THE ARBITRATOR
SOCIETY OF MARITIME ARBITRATORS, INC.

VOLUME 37 JULY 2006 Number 4

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THE PRESIDENT'S CORNER

In conformity with its By-Laws, the Society held its 43rd Annual General Meeting and elections in May and it is with pleasure that I welcome and welcome back to the Board of Governors Svend Hansen, Henry Engelbrecht, Stan Kleppe and Bob Umbdenstock. Congratulations, I very much look forward to working with you. Jack Ring was re-appointed Treasurer and Soren Wolmar will continue as the Society's Secretary.

The second quarter provided several opportunities for us to enhance and promote the SMA as one of the world's leading maritime arbitration societies. In April, we met with representatives of the Ministry of Law, Singapore and its delegation, which included members of the Singapore International Arbitration Centre, for wide ranging discussions of common interest in the area of international maritime arbitration. In May, many of our members participated on various committees in connection with MLA Week in New York. In June, I had a most pleasant follow-up meeting with President Wolfrum of the International Tribunal for the Law of the Sea (ITLOS) on the potential role that Tribunal may eventually play in resolving disputes involving State and/or private entities, rather than the purely inter-State disputes it currently addresses. The SMA's support and active participation in the evolving presence of NYMAR (New York Maritime) as the promotional instrument for New York as the leading maritime center is an ongoing process.

I wish to draw your attention to a couple of recent Court decisions, which will have a major impact on maritime arbitration in New York and on the SMA itself. They are being addressed more fully elsewhere in this Newsletter and deserve serious reading.

Looking down the road, the calendar is fast filling up with events, seminars and congresses involving maritime arbitration issues in places such as San Francisco, New Orleans, Vienna, Hamburg, London, Singapore and many others. Two deserve special attention. NYMAR and SMA will jointly stage a half-day seminar in New York on October 26, 2006 on a "by invitation only" basis. The other being ICMA XVI in Singapore (February 26 to March 2, 2007). The SMA and the New York Bar have

traditionally fielded strong delegations and a similar representation in Singapore would go a long way towards enhancing our prominent position in this ever more competitive arena of maritime arbitration. The deadline for submissions of outlines of intended papers is July 31, 2006. You can find full details on the event's website www.icma2007.com.

Wishing you all a most enjoyable summer,

Klaus Mordhorst

WAITING FOR ICMA

(As some of you may remember, for the last eight years, I was a part owner and contributing editor to The Maritime Advocate. After an exciting and rewarding run, we decided to "retire" the magazine. The editor in charge, and my old friend, Chris Hewer, continues The Maritime Advocate on-line. After all these years of fighting with his deadlines, I thought it would be only fair and appropriate to have him commit for an article to our newsletter. Chris was kind enough to comply, and I'm sure you'll enjoy it.)

Go on the internet – go on, you know you want to. There you will find, under the first reference to ICMA, that it has changed its name to the Indian Chemical Company. Since this is rather unlikely, surf a little more and find the Illinois Country Music Association, the International Cement Microscopy Association, and the International Card Manufacturers' Association.

In the end, give up. There are 455,000 references to ICMA on the internet, and 454,999 of them tell you nothing whatsoever about the International Congress of Maritime Arbitrators. This is a pity, because the real ICMA is the best thing since free pratique. And if you want to argue that there is no such thing as a free pratique, there is no better place than ICMA.

ICMA doesn't do shabby places. The last ICMA, in 2004, was in London, which meant that Michael Baker-Harber could be home in time to put the cat out. The one before that, in 2001, was in New York, which meant that Michael Baker-Harber could be home in time to put Manfred Arnold's cats out. ICMA XVI is to be held next year, from February 26 until March 2, in Singapore, the Lion City – and cats don't come much bigger than that.

With the possible exception of the USMLA out-of-town meetings – where you can avoid doing any work and not feel guilty about it while winning a tennis racquet and going to dinner by boat without leaving your hotel – ICMA is the most enjoyable of all maritime meetings, if you are an arbitrator or a lawyer.

Of course arbitrators and lawyers can't show off, or exaggerate, as much at ICMA as they can at, say, Posidonia, where the chances of them being challenged on a point of law by a passing peer are decidedly remote. But the atmosphere at ICMA is a singular mixture of the collegiate, the commercial, the academic and the informal. Moreover, speakers do not get long enough to bore their audiences, which is a rare bonus at maritime meetings anywhere, any time.

As you might expect, there is a strong US representation at ICMA 2007 in Singapore. Manfred Arnold is chairman of the steering committee, while Klaus Mordhorst and Michael Marks Cohen are members of the topics committee which, as a result, is unlikely to lack ideas. But ICMA is about much more than New York and London.

