublin, Patestides & Stratakis, discussed "nine recurring areas in which the powers of a New York maritime arbitrator are exercised." These recurring areas served as an important definition of the nature of arbitration in New York, and focused on the following: (1) adjournments and admissibility of evidence; (2) discovery; (3) the power to impose sanctions; (4) expert knowledge of the arbitrator; (5) third party consultations and investigations; (6) punitive damages; (7) functus officio and award finality; (8) arbitrator immunity from liability; and (9) arbitrator's security for their fees. (Security for arbitrator's fees should be carefully distinguished from the substantial and often onerous security deposits for legal costs which are required in other arbitration jurisdictions.)

The typical SMA arbitration may consist of one or more hearings, at which the parties may offer any evidence which they deem relevant, with minimal or no interference from the arbitrators. The parties may present their claims and counterclaims themselves (pro se) or be represented by attorneys. Witnesses may or may not be called to testify under oath and, if called, must submit to cross-examination. Unless the parties agree otherwise, a court reporter is customarily employed to record the proceedings. At the conclusion of the presentation of evidence, the parties exchange written briefs and reply briefs, or they may present their final arguments in a Final Oral Argument instead of exchanging briefs (or in addition to post-arbitration briefing).

SOME EVOLUTIONARY CHANGES

A. Procedurally

1. Shortened Arbitration

The New York SMA arbitration forum has shown great flexibility over the years. It has proven to be responsive to the needs of commercial shipping businesses. When calls came for an economical "small claims" type of arbitration, the SMA responded with the Shortened Arbitration Procedures, in 1989, revised in 1991. Functionally, the parties agree to include a Shortened Arbitration Procedure clause in the agreement. As suggested by the SMA, the Shortened Arbitration clause generally is written as follows:

"Should the sum claimed by each party not exceed a certain amount, the dispute is to be governed by the 'Shortened Arbitration Procedure' of the Society of Maritime Arbitrators, Inc. (SMA) of New York, as defined in the Society's rules for such procedure." The Shortened Arbitration Procedure is then triggered when the amount in dispute is less than the amount previously set by the parties as the Shortened Procedure threshold.

Under the Rules for Shortened Arbitration Procedure, the parties try to use a sole arbitrator. If they cannot agree on one, then the selection of their arbitrators and the chairman of the panel proceeds pursuant to an abbreviated schedule. The dispute is usually resolved by means of documents only, although one hearing may be permitted. Finally, the panel's reasoned award must be issued within 30 days from the close of the proceedings, and the fee of each arbitrator is limited to US$1,000 plus expenses. The procedure, is chosen, allows simple and less momentous disputes to be resolved quickly and economically.

2. Conciliation

In addition to arbitration, experience indicated the need of another dispute-resolving

vehicle; therefore, the SMA offers conciliation of maritime disputes. The conciliation procedure can be employed either as a prelude of an alternative to arbitration of litigation. Conciliation is a non-binding process, whereby an amicable solution to a dispute is sought. A single conciliator is appointed who reviews written explanations of the dispute and tries to arrange a settlement. Once signed by both parties, a Settlement Agreement is binding, enforceable and can be converted into a Federal Court Order.

These procedures, although not satisfactory for the resolution of all disputes or not fitting the purposes of all parities, show a system flexible enough to respond to the changing and diverse needs of the maritime community. In addition to its flexibility, the system provides for enough stability to assure reliability, consistency and economic practicality in its decisions.

B. Substantively

1. Punitive Damages

About ten years ago, several New York arbitrators yielded decisions awarding punitive damages in maritime disputes. At the time, the concept was unheard of, and the decisions sparked howls of protest from many in the community who disputed the legitimacy of punitive awards in commercial disputes. Indeed, New York State law continues to prohibit the award of punitive damages by arbitrators. Nonetheless, maritime arbitrators typically are governed by Federal law, which allows arbitrators more leeway.

Generally, however, SMA panels have remained extremely reluctant to award punitive damages. This reluctance stems, in part, from the fact that punitive damages are generally disallowed at law in contract disputes unless the conduct complained of is also a tort. There must be a strong showing of bad faith supported by clear evidence of wrongdoing to support a tort claim meriting punitive damages - a threshold that is burdensome to meet. Even in SMA proceedings evidencing obvious misconduct, SMA panels are still wary of awarding punitive damages.

Similarly, while arbitration panels have the authority to award RICO (the Racketeer Influenced and Corrupt Organizations Act) treble damages, they are loathe to award such relief. In fact, since the first consideration of RICO damages in 1990, only three panels have granted a claimant RICO damages. Although the awards in which punitive and/or RICO damages were given are too few to constitute a pattern, it is noteworthy that RICO and punitive damage awards were given in cases where the owner had been determined by the SMA panel to have converted the charterer's cargo for his own benefit, which practice the arbitrators found particularly loathsome.

Ultimately though, there have been no punitive or RICO damage awards by SMA arbitrators since 1990, and the initial fear that the floodgates had been opened seems to have been unfounded.

2. Punitive Damages and Choice of Law

An interesting wrinkle in the award of punitive damages by arbitrators developed in the mid-1990's. The U.S. Supreme Court held in Mastrobuono v. Shearson Lehman Hutton (1995) (a non-maritime case) that punitive damages could be awarded by arbitrators trying federal questions even in jurisdictions in which state law does not allow arbitrators to award punitive damages. Specifically, the court said that where a federal question is involved (many maritime cases, or cases arising under the Federal Arbitration Act), it allows arbitrators to award punitive damages. The federal question preempts a state law if that state's law holds punitive damages are inarbitrable. The Supreme Court carved out a large exception to New York substantive law which has traditionally stated that arbitrators applying the laws of the State of New York cannot by law award punitive damages.

3. Judicial Review

The threshold for overturning awards, quite correctly, has always been very high. U.S. Courts tend not to disturb awards, because they like to see that alternative legal forums are viable in order to relieve the growing pressures on the court system.

In the past, courts would only review arbitration awards for reasons of public policy, fraud, duress, undue influence, excess of authority and manifest disregard for the law.

Recently, however, some courts have been willing to more carefully review arbitration awards where the arbitration clause required the arbitrators to lay out the specific findings of fact and conclusions of law by which they reached their decision. Such arbitration clauses have been viewed by several Circuit Courts as expanding the grounds for judicial review beyond those enumerated by state or federal statutes. Typically, these courts have overturned the arbitrators' decision if the arbitrators either misapplied the law or their findings of fact were not based on "substantial evidence."

But not all courts have enforced arbitration clauses that expand judicial review. Instead, District Courts that have confronted the issue are currently split on whether an arbitration clause expanding judicial review should be enforced or whether the clause itself impermissibly directs a court to exercise powers beyond those granted by federal or state statute.

4. Judicial Review and Maritime Cases

With respect to maritime cases, the Third Circuit Court of Appeals, in 1996, affirmed a lower court's refusal to enforce an arbitration panel's decision. In that case, a tanker helmsman tested positive for drug use and was subsequently dismissed. The arbitrator granted the helmsman's request for reinstatement. However, the Court of Appeals held that courts may deny enforcement of arbitration awards that contravene a well defined public policy - in this case the important public policy in protecting safety and environmental interests. Although no maritime arbitration awards have been overturned since the Third Circuit case, it seems likely arbitral awards may be subject to closer scrutiny in the future.

5. Human Infrastructure

In the early 1950's, New York maritime arbitration was excoriated as being dominated by a small cadre of arbitrators who allegedly contrived to keep most arbitrations within their exclusive control. This criticism evolved into an often repeated mantra, to the effect, that New York maritime arbitration rested exclusively with a group commonly characterized as "the Twelve Apostles." Whether or not the criticism was justified or true has become moot because the evolutionary process has, in fact, resulted in a published roster of approximately 120 qualified arbitrators representing a cross-section of the industry. It is important to note that along with the present availability of a significant number of arbitrators, there has been a gradual introduction of the dynamics of youth.

Some Future Trends

Predicting the future has always been a precarious undertaking, but some reasoned assumptions about further changes can be made with an acceptable degree of certainty.

One change which has affected almost everyone is the breathtaking acceleration of the speed of communications. First the fax, then voice mail and now e-mail and the Internet have changed the way the commercial world communicates.