The beauty of the congress is its international flavour, and its even-handedness. The speaker from Helsinki gets as long as the speaker from London, and the speaker from London doesn't get very long at all. At ICMA, the chairman doesn't start looking at his watch after a speaker has been on his feet for ten minutes – he starts shaking it. Brevity is the soul of wit and, at ICMA, of conciseness.

Cedric Barclay, who is said, with a little help from his friends, to have thought up the idea of ICMA while doing The Times crossword puzzle on the Moscow subway, once claimed, "A judge is supposed to know nothing. An arbitrator is supposed to know everything." Anybody who has spent time around judges will know this to be true. And anybody who has spent time at ICMA will know that Cedric

Barclay had his tongue firmly in his cheek when he knew he was likely to be quoted.

Most arbitrators aspire, at some time in their lives, to be judges. That is their tragedy. Some judges, at a certain time in their lives, end up as arbitrators. That is theirs. Lawyers, meanwhile, just aspire. ICMA brings them all together, all the disparate threads of the maritime dispute resolution process.

Maritime arbitrators are not the sort of people to seek headlines. They are, for the most part, equable people looking to do a job. ICMA is their Posidonia, without the gadgets. It is their chance to shine among their peers. Expect a full house in Singapore, and book early for the chicken curry at the Banana Leaf in Race Course Road. Accept neither dissent, nor cutlery.

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For those who need to update their calendars, ICMA XVI will take place in Singapore from February 26 to March 2, 2007. Full details are available at the website (www.icma2007.com), including the conference agenda and topics.

Chris' references to the internet search for ICMA reminded me of ICMA XIII when we met in Auckland in 1999. The organizers had arranged for Jim Hopkins (radio personality, author and comedian) to entertain the delegates at a dinner. Jim mused about acronyms, including that for our event, and wondered why we had not simply designated it as Conference of Maritime Arbitrators. He then realized that the acronym would be COMA and that it would be rather difficult to explain to the tax authorities, your employer, or your personal minister of finance that you just spent thousands of dollars to be involved in a coma.

COURT DECISIONS

The recent weeks have brought a few attention grabbing decisions, which have already been reproduced on various websites and trade publications.

Rather than adding to the flood of papers, please refer to the listing below. If you should require assistance in accessing the cases, please notify the SMA.

* AVISTA MANAGEMENT, INC. (d/b/a Avista Plex, Inc.) v. WAUSAU UNDERWRITERS INSURANCE COMPANY. On June 6, 2006, the Hon. George C. Young (United States District Court Middle District of Florida Orlando Division) addressed the plaintiff's motion to designate a location for a Rule 30(b)(6) deposition (Doc. 105). It appears that the parties had not been able to agree on anything, leading the judge to deny the motion and directing the parties to convene at a neutral site at a stipulated time for one game of rock, paper, scissors. The winner would be entitled to select the location for the deposition.

Whereas some might look at this as being creative or even an amusing solution to a problem, others may wonder about this disrespectful and supercilious treatment of the law and its proceedings.

* DYNEGY v. TRAMMOCHEM (Docket No. 05-3544-CV). On June 13, 2006, the United States Court of Appeals for the Second Circuit reversed the District Court's ruling that the court could enforce a New York arbitration panel's subpoena against a non-party to the arbitration present in the Southern District of Texas, but not jurisdictionally present in the Southern District of New York. The Court of Appeals ruled that 9 U.S.C., section 7, does not bestow nationwide enforcement powers on the district courts with respect to subpoenas issued by arbitrators, stating under reliance on JLM Industries v. Stolt-Nielsen (387, F.3d 163, 171 [2d Cir. 2004]) that while the Federal Arbitration Act expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, but not more so.

* STOLT-NIELSEN SA et al. v. ANIMALFEEDS INT. and KP CHEMICAL (06 Civ. 420-JSR). This proceeding is an add-on to the earlier case of JLM Industries v. Stolt-Nielsen (387 F.3d 163

[2d Cir. 2004]). Animalfeeds and KP filed a Consolidated Demand for Class Arbitration on May 19, 2005, which ultimately was heard and decided by a panel of non-SMA members – Gerald Aksen (chair), Kenneth R. Feinberg and William R. Jentes – finding that the arbitration clauses, albeit silent on the issue, permitted class arbitration. On June 26, 2006, Judge J.S. Rakoff found that "the panel acted in manifest disregard of the applicable law, and, in so doing, impermissibly fashioned a new contract under the guise of contract construction." The award was vacated and the matter remanded to the panel for proceedings consistent with his opinion and order.

The underlying contracts, which gave rise to this action, contained different arbitration clauses; the Animalfeeds contract contained an ASBATANKVOY clause which calls for a panel "of three persons" whereas the KP contract contained a VEGOILVOY clause pursuant to which the party-appointed arbitrators shall be "merchant, broker or individual experienced in the shipping business." This latter clause also contains the proviso that if the party-appointed arbitrators cannot agree, the third arbitrator shall be an admiralty lawyer.

* AIMCOR v. OVALOR (05 "CV 10540 [RPP]). This case addresses the motion to dismiss a panel's award issued in an AAA proceeding for reasons of bias by the chairman. On September 22, 2005, a majority decision was rendered in favor of Aimcor by Charles Fabrikant (chairman) and Jack Berg; the dissenter, Stephen Hochman, was not an SMA member. Ovalar filed a motion to remove Mr. Fabrikant as an arbitrator from the proceedings and vacate the award. In a decision rendered on June 28, 2006, Judge Robert. P. Patterson vacated the award for the chairman's non-disclosure of existing business transactions between his firm and an entity related to Aimcor.

Irrespective of whether or not one agrees with Mr. Fabrikant's view on the disclosure, the decision by Judge Patterson contains a paragraph which is worth quoting and remembering:

> *It is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that arbitrators will adhere to these standards. In the years since Justice Black's decision, international arbitrations have taken on an extremely important role in facilitating international commercial transactions among businesses located in all parts of the world. Businesses in many countries are wary of the courts favoring the party resident within their jurisdiction and favor an independent arbitral panel for the prompt resolution of any commercial dispute. Confidence in the arbitral panel to render fair and impartial decisions is important to this country's international trade, and full disclosure is integral to the integrity of the panel's decision. Because of the increase in international transactions and the corresponding increase in disputes it is crucial that there exist a requirement of an appearance of impartiality in arbitrations conducted in this jurisdiction, and that courts take actions designed to assure foreign entitles that arbitrations in the United States are free from the suggestion of partiality.*

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The editor expresses his thanks to the members of the New York Bar who assist in locating and commenting on recent decisions.

LUNCHEON SPEECH

Continuing the practice of reporting on SMA luncheon speeches, we are pleased to publish Michael Marks Cohen's paper, presented at the April 19, 2006 meeting, - "*Are New York Maritime Arbitrators Bound by the Decisions in Other Cases of the Federal Judges in the Southern District of New York?*" Michael is of counsel with the firm of Nicoletti Hornig Campise and Sweeney.

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In my experience there is a great deal of mutual respect between New York maritime

arbitrators and Judges of the United States District Court for the Southern District of New York. Which is helpful, since it is clear that the Federal judges do provide some supervision of the arbitrators in their work.

One category of supervision is when a Federal District Judge issues a ruling in a case arising out of the arbitration itself. The parties are bound by the ruling, which is *res judicata* or perhaps constitutes Law of the Case.

Another area of Federal supervision involves arbitrator misbehavior. The decisions of a Federal District Judge in another case about failure to disclose, a refusal to receive evidence, a denial of an adjournment, or *ex parte* communications between an arbitrator and a party, should be viewed as guidelines. A failure to follow them is not necessarily fatal. But there is a definite risk that the award could be invalidated if the guidelines were ignored. While such decisions of District Judges deserve careful consideration, at the same time arbitrators should not be afraid to act. Most procedural issues fall within an arbitrator's discretion. Discretion is the right to be wrong. The test which courts apply is whether what the arbitrator did or didn't do denied the complaining party a fair hearing. If not, then the error, if error there be, was harmless. A reviewing judge may comment that he would not have done it that way, but he won't invalidate the award unless it caused injustice.

A final category is a corollary to manifest disregard of the law - - namely, how should maritime arbitrators handle a decision of a District Judge on an issue of substantive maritime law which the arbitrators regard as wrongly decided?

Obviously the first choice for the arbitrators is to avoid a confrontation by distinguishing the case -- i.e. pointing out that it would not apply in any event because the facts are different.

If the case cannot be distinguished, can the arbitrator nonetheless refuse to follow it? For example in The MASTROGIORGIS B, [918 F.Supp. 806 (S.D.N.Y.), aff'd, 104 F.3d 356 (2d Cir. 1996)] Judge Haight held that a general exceptions clause in a charter, excluding from laytime delays arising from any causes "whatsoever" which were beyond Charterers' control, shifted the risk of post strike discharge port congestion from Charterers to Owners. He noted that his decision conflicted with a number of maritime arbitration awards. The Second Circuit affirmed, but in an unpublished opinion without precedential effect. In an earlier case not cited by Judge Haight, Judge Cederbaum had ruled in that a *force majeure* clause in an oil sales contract excused the buyer from having to pay demurrage for a delay to the delivering vessel caused by post-hurricane discharge port congestion. [The EDINBURGH FRUID, 771 F.Supp. 63 (S.D.N.Y. 1991)]

What are maritime arbitrators to do with such cases, which fly in the face of settled principles that demurrage is a self contained code and discharge port congestion is virtually always a risk assumed by Charterers under charter parties and by buyers under sales contracts.