Every major shipping related business, from owners to P&I Clubs to class societies to law firms, has a web site and e-mail capability. Information about companies and individuals and factual disputes is available instantaneously at the double click of a computer mouse. This fast proliferation of communication technology has also changed the manner in which the legal; world operates. Court decisions are put on the Internet and are available, at no charge, directly from the courthouse. Asset searches can be performed directly from one's desk and documents are transmitted by e-mail, revised and retransmitted.

This technological revolution is likely to manifest itself in the world of maritime arbitration in several ways. It is likely that written briefs will be submitted to arbitrators and opposing parties by e-mail. Also, the panel's decision will be transmitted to the parties the same way. The panel will also communicate with the parties and each other by e-mail, allowing for prompter resolution of issues such as arbitrator appointments, briefing and

hearing schedules and discovery. Video conferencing allows testimony from far corners of the world to be presented to the panel instantaneously on the computer screen or on video tape.

Currently, SMA awards (which are reasoned and, unique to SMA, published quarterly) are available on the LEXIS computer research service, for a fee. Ultimately, we anticipate that the SMA will keep pace with available technology by putting the awards on its own website where the awards can be read, searched and downloaded into one's own computer. Although the law does not mandate that previous decisions be followed as precedents, these decisions are, in fact, cited in subsequent cases to edify and provide for a reasonable degree of reliable consistency.

Aside from technological advances, the future may see some limited expansion of judicial review of arbitration awards ("Judicial Review" discussed supra), with the likelihood of more awards being vacated or modified by the court system.

Finally, it is extremely difficult to predict whether the retrenchment in the award of punitive and RICO damages may be short lived. It is probable that, in an increasingly competitive marketplace, arbitrators may feel pressured to "send a message" to those who reprehensibly, obviously and repeatedly abuse the system for financial gain.

Overall, the technological revolution should lend itself toward quicker and more economical resolutions of arbitrable disputes. These changes will fit in with the flexibility and the innovativeness manifested by SMA arbitration. We anticipate that the dynamic, less rigid, user-friendly reality of New York, as a prime center of maritime arbitration, should gather more popularity and significance as the future unfolds.

(This article was written by John G. Poles, Esq., John C. Stratakis, Esq. and Jana N. Byron, Esq., members of the New York law firm Poles, Tublin, Patestides & Stratakis, LLP)

COGSA AND BURDENS OF PROOF

The Effect, If Any, on the Burdens of Proof by Incorporating Cogsa by Reference into a Charter Party

By Chester D. Hooper [1]

Courts, arbitrators and authorities differ on the effect to the burdens of proof of the incorporation of COGSA into charter parties. [2]

There are basically three choices of burdens of proof to apply between the owner and charterer of a vessel: (1) Those of a private contract of carriage or bailment; (2) those of common carriage; and (3) those of common carriage as altered by COGSA. Under private carriage, the parties have complete freedom to define the rights and liabilities of both owner and charterer. The charter party that evidences the private contract may also define the burdens of proof, but charter parties seldom do.

The ability of the parties to a private contract to define the burdens as they choose is the distinguishing factor between private and common carriage. A common carrier is held to strict burdens, burdens which may not be altered by contract. [3]

A review of cases and authorities tell us that the incorporation of COGSA into a contract of private carriage does not prohibit the parties from defining the burdens as they see fit. COGSA, if incorporated into a private contract, would be incorporated as terms of the contract. It would not be incorporated with the force of law. Thus, any specific provision of the charter party would take precedence over the general incorporation of COGSA.

The well known contract interpretation rule that specific terms take precedence over general terms explains the effect of COGSA's incorporation into a charter party. If the specific terms of a charter party express an intent of the parties to apply burdens of proof that differ from COGSA's, those burdens rather than COGSA's should apply. If the parties do not express an intention to apply any burdens of proof other than COGSA's, the burdens of proof attributable to COGSA should apply.

A close reading of the landmark case of Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941), 1941 AMC 1697

supports this suggestion. Commercial Molasses concerned a tank barge, which had sunk in calm seas while being loaded.

The Supreme Court explained that sinking of a barge in calm seas would give rise to a presumption of unseaworthiness. The barge owner was, however, able to overcome that presumption with evidence, obtained after the barge was raised, that the barge had no discernable unseaworthy condition that could have caused the sinking.

The Supreme Court did not require cargo interests to explain the precise cause of the loss. To the contrary, Mr. Justice Stone explained that even in the private contract of carriage, the vessel interests, as bailee, had the burden to come forward with evidence to explain that the sinking was not their fault. They were able to do so in the Commercial Molasses case.

The Supreme Court explained the private carrier duty as follows:

> The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss which it is alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. . . . If the bailee fails it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely. . . .
>
> Whether we label this permissible inference with the equivocal term "presumption" or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start.
>
> Proof of the breach of warranty of seaworthiness stands on no different footing. The trier of fact may in many situations infer the breach from the unexplained circumstance that the vessel, whether a common or private carrier, sank in smooth water. . . . Whether in such circumstances the vessel has the status of a private bailee is of significance only in determining whose is the burden of persuasion. Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve.

1941 AMC at 1702-03 (citations omitted).

The Supreme Court explained that in the case of a tie, the cargo interests in private carriage would not prevail while they would prevail in a common carriage tie.

The Commercial Molasses court explained the burdens attributable to common carriage as follows:

> Hence we are not concerned with the rule that one who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show

> that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary "bailee" but because he is a special type of bailee who has assumed the obligation of an insurer. ...
>
> For this reason the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or because he is a common carrier or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. ... And in that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception. ... A similar rule is applied under the Harter Act, which gives to the owner an excuse for unseaworthiness, if he has exercised due care to make his vessel seaworthy, for there the burden rests upon him to show that he has exercised such care.

1941 AMC at 1700-01 (citations omitted).

The question to be answered is whether the incorporation of COGSA by reference into a charter party also incorporates the burden of proof rules attributable to COGSA. R. Glenn Bauer argues that such an incorporation does not also incorporate the burdens often attributable to COGSA while Chandler argues that it does, or should.

If the Commercial Molasses tank barge charter had, in 1937, incorporated the then new COGSA by reference, the Supreme Court would have long ago given us the answer to this question. It did not, and we are still struggling to determine the answer.

The general rule of contract interpretation should give us the answer. If the specific terms of the charter party express an intention of the parties to place the burden of proof on one party or the other, that intent should be upheld even if it is contrary to COGSA, and even if COGSA were incorporated by reference into the charter party. If the parties wished to incorporate the burdens of proof attributable to COGSA, they could say so. They could easily state that COGSA is incorporated into the charter party and would govern the charter party as if it applied with the force of law.

The absence of the burdens attributable to COGSA does not mean that cargo interests bear the burden to prove precisely what caused the damage. Cargo interests are, of course, assisted by the presumptions explained by Commercial Molasses.

An example of this common sense approach may be found in Nissho-Iwai Co., Ltd. v. M/T STOLT LION, 617 F.2d 907, 1980 AMC 867 (2d Cir. 1980) *appeal after remand*, 719 F.2d 34, 1983 U.S. App., 1984 AMC 2611 (2d Cir. NY, 1983). There, the charterer, Stolt Nielsen Inc., argued that the incorporation of COGSA into a charter party via the U.S.A. Clause Paramount also incorporated the burden rules attributable to COGSA. The Second Circuit did not reach that question. Instead, it interpreted the time charter party through instruction it received by an article written by R. Glenn Bauer, hereafter to place the burden of proof on the vessel owner.