Of course the cases must be treated with respect. But they need not be given any greater deference than arbitration awards by earlier SMA panels. With one exception, the decision of a Federal District Judge is not *stare decisis* – i.e. it has no binding effect except on the parties to the case before it. It does not in any sense represent the law of the district. Other judges on the same court, indeed even the same judge in the same proceeding at a later time, or in a different matter altogether, are free to reject the case. Administrative agencies of the Government may continue to act contrary to the decision in other matters. Arbitrators too, are at liberty to acknowledge that they are aware of the case but find it unpersuasive.

I mentioned there was an exception. Sometimes a District Court decision on a rare issue becomes with age a leading case, reflecting settled jurisprudence which is uncontradicted elsewhere. For example, the principle that a judicial sale of a vessel by a foreign admiralty court clears all maritime liens is based substantially on an 1880 decision of a Michigan Federal District Court in The TRENTON. [4 Fed. 657 (E.D. Mich. 1880)] Arbitrators could not ignore that case, but would instead have to distinguish it before awarding a recovery on a maritime lien putatively cleared by a foreign judicial sale.

Second Circuit precedent must be treated completely differently than ordinary District Court decisions. For one thing, Second Circuit decisions by panels of three judges - - unless unpublished - - are *stare decisis*. They bind not only the District courts of New York, Connecticut and Vermont, but also the Second Circuit itself, unless overruled by the Supreme Court or by the Second Circuit sitting en banc (13 judges).

Interestingly, however, Second Circuit cases are not binding elsewhere. It is well known that if an issue of New York law arises in a Federal case, the Federal Court must apply New York law as interpreted by the New York Court of Appeals in Albany. This is the Erie Doctrine. So too, when an issue of Federal law arises in a State court, the State judge must apply Federal law as announced by the Supreme Court of the United States. This is the so-called Reverse – Erie Doctrine. Both doctrines are mandated by the U.S. Constitution.

But a New York State court is not obligated to follow any decisions of the Second Circuit. If, as happens from time to time, there is a conflict between decisions in the Second and say the Ninth Circuits, the New York State court is entitled to follow the Ninth Circuit and to reject the Second Circuit decision. Indeed, the New York court may, if it chooses, reject both the Second and Ninth Circuit decisions and issue its own view about what the Federal law is.

The historical basis for this situation is that the Constitution authorized but did not require, Congress to create lower Federal courts. If Congress had not set up lower Federal courts, Federal law would simply have been applied by State courts, with the Supreme Court sitting to resolve conflicts among the State courts about Federal law. This is what happens now in Europe - - national courts apply EU law and the ECJ resolves conflicts. As a historical curiosity, it may be noted that in the Confederate States, there were national tribunals called Confederate District Courts as well as State courts which both applied the laws enacted by the Confederate Congress in Richmond. But no Confederate Supreme Court was established to resolve conflicts. Indeed no Confederate appellate courts were ever organized to hear appeals from the Confederate District Courts.

Maritime arbitrators may not have the same latitude as State Court judges to pick and choose between the Second Circuit and other Circuit Court decisions on issues of Federal law. There have been only four cases in which the Second Circuit vacated an arbitration award for manifest disregard of the law. In one of those cases, a New York arbitrator applying Federal labor law chose to follow more recent D.C. Circuit and Fifth Circuit decisions rather than a much older Second Circuit case. His award was summarily vacated as being in manifest disregard of the law -- actually it was more like *lese majesty* because, in rejecting Second Circuit precedent, the arbitrator remarked it was time for a new Second Circuit opinion.

Suppose for example Judge Haight's decision in The MASTROGIORGIS B had been affirmed by the Second Circuit, not in an unpublished opinion, but instead in a reported decision entitled to *stare decisis*. Would maritime arbitrators who refused to hold that general exceptions clauses in charter parties shifted the risk of port congestion from Charterer to Owner then be guilty of manifest disregard of the law?

Suppose in another case the issue came up about whether Owners had to prove that they exercised due diligence to make the vessel seaworthy before they could take advantage of the COGSA fire defense which shifts to cargo owners the burden of proving that the fire was caused by the actual fault and privity of the owner. The Second Circuit says no such proof of due diligence is required of Owner. The Ninth Circuit says it is. Would the arbitrators manifestly disregard the law if, noting the conflict, they followed the Ninth Circuit, required Owners to put in proof of due diligence, and then found against Owners because they failed to meet their burden of proof?