> Parcel as time charterer makes three arguments in support of its contention that Anglomar must bear the burden of proving freedom from negligence in order to be indemnified by Parcel. First, Parcel contends that the Time Charter itself, which governs the relationship between Anglomar and Parcel, places the burden of proving freedom from negligence on Anglomar. Second, Parcel argues that a bailment relationship exists between a vessel owner and a time charterer with the time charterer as bailor and the vessel owner as bailee. Under federal bailment law, according to Parcel, if the time charterer can make out a prima facie case by establishing the loss of his goods, then the burden shifts to the bailee, the vessel owner, to prove that the non-existence of negligence is as probable as its existence. Finally, Parcel contends that by virtue of a "Clause Paramount"

> contained in the Time Charter, the terms of COGSA are incorporated into the Time Charter and governs the relations between the vessel owner and the time charterer. According to Parcel, once COGSA is brought into the Time Charter, the vessel owner becomes the "carrier" for the purposes of COGSA and the time charterer becomes the cargo interest, imposing upon the vessel owner the burden of a common carrier, once a prima facie case is made out, to come forward with evidence showing that the cargo was not damaged because of fault on its part. Because of our resolution of the first of these arguments, we need not address the second and third. . . . .
>
> As a general rule, as between a time charterer and a vessel owner, the responsibility for cargo loss falls on the one who agreed to perform the duty involved. See Bauer, *Responsibilities of Owner and Charterer to Third Parties -- Consequences under Time and Voyage Charters,* 49 Tul. L. Rev. 995, 1009 (1975).

STOLT LION, 1980 AMC at 874-76.

I remember during my argument of this case on behalf of Stolt Nielsen, Judge Feinberg asking where I contended clause 32 of the WARSHIPOILVOY (Rev.) form charter party placed the burden of proof. Judge Feinberg looked surprised when I answered that clause 32 did not place the burden anywhere. I then argued that common sense should place the burden on the owner because the owner had custody of the evidence.

The Second Circuit agreed with that approach.

END NOTES

1. B.A. 1963 Hobart College, J.D. 1970 Albany Law School of Union University. Member of the firm of Haight Gardner Holland & Knight, A Law Office of Holland & Knight LLP. Past President of The Maritime Law Association of the United States. The author wishes gratefully to acknowledge the assistance of Suzan Aydin, J.D. 1989 Erasmus University Rotterdam, L.L.M. 1999 New York University.
2. In the matter of the Arbitration between Mitsubishi International Corporation, the voyage charter of M/V Heering Kirse v. her owner, Tokei Shipping Company, S.M.A. No. 1171 (N.Y. Arb. 1977) (Donald Zubrod, Jack Berg, and Lloyd Nelson, Arbs.); In the matter of the Arbitration between Sociedade Portugesa de Navios Tanques Ltd., owners of M/V Marofa v. Amoco Transport Co., 1984 AMC 769, S.M.A. No. 1815 (N.Y. Arb. 1983) (R. Glenn Bauer, Chairman, J. Bond Smith, Jr., and Lloyd C. Nelson, Arbs.); George F. Chandler, III, *The Measure of Liability for Cargo Damage Under Charter Parties*, 20 J. Mar. L. & Com. 395 (1989); R. Glenn Bauer, *The Measure of Liability for Cargo Damage Under Charter Parties: A Second Look*, 21 J. Mar. L. & Com. 397 (1990).
3. Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941), 1941 AMC 1697.

IS VOUCHING-IN VALID? YES, BUT.....

In recent issues THE ARBITRATOR highlighted decisions where charterers entered into agreements containing conditions not back-to-back to the lead charters [see Vol. 31, No. 1, October 1999 re: *ERMIS* (SMA 3554) and Vol. 31, No. 2, January 2000 re: *THORSFREDDY* (SMA 3527) and *ELPIS* (1999) 1 Lloyd's Rep 606]. Yet another case of dissimilar conditions, this time involving different arbitration venues, came to light in a recent partial final award. The panel confirmed the legitimacy of vouching-in with the requirement that the defendant fully and fairly protect the rights of the ultimate indemnitor.

Liria Marine Company, Ltd., owner of *M/T VAKIS TSAKIROGLOU*, time chartered its vessel to Docenave. Docenave, in turn, voyage chartered the vessel to sub-charterer, Ensidesa. The time charter was on the NYPE firm and provided for New York

arbitration. The voyage charter was on a private form containing a London arbitration clause.

Disputes that arose between Charterer and Sub-Charterer as a result of the vessel's grounding were arbitrated in London and Charterer was held liable to Sub-Charterer for damages. Charterer attempted to vouch Owner, as the party ultimately responsible for the casualty, into the London arbitration. Owner refused to join or otherwise participate in the London proceeding other than to produce certain documents to assist Charterer in its defense.

Having lost in London, Charterer moved before the New York panel seeking an award binding Owner to the issues previously decided by the London arbitrators. The panel carved out two threshold issues: 1) is the practice of vouching-in a permissible action? and 2) in exercising this practice did Charterer fulfill all of the prerequisite conditions to protect Owner's rights?

The panel provided a detailed discussion of the practice of vouching-in and concluded it to be proper where "the tribunal hearing the original dispute does not have jurisdiction over a third-party which is ultimately responsible for the claimant's damages."

The panel unanimously concluded that Charterer was within its rights when it vouched Owner into the London arbitration. However, it also found that Charterer may have failed in its duty to fully and fairly protect Owner's rights in that proceeding. The London panel found the Master to be incompetent and the ship to have been unseaworthy, yet neither the Master nor any other ship's officer testified at the London arbitration.

In New York, Owner raised issues of errors in navigation and management of the vessel which, if proven, could excuse Owner from liability under the time charter and the Bills of Lading. The panel was not satisfied that the issues of the Master's competence and of latent defects of the vessel were fairly and fully presented in the London arbitration. It granted Owner leave to present any additional evidence on those two issues not previously presented in the London arbitration. See ***VAKIS TSAKIROGLOU*** , SMA 3567 [1999]

VESSEL SUITABILITY AND MITIGATION

Following the occurrence of a loss, what mitigation efforts must a charterer reasonably take in view of its belief that the chartered vessel is unsuitable? A recent award addressed such an issue.

In November, 1995, Network Shipping Ltd., a Del Monte subsidiary, entered into three one year time charters for the reefer vessels SPRINTER, SKIER and SCAMPER for use in Del Monte's dedicated palletized banana trade from Ecuador to California. Enterprises Shipping, part of the Restis Group in Piraeus, managed the vessels.

The arbitration arose out of a dispute concerning whether or not the vessels were "pallet friendly" and could properly carry the bananas after they had been converted from the traditional break bulk configuration of many older reefer vessels. The panel found that the vessels were not suitable for the intended service. A panel majority determined that the charterer had suffered extensive market losses because it could not use the vessels in the dedicated palletized trade and had acted reasonably in not permitting them to be used to carry bananas at all. The dissenting arbitrator said that the charterer had not acted reasonably in its mitigation efforts, which efforts seemed to have been driven in part by its legal position in the arbitration.

The vessels were built in the late nineteen seventies and early eighties and had been used in the break bulk trades. By the early nineties, many of the banana routes were being either containerized or palletized. These vessels were not suited for those trades. In December, 1991 and thereafter, the vessels were acquired by Enterprises with the intent of converting them to "pallet friendly" vessels and chartering them to major banana companies. It was generally understood in the trade that "pallet friendly" meant a vessel with 2.2 meters underdeck height in each hold or compartment so that a banana pallet could be maneuvered freely and stowed in each compartment. The vessels did not have this height.

The managers structurally altered the compartments. They cropped the overhead beams and reduced the height of the plenums. The latter was done without consideration that a smaller plenum might not provide sufficient area to allow proper air circulation without increasing the fan power. The vessels' electrical systems could not tolerate a fan power increase without major upgrade. None of the necessary machinery and electrical work was done.

The vessels entered Network's service in January, 1996 and almost immediately the personnel at the discharge port began complaining about high

pulp temperatures throughout various compartments. After examining into and excluding stowage, pre-shipment conditions and similar matters, the charterer focused on the vessels' cooling systems. It's surveyors and experts concluded that the refrigeration equipment and machinery were incapable of producing the air change rates required by each of the time charters.

Del Monte management decided that the vessels could no longer be used in the intended trade. The charterer, at first, canceled the charters, then rescinded the cancellations and maintained the hire payments. Management also determined that the vessels could not be used in any banana trades. Thus, the vessels' substitute employment possibilities were severely limited to lower paying freight markets.

The panel found in favor of the charterer that the vessels could not properly carry palletized bananas. The majority awarded the charterer most of its claimed damages, including proven damages for the losses paid to its customers. The panel noted that mitigation in a volatile market is often hard to assess, especially where the mitigating party's motives and good faith are called into question. The majority felt that since the vessels could not be used to carry palletized bananas and they reasonably believed that the vessels could not carry break bulk bananas, Del Monte did not have to take the risk of damage claims or loss of reputation by putting the vessels into such trades. The dissenting arbitrator focused on the fact that the mitigation efforts were constrained by the litigation posture of the charterer. He concluded they had not acted in good faith and would not have awarded the level of damages which the majority felt appropriate in the circumstances. See **SPRINTER, SKIER, SCAMPER, SMA No. 3558** [1999].