Of course if someone paid me, I could argue these points either way. But looking at the issues without prejudice as an academic I would say that the labor arbitration case was different because it involved government regulation of labor practices and the regulated employers and unions were all located within the territorial jurisdiction of the

Second Circuit. Almost certainly the parties lacked power to choose which court's interpretation of Federal law governed their relationship. And most probably neither the Fifth Circuit nor the D.C. Circuit would have had jurisdiction over a dispute arising between the parties. Under these circumstances they were stuck in the Second Circuit and it made sense for the Circuit to insist on uniform application of a labor rule within the Circuit territory.

Different considerations apply to charter party matters subject to N.Y. maritime arbitration. To begin with, such disputes turn on construction of contract terms in the context of the global shipping industry, which is in many respects unregulated. And there are very few maritime arbitrations where all of the principals have their offices nearby. Moreover, New York is a world arbitration center whose experienced maritime arbitrators can be expected to know and understand the commercial expectations of parties concerning allocation of risks in form charter parties. By contrast the courts in the U.S. only very irregularly adjudicate charter party disputes. The cases Judge Haight relied upon in the MASTROGIORGIS B all predated WW II - - indeed one case predated WW I - - i.e. before arbitration because the most common vehicle for resolution of charter party issues. Most charter cases now show up in the West Reporter System only when the Government is involved, since the U.S. rarely agrees to arbitrate, preferring instead to require the use of contracting officers, and Boards of Contract Appeals before providing recourse to the courts.

I would therefore make the following argument in support of allowing maritime arbitrators to reject the Second Circuit precedent if there had been one affirming Judge Haight's decision:

I would emphasize that what parties intended when they incorporated a general exceptions clause into a charter is a question of fact and the arbitrators are entitled on the basis of their knowledge of the industry to find as a fact that the parties did not intend such a vaguely worded clause to have the dire consequence of shifting the risk of port congestion from Charterers to Owners. The main reason port congestion is at charterers' risk is because, without the gift of prophecy, Owners cannot accurately factor the cost of it into the freight rate. Owners do not want to be underpaid; Charterers do not want to be overcharged. Accordingly, the industry expectation is that the cost of port congestion will be assessed and paid by Charterers after the actual duration of congestion is known. The courts would not have jurisdiction to review such factual findings of arbitrators.

As for favoring Ninth Circuit precedent in a fire case, I would characterize the labor precedent as creating a default rule which points to application of Second Circuit precedent as the governing law only when the parties have not otherwise validly chosen a different governing law. Whether or not the parties in the labor case had the power to select Gulf Coast labor rulings to apply to East Coast labor relations, there was nothing from which the arbitrator could conclude that they had actually done so. By contrast, it would be appropriate for New York maritime arbitrators to find as a fact that, based on industry expectations, although the parties to an international maritime transaction by agreeing to arbitrate in New York, expected the arbitrators to apply U.S. maritime law, they did not intend that the arbitrators in their search for U.S. law should be handicapped by obsolete Second Circuit precedent. Rather, the common expectation in the industry is to leave it up to the arbitrators to select what they regarded as the better rule if there were two lines of authorities bearing on the same issue of maritime law. Since the parties could certainly have agreed to arbitrate an international maritime dispute in New York under Ninth Circuit precedent, doing so would hardly constitute manifest disregard of the law.

Finally, as a practical matter the Federal court in the Southern District of New York is not the only forum for post-award court proceedings based on a New York arbitration. The parties could go to the State courts as well. If the proceedings were started by arrest of the vessel or attachment of a bank account outside New York, the Court at the situs of the seizure would also have jurisdiction. And it is now recognized that post award proceedings are proper virtually anywhere in the United States where one party can get *in personam* jurisdiction over the

other. State courts generally, or even Federal Courts outside New York, are hardly likely to refuse to confirm awards which reject Second Circuit precedents in favor of precedents from some other circuit.

Maritime arbitrators have nothing at all to fear from rejecting as unpersuasive opinions in admiralty cases by Southern District judges. Moreover, while not as clear, maritime arbitrators, if they act professionally, probably can avoid even some Second Circuit opinions as well.

ELECTIONS AND COMMITTEES

Pursuant to Article II, Section 2, the president and vice president are elected at two-year intervals for a two-year term. Four of the ten governors are elected for terms of two years each. Two governors are named by presidential appointment and serve for one year. In addition to President Klaus C.J. Mordhorst and Vice President Thomas F. Fox, the following members continue to serve on the Board: John F. Ring (Treasurer), Soren Wolmar (Secretary), Lucienne C. Bulow and Donald J. Szostak.