NY ARBITRATORS' FEES

In the spirit of attempting to involve its readers in the substance of this newsletter, THE ARBITRATOR poses the following question:

Do current SMA Members or others involved in the arbitral process perceive there to be a fee collection problem?

Manfred Arnold advises that the *Maritime Advocate* will address the subject in a forthcoming issue with the following observation:

> The method of settling arbitrators' fees is just one of the procedural features which distinguishes London from New York. In London, payment of the fees is due upon issuance of the award, and either party, upon full payment of its fee liability, can pick up the arbitration award.
>
> In New York, arbitrators issue their awards on credit, so to speak. As a general rule, payment is expected 30 days after issuance of the awards and comes either from the parties directly, from counsel or from the SMA Escrow Account.
>
> Because of this aspect, it is safe to say that over the years, New York arbitrators have not always collected full amounts due them under the awards. Realistically, that may have to be viewed as the expense of doing business and, although that does not make it right, it is an unfortunate fact of life. Of course, this is of little comfort for the individual involved in the occasional arbitration who gets paid a reduced amount, or worse, not at all. For others, it becomes an inconvenience and, to a degree, an embarrassment when they have to assume the unpopular role as the debt collector.

THE ARBITRATOR invites those readers with an opinion on this subject to make known their thoughts by letter to the Society's office or by e-mail to the Editor.

CORRECTION

In the January 2000 issue of THE ARBITRATOR, the article entitled CHOICE OF LAW erroneously began with reference to Letters of Understanding. The reference should have been to Letters of Undertaking. Our apologies to the author, Mr. David Martowski, for this editorial lapse.

For *THE ARBITRATOR*
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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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THE PRESIDENT'S CORNER

On behalf of The Society of Maritime Arbitrators I want to express to all of our readers our best wishes for the new year, the new century, the new millennium and beyond. The continued support which the Industry has shown to our Society in the past is greatly appreciated. Our members continue to stand ready to serve the Maritime community, be it as arbitrators, mediators or educators. HAPPY NEW YEAR!!

Lucienne C. Bulow

ICMA XIV - RESERVE THE DATE

As announced at the 13th International Congress of Maritime Arbitrators, held in Auckland, New Zealand last March, New York City has been selected to host the next Congress, ICMA XIV. This will be a repeat venue for New York, where ICMA V was held some twenty years ago during October 1981.

ICMA XIV will take place in New York's famous Waldorf Astoria Hotel on Park Avenue from October 22 through 26, 2001. Although the dates may seem to be far away, time has a way of fleeting, so kindly mark your calendars now.

The Planning Committee is hard at work to make this Congress a truly memorable event, both in terms of the papers to be presented and the array of attractions New York has to offer. A call for papers will be made later this year by Mr. Philip Yang of Hong Kong, listing suggested subjects to be addressed.

See you at the Waldorf in October 2001!!

By Pieter L.M. Vismans, Chairman -SMA Planning Committee for ICMA XIV

US COGSA 2000

Attendees at SMA's October 20, 1999 luncheon were treated to an extensive and detailed explanation of the proposed revision of COGSA, "Carriage of Goods by Sea Act, 2000."

President Bulow introduced the speaker, Vincent M. DeOrchis, Esq., and noted that COGSA 2000 is a far reaching piece of legislation, which has been 8 years in preparation, and is largely the work product of the MLA with the support of many Maritime Industry groups.

Vince DeOrchis titled his comments "Arbitration Forum Provisions in the New COGSA Proposal." He began his speech by noting that the latest draft of the COGSA Proposal, No. 6, which was issued in September 1999, has radically changed the forum provision with respect to both arbitration and litigation. The current draft is expected to be introduced to the United States Senate early this year.

Mr. DeOrchis noted that the original MLA Proposal had always intended that a cargo owner have the option of filing suit or pursuing arbitration outside the United States where the bill of lading contains such a provision. However, to avoid any misunderstandings, the MLA adopted the suggestion of the Senate staff that the COGSA proposal use language similar to the Hamburg Rules, Article 21, since this is already an accepted forum provision.

Under the most recent revision of the COGSA Proposal, a cargo owner has the option of filing suit or seeking arbitration with an ocean carrier in the United States if one of the following five factors are present: 1) the port of loading or discharge is in the U.S., 2) the goods are received or delivered by the carrier in the U.S., 3) the principal place of business of the carrier is in the U.S., 4) the contract was made within the U.S. and 5) the forum specified in the bill of lading is within the U.S.

The new COGSA proposal should help to avoid the potential problem associated with the "Sky Reefer" decision of 1995, which would allow a cargo claimant to have a foreign decision overturned by U.S. courts because the foreign court or tribunal failed to properly apply U.S. COGSA.

Following the presentation, Howard McCormack, the President of the MLA, stated that his organization strongly approved the legislation as currently drafted, and was making every effort to have it enacted into U.S. law.

During a question and answer period, Mr. DeOrchis noted that although the new legislation will apply to multi-modal transport, rail and truck operators were still not governed by the proposed legislation. Mr. DeOrchis stated that he hoped both rail and truck carriers would "come on board" once the proposal became law.

Reported by Joseph Cangelosi, Member SMA

MARITIME ARBITRATION - THE CLUB PERSPECTIVE

"There are three criteria by which the effectiveness of arbitration systems (e.g. New York, London, Paris) are measured: Consistency/Predictability, Speed, and Cost. A system which delivers well under these three heads will prove successful."

So concluded Mr. M.J.C. Salthouse, Assistant Manager in the FD&D Department of the North of England P&I Club, in a riveting presentation to approximately ninety lawyers and arbitrators at the November 1999 SMA luncheon. His talk provided insight into P&I Club focus on Maritime Arbitration Systems from two distinct perspectives; firstly as the ultimate purchaser of a contractual method of dispute resolution, and secondly as lawyer users of that system.

Mr. Salthouse defined freight, demurrage and defense cover (FD&D) as *a form of optional mutual insurance for legal and associated costs in relation to enforcing or defending certain types of ship owning risks.* FD&D cover is quite different from P&I cover in that it provides insurance for an owner only against costs, such as lawyers, correspondents, arbitrators, surveyors and other experts incurred in pursuing or defending those claims within the scope of FD&D cover. Perhaps the most important feature of FD&D cover is that it is discretionary in that it covers costs of enforcing only *proper* claims and defending only claims *improperly* brought in respect of vessels entered in the Class. The Directors of the FD&D Class, through the day to day activities of its Managers are free to pick and choose those claims likely to be won and to decline support for claims likely to be lost.

The speaker observed that Clubs do not choose the system for dispute resolution that an owner or charterer member adopts into his contract. Clubs do attempt to guide their members in that choice. The measuring criteria adopted by the Clubs, consistency/predictability, speed and cost, are valid from the perspectives of legal cost insurers and lawyer users of the system.

Mr. Salthouse considered that predictability derives from sources such as publication of arbitration awards, a strong body of case law and, consistency of awards among arbitrators. It is impossible to give good advice to an owner or charterer member or to make the discretionary choice between proper and improper claims unless results can be predicted with a degree of certainty.

He ventured that the interests of justice are not served if one side can unreasonably delay an arbitration. A system "works" if it can help a party seeking a prompt decision and, conversely, hinder a party seeking unreasonable delays. Linked to the speed of procedure is the need (or lack of need) for an oral hearing. Mr. Salthouse observed that systems that rely heavily on "Documents only" procedures are at a considerable advantage to a competitive system where an oral hearing (or hearings) is the norm.

"If a system does not allow a successful party to recover his costs," the speaker stated, "it will render a large proportion of charter party disputes uneconomic to pursue. Moreover, the ability to put the other side at risk on costs is an important tactical weapon encouraging a party with a legitimate claim and discouraging a party from running a spurious defense."

While Mr. Salthouse welcomed the change to the SMA Rules which now permit arbitrators to award a reasonable allowance for costs, including attorney fees, he urged:

- consistency among the arbitrators as to when such awards of costs are made and also the amount of costs awarded;

- an award of costs not be linked simply to the outcome of the arbitration. If the behavior of the winning party is such that they have, for example, wasted the time of both their opponent and the tribunal, they should be penalized in costs with the amount of costs awarded reduced or even extinguished.

In response to a question regarding the cost benefit of a reasoned award, Mr. Salthouse was most emphatic that publishing of an award is extremely important, well worth the minor incremental cost and time needed to produce it. He complimented the SMA for its valuable contribution to the arbitration process in its Award Service, which goes a long way to assisting lawyer users, owners, charterers and P&I Clubs in determining the consistency and predictability of New York Arbitration.

GLOBAL COOPERATION

Members and guests present at the SMA luncheon meeting on December 15, 1999 witnessed a toast to New York Arbitration and the millennium by speaker Ignacio de Ros, an admiralty attorney from Barcelona, Spain. The sparkling wine from Spain and Mr. de Ros' presentation were both excellent.

Mr. de Ros, in his presentation entitled "Making the most of Global Co-operation", detailed information relevant to the facility with which vessel arrests can be made in Spain. He addressed procedures, documentation, duration, and cost factors.

Mr. de Ros also discussed the use of computer generated graphics in Spanish courts in admiralty controversies. Judging by the ten or so examples which he presented, most relevant litigation arises from collisions. We saw several examples of botched crossings, over takings, and meetings at sea all superimposed over applicable navigation charts.

Mr. de Ros uses these computer generated depictions of vessel tracking, speed and fog conditions to construct a picture of prevailing conditions before and during the casualty, up to the point of impact, to accompany the testimony of his expert witness. The presentations are qualified by the expert (usually a master mariner) using vessel logs for course, speed and time and weather charts, tide tables, and other information independently documented by national agencies responsible for maintaining such data.

Reported by Joseph Cangelosi

CHOICE OF LAW

Does "Choice of Law - Jurisdiction Clause" in Letters of Indemnity and Letters of Undertaking override the charter party's Arbitration clause?

A recent New York arbitration award and a London Queen's Bench decision addressed this troublesome dilemma.

In **THORSFREDDY, SMA No. 3527** [1999], Owners were requested to divert from the vessel's originally designated discharge port of Qingdao, to Qinhuangdao, while performing under a time charter and various sub-charters. In return, sub-charterers issued Letters of Indemnity counter-signed by Time Charterers. Chinese customs authorities subsequently arrested the vessel at Qinhuangdao for alleged smuggling by cargo receivers, and Owners demanded indemnification from Time Charterers for delays caused by the change in the bills of lading's discharge port. The Time Charter Party provided:

> "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of New York + + + pursuant to the laws relating in arbitration there in force + + +.",

while the LOI executed by Charterers in consideration of Owners' agreement to discharge cargo at a port other than that described in the bills of lading, contained the standard provision:

> "This indemnity shall be construed in accordance with English Law and each and every person liable under this indemnity shall, **at your request,** submit to the jurisdiction of the High Court of Justice of England." [emphasis added]

The panel unanimously decided the threshold jurisdictional question in Owners' favor, holding that the LOI did not confer exclusive jurisdiction to the High Court of Justice but simply provided for the submission of any dispute to the High Court at Owners' election. It emphasized that there was no evidence of the parties' intention to deny Owners' right to have New York arbitrators resolve any dispute arising from this very situation which was specifically addressed in the charter party; and that if Charterers had intended to substitute English law and jurisdiction for New York law and arbitration, they should have, at the very least, deleted the elective language in the LOI's "Choice of Law - Jurisdiction Clause" and made the provision mandatory.

Separate disputes involving this very same issue presently pending between the vessel's other charterers, could have been resolved in the one New York proceeding had the parties chosen to incorporate the SMA Rules in their arbitration clauses (Section 2 - Consolidation).

In **The ELPIS** [1999] 1 Lloyd's Rep 606, plaintiffs, described as "Owners of cargo", obtained a writ *in rem* against the vessel which was arrested the following day. A P&I Club Letter of Undertaking was posted on the Vessel Owners' behalf and the ship was released. Thereafter cargo owners made an application to the Admiralty Registrar to add Charterers, who may have had an interest in the cargo, as a plaintiff in the action. Vessel Owners argued that leave should not be granted because the charter party provided for London arbitration. Cargo interests argued that the charter party's London arbitration clause was inoperable because the LOU issued on the ship's behalf in consideration of "cargo owners" releasing the ship, provided (1) that

cargo owners would not commence and/or prosecute legal or arbitration proceedings "otherwise than before the court referred to below"; and (2) Vessel Owners agreement that the claims would be "subject to English Law and to the exclusive jurisdiction of the English High Court of justice."

The Queen's Bench affirmed the Admiralty Registrar's decision to allow the addition of Charterers as a plaintiff. In holding that the LOU was clear and unambiguous and that cargo interests promised not to proceed other than in the High Court, the Court emphasized that this reference was "to ensure that there was one set of proceedings for cargo claims all of which were to be brought in one forum."

Lessons Learned: Ensure that the "Choice of Law - Jurisdiction Clause" of LOI'S and LOU'S issued 'in the heat of battle' clearly reflect the parties' intentions.

By David Martowski - Member SMA

RECENT AWARD: SHARED LIABILITY FOR VESSEL STABILITY

A recent award addressed claims arising from the failed attempt to transport dredge spoils aboard the barge PATRICIA SHERIDAN on a voyage from New York harbor to Corpus Christi, Texas. ECDC Environmental (ECDC) contracted with the Port Authority of New York and New Jersey to ship 150,000 tons of the spoils to Texas, then on by unit train to a landfill in central Utah. Charters were concluded with a number of carriers, Sheridan Transportation Corporation (Sheridan) being one. ECDC was unfamiliar with the intricacies of ocean transportation and Sheridan had never carried dredge spoils nor was it familiar with the carrying characteristics of the product.

Two key clauses in the charters were:

> *"1...a full cargo which the Charterers shall provide consisting of dredge spoils stabilized with quick lime or customary stabilizing agents."*
>
> *"19(g). Cargo to be loaded in stabilized condition so as not to cause any stability problems.*"

The initial wording of 19(g) contained the word "dry", however, this was changed to "stabilized" after ECDC insisted it could not guarantee the cargo would be completely free of water. ECDC's plan for dewatering and stabilizing the cargo was to add 6% lime. Lime produces an exothermic reaction which is intended to burn off much of the ingrained water.

The PATRICIA SHERIDAN, one of two Sheridan barges scheduled to lift dredge spoils, was built in 1966, classed by ABS, had two hatches in each of three cargo holds and upper wing trim plates in the cargo compartments. She had a history of a leaking ballast tank, several sandwich patches at points along the hull and various temporary repairs performed subsequent to a prior grounding in the James River. The barge was then due for her sixth special survey.

The barge departed New York on October 8, 1995, and proceeded without incident until October 11, when she emerged from a rain squall showing a port list. The vessel was immediately diverted into Charleston, however, the cant worsened as the weather deteriorated and the Master and pilot decided to intentionally ground her on a sandy bottom. A few hours later, the hatch covers at no. 2 hold came off and a portion of the cargo washed into the sea.

The barge was subsequently refloated, the hatch covers recovered and reinstalled, however, the parties could not agree which would be responsible for the cost and expense of stiffening the cargo so the voyage could be completed. Also, the USCG ordered ECDC to clean up the cargo spill pursuant to its authority under CERCLA. The dredge spoils were believed to be contaminated with various harmful chemicals. The cleanup was accomplished

at considerable expense and Portland cement was added to stiffen the cargo and make it more transportable. The barge then went on to complete its voyage.

Sheridan claimed damages of $4,322,013 for repair costs, loss of use of the vessel and a variety of other costs and expenses. ECDC's claims total $7,753,882, covering the spill cleanup, material handling, storage and other assorted costs.

The panel noted that while Sheridan was responsible for the barge's seaworthiness, Clause 19(g) expressly provided for ECDC to assume stability risks, particularly as stability was affected by the cargo's condition. The panel's unanimous decision analyzes the rights and obligations of the parties under COGSA, the application of the Pennsylvania Rule as argued by ECDC and the net effect of Clauses 1 and 19(g).