At the May 9, 2006 annual meeting, the following members were elected to the Board of Governors: Henry E. Engelbrecht, Svend H. Hansen, R. Stanley Kleppe and Robert P. Umbdenstock. At the June 14 Board meeting, President Mordhorst appointed David W. Martowski and Manfred W. Arnold to complete the current Board.

The chairs for the permanent and ad hoc committees are as follows:

The ARBITRATOR Manfred W. Arnold
The Award Service Allan Bowdery
Bylaws and Rules Lucienne C. Bulow
Education Austin L. Dooley
Professional Conduct Stanley Kleppe
Liaison Manfred W. Arnold
Luncheon Thomas F. Fox
Membership Michael A. van Gelder
Salvage Robert P. Umbdenstock
Seminars and Conventions Klaus C.J. Mordhorst
Technology Donald J. Szostak
Index & Digest* David W. Martowski
Small Craft* Wes Wheeler
Strategic Planning* Thomas F. Fox
(* Ad hoc Committees)

For any questions and/or suggestions on committee issues, feel free to contact the chairs directly.

NEW CHAIR FOR THE ADMIRALTY COMMITTEE OF THE CITY BAR ASSOCIATION

Raymond J. Burke of Burke & Parsons will succeed Brad Berman as Chair of the Admiralty Committee of the Association of the Bar of the City of New York effective in September. The Admiralty Committee consists of about three dozen members of the City Bar who meet on a monthly basis. The traditional format of the Admiralty Committee is to have industry speakers at the dinner meetings followed by an open discussion. Ray is working with Tom Fox (the SMA Luncheon Chair) to see if there might be out-of-town speakers who would be of interest to both the SMA and The Admiralty Committee. Suggestions about possible speakers and/or topics would be appreciated (burke@burkeparsons.com).

THE CAMBRIDGE ACADEMY OF TRANSPORT'S SEMINAR ON CHARTER PARTY DISPUTES

(*Past President David Martowski shares with the readers his participation in a London seminar June 14-16, 2006.*)

On June 15, Seminar Moderator David Martin-Clark and I presented a side-by-side comparison of several differences between London and New York maritime arbitration.

The Cambridge Academy of Transport was established in 1985 and offers 20 intensive management training courses to the international shipping community at the University of Cambridge, London and other overseas fora. Director Dr. John

Doviak has presented a great variety of timely and stimulating curricula which have been attended by participants from 95 nations.

June's program was attended by shipping executives from Egypt, Germany, Kuwait, Monaco, Norway, Saudi Arabia, United States and Venezuela – reflecting a wealth of multicultural experience from our most global of industries.

Our presentation included a summary of the LMAA and SMA Rules, publication of awards and confidentiality, awarding of attorneys' fees and costs, arbitrators' powers to order security, an overview of the US judicial system, attachment pursuant to Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, consolidation, participation of non-signatories to the arbitration agreement, and "sub details."

A great deal of interest was expressed in Rule B attachments and the decisions in Winter Storm Shipping Ltd. v. TPI, 301 F.3d 263 (2d Cir. 2002); cert. denied, 2003 US Lexis 4627; Seaplus Line Co., Ltd. v. Bulkhandling Handymax AS, 2006 AMC 82 (SDNY 2005); and Aqua Stoli Shipping Ltd. v Gardner Smith Pty Ltd., 384 F.Supp. 2d 726 (SDNY 2005) were covered in detail. The appeal of the Aqua Stoli decision was argued in early March and I summarized the points made in the briefs of *amicus curiae* submitted on behalf of The Clearing House Association and the Federal Reserve Bank of New York supporting vacation of the shipowner's attachment and arguing that the Winder Storm decision should be re-examined and overruled. A lively discussion followed and the question now is what will be the Second Circuit's decision.

This experience with the Cambridge Academy of Transport was not only educational but also thoroughly enjoyable.

HERMIT CRAB AWARD

Sea Tow Port St. Joe, FL v. David DeLeo

SMA Award No. 3927

This recent SMA salvage award before a sole arbitrator involved a fishing vessel that foundered and nearly sank in stormy weather about 20 miles off the Florida Gulf Coast in March 2005.

During the night of March 7, 2005, the Hermit Crab, a 55-foot sport fishing vessel with her owner, his wife and her [adult] son aboard, was struck by a waterspout, lost power and began taking on water. The U.S. Coast Guard responded and attempted without success to anchor the vessel. The Hermit Crab began to sink, and was abandoned by her crew, who were then rescued from the water by Coast Guard personnel. The owner, who was apparently diabetic, was hospitalized. The vessel was left adrift with about 12 feet of her bow above water. The next morning, the son called Sea Tow Port St. Joe and asked them to salvage his stepfather's vessel and to retrieve a box of his mother's jewelry that was still onboard. However, no operations were conducted that day due to poor weather and 8 to 10 foot seas.