The panel rejected ECDC's 19(g) argument that the clause was simply a cargo acceptance clause and only required ECDC to condition the cargo with a stabilizing agent, subject to Sheridan's right to accept or reject the cargo for shipment. The panel also disagreed with Sheridan's contention that ECDC breached clause 19(g) because it loaded a cargo that could and did, in fact, shift.

After accepting extensive documentary evidence and witness testimony, the panel concluded the initial list developed as a result of extrinsic water on board, particularly in no. 2 port ballast tank, followed by a creep of the upper cargo layer, gradually magnifying the heel to dangerous proportions. The arbitrators did not accept expert testimony, key to ECDC's position, that some 500 tons of water had entered the barge causing the eventual attitude of fourteen degrees to port. The panel concluded the only way the barge could have attained the fourteen degree list was for there to have been a dislocation of cargo. In summary, the panel concluded that neither the barge's unseaworthy condition nor the cargo shipper's omission was the sole cause of the casualty. Rather it was a combination of the two problems that caused or contributed to the casualty. Neither condition was disabling in the sense that it, in and by itself, could have caused the casualty. Therefore, the panel concluded the parties should bear equal liability for the consequences of the incident.

The panel's award also analyzed the various major items of damages and discussed the bases of why they were or were not acceptable items of damages. In the end, ECDC was awarded $1,377,548.49. See **PATRICIA SHERIDAN**, **SMA No. 3569** [1999].

IN MEMORIAM

The international maritime community has lost a well respected member, Pierre Dardelet, who was former President of the Chambre Arbitrale Maritime de Paris and of FONASBA. He was a member of the Steering Committee of the International Congress of Maritime Arbitrators (ICMA). He will be sorely missed.

The SMA notes with sadness the passing of a great supporter, Donald F. Mooney, an outstanding member of the New York maritime bar and a member of the Maritime law Association since 1952. A frequent attendee at SMA luncheons, throughout his career, Don was actively involved in presenting cases to SMA panels. He was widely respected for his professional integrity and hard work on behalf of his clients.

For THE ARBITRATOR
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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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THE PRESIDENT'S CORNER

The International Refrigerated Transportation Association (FRTA) held its fifth annual conference in Seattle this past June. I was invited to serve as the Chair of a Mock Arbitration Panel staged for the IRTA delegates, who numbered about 200. Based on an SMA award, the proceeding provided the participants in the arbitration an excellent opportunity to demonstrate how arbitrations are conducted in New York under S.MA rules.

This presentation was most timely for carriers, vessel operators (NVOCC's) and shippers, who, under the new Ocean Shipping Reform Act which took effect on May 1, 1999, are now able to negotiate private, unpublished freight rates and service contracts. Adding arbitration clauses to these newly developing contracts as well as in bills of lading, container and equipment leases and stevedore agreements could be of benefit to all parties.

Contrary to common belief, we continue to find broad participation of SMA members in New York arbitration decisions every year. Over the past twelve months seventy-three New York arbitrators were involved in at least one arbitration. Twenty-eight arbitrators participated in more than two arbitrations.

In our continuing effort to be responsive to the needs of the maritime and related industries, I introduced the new SMA Rules for Mediation at the Xlllth International Congress of Maritime Arbitrators in Auckland, New Zealand. Although arbitration is still the preferred method of Alternative Dispute Resolution ("ADR"), and the Mediation Rules are not intended to replace arbitration, there are definitely certain types of cases which could benefit from being mediated.

The Mediation Rules are non-binding and confidential and may be used in tandem with current SMS Arbitration Rules. As such, parties and their attorneys can now have an additional alternative means to resolve their disputes in New York. These methods of ADR should continue to allow parties to seek resolution of their disputes in a time-efficient and cost-effective way, to their mutual satisfaction.

Copies of these new Rules for Mediation are available on request from the SMA office.

I am pleased to report that at the Congress, the SMA won its bid to host the XlVth International Congress of Maritime Arbitrators in New York in October 2001. These biennial Congresses which are attended by the international arbitral and legal communities offer great opportunities for the exchange of ideas among arbitrators, lawyers and parties to arbitration.

Lucienne C. Bulow

AUCKLAND HOSTS ICMA XIII

Nearly 200 delegates consisting of leading maritime arbitrators and attorneys met in Auckland March 1-5, 1999 to take part in the XIIIth International Congress of Maritime Arbitrators (ICMA). The Congress was hosted by the Arbitrators' and Mediator's Institute of N Z Inc.

The program began with a Powhiri in which London arbitrator Bruce Harris, as the representative of the delegates, was challenged and then welcomed by Maori warriors in traditional ceremonial garb. A program followed during which the Governor General of New Zealand, Elders of the Maoris and the Mayor of Auckland welcomed the delegates.

The traditional Cedric Barclay Memorial Lecture was delivered by the Honorable Justice Bradley H. Giles. Sadly, a month and a half after delivering this Lecture, Justice Gilles died of cancer at the age of 55. Justice Giles who was a partner of Russell McVeagh McKenzie Bartlect & Co. and probably New Zealand's pre-eminent litigator in the area of maritime law, was an alumnus of the University of Michigan Law School.

A number of thoughtful papers were presented on topics varying from Developments in Maritime Arbitration all over the world, to the question of whether arbitration actually "delivers," to the training of arbitrators and to current legal issues relating to carriage of goods and bills of lading. Papers on the implication of the ISM Code to Salvage and pollution were delivered as well as others on more specific problems under Time Charter Parties, on security and enforcement. Discussions occurred regarding immunity of arbitrators, the role of the courts, mediation and a myriad of other subjects.

The next Congress will be held in New York under the auspices of the Society of Maritime Arbitrators in October 2001.

SMA Vice President Pieter Vismans has been appointed Chairman of the Ad-Hoc Executive Committee for the Planning of ICMA XIV.

MLA CENTENNIAL

The Maritime Law Association celebrated its centennial anniversary during the first week of May 1999 in New York, presided over by its President Howard M. McCormack. The MLA is synonymous with the development of maritime law in the United States and through its several committees (Arbitration committee through its MLA/SMA Liaison subcommittee and Salvage committee) plays an increasingly important role in the conduct of maritime arbitration in New York. The SMA is proud of the mutually-beneficial relationship established with those committees which serve to maintain the appeal and improve the process of maritime arbitration in New York.

BIMCO SEMINAR IN NEW YORK

On September 30,1999, BIMCO sponsored another in its series of seminars "Towards Better Decisions." Henry E- Engelbrecht, Past President of the SMA was there and has filed the following report.

BIMCO's first tanker seminar in New York was held on September 30th in the great hall of the New York Bar Association. Sponsored by the Bar Association (Admiralty Committee), The Society of

Maritime Arbitrators (New York), Maritime Law Association (New York) and the Connecticut Maritime Association, over one hundred guests attended. representative of the broad maritime related industry resident in the New York area. The seminar focused primarily on laytime and demurrage issues under tanker voyage charter parties.

Donald Davies, Esq., the well known London Maritime Arbitrator, spoke on legal issues relevant to arrived ships, notices of readiness and the impact on commencement of laytime.

Alfred E. Yudes, Jr., Esq., partner, Watson Farley & Williams, addressed the issue of berth congestion and other causes preventing prompt berthing, such as cargo unavailability, weather conditions, port restrictions, navigation risks, strikes and other causes beyond charterers' control.

James H. Hohenstein, Esq., partner, Haight Gardner Holland & Knight spoke on drafting clear and complete Statements and Statements of Fact based on contemporaneous information and supported by adequate documentation.

The interim luncheon, sponsored by Haight Gardner Holland & Knight, was addressed by Lucienne C. Bulow (SMA President), who spoke at length on the advantages of arbitration in New York under SMA Rules.

Legal issues arising from slow loading and discharging were discussed by Leroy Lambert, Esq., partner, Healy & Baillie, in the context of warranty, typed and special clauses, and the consequences of breach.

Eric L. Lenck, Esq., partner, Frechill, Hogan & Mahar, spoke on the laytime issues which arise when things go wrong, such as shore/ship breakdown, explosion, collision, strike and boycott, based on New York SMA awards and federal case law dealing with charter party disputes. Related topics, such as the ISM Code, oil majors approval clauses and Y2K issues were also discussed.