On March 9, Sea Tow, along with the stepson (in his own boat), located the vessel, which, although still partially afloat, had capsized. Sea Tow was unwilling to enter the vessel or undertake her salvage without a contract, and proffered a Sea Tow "Log and Job Invoice" that provided for wreck removal on a time and materials basis. No amount was estimated, although the stepson alleged that Sea Tow told him the job would cost between $25,000 and $30,000 when he signed the contract. The stepson also allegedly told Sea Tow that the jewelry was worth about $200,000, although the owner and his wife later testified it was worth no more than about $15,300.

Two days later the stepson signed a U.S. Open Form Salvage Agreement ("MarSalv") with the work similarly described as in the Log and Job Invoice. However, the notation "per price list" had been added and a three-page list detailing labor and equipment rates was attached.

The jewelry was retrieved on March 9, and over the next nine days the vessel was towed first to a marina at Scipio Creek for complete dewatering and inspection, and then to a marina in South Port where she was hauled out. Early on March 11, a Sea Tow company in Horseshoe Beach, some 70 miles from the site, was called in to assist because it operated a larger salvage vessel with stabilizers. However, some three hours after departing Horseshoe Beach the

vessel lost both stabilizers and returned to port. Sea Tow Port St. Joe did not go to the site that day to continue salvage work on the Hermit Crab, nor did it attend at the site for the entire weekend of March 13 and 14. According to the salvage report, this was due to "bad" weather. However, the owner maintained that Sea Tow was attending to other towing jobs.

On March 21, the owner of the Hermit Crab and his insurance company were presented with a bill for $84,446.25, which the owner refused to pay. He contended there was no enforceable contract, or if there were, the job could cost no more than the $25,000 to $30,000 Sea Tow told his stepson that it would. In addition, the owner argued that he was not personally liable because his stepson signed the contract. He also found Sea Tow's bill exorbitant and argued that because of their delay in salvaging her, every window on the Hermit Crab was broken, which led to her total loss.

Sea Tow alleged that the owner received $250,000 from the vessel's underwriter, plus an additional 5 percent of that figure towards salvage costs. In addition, Sea Tow maintained that the vessel was ultimately sold for $35,000. No documentary evidence of this was introduced. However, the owner produced a bill of sale for the vessel to a Florida auction company for the consideration of $1.00.

The arbitrator had to first decide whether there was a valid, enforceable salvage contract, and if so, whether Sea Tow's charges were misrepresented and/or excessive; and whether Sea Tow's alleged delay caused additional damage to the vessel. He also noted that because the salvage was undertaken on a time and materials basis, the considerable discussion as to the values of the vessel and its contents was moot, because Sea Tow's compensation was assured irrespective of whether the Hermit Crab was saved or not. Nevertheless, this did not give the salvor a *carte blanche*: his charges had to be reasonable. Although the two contracts were signed only by the owner's stepson, the arbitrator was persuaded by the parties' actions that there was a valid and binding contract. In fact, the owner himself stated in his affidavit that he and his wife had called Sea Tow repeatedly during the first five days, begging them to save his boat.

There was no other evidence to support the stepson's allegation that the job would cost a maximum of $30,000. Neither the Log and Job Invoice nor the MarSalv agreement contained any such references, and the arbitrator noted that because written agreements are generally deemed to embody the entire intent of the parties, the parties in this case were bound by the terms of the contracts they signed.

The arbitrator found no evidence to indicate that the reason all of the vessel's windows were broken and the boat became a total loss was because of a delay by Sea Tow in salvaging her. The owner himself stated the vessel was hit by a waterspout—a marine phenomenon akin to a tornado. This was the likely cause of the windows being blown out. In fact, according to the Coast Guard station report for March 10, Sea Tow's divers reported there was no apparent structural hull damage, but confirmed that the windows were blown out.

With respect to Sea Tow's bill, which was itemized by day, personnel and equipment, the arbitrator found it to be overstated. Sea Tow was not faulted for any lack of expertise or equipment, and clearly the operation involved some risk, especially on the first two days. However, the evidence indicated the operation took place largely in fair weather, and the salvage report contained few details of weather conditions other than to describe them occasionally as "bad" or "deteriorating". In addition, Sea Tow was not on site for three of the days on which substantial charges were assessed for its equipment. The owner was also charged with the cost of the aborted trip of the vessel from Sea Tow Horseshoe beach, and for "standby time" attributed to persons not identified in the salvage report. After reviewing the bill, the arbitrator reduced it by $21,147.75. Sea Tow was also awarded interest at the average prime rate on its revised claim. Each side paid its own costs and attorney's fees, and half the arbitrator's fee.

Stephen H. Busch

THE SMA ESCROW ACCOUNT

Back in 1986, the SMA created an escrow account to provide a safe haven for potential arbitrators' fees and expenses. Although it found some initial resistance, attorneys and principals ultimately realized that the request for arbitrators' security not only provided protection for the panelists, but also for the parties under the joint and several provisions.

By now, the procedure to obtain fee/expense security has been quite accepted. It also has become accepted under the LMAA Terms [Tribunal's Fees (E)].

As of May 31, 2006, the SMA escrow account at JP Morgan Chase Bank (which is a segregated interest-bearing account) showed deposits of $1.3 million. The cost for maintaining the account is borne by charges of $100 payable by each of the arbitrators.

For specific remittance details and account administration, please feel free to contact the SMA's office.

SOME PERSONAL NOTES . . .

* First of all, I want to express my personal thanks to Don Szostak for the outstanding job he has done over the last six years as editor of THE ARBITRATOR. Citing Mrs. Slocum, a character from a BBC comedy, "I am unanimous in that." It cannot have been easy, particularly if there was so little support from the readers. I should like to appeal to the SMA members as well as the other recipients of the publication to play an active role. If you hear of interesting cases, developments or events which you would like to share with your colleagues, write to me. If you have comments, questions or objections to items published, feel free to address them. If I do not have the answers, I will find someone who does.

* Let me share with you a brief story which resulted from my having written a contribution to THE ARBITRATOR dealing with the SMA/MLA participation in the Manzanillo seminar in March 2005, organized and hosted by the Mexican Maritime Law Association (Vol. 36 No. 3 April 2005). The event was attended by approximately 75 delegates from the U.S. and Mexico, including some representatives from PDVSA in Venezuela. As they were the only non-U.S./non-Mexican attendees, I thought they deserved a special mention, but others thought differently.

In 2003, PDVSA had appointed me to an ICC arbitration. Hearings were held in 2005, and a unanimous decision and award was issued on February 9, 2005 in favor of PDVSA. On December 5, 2005, I was challenged because of "ex parte communication with PDVSA at a seminar for promotional and other purposes;" the support for this motion was my article in THE ARBITRATOR. I responded to the ICC as follows:

> *As best as I remember, approximately 75 individuals attended the conference, and among them was a PDVSA lawyer by the name of Walter La Madriz. My only direct contact with this gentleman was the exchange of name cards while sitting across from one another at an open table during a lunch break. Mr. La Madriz's command of the English language was, as I recall, quite limited and a Mexican delegate translated for him. The only thing involving Mr. La Madriz that I recollect from the general discussion at the table was that he had originally planned to attend the Tulane Maritime Law conference in New Orleans, but decided against it because it was held in English, whereas the Manzanillo meeting was conducted in Spanish and English with simultaneous translations.*

On January 23, 2006, the ICC rejected the challenge.

If someone wonders why I recounted this story, it is simply to alert the readers that according to

a German saying, the best person cannot live in peace if it does not suit the nasty neighbor. In other words, even if your intentions are honorable, someone will find fault. Even though I have asked you to volunteer information or contributions to THE ARBITRATOR, I also want to point out that someone might hold it against you whatever you write for this SMA publication. Keep it in mind, but let it not deter or intimidate you.

* When putting together this issue of THE ARBITRATOR, I have come to appreciate that getting material for publication is not really the biggest problem. The point I have to wrestle with is the fact that I cannot inject my personal views into a publication which is the voice of the SMA. Even in this first editorial attempt, I was sorely tempted to take a few swipes. I apologize in advance if I ever should cross the line. I have asked Don Szostak to stay on and be not only my "guardian angel," but ensure that I will continue the true and tested standards which he had created during his tenure as chair of this committee.

* In years gone by, the shipping community was centered in Manhattan. Owners, charterers, brokers and lawyers would meet in the shadow of the Statue of Liberty at places like the Produce Exchange, the DAC, the Harbor View, the Whitehall Club and other watering holes. I remember someone saying that if you had not seen a regular at the Whitehall Club two days in a row, then he was either traveling or had passed away. With the decentralization of shipping and the exodus to cities in the tri-state area, personal contacts have become less frequent. This also applies to the SMA members. I thought it might be interesting to include brief personals of both new and old SMA members, maybe even with a photo, in the future issues of THE ARBITRATOR. I invite comments and volunteers.

For THE ARBITRATOR

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