Jack Berg, Maritime Arbitrator and former SMA President, addressed the historical background of force majeure, contract frustration and elements from which they arise. Governing legal principles, leading cases and arbitration decisions in this context were also discussed, as well as demurrage and detention claims.

A cocktail party, sponsored by Healy & Baillie and Freehill, Hogan & Mahar, most appropriately marked the conclusion of one of the more interesting seminars to take place in New York."

In a related development, Soren Wolmar has been appointed Chairman of an SMA ad-hoc Liaison Committee with BIMCO. He will be working with John Besman and Don Zubrod, who have been involved with BIMCO for many years, to coordinate our efforts in organizing future joint events.

ARE YOU CONFUSED BETWEEN VESSEL ARREST AND VESSEL ATTACHMENT? READ ON--

The difference in the U.S.A. between the arrest of a vessel by a maritime lien holder and the attachment of a vessel by a creditor is sometimes confusing. In either case, the owner's vessel is seized by a U.S. Marshal or sheriff and will remain that way until sold by a court to satisfy a judgment, unless the owner arranges to substitute sufficient security in order to obtain her release. The legal distinction between the two forms of seizure is worth noting.

Under maritime law a vessel may be seized both *in rem* and *in personam*. An *in rem* proceeding is brought solely against the vessel, which is considered to a have a legal personality of her own. Usually the vessel owner bails the vessel out by putting up security, otherwise the vessel may later be sold to satisfy a judgment. A vessel may be arrested in rem only if the plaintiff has a maritime lien against the vessel.

On the other hand, any property of an owner who is sued *in personam*, including any vessel he may own, may be seized by the process of attachment when the court has no jurisdiction over the owner, i.e. he cannot be found and served with a summons and complaint in the area over which the court has jurisdiction. If a foreign shipowner does business in the court's jurisdiction, but cannot be found in order to accept service of process, his property may be attached. The plaintiff does not have to make an exhaustive search to find the defendant. Reasonable efforts are sufficient.

In an *in rem* proceeding, the court obtains jurisdiction only over the arrested vessel, and its owner is not personally liable for any remaining balance if the vessel is sold but the proceeds are inadequate to cover the judgment.

In the case of an *in personam* suit against an owner, where a vessel is attached by a court and later sold, the owner is still responsible for the unsatisfied balance of the judgment obtained against him. As noted, the vessel attached may have no relation to the claim brought against the owner but is treated like any asset of the owner, such as a bank account, found within the court's jurisdiction. For this reason, attaching a vessel as property of the owner in a claim for money not related to the vessel does not require the plaintiff to have a maritime lien against the attached vessel.

Finally, the two remedies may be exercised simultaneously in the same suit.

Suits to arrest a vessel *in rem* may only be filed in Federal Courts, since they have admiralty jurisdiction. Foreign resident attachments may be carried out either under federal rules in federal courts or in state courts under state statute where they exist.

A recent constitutional challenge to a Louisiana non-resident attachment statute, on the grounds that it violated the commerce clause by seizure of a nonresident owner's U.S. flagged vessel was rejected by a Federal Court in Louisiana on the grounds that attachment is a procedural matter and not an attempt to regulate interstate commerce. Vivan Tankship Correspondence v. Candido Castro, 24 F. Supp. 650. (De Orchis, Walker & Corsa, LLP "Client Alert", Winter 1999)

MV "ANNA" - WRONGFUL ARREST IN THE GUANGZHOU (CANTON) MARITIME COURT

This article was written by Nigel Binnersley in Healy & Baillie LLP's Mainbrace - May 1999

The concept of wrongful arrest is very much alive and kicking in China today. A reported decision from the Guangzhou Maritime Court in South China concerning the vessel "Anna" confirms this fact.

The vessel loaded a cargo of wheat in the U.S. and arrived in Southern China in October 1996. The Chinese consignee applied to the Guangzhou Maritime Court to arrest the vessel on the basis that the Master had allegedly wrongfully marked the bill of lading describing the apparent condition of the goods. The vessel was arrested and the Owners provided security for the vessel's release.

In breach of the relevant Chinese procedural law, the Claimant failed to bring legal proceedings in the Guangzhou Maritime Court within the required 30 day limit. At the request of the Owners, the Court released the guarantee. Thereafter, the Owners sued the Chinese Plaintiff for wrongful arrest and claimed damages.

The court handed down judgement in favor of the Owners indicating that the arrest was indeed wrongful because the remarks made by the Master upon the relevant bill of lading were correct. The court allowed the wrongful arrest application to succeed but disallowed the Owner's claim for loss of time and bunkers and shifting fees, the P&I Club's correspondent's fees, the survey fees of the Hong Kong-based surveyors and solicitors. The court, however, allowed the Owner's claim for its local agent's fees, local lawyers' fees and the court's arrest fee, together with interest.

The court awarded the Owners a total of nearly US$62,000 plus interest at 7%. The decision is encouraging for a number of reasons but principally because counter-security is required to be provided from an arresting party prior to any arrest. There have been a number of spurious arrests of vessels in China over the years and this decision may give overzealous claimants pause for thought. Secondly, the judgment of the Guangzhou Maritime Court, which is possibly the busiest of the nine maritime courts in China today, is against a local Chinese company and in favor of a foreign company. Although the decision of the court is not binding on the other maritime courts in China, it can only be viewed as good news for the international shipping community.

NO LIEN FOR BUNKER SUPPLIERS

Mr. Justice Clarke in the "YUTA BONDAROVSKAYA" has reaffirmed the position that a supplier of bunkers to Time Charterers does not acquire a maritime lien over a vessel.

Whilst having sympathy with the position of an unpaid bunker supplier, the Judge summarized the position in English law as follows:

"...If a bunker supplier wishes to ensure payment, and is not willing to give a time charterer credit, he should obtain the consent of the shipowner or demise charterer, as the case may be, before the contract is made, or he should insist on payment in advance, or upon security from the time charterer. There is, however, no warrant for holding a shipowner or demise charterer personally liable without his consent."

(Waterson Hicks Newsletter, January 1999)

STOWAGE, LASHING AND UNSEAWORTINESS

The following summary recently appeared in the Waterson Hickes, Newsletter. The decision appears to be somewhat at odds with the "MASTER PANOS" award, also summarized herein. The differences might be in the facts, the venue, or both.

Part of a deck cargo of timber loaded on "IMVROS" was lost overboard during heavy weather. The cargo had been loaded and stowed under the directions of the Charterer's supercargo although the lashing of the cargo was carried out by the crew. The arbitrators held the loss to have been caused by inadequate lashing in breach of the IMO Code of Practice for loading timber and considered that the Master should have been alive to this possibility.

The Charter party was on amended NYPE terms. There was an express absolute obligation of seaworthiness on the Owners while responsibility for the proper loading and lashing of the cargo lay with the Charterers under the supervision of the Master.The Clause Paramount had been deleted and therefore U.S. COGSA was not applicable. There was also an additional clause placing the obligation of loading and lashing upon the Charterers to the Master's satisfaction.

The arbitrators accepted the Owners' submission that responsibility for the proper loading and lashing of the cargo lay with Charterers irrespective of whether bad lashing made the vessel unseaworthy. The Charterers appealed to the Commercial Court where it was held by Mr. Justice Langley that reference to lashing being performed under the supervision of the Master or to the Master's satisfaction were not qualifications upon Charterer's obligation to load and lash the cargo. The Owners were not in breach of their obligation of seaworthiness since they arose from Charterer's failure to load the vessel properly, for which they were liable as between Owners and themselves. The Judge also held that Owners' right to intervene would not normally carry with it liability for failure to do so. Charterers' argument that the words "under-the supervision of the Captain" made the Master responsible for stowage or placed the onus on Owners to show that the damage was not due to an omission by him to exercise proper supervision was rejected unless it could be demonstrated that bad stowage was

attributable only to the Master's orders or was the result of matters of which the Master but not the Charterers was aware.

RECENT DECISIONS:
BACK TO BACK CHARTERS - DON'T COUNT ON IT

A recent final award involving the M/V ERMIS, SMA 3554 (1999), illustrates the peril of drafting charters which are presumably back to back, but are not. In this context, an incorporation by reference of sales contract terms or other agreements into a charter can be risky business if they are not fully understood. The ERMIS dispute highlights this problem.

Cargill Incorporated (Cargill) sold a 50,000 ton cargo of corn of National Livestock Cooperatives Federation (NLCF) FOB vessel Puget Sound. The sale provided for Cargill to directly settle loadport demurrage with the shipowner. NLCF entered into a charter with Pan Ocean Shipping Co. (Pan Ocean) and, shortly thereafter, Pan Ocean entered into a charter with Louis Dreyfus Corp. (Dreyfus), as disponent owner. The ERMIS was nominated to lift the corn cargo.

The vessel presented at Seattle on January 30, but was not loaded until February 27. The delays were the result of massive rainstorms in the Pacific Northwest causing flooding and major interruptions of rail service into the port. The issue before the panel centered upon the nature of the delays and whether the respective shipowner or charterer bore responsibility for the time lost, about $284,000. The parties stipulated to an "Agreement for Consolidated Arbitration" whereby the issue could be submitted to one tripartite panel for decision under the Dreyfus/Pan Ocean and Pan Ocean/NLCF [Cargill] charters.

The arbitrators first addressed the Dreyfus charter and unanimously agreed the vessel's delay was the result of inland cargo supply problems and congestion and not because of bad weather at the berth. The evidence established the loading delays were caused by flooding and a complete shutdown of rail service into Cargill's Seattle facility. However, in finding for Dreyfus, the panel agreed there was nothing in that charter party, express or otherwise, which relieved Pan Ocean from responsibility from demurrage.

Pan Ocean first argued it was not liable for demurrage under the Dreyfus charter, but alternatively maintained if the panel found otherwise it was owed a similar sum by Cargill because the charters were identical with respect to loadport terms. The panel disagreed.

The Cargill/NLCF sales contract provided, in part, for "[N]LCF usual terms & practices, and generally accepted international business practices." Cargill argued that the North American Export Grain Association (NAEGA No. 2) was a part of the Pan Ocean charter because the charter incorporated by reference the "general Terms and Conditions for NLCF Tender" and "Contract between Charterers [NLCF] and Suppliers [Cargill] of the cargo".

In finding for Cargill, the panel concluded that NAEGA No. 2 was the usual contract form for shipments of bulk grain sold FOB out of the United States and that Clause 20 of that contract, "Strikes or Other Causes of Delay in Delivery", permitted delays in delivery due to "exceptional impediments to transportation". NAEGA No. 2, Clause 20 was incorporated into the Pan Ocean charter by reference as an "[a]ccepted international business practice" not in conflict with other provisions of the charter.

In summary, the panel concluded the charters were not identical and made a point of remarking that its decision reflected those differences.

CLAUSE 8--LOAD, STOW, TRIM v. SEAWORTHINESS

The MASTER PANOS, SMA 3501 (1999), addresses the always troublesome question of where the line may be drawn between a charterer's NYPE Clause 8 responsibility to load, stow, trim, last, etc. under the supervision of the Master, and the shipowner's non delegable obligation to insure the vessel's stability and seaworthiness.

The MASTER PANOS loaded a cargo of newsprint, liner board, hardwood and lumber at Quebec, Canada and Cornerbrook, Newfoundland during the month of January. Bundled lumber was stowed on deck, six high across hatches 3 and 4. The stowage was in accordance with the Canadian Code and approved by the Port Wardens at both ports. The Master testified he was familiar with the Canadian Code and the Chief Officer witnessed the stowage, inspected the lashings and was satisfied it was done properly. At departure, the GM was 2.54 meters (8.33 feet), the double bottom tanks were full and the upper wing ballast tanks were empty. No ballast adjustments were made prior to sailing or the casualty.

The vessel proceeded through Cabot Strait at an average speed of 12.36 knots, rolling heavily with force 9-10 winds on her beam. Just hours after departing Cornerbrook, the deck timber cargo shifted and the securing stanchions and bulwarks were bent to port. The vessel anchored in the safety of Petite Micquelon Island and thereafter was escorted to Argentia as a port of refuge. The deck cargo was restowed and the vessel then proceeded to her final destination without incident.

The dispute principally concerns liability for withheld hire and other expenses associated with the deviation to Argentia and the costs incurred there.

Owner maintained the deck cargo shift was the result of stowage and lashing deficiencies, ice and snow accumulations on the bundles and excessive height of the deck cargo. It was further argued that Clause 8 has been consistently interpreted as a contractual allocation of cargo handling costs and risks of deficient stowage to the charterer, and that the Master and ship's officers are merely charterer's servants for this purpose.

Charterer alleged the GM was excessive, three times what the Canadian Code stated it should have been, and that the cargo shift was the combined result of the GM problem and the Master's negligent shiphandling while transiting Cabot Strait.

The panel majority noted the allocation of cost and risk under Clause 8 but concluded that while the Master may act for charterer in loading and stowing cargo, there is a point at which stability and seaworthiness issues should be addressed. The panel stated these are issues in which the Master obviously acts for the shipowner. The same was said for the Master's navigation skills during the vessel's Cabot Strait passage just prior to the accident. The panel majority found for charterer.

The dissenting arbitrator concluded both parties were to bear responsibility for the cargo shift, therefore, they should share the monetary consequences of the event. In the dissent's view, the Master had a limited ability to reduce the vessel's GM on sailing; the charterer wrongfully decided to stow the deck cargo too high; charterer allowed the bundles of lumber to become snow and ice coated prior to loading and securing on deck; but, that the Master should nevertheless be faulted for not deballasting the double bottom tanks, reduce speed or alter course during the Cabot Strait passage.

The award also discusses the scope of Clause 64 and its application to this fact pattern. The Clause read, in pertinent part:

> *Charterers have the option of loading intended cargoes on deck/hatch covers at Charterers' time, expense, risk and responsibility..... within vessel's stability and always to Master's satisfaction which not to be unreasonably withheld.*

IN MEMORIAM

It is with deep sadness that we report the passing of SMA members Robert P. Nast, Edmund H. Orton and past SMA President, Charles F. Nisi. Mr. Nast was a retired member of Bingham-Bigotte & Company, shipbrokers. Mr Orton was a vice president of Intercontinental Cargo Express Ltd who was formerly with American Union Transport Forwarding, Inc. Mr. Nisi who was president of the SMA from 1985 to 1986, had been president of Sanko Kisen Corporation U.S.A. before his retirement. They will be missed.

SMA'S 1999-2000 ELECTIONS OF OFFICERS AND BOARD

At the 36th Annual Meeting of the SMA on May 11, 1999, the membership elected Lucienne C. Bulow as President and Pieter L.M. Vismans as Vice President for a two-year term from 1999-2000 and Austin L. Dooley, Thomas F. Fox, Katherine A. Pappas and Herbert Sondheim as two year term Governors.

SMA's Board of Governors for 1999/2000 is as follows: (with their alternates in parentheses):

Lucienne C. Bulow	(-)
Manfred W. Arnold*	(Svend Hansen, Jr.)
Stephen H. Busch	(William E. Peters)
Austin L. Dooley	(Klaus Mordhorst)
Thomas F. Fox	(Konstantinos Livanos)
Stanley Kleppe	(Lawrence Jacobson)
Katherine A. Pappas	(James J. Warfield)
A.J. Siciliano*	(Donald J. Szostak)
Herbert Sondheim	(Donald Frost)
Pieter L.M. Vismans	(David Letteney)
Michael A. van Gelder	(George H. Hearn)
Soren Wolmar	(Robert G. Walsh, Jr.)

*By Appointment of the President

Messrs. Sondheim and Wolmar were re-appointed as SMA's Treasurer and Secretary, respectively. Mr. Sondheim will be assisted in his duties as Treasurer by Messrs. Peters and Warfield.

The following Committee Chairs were appointed/reappointed:

Arbitrator - D. Szostak
Award Service - D. Letteney
By Laws and Rules - K. Pappas
Membership - S. Kleppe
Education - M. van Gelder
Liaison - P. Vismans
Luncheon - A. Dooley
Technology - J. Warfield
The Log - S. Busch
Salvage - S. Busch
Seminars and Conventions - M. Arnold

Past president Siciliano has agreed to continue to prepare the Headnotes for the Award Service.